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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
The Honorable Roger L. Couch, Trial Judge
The Honorable Perry H. Gravely, Post-Conviction Relief Judge

Appellate Case No. 2021-000505

DEVIN MIDDLETON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

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 was ineffective for allowing Petitioner to plead guilty under North Carolina v. Alford, when there was a strong factual basis for Petitioner's plea and any deficiencies in the factual basis were caused by Petitioner's decision to plead guilty? Furthermore, did the post-conviction relief court properly deny relief when there was no evidence to support Petitioner's contention that trial counsel was ineffective or that Petitioner would have continued his trial if not for trial counsel's ineffectiveness?

STATEMENT OF THE CASE

Petitioner Devin Middleton is presently confined in the South Carolina Department of Corrections following his guilty plea in Charleston County. On March 23, 2015, Officer Jamal Medlin of the Charleston Police Department responded to a call reporting that gunshots were fired in the Gadsden Green community of Charleston. (App. 632). Medlin located the body of Brandon Washington (Victim) in an alleyway in the vicinity of 16 Norman Street. (App. 636-39). Medlin also located Petitioner at the scene of the crime. (App. 646-47). Petitioner was subsequently interviewed by law enforcement. Petitioner denied shooting Victim, but admitted he was part of the altercation with Victim and may have sprayed Victim with pepper spray. (App. 57, 64). The City of Charleston maintained video surveillance of the area. Detective Paul Krasowski viewed the surveillance footage and identified Petitioner pointing an unknown dark object at Victim. (App. 60-63). A nearby pedestrian, Hugo Paredes, testified he was driving by the area of the shooting on the day of the offense and heard a gunshot. Paredes saw an individual near the alleyway where Victim was shot wearing a tan or khaki colored jacket. (App. 458-59). On April 16th, Krasowski met with Clayton Smalls. Krasowski presented a six person photo lineup to Smalls which contained a photograph of Petitioner's co-defendant, Te'Quan Perry. (App. 661-70). Smalls selected Perry out of the lineup and identified him as being one of the individuals who were present near the alleyway on the day of the shooting. (App. 716-24).

During its February 2016 term, the Charleston County Grand Jury indicted Petitioner for murder. (App. 1127-28). Petitioner was indicted for an additional count of conspiracy April 2017. (App. 1124-25). John Apicella, Esquire, represented Petitioner and Assistant Solicitors David Osbourne and Ted Corvey of the Ninth Circuit Solicitor's Office represented the State.

On June 12-15, 2017, Petitioner and his co-defendant stood trial before a jury in the Charleston County Court of General Sessions before the Honorable Roger L. Couch. After three days of trial, Petitioner pled guilty to criminal conspiracy and the lesser included offense of voluntary manslaughter pursuant to North Carolina v. Alford[1]. (App. 45-53). The State and Petitioner agreed to a negotiated sentence of twenty years' imprisonment for voluntary manslaughter to run concurrently with a sentence of five years' imprisonment for conspiracy. (App. 1046).

Petitioner did not appeal his convictions or sentences. On December 21, 2017, Petitioner filed a *pro se* application for post-conviction relief (2017-CP-10-6558) in which he alleged two grounds of relief. Petitioner alleged that: (1) plea counsel was ineffective for allowing Petitioner to plead guilty to voluntary manslaughter and conspiracy when there wasn't a sufficient factual basis to do so, (2) there was a conflict of interest on behalf of the Assistant Solicitor, because the Solicitor previously investigated Petitioner when the Solicitor was a law enforcement officer. (App. 1054-55). On March 14, 2018, the State filed a Return and requested an evidentiary hearing. (App. 1061-67). On March 11, 2020, Petitioner, through counsel, filed an amended PCR application which alleged trial counsel erred in not calling Marvin Johnson as a witness. (App. 1059-60). An evidentiary hearing into the matter convened on December 8, 2020, via Webex, before the Honorable Perry H. Gravely, Circuit Court Judge. Petitioner appeared virtually alongside PCR counsel, James K. Falk, Esquire. Assistant Attorney General Benjamin Limbaugh represented the State.

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

Petitioner testified on his own behalf and presented testimony from plea counsel, John Michael Acipell, Esquire. Petitioner also called Marvin Johnson as a witness.

On April 26, 2021, Judge Gravely issued a written order denying the application in full. (App. 1112-1122). On May 17, 2021, 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 was ineffective allowing his client to plead guilty under Alford.

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). 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.

Petitioner claims the post-conviction relief court erred in denying him relief because counsel allowed him to plead guilty under Alford when there was not a strong factual basis to support the plea. Petitioner's argument fails for two reasons. First, there was a strong factual basis for Petitioner's guilt, notwithstanding the fact that Petitioner plead guilty before the State could present the majority of their case in chief. Second, there is no evidence in the record to support Petitioner's contention that counsel was deficient in his representation of Petitioner, nor is there evidence to support that Petitioner's claim that he would have continued with his trial rather than plead guilty if not for counsel's alleged deficient conduct. 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 voluntary 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).

