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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Orangeburg County
Court of Common Pleas
The Honorable Diane S. Goodstein, Resident Judge of the First Judicial Circuit

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Appellate Case No. 2021-000774

TELLAFERRO RANDOLPH, #296483, PETITIONER,

vs.

STATE OF SOUTH CAROLINA, RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENTS OF ISSUE ON PETITION FOR WRIT OF CERTIORARI 1

STATEMENT OF FACTS 2

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW 6

ARGUMENT.....7

The PCR court correctly found plea counsel rendered effective assistance and Petitioner entered his guilty plea knowingly and voluntarily where plea counsel reviewed all available discovery with Petitioner prior to the plea and Petitioner did not introduce the items of discovery he claims he did not see at the evidentiary hearing.

CONCLUSION.....14

STATEMENTS OF ISSUE ON PETITION FOR WRIT OF CERTIORARI

Petitioner's Statement of Issue on Petition for Writ of Certiorari

Whether trial counsel rendered ineffective assistance of counsel when he failed to provide Petitioner with all discovery in the case, rendering Petitioner without the opportunity to fully assess the case against him and thereby making his guilty plea unknowing and involuntary?

Respondent's Counterstatement of Issue on Petition for Writ of Certiorari

Did the PCR court somehow err by finding plea counsel rendered effective assistance and Petitioner entered his guilty plea knowingly and voluntarily when plea counsel reviewed all available discovery with Petitioner prior to the plea and Petitioner did not introduce the items of discovery he claims he did not see at the evidentiary hearing?

STATEMENT OF FACTS

On August 3, 2014, at approximately 2:00 o'clock in the morning, in the parking lot of Club Ambition, located in Orangeburg County, a verbal altercation occurred between Petitioner and a group of club-goers over a parking spot. (App. p. 10). Victims Travis Wilson and Michael Davis, along with five others (Brandon Wilson, Cedrick Fowler, Christopher Bradley, Ayesha Aiken, and Whitney Bonaparte) arrived at the Club in four separate vehicles. (App. pp. 10-11). Witness Whitney Bonaparte, the driver of one of the vehicles, pulled into the Club's crowded parking lot and into the parking space Petitioner had intended on parking in. (App. p. 11). As a result, a verbal altercation resulted between Ms. Bonaparte and Petitioner. (App. p. 11). Thereafter, Victim Davis and witness, Ayesha Aiken, also became involved in the aforementioned verbal altercation. (App. p. 11).

Six witnesses gave statements attesting Petitioner began shooting a firearm at some point during the altercation where Victim Wilson was struck two times and passed away from him injuries and Victim Davis was shot three times. (App. pp. 11-12). Significantly, some of the witnesses knew Petitioner and/or were able to pick Petitioner out of a photo lineup following the incident. (App. p. 12).

An additional witness, Anthony Jamison, was also in the parking lot at the time of the incident. (App. p. 12). Mr. Jamison stated Victim Davis had a small caliber handgun in his hand when the verbal altercation began. (App. p. 12).

Following the shooting, Victim Davis was taken to Regional Medical Center where two bullets were recovered from him. (App. p. 12). Those bullets and the bullets recovered during Victim Wilson's autopsy were sent to SLED for analysis[1]. (App. p. 14). The recovered projectiles were consistent with bullets from a .44 caliber cartridge – however, no guns or shell casings were recovered to compare them to. (App. p. 13). One .25 caliber shell casing was found at the scene. (App. p. 14). This casing was later linked to a gun owned by Victim Davis. (App. p. 14).

[1] A gunshot residue kit was also collected from the deceased during autopsy and sent to SLED. (App. p. 14). The results revealed Victim Wilson most likely fired a gun the night of incident as gunshot residue was found on his right palm and the back of his right hand (App. p. 14).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Petitioner was indicted during the October 2015 term of the Orangeburg County Grand Jury for murder (2014-GS-38-1258) and attempted murder (2014-GS-38-1257). On October 29, 2015, Petitioner appeared before the Honorable Edgar W. Dickson and pled guilty to the lesser-included offenses of voluntary manslaughter and assault and battery of a high and aggravated nature (ABHAN) pursuant to *North Carolina v. Alford*[2]. Petitioner was represented by Robert Douglas Mellard, Esquire. Tommy Scott of the First Circuit Solicitor's Office prosecuted the case. Judge Dickson sentenced Petitioner to concurrent sentences of fifteen years' for voluntary manslaughter and fifteen years' for the ABHAN charge. Petitioner did not appeal the conviction or sentence.

