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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable Letitia A. Verdin, Trial Judge
The Honorable Grace Gilchrist Knie, PCR Judge

Appellate Case No. 2021-000551

TYSEAN EDMONDSON. ..... Petitioner.

v.

STATE OF SOUTH CAROLINA. ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Tysean Edmondson (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections. In July 2016, the Spartanburg County Grand Jury indicted Petitioner for two counts of attempted murder (2016-GS-42-4096 and -4097 (count one)) and possession of a weapon during a violent crime (2016-GS-42-4097 (count two)). N. Douglas Brannon, Esquire ("Counsel") represented Petitioner. Spenser H. Smith prosecuted the case. On April 25, 2017, Petitioner pled guilty before the Honorable Letitia A. Verdin, circuit court judge, to the lesser-included offenses of assault and battery of a high and aggravated nature and the lesser-included offense of unlawful carry of a pistol. Petitioner was sentenced to sixteen years' imprisonment on the ABHAN charges and one year imprisonment for unlawful carry of a pistol.

Petitioner, by and through Counsel, filed on April 25, 2017, a motion to reconsider the sentence imposed. Petitioner and Counsel again appeared before Judge Verdin on June 5, 2017. Judge Verdin took the matter under advisement, and filed an amended sentencing sheet on December 27, 2018, resentencing Petitioner to twelve years' imprisonment on the ABHAN. Petitioner did not appeal his plea or sentence.

Petitioner timely filed a PCR application on August 26, 2019, alleging:

1. "The Court failed to inform defendant of the elements of the hand of one is the hand of all. Also the trial court failed to inform defendant of the elements of attempted murder."
    a. "In relation to ground one in the Petition, during the Plea colloquy defense Counsel informed the Court that the reason defendant was Pleading guilty was because of the hand of one is the hand of all. However, the Court never informed defendant of the elements that the State must prove to find defendant guilty under such theory."
2. "The factual basis did not support the offense."
    a. "In relation to ground two in the Petition, the Court never informed defendant of the Elements of Attempted Murder. Though defendant pleaded guilty to ABHAN, provided he rejected the State's offer, he faced the charges of Attempted Murder. Hence, before an intelligent decision could be had of whether to accept or reject the plea, it was necessary for the Court to inform

defendant of the elements of Attempted Murder."

3. "Trial court failed to inform defendant of elements of ABHAN."
    a. "In relation to ground three in the Petition, during the Plea Colloquy the State, in support of its factual basis for ABHAN, told the Court that one of the victims, Mr. Clay, did not suffer any bodily and/or physical injure at all. In ought for a person to commit the offense of ABHAN, there must be some form of physical and/or bodily injure. Defendant pleaded guilty to two counts of ABHAN, one of those counts being against Mr. Clay."
    b. "In relation to ground Five in the Petition, the trial court failed to inform defendant of the elements of the offense he pleaded guilty to, i.e. ABHAN."
4. Ineffective assistance of plea counsel, in that:
    a. "In relation to ground four in the Petition, defense counsel failed to inform defendant of the elements of Attempted Murder to enable defendant to make an intelligent decision of whether or not to accept the State's offer or proceed to trial."
    b. "Defense Counsel was also ineffective for allowing defendant to plead guilty to an offense that the factual basis did not support."

In addition to proceeding forward on the above, Petitioner challenged the validity of the plea, stating it was entered unknowingly, unintelligently, and involuntarily. He also stated that he was unclear about the difference between hand of one hand of all and mere presence.

Respondent made its return on October 30, 2019. The evidentiary hearing occurred on April 6, 2021, before the Honorable Grace Gilchrist Knie, circuit court judge. J. Falkner Wilkes, Esquire was Petitioner's attorney. Chelsey F. Marto, Esquire of the South Carolina Attorney General's Office represented Respondent.

The Court issued an order of dismissal, denying Petitioner's PCR application and remanding him to the custody of South Carolina Department of Corrections on April 26, 2021. The Court found:

1. The plea was entered freely, knowingly, intelligently, and voluntarily
2. Petitioner sufficiently understood the elements of both the charges he was indicted under, and the charges to which he ultimately pled guilty.
3. Petitioner sufficiently understood the theory of hand of one hand of all.
4. Petitioner and Counsel seemingly thought that the facts were sufficient for Petitioner to support the conviction before entering the plea and while at the plea hearing.

