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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2020-001517

WILLIAM TYREL FLEMMING, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The post-conviction relief judge properly found Petitioner freely, voluntarily, knowingly, and intelligently entered his guilty plea and failed to establish plea counsel was deficient in failing to file a motion for Solicitor Jepertinger to recuse himself from Petitioner's case. Further, Petitioner failed to demonstrate that any alleged deficiency prejudiced him or impacted his decision to plead guilty.

STATEMENT OF THE CASE

Petitioner is presently confined by the South Carolina Department of Corrections pursuant to orders of commitment by the Florence County Clerk of Court. Petitioner was indicted during the January 2018 term of the Florence County Grand Jury for two counts of distribution of cocaine base and two counts of distribution of cocaine base in proximity of a school. Rosemary Parham, Esquire, represented Petitioner, but Lawton Matthews, Esquire, another attorney at her firm, represented Petitioner at his plea hearing due to a scheduling conflict. Deputy Solicitor John C. Jepertinger, Esquire, represented the State. On October 4, 2018, Petitioner appeared before the Honorable Thomas A. Russo to plead guilty to one count of distribution of cocaine base, third offense for a negotiated sentence of twelve years' incarceration; the State dismissed the remainder of his charged offenses. Petitioner did not appeal his plea or sentence. (App.pp.1–23, 126–29).

On February 25, 2019, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully because his guilty plea was not knowingly and intelligently made. On November 12, 2019, the State filed a return and motion to dismiss, arguing Petitioner had failed to articulate any ground demonstrating he was entitled to relief. The PCR judge filed a conditional order of dismissal on December 5, 2019. Thereafter, Petitioner, now represented by PCR counsel Overture E. Walker, filed an amended application alleging:

> Ineffective Assistance of Counsel;
>
> a. "[F]ail[ure] to adequately investigate the criminal charge(s) for which [Petitioner] was convicted and prepare a defense for trial."
> b. "[F]ail[ure] to call or communicate with material witnesses whose testimony would have been favorable to [Petitioner]."
> c. "[F]ail[ure] to file a motion for a bond reduction."

d. "[F]ail[ure] to advise [Petitioner] he was pleading guilty to a violent offense and would be required to serve eighty-five (85%) percent of his sentence."
e. "[F]ail[ure] to timely request a preliminary hearing."
f. "[F]ail[ure] to file a motion request the removal of the assistant solicitor from [Petitioner's] case."
g. "[F]ail[ure] to object to enhancement of the underlying criminal charges pursuant to S.C. Code Ann. § 44-53-375."
h. "[F]ail[ure] to inform [Petitioner] of his right to appeal his guilty plea and sentence, and/or fail[ure] to initiate an appeal of the same on his behalf."

Involuntary Guilty Plea

a. "[Petitioner] entered a guilty plea to Distribution of Cocaine Base – 3rd offense with a negotiated sentence of twelve (12) years imprisonment without ever reviewing evidence and/or discovery in his case."

(App.pp.47–49)

An evidentiary hearing into the matter was convened on December 16, 2019, at the Florence County Courthouse in Florence, South Carolina, before the Honorable D. Craig Brown. At the hearing, Petitioner testified he asked Parham to represent him because she was already representing him on unrelated charges. He claimed that during the fifteen month period between his arrest and his plea, Parham only met with him "once, twice at the most" and advised Petitioner to accept the State's offer to plead to a single offense with a twelve-year sentence rather than go to trial, be convicted, and face a maximum of thirty years' incarceration. (App.pp.50, 54–55)

Petitioner recalled Parham informing him Jepertinger was "very angry" with Petitioner, refused to work with him on some type of charge reduction, and believed Petitioner would not get a fair trial. The basis of these conclusions was a message Jepertinger had written on a plea offer sheet, which stated:

> Bye –Bye. Dist. of C/B 3rd's. V is for Vendetta. He got mercy in March of 2017; now he gets the State's unyielding justice. Will recommend consecutive sentences.

Petitioner asserted that, after Jepertinger's vendetta against him was made obvious, Parham should have showed the plea offer sheet to the judge and gotten Jepertinger removed from the case. Petitioner was unaware of how the parties arrived at the offer for the negotiated plea and a twelve year sentence, but he recalled Parham informed him that Jepertinger was adamant that he would not go any lower than that sentence. (App.pp.56–59, 70, 103)

On cross-examination, Petitioner recalled various details of his plea hearing, including stating he was satisified with his representation and that he understood he was pleading guilty to a non-parolable offense. Petitioner did not dispute the facts of the case as they were presented by the solicitor: Petitioner readily admitted he was guilty of the crime with which he was charged and to which he ultimately pled guilty. (App.pp.72–75)

Parham testified she first encountered Petitioner when she began representing him on distribution of cocaine and bank fraud charges in 2017. Jepertinger was the prosecutor in that matter and gave Petitioner "a really good plea deal": Petitioner was placed on probation for those charges while numerous others were dismissed. Within months of that plea, Petitioner was arrested on the charges pertaining to the conviction at issue, and Parham agreed to represent him again out of sympathy. (App.pp.75–77).