Petitioner filed an application for post-conviction relief on May 25, 2016. In his application, Petitioner alleged he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. "Counsel failed to appeal."
   b. "Counsel misinformed me."
2. Subject Matter Jurisdiction
   a. "Court of General Sessions failed to have jurisdiction."
   b. "Defective indictment."
3. "Violation of U.S. Constitution 4th, 5th, 6th, and 14th amendments."

Respondent made its return to the post-conviction relief application on May 25, 2016, and moved for a more definite statement, requesting amendments with specific allegations. An evidentiary hearing was convened on December 14, 2017, before the Honorable Kristi L. Harrington, then-circuit court judge. Petitioner was present at the hearing and represented by Jonathan D. Waller, Esquire. Respondent was represented by then-Assistant Attorney General

[2] 400 U.S. 25 (1970).

Ruston W. Neely of the South Carolina Attorney General's Office.

At the evidentiary hearing, Petitioner proceeded forward on the following claims:

1. Ineffective assistance of counsel.
    a. Involuntary guilty plea
        i. Failure to provide Petitioner with discovery materials and
        ii. Failure to challenge search and seizure.

Petitioner testified on his own behalf and presented testimony from plea counsel Robert Douglas Mellard. No other witnesses were presented and no additional evidence was introduced. At the conclusion of the hearing, Judge Harrington took the matter under advisement and requested both parties submit proposed orders. Proposed orders were submitted. However, Judge Harrington retired from the bench before ruling on the matter, leaving the matter unresolved.

Pursuant to Rule 63, SCRCP, the matter went before the Honorable Diane S. Goodstein, a resident judge of the First Judicial Circuit. Judge Goodstein was provided with and thoroughly reviewed the entire record, including the transcript of the evidentiary hearing before Judge Harrington. After this review, the Court certified familiarity with the record and determined the matter could be completed without prejudice to the Petitioner or Respondent. By Order dated July 1, 2021, Judge Goodstein determined Petitioner failed to establish any constitutional deprivations or other grounds entitling him to relief and denied his application with prejudice.

Petitioner timely initiated this appeal.

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 circuit court's ruling 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

The PCR court correctly found plea counsel rendered effective assistance and Petitioner entered his guilty plea knowingly and voluntarily where plea counsel reviewed all available discovery with Petitioner prior to the plea and Petitioner did not introduce the items of discovery he claims he did not see at the evidentiary hearing.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her 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, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. 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." *Id.*, 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below

the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. *Harris v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984). The standard 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." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Where a defendant is represented by counsel during the plea process and enters his plea with the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Hill*, 474 U.S. at 56.

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. 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. *Strickland*, 466 U.S. 668.

Petitioner alleges his plea was involuntary because Counsel failed to review all discovery with him.[3] However, the PCR court found Petitioner's decision to plead guilty was freely and voluntarily made, particularly since Counsel credibly testified he reviewed and explained all discovery he received with Petitioner. (App. p. 86). The PCR court further found Petitioner knew he had not seen the discovery he alleges Counsel failed to review with him – a ballistics report and autopsy report – when he pleaded guilty. (App. p. 86). Moreover, Petitioner failed to meet his burden of proving prejudice because he did not introduce either item of discovery he claims he did not see. Accordingly, this Court should deny certiorari as to this issue.

In his Petition, Petitioner argues Counsel "did not share some of the evidence found in the discovery period with [Petitioner] before [Petitioner] decided to accept a guilty plea." (Petition p. 6). Petitioner specifically alleges Counsel did not provide him a ballistics or autopsy report (Petition p. 6). This is a misstatement of Counsel's testimony as a whole. At the evidentiary hearing, Counsel testified he reviewed all discovery with Petitioner and if he received supplemental discovery, would have gone over it with Petitioner. (App. p. 69). Additionally, Counsel testified that to his knowledge, he had not received a ballistics report, nor had he received an autopsy report at the time of the plea. (App. p. 64). Counsel testified a ballistics report would only have been prepared if the weapon believed to have been fired could be produced. (App. p. 64). Counsel had no recollection of ballistic testing being done. (App. p. 64). Notably, Counsel testified neither a ballistics report nor an autopsy report would have provided any evidence that would have been beneficial to Petitioner's case. (App. pp. 64, 70).

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[3] Petitioner argues trial counsel failed to review discovery pertinent to Petitioner's ability to knowingly and voluntarily enter into a plea. However, Petitioner wholly fails to allege any error in the lower court's findings. Despite this failure, Respondent addresses Petitioner's argument and interprets Petitioner's issue statement to allege the PCR Court erred in its findings. *State v. Culbreath*, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal.").