"The primary thrust of the Alford decision is that a defendant may voluntarily and knowingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit he participated in the acts constituting the crime." State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013). "The Alford plea is, in essence, a guilty plea and carries with it the same penalties and punishments." Id. A "trial court has wide discretion in determining whether a factual basis exists" for an Alford plea. U.S. v. Morrow, 914 F.2d 608, 611 (4th Cir. 1990).

"Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002). "A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." Condrey, 349 S.C. at 194, 562 S.E.2d at 325. "Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt." State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007). However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." State v. Hill, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977).

Here, Petitioner's argument fails for two reasons. First, there was a strong factual basis for Petitioner's guilt despite the fact the State had yet to present the majority of their case in

chief. In his petition to this Court, Petitioner argues there was no evidence he participated in Victim's murder. However, Petitioner concedes there was a factual basis to convict Petitioner's codefendant, Te'Quan Perry. Furthermore, Petitioner concedes there was evidence that Petitioner knew Perry and threatened witnesses against Perry, that Petitioner participated in a physical confrontation with Victim, and that Petitioner sprayed Victim with pepper spray. (Petition for Cert. 6-7). This evidence would have been corroborated by the surveillance footage that the State intended to play for the jury. (App. 60-64). The State was not required to prove that Petitioner shot Victim, but merely that Petitioner aided, abetted or encouraged Victim's murder.

The only reason more evidence against Petitioner was not presented was because Petitioner pled guilty before the State could finish presenting their case. Indeed, when the trial judge remarked that he had already heard a factual basis for the plea, the Solicitor replied "well, we had not even begun our case was our position, Your Honor." (App. 1044, lines 2-3). In his testimony before the PCR court, counsel for Petitioner remarked that various pieces of evidence had not yet been presented to the jury, but would have eventually been entered against Petitioner. (App. 1087-88, 1099). Therefore, by complaining to this Court that there was not a strong factual basis for his plea when Petitioner prevented the State from presenting additional evidence because Petitioner chose to plead guilty, Petitioner is attempting to have his cake and eat it too.

Petitioner's argument also fails because there is no evidence in the record to support Petitioner's claim that counsel was deficient in his representation or that Petitioner would have insisted on proceeding to trial if not for counsel's deficiencies. Petitioner was initially offered a negotiated plea to voluntary manslaughter for a sentence of twenty years after the first day of his trial. (App. 253). Petitioner declined that offer and the trial continued for another three days.

trial. (App. 253). Petitioner declined that offer and the trial continued for another three days. (App. 254). After an additional three days of testimony and motions, Petitioner pled guilty to the same offer initially made by the State after the first day of trial. (App. 1022). The trial judge engaged in a thorough colloquy with Petitioner and his co-defendant regarding their pleas. (App. 1022-46). The trial judge specifically addressed the nature of an Alford plea with Petitioner. Petitioner acknowledged there was a factual basis for his plea during the following exchange:

> The Court:...My understanding of the plea—are you pleading guilty under Alford?
>
> Petitioner: Yes, sir.
>
> The Court: Now, sir, what that means to me is that you and your lawyer have reviewed the evidence that the State has in its possession and after review of that evidence it is your belief that if the evidence were presented to the jury during the trial that it would more than likely result in a conviction. And so while you do not admit to those facts, you have decided that it would not be in your best interest to contest the case. So in effect you are pleading no contest. Is that, in fact, how you view this?
>
> Petitioner: Yes, sir.

(App. 1034, lines 1-15). In his testimony to the PCR court, Petitioner complained that his attorney advised him to plead guilty despite the fact that Marvin Johnson did not appear at trial. (App. 1076-80). Petitioner contradicted his testimony during the plea colloquy and insisted that there was not "strong evidence for the factual findings", but never articulated how his attorney was deficient or otherwise explained that he would have proceeded with the trial if not for his attorney's deficiency. (App. 1079). Trial counsel testified that while there was a chance Petitioner could be acquitted, there was evidence that placed Petitioner at the scene of the murder with the shooter and evidence that had yet to be admitted which created a circumstantial case of Petitioner's guilt. (App. 1087-89). Counsel specifically identified Petitioner's admission that he

used pepper spray against Victim along with evidence of pepper spray on Victim's clothing as evidence that would "tip the balance" of evidence against Petitioner. (App. 1093). According to trial counsel, "a competent solicitor could use that as evidence against [Petitioner] for being more than just a bystander." (App. 1093, lines 15-17).

In light of the evidence in the trial record and the evidence presented during the PCR hearing, there is no evidence to support Petitioner's claim that trial counsel was ineffective. Even if there was evidence that trial counsel was ineffective, there is no evidence that Petitioner would have continued with his trial if not for trial counsel's deficiency. Even, the self-serving testimony Petitioner offered at his PCR hearing does not establish that counsel was defective or that Petitioner would have insisted on going to trial if not for counsel's deficiencies. Even if Petitioner's testimony had established a deficiency by counsel and a prejudice to Petitioner, Petitioner's testimony is contradicted by his plea colloquy with the trial judge and trial counsel's testimony at the PCR hearing. Therefore, there is evidence to support the PCR court's denial of Petitioner's requested relief. 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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