Thus, the request for relief was denied. Petitioner appeals from the denial of relief.

STATEMENT OF FACTS

On July 5, 2015, officers conducted a checkpoint when Petitioner pulled up. (App. 95). Marijuana odor was coming from the car, a dog sniff occurred, and the car searched. (App. 95). Marijuana and a .22 caliber pistol were found in the car. (App. 95). Petitioner was later released on bond when the next incident occurred. (App. 95).

On April 1, 2016, deputies responded in reference to a shooting. (App. 95). The victim stated he and his girlfriend left the house and, shortly thereafter, a dark car pulled behind them. (App. 95). He heard two or three gunshots and realized the back window of his car was shot out and his girlfriend's face grazed by a bullet. (App. 95). A deputy was sitting in a patrol car in the vicinity of the shots. (App. 95). After the gunshots, the dark car began speeding away and the officer attempted a traffic stop. (App. 95-96). The deputy saw firearms thrown out of the driver's side of the vehicle. (App. 96). An eight to ten minute high speed chase occurred, ending in Victoria Gardens Apartments. (App. 96). Petitioner, the back seat passenger, jumped out of the car and took off running as the driver, Douglas Jones, and front seat passenger, Deandre Foster, stayed in the car. (App. 96).

The vehicle search revealed a loaded AR-15 magazine, an AR-15 round in the driver's front pocket, an extended magazine for a .40 caliber pistol, and another loaded pistol magazine in the vehicle. (App. 96).The police went back to the route of the chase and found an AR-15 on the side of the road that was thrown out of the vehicle. (App. 96). Another 9 millimeter pistol was found roadside. (App. 96). The next day a Milliken's ground crew brought in a third pistol that was discovered around where the chase took place. (App. 96). The State believed that all individuals in the car were armed because there were three individuals and three guns in the car. (App. 96). All three defendants came back with gunshot residue on them and Petitioner admitted

that the 9 millimeter Smith & Wesson with a regular clip was his. (App. 96).

The incident occurred because a girl's car got keyed. (App. 96). Jones' girlfriend had a dispute with her prior roommate and the roommate was kicked out of the apartment, stealing various items and allegedly vandalized Jones' girlfriend's car on her way out. (App. 97). Jones' girlfriend told Jones, knowing he and his friends would show up with weapons, but did not know exactly what would happen when they did. (App. 97).

Pictures were taken of the back and front of victim's car, showing the bullet went right by where the victim's girlfriend's head was. (App. 97). A third picture shows the victim's girlfriend's face, where she was grazed by the bullet. (App. 97). The victim himself was uninjured. (App. 97).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. 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, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

In a PCR action, the petitioner bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner asserts ineffective assistance of counsel as a ground for relief, the petitioner must show "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 v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the petitioner must prove defense counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed

in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

In the context of a guilty plea, the petitioner must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Petitioner's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the petitioner is entitled to depart from previous judicial admissions

made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the petitioner must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "'[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.'" *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, "guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea." *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981). Though rare, pleas are rendered invalid when the PCR court finds that the trial judge did not affirmatively ask for an admission of guilt or advise the defendant of the crucial elements of the charged offenses and the mandatory minimums associated with the crime. *See Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 624 (1999) (finding that the plea entered was not voluntary, intelligent, and knowing

when counsel had little to no memory of issues discussed with petitioner prior to the plea and the plea court failed to question petitioner to ensure he knew about the consequences of the plea or the elements charged).

I. The post-conviction relief court properly determined that Petitioner freely, knowingly, intelligently, and voluntarily entered his plea.