Essentially, Counsel was making a distinction between discovery that was necessary for Petitioner to decide whether he wanted to plead guilty or go to trial, and discovery that was more related to trial preparation, such as official autopsy reports of already-known test results. (App. p. 70). Counsel further stated he would not have proceeded to trial without an autopsy report. (App. p. 70). Additionally, Petitioner conceded that though he believed more discovery existed, he was not sure if it existed. (App. pp. 59-60). Nonetheless, he never raised this as an issue to the plea court, and in fact, to the contrary, he affirmed to the plea court he had enough time to talk with Counsel, and he was satisfied with Counsel's work on his case. (App. pp. 8-9).

Thus, there is probative evidence in the record to support the PCR court's finding "[Petitioner] knew he had not seen a ballistics report or autopsy report when he pleaded guilty and it did not affect the voluntarily, intelligent, and knowing nature of [Petitioner's] guilty plea" and Counsel was not deficient in either his actions and advice nor was Petitioner prejudiced by the alleged deficiency. (App. p. 86). These findings were predicated on Counsel's "credible" testimony.

Moreover, *Hill* makes clear the prejudice prong ordinarily requires "something more" than simply a defendant's assertion that but for counsel's deficient performance he would not have pleaded guilty, but would have gone to trial. *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (citing *Hill*, 474 U.S. at 58–59); *see also Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). Rather, a PCR applicant must show some evidence "that would have affected counsel's advice to [him] to accept the plea bargain offered or that would have caused [him] to decline to accept it." *Stalk v. State*,

383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009); *see also Porter v. State*, 368 S.C. 378, 386, 629 S.E.2d 353, 357 (2006) (holding no evidence showed counsel's failure to investigate a potential witness would have yielded a result different from that which defendant's counsel believed at the time of the plea and defendant pleaded guilty in light of the complete information available at that time), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Additionally, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

Many factors may legitimately influence a decision to plead guilty, such as the reduction of stress on a defendant and his or her family, the removal of uncertain consequences, and reduction of actual sentencing exposure. *McMann v. Richardson*, 397 U.S. 759, 768–69 (1970). *See also Wicker v. State*, 310 S.C. 8, 425 S.E.2d 25 (1992) ("[A]lthough petitioner pled guilty to avoid a possible death sentence, the plea was entered with knowledge of the sentences attendant to the guilty plea and so was knowing and voluntary."); *Cf. Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (pointing out that the imposition of the difficult choice between going to trial and pleading guilty is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas).

In this case, when asked what led Petitioner to his decision to plead, Petitioner candidly testified he pled guilty after "[Counsel] sent me the letter appointing the trial and what was going to be said at the trial, how all the evidence was pointing to me. And by previous – through life, I know what murder carries and that kind of shook me up..." (App. pp. 56-57). Additionally, Counsel testified that following discussions regarding defenses to Petitioner's charges and after further investigation, Petitioner requested Counsel explore potential offers. (App. p. 66). Counsel

testified that upon Petitioner's request he began plea negotiations with the Solicitor's Office. (App. p. 66). Petitioner also affirmed to the plea court multiple times he believed there was a substantial likelihood he would be convicted if he went to trial. (App. pp. 8, 17-18).

"This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ." *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); *see also Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); *Skeen v. State*, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Petitioner cannot establish he was prejudiced by Counsel's alleged failure to review all discovery with him, as Petitioner did not introduce the evidence at the evidentiary hearing that he claims Counsel should have discussed with him prior to the guilty plea. Therefore, this allegation is supported by nothing more than speculation, which is insufficient to meet Petitioner's burden of proof on the prejudice prong. *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); *cf. State v. Cabbagestalk*, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984) ("[f]ailure to make an offer of proof precludes the appellant from raising the issue on appeal."). Petitioner has the

burden of establishing error on appeal. Here, Petitioner has offered no evidence to support his claim of ineffective assistance of counsel, notwithstanding his own testimony. Nor does Petitioner maintain that the discovery he alleges Counsel failed to review with him exists.

The PCR court properly weighed the testimony from Petitioner and Counsel at the evidentiary hearing, along with the record of the plea hearing, and found the combination of the plea colloquy and Counsel's credible testimony was dispositive as to this issue. (App. pp. 83-86). Because the PCR court committed no error of law and in deference to its factual findings, this Court should deny certiorari as to this issue.

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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