

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jan 14 2022**

S.C. SUPREME COURT

Certiorari to Greenville County  
The Honorable Letitia Verdin, Plea Judge  
The Honorable Edward W. Miller, Post-Conviction Relief Judge

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Appellate Case No. 2020-001569

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GARY Z. THOMAS,

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 ISSUES**

### **I.**

**Did the post-conviction relief court properly deny relief for the allegation that plea counsel was deficient in his representation of Petitioner for the charge to which Petitioner plead guilty, when Petitioner only alleged that counsel was deficient in his representation of Petitioner for a separate, unrelated charge that was ultimately dismissed?**

### **II.**

**Did the post-conviction relief court properly refuse to enforce Petitioner's subpoena of Victim when Victim's proposed testimony was not relevant to the charge to which Petitioner plead guilty?**

## STATEMENT OF THE CASE

On December 1, 2017, Petitioner Gary Thomas plead guilty to a single count of second degree domestic violence. (App. 8-11). Petitioner also faced an additional first degree domestic violence charge that was dismissed pursuant to his plea agreement. (App. 149). On April 26, 2017, Petitioner and his girlfriend, Diane Phillips (Victim) engaged in a verbal argument over a cell phone. (App. 10). Later in the day when Victim returned home, Petitioner threw her on the couch and punched her once. (App. 10).

Petitioner waived presentment of his second degree domestic violence charge to the grand jury and plead guilty before the Honorable Letitia Verdin on December 1, 2017. John Gravlee, Esq. represented Petitioner, and Assistant Solicitor Durham Hill of the Thirteenth Circuit Solicitor's Office represented the State. Judge Verdin sentenced Petitioner to three years' imprisonment suspended to five years' probation. (App. 11).

Petitioner did not appeal his conviction or sentence. On November 30, 2018, Petitioner filed an application for post-conviction relief. (2018-CP-39-1276) (App. 13-18). Petitioner alleged five grounds for relief including, an allegation that his guilty plea was entered involuntarily and that his right to adequate counsel was violated. (App. 18). The State filed a return and a partial motion to dismiss on February 8, 2019. (App. 21-29). On April 16, 2019 Petitioner appeared before the Honorable Alex Kinlaw, Jr. and moved to have his attorney, Don A. Thompson, Esq., removed as counsel for his PCR action. Judge Kinlaw granted Petitioner's request and allowed him to proceed pro se. (App. 50). Petitioner filed a supplemental PCR application on July 15, 2019. (App. 54). The State filed a return to the supplemental application on October 8, 2019. (App. 56-65). An evidentiary hearing into the matter convened on October

22, 2019 before the Honorable Edward W. Miller. Petitioner represented himself. Assistant Attorney General Taylor Z. Smith represented the State. Petitioner testified on his own behalf and presented testimony from plea counsel, the solicitor, and his current girlfriend, Ferris Harvley.

On January 22, 2020, Judge Miller issued a written order denying the application in full. (App. 170-96). On February 14, 2020, Petitioner filed a motion to alter or amend judgement. On March 2, 2020, Petitioner filed an amended motion to alter or amend judgement. On October 20, 2020, Judge Miller denied Petitioner's motion to alter or amend judgement. On November 1, 2020, Petitioner appealed the denial of his application to this Court. On appeal, Petitioner only challenges the denial of relief for his claim that his guilty plea was entered involuntarily by plea counsel's insufficient investigation into his case and claims the PCR court also erred by not allowing him to question Victim during his PCR hearing.

## 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

### I.

**The post-conviction relief court properly denied relief for the allegation that plea counsel was deficient in his representation of Petitioner for the charge to which Petitioner plead guilty, because Petitioner only alleged that counsel was deficient in his representation of Petitioner for a separate, unrelated charge that was ultimately dismissed.**

Petitioner claims the post-conviction relief court erred in denying him relief for the allegation that Petitioner's guilty plea was involuntary because it was induced by plea counsel's insufficient investigation into his case. Specifically, Petitioner complains that plea counsel did not investigate his claims that his email account and a USB drive contained exculpatory evidence related to his first degree domestic violence charge, which was ultimately dismissed. Petitioner contends that counsel's failure to investigate these claims somehow caused Petitioner to involuntarily plead guilty to the separate unrelated charge of second degree domestic violence before Judge Verdin. Petitioner's argument fails for two reasons. First and foremost, Petitioner does not allege any deficiency by plea counsel in his representation of Petitioner for the charge to which Petitioner actually plead guilty. Rather, Petitioner alleges that plea counsel was deficient in his representation on a separate, unrelated charge that was ultimately dismissed. Because Petitioner does not allege any deficiency in plea counsel's representation on the charge to which he ultimately plead guilty, Petitioner is not entitled to relief. Second, even if Petitioner did allege a deficiency on plea counsel's part, Petitioner failed to prove that plea counsel was deficient. 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 688). 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).