On appeal, Petitioner argues the PCR court erred in denying him relief because the plea was not freely, knowingly, intelligently, and voluntarily entered. However, the PCR court properly rejected this argument, finding that the plea was freely, knowingly, intelligently, and voluntarily entered. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

The plea transcript reflects that the plea was voluntarily, freely, knowingly, and intelligently entered. Specifically, the State called the case by explaining Petitioner was charged with attempted murder and pleading to the lesser-included offense of ABHAN. (App. 81). The court told Petitioner he was pleading to two counts of ABHAN, carrying up to twenty years' imprisonment each. (App. 85). He was told these charges are classified as violent and serious. (App. 85). He was also told he was pleading to one count of unlawful carrying of a pistol, carrying up to a year imprisonment. (App. 85). Petitioner told the court he had discussed the charges with Counsel and he was happy with what Counsel did for him. (App. 88). Petitioner stated he was not under the influence of alcohol or drugs the day of the plea hearing. (App. 92). Petitioner stated he understood he was waiving his right to a jury trial, where he would have to be found guilty beyond a reasonable doubt by a jury, his right to remain silent, and his right to call and cross-examine witnesses. (App. 93). Petitioner stated no one promised him anything or forced him in any way to enter the plea. (App. 93-94). Additionally, after the facts were put on

the record, Petitioner stated he still wanted to plead. (App. 98-99).

Counsel's testimony at the evidentiary hearing also substantiates the plea's validity. Counsel stated that the State made a plea offer and he told Petitioner he could choose to go to trial instead up until the night of the plea hearing. (App. 133).Counsel testified that he showed Petitioner the discovery when they met prior to the plea and that Petitioner knew the evidence the State had against him. (App. 133-34). Counsel stated it was Petitioner's decision alone to enter the plea, "without hesitation." (App. 135-36). Counsel stated he never promised him anything or attempted to force him into pleading. (App. 136). Counsel stated he met with Petitioner the night before the guilty plea and in the holding cell the day of the guilty plea and warned him about the effects of waiving his constitutional rights. (App. 136). Petitioner never asked questions or otherwise indicated he did not understand something discussed during these conversations. (App. 136). Based upon Counsel's testimony at the evidentiary hearing and the plea transcript, Respondent contends that the plea was entered freely, knowingly, intelligently, and voluntarily. Accordingly, this Court should deny certiorari on this ground.

II. The post-conviction relief court properly determined that Petitioner failed to establish that he was not adequately informed of the charges, hand of one hand of all, accomplice liability, and transferred intent when he was sufficiently advised of and understood this at the plea hearing.

On appeal, Petitioner argues the PCR court erred in denying him relief because Petitioner was not adequately informed of the elements of the charges pled to, the hand of one hand of all theory, accomplice liability, or transferred intent. However, the PCR court properly rejected this argument, finding that Petitioner was sufficiently advised of and understood the charges, accomplice liability, hand of one hand of all, and transferred intent. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

A person is guilty of assault and battery of a high and aggravated nature "if the person unlawfully injures another person and great bodily injury to another person results; or the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(B)(1)(2015). "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29. Attempted murder is not a mere codification of the offense of assault and battery with intent to kill, but rather constitutes a new, separate offense for which a specific intent to kill must be proven beyond a reasonable doubt. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).

"'Under the 'hand of one is the hand of all' theory [of accomplice liability], one who joins with another to accomplice an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.'" *State v. Thompson*, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05 (Ct. App. 2007) (quoting *State v. Condrey*, 394 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)). Though "[m]ere presence and prior knowledge that a crime was going to be committed, without more is insufficient to constitute guilt", "'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 [principal].'" *Id.* (quoting *State v. Hill*, 268 S.C. 390, 395-96, 234 S.E.2d 219, 221 (1977)). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010).

In similar cases, convictions were sustained if there was sufficient evidence indicating a common scheme or plan, regardless of whether the defendant was the shooter. *See Gibson*, 390 S.C. at 355, 701 S.E.2d at 770 (finding sufficient evidence existed indicating the defendant

participated in a common scheme or plan with his co-defendant when he agreed to act in concert with his co-defendant who fired the fatal shot because defendant informed co-defendant of the situation, called him to pick him up for a reason beyond removing defendant from the scene, and that defendant was aware of the firearm in co-defendant's car); *State v. Dickman*, 341 S.C. 293, 534 S.E.2d 268 (2000) (finding that sufficient evidence existed to sustain a murder conviction when the defendant acted with his co-defendant pursuant to a common scheme or plan when he told a friend the date the murder would take place, arranged the incident with co-defendant, retrieved a gun beside the co-defendant, and handed the gun to co-defendant, who promptly fired the gun).

