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**Aug 10 2021**

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County  
The Honorable Deadra L. Jefferson, Plea Judge  
The Honorable Michael G. Nettles, Post-Conviction Relief Judge

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Appellate Case No. 2020-001408

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LEVELL GRANT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **RESPONDENT'S STATEMENT OF ISSUE**

**Did the post-conviction relief court properly deny relief for the allegation that plea counsel failed to challenge the factual basis of one of the armed robbery charges that Petitioner faced when the Victim never asserted that Petitioner was unarmed and even if he had, Victim later recanted his statement to plea counsel. Even if counsel was deficient, did Petitioner fail to prove he was prejudiced by counsel's errors?**

## **STATEMENT OF THE CASE**

Petitioner Levell Grant is presently confined in the South Carolina Department of Corrections following his guilty plea in Charleston County. On February 19, 2015, William Cody Hood was looking to buy drugs from a man named Nick Washington. (App. 54-55, 68-69). After asking Washington for drugs, Hood received a phone call from an unknown person. (App. 68). Hood agreed to meet the unknown person at the Planter's Trace apartments. (App. 68). When Hood arrived he met with Petitioner and began to discuss the transaction. (App. 69). When Hood noticed a second individual kneeling in the bushes, Petitioner placed Hood in a chokehold. (App. 69). Petitioner pressed an object into Hood's back and threatened to kill Hood if he didn't stop resisting. (App. 69). Hood eventually lost consciousness. (App. 55). When he regained consciousness, Hood realized his phone and his money were missing. (App. 55, 69). Petitioner admitted to law enforcement that he took marijuana from Hood, but denied having a gun or taking Hood's phone and money. (App. 55, 70).

On September 12, 2015, Petitioner entered an illegal gambling casino that was being operated out of a storage facility armed with an AK-47 type rifle. (App. 55-56, 71). He robbed an employee of the casino of her purse and took money from the business. (App. 56). The incident was recorded on a security camera. (App. 71).

During its August 2015 term, the Charleston County Grand Jury indicted Petitioner for armed robbery and assault and battery, first degree for the offense involving Hood. (App. 189-90, 197-98). Petitioner was indicted for an additional count of armed robbery and possession of a weapon during the commission of a violent crime in April 2016 for the offense involving the

casino. (App. 169-70, 181-82). Benjamin Lewis, Esq. represented Petitioner and Assistant Solicitor David Osbourne of the Ninth Circuit Solicitor's Office represented the State.

On May 11, 2016, Petitioner appeared in the Charleston County Court of General Sessions before the Honorable Deadra Jefferson and pled guilty to all charges. (App. 45-53). The State and Petitioner entered into a negotiated sentence to run all sentences concurrently in a twenty to twenty-five year range. (App. 46). Judge Jefferson deferred sentencing until May 17, 2016. (App. 59-65). On May 17, Judge Jefferson sentenced Petitioner to twenty-three years' imprisonment. (App. 84).

Petitioner did not appeal his convictions or sentences. On March 24, 2017, Petitioner filed an application for post-conviction relief (2017-CP-10-1725), alleging three grounds for relief. (App. 86-93). Petitioner alleged that: (1) plea counsel was ineffective, (2) that plea counsel failed to file a Motion to Reconsider the sentence imposed, and (3) that the State committed prosecutorial misconduct. (App. 89). On October 18, 2017, the State filed a Return and a Motion for a More Definite Statement. (App. 94-100). On May 17, 2019, Petitioner filed an amended PCR application through counsel. (App. 102-03). Among other allegations, Petitioner alleged plea counsel knew there was no factual basis for one of the armed robbery charges. (App. 102). An evidentiary hearing into the matter convened on July 25, 2019 before the Honorable Michael G. Nettles, Circuit Court Judge. Petitioner was present alongside PCR counsel, James K. Falk, Esquire. Assistant Attorney General Benjamin Limbaugh represented the State.

Petitioner testified on his own behalf and presented testimony from plea counsel Lewis. Lewis testified he interviewed Hood and recorded his statement on video. (App. 116-18). Lewis testified that Hood asked him if the charges could be dropped. (App. 121). However, Lewis

acknowledged that Hood later changed his position before trial and wanted to proceed with the charges. (App. 121). Lewis admitted he never turned the video over to the State for strategic reasons in preparation for trial.<sup>1</sup> (App. 117).

On September 28, 2020, Judge Nettles issued a written order denying the application in full. (App. 156-68). On October 16, 2020, Petitioner appealed the denial of his application to this Court. On appeal, Petitioner only challenges the denial of relief for his claim that plea counsel did not challenge the factual basis for the armed robbery charge relating to the robbery of Hood.

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<sup>1</sup> At Petitioner's plea hearing, the Assistant Solicitor acknowledged he had never seen the video recorded statement. However, the Solicitor noted that he asked Hood about the statement and Hood indicated he believed he was speaking with the prosecution and not the defense. The Solicitor told the plea judge that Hood was suffering from drug addiction at the time and speculated that Hood may have been intoxicated when he was initially interviewed by Lewis. (App. 79-80).