After Parham began representing Petitioner on these charges, she was informed by Jepertinger he would not be lenient with Petitioner because he was arrested within two months of receiving probation for his prior offenses. Parham received discovery from Jepertinger sometime after that conversation, at which time she found the plea sheet referrencing the "vendetta" on top of the documents. She, knowing Jepertinger "very well" and having worked with him on a number of cases together, interpreted his written statement as "an attempt at

humor" which did not merit his removal from the case. However, she did understand Jepertinger was serious about Petitioner receiving a tougher sentence on the charges but acknowleged Jepertinger was "rightfully" frustrated with Petitioner due to Petitioner reoffending so soon after receiving a very lenient plea deal. Additionally, Petitioner never expressed any concern to Parham that Jepertinger was biased or should be removed from his case. (App.pp.77–80, 87–90)

Parham also explained that, contrary to what Jepertinger wrote on the plea sheet, he did in fact make a plea offer to Petitioner for a twelve year sentence. When she presented the plea offer to Petitioner, he emphasized he did not wish to go to trial but that he also did not want to plead to a non-parolable offense and serve at least 85% of his sentence. Based on the State's indisputable evidence of Petitioner's guilt, including: (1) a video of the controlled purchase of drugs in which Petitioner's face is clearly visible; and (2) his own admissions to her of his guilt, Parham believed accepting the offered plea deal was Petitioner's best option. Petitioner's plea hearing was originally scheduled for October 3 but, after showing up at the courthouse, an issue arose which pushed the plea to October 4. As a result, Parham was unable to attend the plea but Petitioner agreed to allow Matthews to represent him at the hearing. (App.pp.79–81, 83–87).

Matthews testified about his limited involvement in Petitioner's case, which mainly consisted of representing Petitioner at his guilty plea hearing. He recalled Petitioner did have some hesitation with the plea deal and had hoped for a better offer from the State, but after a lengthy discussion Petitioner decided to accept the plea offer and understood it was preferable to going to trial. When Petitioner brought up Jepertinger's comment on his plea sheet, Matthews explained the comment was a result of Petitioner receiving a favorable plea in 2017 but then reoffending only months after that. Matthews asserted that he personally believed the plea offer

extended was a "fair deal" based on the circumstances of the case and the strength of the State's evidence. (App.pp.92–97).

Following the witnesses' testimonies, the PCR judge reviewed Petitioner's convictions and sentences with the parties. The PCR judge observed Petitioner's March 2017 pleas were to a "banking fraud or a federally chartered or insured financial instituion crime" as well as two counts of "manufacture, distribution cocaine base first." For the first charge, he was sentenced to five years' incarceration suspended to three years' probation. The sentences for his cocaine charges were twelve years' incarceration suspended to three years' probation. Finally, the PCR judge noted Petitioner was sentenced to twelve years' incarceration for the charge at issue which was to be served concurrently with his other charges. The parties confirmed these charges and sentences and the PCR judge took the matter into consideration. (App.pp.99–101)

On October 30, 2020, the PCR judge issued an order denying relief. In the order, Judge Brown found neither counsel was deficient, nor could Petitioner demonstrate he was prejudiced by his attorneys' performance. Specifically, the PCR judge found credible Parham's testimony that Jepertinger's message on the plea offer sheet was his attempt at humor and did not concern or alarm her; she had several conversations with the solicitor about Petitioner's charges and knew the source of Jepertinger's frustration was that Petitioner had reoffended only a couple months after receiving a generous plea deal. The PCR judge also found credible Matthews' testimony that Jepertinger, despite being upset with Petitioner, offered a fair plea deal at the lower end of the sentencing range for the offense. Finally, the PCR judge observed Petitioner only pressed for a better plea deal and never asked for the solicitor to be removed from the case. (App.pp.104, 121–23).

On November 17, 2020, Petitioner filed a Notice of Appeal, appealing the PCR court's denial of his application for PCR. Petitioner filed his Petition for Writ of Certiorari and the Appendix on July 12, 2021. This Return on behalf of the State now follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). To be voluntary, a plea must not be induced by "threats, misrepresentations, or perhaps by promises that are by their nature improper as having no proper relationships to the prosecutor's business (e.g. bribes)." Brady v. United States, 397 U.S. 742, 748 (1970). A plea will not be deemed invalid simply because it "represents a compromise by [a] defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment." United States v. Cox, 464 F.2d 937, 942 (6th Cir. 1972) (citing Brady, supra). "Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation." Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citing Brady, supra).