Based upon the plea transcript and Counsel's testimony at the evidentiary hearing, Petitioner seemingly understood the elements of the crimes he was charged with and pled to. At the plea, the State explained that Petitioner was charged with attempted murder and would be pleading to the lesser-included offense of ABHAN. (App. 81). The plea court advised Petitioner he was pleading to two counts of ABHAN, which carried up to twenty years' imprisonment. He was advised that these crimes are classified as serious and violent offenses. (App. 85). He was informed that he was pleading to one count of unlawful carrying of a pistol, carrying up to a year in prison. (App. 85). Petitioner informed the plea court that he had discussed the charges with Counsel. (App. 88). In mitigation, Counsel stated Petitioner was pleading "because the hand of one is the hand of all." (App. 100). Petitioner never interjected or otherwise indicated at the plea hearing that he did not understand Counsel's advice, something discussed in the plea colloquy, or hand of one hand of all when the theory was discussed by Counsel.

At the evidentiary hearing, Counsel stated he printed out the statute for each charge and read and explained the elements and charges to him word for word. (App. 133-134). Counsel

stated that Petitioner seemingly understood the conversations, noting that Petitioner is a "very smart young man." (App. 133-34). Counsel stated they discussed hand of one is the hand of all and "absolutely" discussed mere presence, noting that you cannot discuss one concept without discussing the other. (App. 134). On cross-examination, Counsel confirmed they discussed both hand of one hand of all and mere presence and in great detail. (App. 137). Counsel stated he did not know if he told Petitioner that he could not be convicted if he was just merely present, but explained the difference between mere presence and what must be shown to be found guilty under hand of one hand of all. (App. 134). Counsel testified that he thought there was sufficient evidence that Petitioner was not just merely present, noting that Petitioner took off running from the police and tossed the gun. (App. 134-35, 138). Counsel stated he discussed the facts of the case, the impressions those create concerning Petitioner's involvement, and how they are sufficient to sustain a conviction. (App. 134). Thus, based on the above, it is clear Petitioner understood the elements of the crimes charged with and pled to, as well as hand of one hand of all, mere presence, and transferred intent. Accordingly, the PCR court properly denied relief on this ground. This Court should deny certiorari.

III. The post-conviction relief court properly determined that Petitioner failed to establish that the facts of the case did not support the offense he pled to when he pled guilty to the facts as recited at the plea hearing by the prosecutor.

On appeal, Petitioner argues the PCR court erred in denying him relief because the facts of the case did not support the offense he pled to. However, the PCR court properly rejected this argument, finding that Petitioner accepted the facts as stated by the prosecutor and stated he still wished to plead guilty to those facts and the correlating charges after they were recited at the plea hearing. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

"A defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted (or to which he has waived grand jury presentment), but of which he is not guilty." *Rollison v. State*, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001); *see also Anderson v. State*, 342 S.C. 54, 58, 535 S.E.2d 649, 651 (2000) ("We find, so long as there was a sufficient factual basis to support the crime for which the defendant was indicted, a plea to any lesser included offense is sufficient."). ABHAN is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3); *State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

At the plea hearing, and after the prosecutor recited the facts, Petitioner stated he still wanted to plead. (App. 98-99). Counsel testified at the evidentiary hearing that he reviewed the discovery with Petitioner and he had access to all documents during their meetings. (App. 132-33). Counsel stated that he thought there was evidence that Petitioner went beyond mere presence because Petitioner admitted that not only did he have a gun, but he got out of the car, took off running, and threw the gun. (App. 134-35). Still, even if Petitioner is correct and the evidence does not perfectly fit the charge, under Petitioner still freely pled to ABHAN; the lesser-included offense of attempted murder, of which he was indicted for. Accordingly, the PCR court properly denied relief on this ground. This Court should deny certiorari.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner entered his plea freely, knowingly, intelligently, and voluntarily with effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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