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The post-conviction relief court properly denied relief for the allegation that plea counsel failed to challenge the factual basis of one of the armed robbery charges that Petitioner faced, because the Victim never asserted that Petitioner was unarmed and even if he had, Victim later recanted his statement to plea counsel. Even if counsel was deficient, Petitioner failed to prove he was prejudiced by counsel's errors.**

Petitioner claims the post-conviction relief court erred in denying him relief because counsel advised him to plead guilty without challenging the factual basis of one of the armed robbery charges he faced. In support of this argument, Petitioner contends “Hood, in a video recorded statement, said that he did not believe Petitioner was armed during the robbery” and therefore “Counsel had a duty to use this information to challenge the factual basis of the plea and his failure to do so was ineffective assistance of counsel.” (Petition for Certiorari 6). However, the underlying premise of Petitioner’s argument is flawed. Contrary to Petitioner’s assertion, Hood never asserted Petitioner was unarmed. During the PCR hearing, plea counsel Lewis testified regarding his interview with Hood: “So from that interview identity wasn’t an issue but during that [Hood] said [Petitioner and codefendant] claimed they were armed. They did something to act as if they were armed, but I didn’t believe that they were armed.” (App. 117 lines 23-25—118 line 1). Thus, the evidence in the record merely established that Lewis had the subjective opinion that Petitioner was not armed. There is no support in the record for Petitioner’s assertion that Hood actually made such a claim.<sup>2</sup> Even if we assume that Hood told Lewis that Petitioner was unarmed, the PCR Court properly recognized that Hood subsequently

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<sup>2</sup> Ultimately Lewis’ interview with Hood would resolve any ambiguities about what was said during the interview, but the interview was not produced as an exhibit during Petitioner’s plea or during the PCR hearing.

recanted his statement to Lewis. (App. 120-21, 165-66). Therefore, Lewis did not fail to challenge the factual basis of the armed robbery involving Hood and Lewis was not ineffective in his representation of Petitioner. However, even if Lewis was deficient in his representation of Petitioner, Petitioner has failed to show he would have gone to trial, but for plea counsel's errors. This Court should deny certiorari.

Petitioner, like all other criminal defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must

overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500, 505 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

"A guilty plea should only be accepted where the record evidences 'an affirmative showing that it was intelligent and voluntary.'" Boykin v. Alabama, 395 U.S. 238, 242 (1969). This is because "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). In order to find a guilty plea was knowingly and voluntarily entered into, the record must establish the defendant had a full

understanding of the consequences of his plea and the charges against him. Boykin, 395 U.S. at 244.

However, “[a] guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate’s right to contest the validity of such a plea is usually, but not invariably, foreclosed.” Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). “Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea.” Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that “guilty plea[s] must be treated as final in the vast majority of cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel’s advice was not within the range of competence demanded of attorneys in criminal cases. Lockhart, 474 U.S. at 56. A defendant needs to show (1) counsel’s representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for counsel’s errors, the defendant would not have pled guilty and would have insisted in going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill, 474 U.S. 52, 106 S Ct. 366).

South Carolina Code § 16-11-330(A) provides that a person is guilty of armed robbery if they commit “robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon or while alleging, either by action or words, he was armed while using a

representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.” S.C. Code § 16-11-330(A).

Here, Petitioner’s argument fails for three reasons. First, Petitioner incorrectly asserts that Hood claimed Petitioner was not armed. On the contrary, Lewis merely testified to his subjective belief that Petitioner was unarmed. (App. 117-18). When establishing the factual basis for the plea, the State relayed that while Hood didn’t see the weapon being used, Hood felt an object being placed into his back and Petitioner threatened to kill him. (App. 69). These facts establish that Petitioner used a weapon or at the very least the representation of a weapon to rob Hood. Therefore, there was a sufficient factual basis for Petitioner’s plea. However, even if Hood initially told Lewis that Petitioner was unarmed, Hood later recanted his initial statement to Lewis. (App. 120-21). When Hood’s probable testimony is considered in conjunction with Petitioner’s acknowledgement to law enforcement that he took marijuana from Hood, there was very little ground for Lewis to challenge the factual basis of the plea.<sup>3</sup> (App. 124-25).

Even if Petitioner could show Lewis was ineffective in his representation, Petitioner has failed to show he would have insisted on going to trial but for counsel’s errors. In his testimony during the PCR hearing, Petitioner complained that Lewis never gave Hood’s statement to the solicitor. (App. 145). However, Petitioner never asserted he would have gone to trial if the statement had been given to the State. Rather, Petitioner complained “[Lewis] could have gave

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<sup>3</sup> Lewis acknowledged he could impeach Hood with his prior inconsistent statement, but acknowledged that based on Petitioner’s confession to stealing marijuana from Hood, Petitioner would likely be convicted of at least strong arm robbery. Therefore, Petitioner would likely face second armed robbery case with stronger evidence after already obtaining one conviction for strong arm robbery. Lewis testified his first priority was to get Petitioner to plea to both armed robberies at the same time so as to avoid a sentence of life without parole. Therefore, Lewis and Petitioner made the strategic decision to plea to both armed robbery charges at once. (App. 118-26).

the [Solicitor] the DVD. And that would have sort of made come little strategy to try to come in with the 20 to 25 years.” (App. 150, lines 19-21). Thus, it appears Petitioner is merely complaining that he didn’t receive a better plea offer; not that he would have gone to trial if Lewis had given the Hood interview to the Solicitor. Additionally, despite Petitioner’s claim at the PCR hearing that he wanted to go to trial, Petitioner told the sentencing judge that he was satisfied with his lawyer’s services, that his lawyer had done everything that Petitioner asked him to do, and that he was pleading guilty freely and voluntarily. (App. 57-58). This Court should deny certiorari.

**CONCLUSION**

Because the post-conviction relief court properly determined Petitioner freely entered into a plea after being effectively represented by counsel, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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August 10, 2021