It is a necessary aspect of the plea process that a prosecutor may "confront[] a defendant with the risk of more severe punishment," despite having a potential discouraging effect on a defendant's assertion of his right to trial, so that the prosecutor may "persuade the defendant to forego his right to plead not guilty." Id. at 364. Imposition of such difficult choices is inescapable in a legal system which encourages plea negotiations. Id. Further:

> "To hold that the prosecutor's desire to induce a guilty plea is an 'unjustifiable standard,' which . . . may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. . . . [P]rohibit[ing] a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows . . . ."

Id. at 364–65.

ARGUMENT

The post-conviction relief judge properly found Petitioner freely, voluntarily, knowingly, and intelligently entered his guilty plea and failed to establish plea counsel was deficient in failing to file a motion for Solicitor Jepertinger to recuse himself from Petitioner's case. Further, Petitioner failed to demonstrate that any alleged deficiency prejudiced him or impacted his decision to plead guilty.

Petitioner argues the PCR Judge erred in denying his application for PCR, claiming his guilty plea was not freely, voluntarily, knowingly, and intelligently made because the "coercive and threatening language" in the plea offer sheet stripped Petitioner of his "decision making ability" and that PCR counsel should have moved to recuse Jepertinger due to his bias against Petitioner. The State disagrees with these allegations: as demonstrated by the record, Petitioner's counsel was not deficient nor was he prejudiced by their representation.

In Petitioner's case, there is substantial evidence which supports the PCR Judge's findings and contradicts Petitioner's allegations that his plea was not freely, voluntarily, knowingly, and intelligently entered. For example, the comments on the plea offer sheet were not improper. Notably, prosecutors are permitted to threaten a defendant with the risk of more severe punishment in order to induce a guilty plea. Bordenkircher, 434 U.S. at 364. Jepertinger did not threaten Petitioner with an illegal or improper sentence: Petitioner's charges were, in fact, third offenses and Jepertinger was permitted to recommend consecutive sentences. See id. Additionally, the basis of Jepertinger's frustration, Petitioner's reoffending only two months after receiving an extremely lenient plea deal, was one which should concern any steward of justice.

Critically, Petitioner fails to acknowledge that subsequent to writing the message on the plea offer sheet, Jepertinger did, in fact, back off from his strict position and worked with

Parham in structuring a plea deal. For example, Petitioner was originally indicted for two counts of distribution of cocaine base and two counts of distribution of cocaine base in proximity of a school, but Jepertinger dismissed three of those charges. The remaining charge, a distribution of cocaine base which was also a third offense, possessed a sentencing range of ten to thirty years along with a maximum possible fine of fifty thousand dollars, yet Jepertinger offered Petitioner a sentence close to the mandatory minimum, twelve years' incarceration. Further, this twelve years sentence ran concurrently with the twelve year sentence Petitioner was required to serve for violating his probation, meaning Petitioner, in practice, was not given "additional" prison time. Contrary to Petitioner's allegation that Jepertinger was biased and could not treat him fairly, Jepertinger gave Petitioner an extremely generous plea deal despite his obvious guilt. The State cannot emphasize this point enough: not only was Petitioner's guilt uncontested at his plea, but Petitioner admitted his guilt for the charged offenses during his PCR hearing. Additionally, Parham testified Petitioner never disputed his guilt and that Jepertinger possessed irrefutable recordings of Petitioner committing the charged crimes. Had Jepertinger so desired, he could have elected to not offer Petitioner a plea deal, proceeded to trial on all four charges, and pushed for sentences consecutive to his probation revocation.

Further, although Petitioner testified at the PCR hearing that, but for counsels' failure to move for Jepertinger's removal from his case, he would not have entered a guilty plea and would have proceeded to trial, the record contradicts this claim. Both Parham and Matthews testified Petitioner never requested Jepertinger's removal from the case or even expressed any concern with his participation. Most importantly, Petitioner, under oath, claimed during his plea that he had not been "threatened in any way" to enter his plea and had done so of his "own free will."

(App.pp.12–13). Accordingly, all credible evidence presented at the PCR hearing indicates Petitioner was not actually improperly threatened, nor did he perceive such, by Jepertinger.

Analyzed under the lens of Strickland, trial counsel were not deficient because neither they nor Petitioner believed Jepertinger was improperly biased against Petitioner: if no one believed Jepertinger was biased, Petitioner's plea could not have been involuntary. See Brady, 397 U.S. at 748. Further, Jepertinger's willingness to work with Parham and give Petitioner a favorable plea deal underscores he was not, in fact, unfairly biased against him or that Petitioner was somehow prejudiced by having Jepertinger involved in his case. Petitioner's guilt was never in dispute and Jepertinger, had he so desired, could have easily obtained a conviction at trial and sought up to a thirty year sentence against Petitioner due to his criminal history. Instead, Jepertinger offered Petitioner a twelve year sentence which, in effect, did not require Petitioner to serve any more prison time than he was already required to serve as a result of violating his probation. For all these reasons, there is not a reasonable probability Petitioner would have insisted on going to trial; thus the PCR judge correctly found Petitioner failed to demonstrate counsel was ineffective. See Hill, 474 U.S. at 59.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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