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).

Here, Petitioner's acknowledges that his argument "has a few logical steps" that need to be parsed out in order to understand his argument. (PWC 5). However, Petitioner's careful attempt to explain the many steps of his argument do not negate the simple, but fatal, flaw in his argument. Petitioner's argument fails because he does not allege any deficiency by plea counsel in his representation of Petitioner for the charge of second degree domestic violence. Rather, Petitioner alleges plea counsel was deficient in his representation of Petitioner for the separate, unrelated charge of first degree domestic violence. For example, Petitioner argues plea counsel did not attempt to obtain exculpatory emails and voicemails contained within Petitioner's email account and a USB drive. However, even if plea counsel had obtained the aforementioned evidence, it was not relevant to Petitioner's defense to the second degree domestic violence charge he ultimately plead guilty too. Petitioner does not even attempt to identify any way plea counsel was deficient in representing him for second degree domestic violence. Instead, Petitioner baselessly speculates that his first degree domestic violence charge may have been dismissed sooner if plea counsel had located the alleged exculpatory evidence. Accordingly, Petitioner complains that he only plead guilty to second degree domestic violence because he

couldn't bond out of jail on the first degree domestic violence charge and because he did not like the conditions at the Pickens County jail. Petitioner's financial means to pay a bondsman and the living conditions at a jail have no bearing on the performance of a defense attorney. Plea counsel could no more control Petitioner's financial resources or the living conditions at the local jail than he could control the weather.

Second, even if Petitioner had alleged a deficiency by plea counsel, Petitioner failed to prove that plea counsel was deficient. Plea counsel testified he received a USB drive from Petitioner and attempted to open it but was unable to do so. (App. 118). Even if plea counsel was able to open the USB drive or if he had accessed Petitioner's email account, none of the evidence located on those devices would have been relevant to Petitioner's defense against second degree domestic violence. Thus, plea counsel was not deficient in failing to obtain exculpatory evidence related to a charge that was ultimately dismissed. This Court should deny certiorari.

## II.

**The post-conviction relief court properly refused to enforce Petitioner's subpoena of Victim because Victim's proposed testimony was not relevant to the charge to which Petitioner plead guilty.**

Next, Petitioner argues the post-conviction relief court erred by not enforcing a subpoena of Victim and thereby not allowing Petitioner to question Victim at the PCR hearing. Like Petitioner's first argument, his second argument is convoluted and requires many logical steps to parse out. In short, Petitioner asserts Victim's testimony was necessary to prove that she lied about the underlying allegations against Petitioner for his separate, unrelated first degree domestic violence charge. However, Petitioner's second argument fails for the same reason his first argument fails. Even if the trial judge had enforced Petitioner's subpoena against Victim, Victim's testimony would have been irrelevant to the PCR judge's determination of whether plea counsel was deficient in his representation of Petitioner for his second degree domestic violence charge. Even if Victim testified that she lied about the allegations against Petitioner that lead to him being charged with first degree domestic violence, her testimony would be completely irrelevant to a determination of whether plea counsel was deficient in his representation of Petitioner for the separate, unrelated second degree domestic violence charge. Furthermore, Petitioner's own witness, Ferris Harvley, admitted during her testimony that Petitioner hit Victim during the incident that lead him to be charged with first degree domestic violence. (App. 112-13). At best, Victim's testimony may have contradicted Harvley's but would not have proven that plea counsel was deficient in his representation of Petitioner on a separate, unrelated charge. Finally, as the PCR judge recognized in his order, Petitioner never requested a final ruling on his request to subpoena Victim and therefore this issue was abandoned by Petitioner. (App. 173-74).

**This Court should deny certiorari.**

**CONCLUSION**

Because the post-conviction relief court properly determined that Petitioner failed to allege that plea counsel was deficient in his representation of Petitioner for the charge of second degree domestic violence, 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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