



SUPREME COURT OF GEORGIA
Case No. S16H1836

Atlanta, August 28, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

WILLIAM SCOTT FITTS v. BARRY GOODRICH, WARDEN

From the Superior Court of Coffee County.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 2009-SU-S-855

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Lu C. Fulton, Chief Deputy Clerk

¹ References to testimony adduced at the May 26, 2010 evidentiary hearing are designated “HT,” followed by the page number. The exhibits admitted at the hearing are each separately paginated, so that references are designated, “Resp. Ex.,” followed by the exhibit number and page number.

Kinsey (counts 2 and 3); aggravated assault with a deadly weapon (count 4); possession of a firearm by a convicted felon (count 5); and possession of a firearm during the commission of a felony (count 6). (Resp. Ex. 1, p. 3-6). On August 31, 2004, Petitioner pled guilty to malice murder. (Resp. Ex. 5). On September 20, 2004, the court sentenced Petitioner to life imprisonment, and the remaining counts were dead-docketed. (Resp. Ex. 1, p. 1; Resp. Ex. 6, p. 5).

Petitioner filed this action pro se in the Superior Court of Macon County on July 22, 2008; Petitioner raised one ground. On November 9, 2008, Petitioner submitted an additional ground in his motion to amend. Counsel for Petitioner entered an appearance on March 5, 2009, the same day on which Petitioner filed, through counsel, an amended petition in which he raised four additional grounds. On June 17, 2009, the case was transferred to this Court.

This Court held an evidentiary hearing on May 26, 2010. The Court will address similar claims together.

I. INEFFECTIVE ASSISTANCE OF COUNSEL
(Ground 1 of Petition; Ground 1 of Second Amended Petition)

In the lone ground of the original petition and ground 1 of his second amended petition, Petitioner alleges he received ineffective assistance of counsel in that, but for the actions of his attorneys, Petitioner would have not pled guilty and instead would have proceeded to trial. Petitioner asserts that “counsel offered nothing to add to or refute the factual basis as outlined by the Assistant District

Attorney,” and that the “record contains no ‘plea and waiver form’ or other indicators that plea counsel had advised Mr. Fitts of his legal and Constitutional rights.” Petitioner claimed that his attorneys never discussed his rights with him. (HT. 19-21).

Findings of Fact

Lawyers Bruce Harvey and Jennifer Hanson represented Petitioner throughout the proceedings, including the guilty plea proceeding. (Resp. Ex. 1, pp. 2-3; Resp. Ex. 2; Resp. Ex. 3; Resp. Ex. 4; Resp. Ex. 5; Resp. Ex. 6).

On the day of Petitioner’s guilty plea hearing, Mr. Harvey indicated to the court that he was uncertain whether he was still Petitioner’s attorney: “I don’t know whether I’m his lawyer. So we’re in a position that all this has essentially been negotiated outside of my presence, outside of my knowledge, outside of my participation. So I’m standing mute at this point.” (Resp. Ex. 5, p. 5). The State clarified the issue, indicating that, while Petitioner had been on fugitive status, members of Petitioner’s family contacted the State directly and indicated that Petitioner “no longer was employing Mr. Harvey’s firm.” (Resp. Ex. 5, p. 5-6). Members of Petitioner’s family then asked the State “what kind of offer I would make if he turned himself in,” and the State informed Petitioner’s family members of the offer to which Petitioner eventually pled guilty. (Resp. Ex. 5, p. 6).

The prosecutor then contacted Ms. Hanson, who indicated that neither she nor Mr. Harvey had been released; the prosecutor then informed Ms. Hanson of the plea offer, Ms. Hanson informed Petitioner of the offer, and Petitioner indicated he would accept. (Resp. Ex. 5, p. 5-6).

Prior to entering his guilty plea, Petitioner expressed concern about how his malice murder sentence would affect his pending federal charges. (Resp. Ex. 5, p. 7). He indicated he wanted more time with Mr. Harvey to discuss the implications of his federal charges on a malice murder sentence. (Resp. Ex. 5, p. 7). Mr. Harvey then suggested a "workaround": allow Petitioner to enter his plea on August 31, then sentence him later once Petitioner's pending federal charges were resolved. (Resp. Ex. 5, p. 11-12). Petitioner indicated this was a suitable "workaround," and he desired to enter a guilty plea. (Resp. Ex. 5, p. 8).

During Petitioner's guilty plea hearing, Mr. Harvey insured that the terms of the negotiated plea were as Petitioner agreed, insuring several times on the record that a condition of the plea was a recommendation from the State as to where Petitioner would be housed while incarcerated. (Resp. Ex. 5, p. 15-17). During the plea colloquy, Petitioner and the State had the following exchange:

Q: Now, you've been represented by Mr. Bruce Harvey and another associate in his firm, Ms. Jennifer Hanson. Are you satisfied with the job that they've done in representing you?

A: Yes.

Q: Are you entering this plea after having had enough time to consult with your attorneys?

A: Yes. Really, I didn't even consult with my attorney on this.

Q: Okay. Did you consult with Ms. Jennifer Hanson about this?

A: I just told her I wanted to plead. Didn't really consult with her.

Q: Okay. Do you need more time to talk to your attorneys before you enter this plea?

A: No.

Q: Have you had all the time you need to talk with them before you enter this plea?

A: Yes.

Q: Do you need to stop at any time and ask them questions or for advice?

A: No. I asked Bruce about that stuff.

Q: So are you satisfied that you've had enough time to talk with them and ask them every question you have, not only about the terms of the plea agreement, but also about any defenses that you might have?

A: Yes.

Q: So this is what you want to do?

A: Yes.

(Resp. Ex. 5, p. 19-20).

Conclusions of Law

The two-pronged standard of Strickland v. Washington, 466 U.S. 668 (1984), applies in the guilty plea context. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The attorney performance prong of the test in this setting is simply a restatement of attorney competence set forth in Tollett v. Henderson, 411 U.S. 258 (1973), and McMann v. Richardson, 397 U.S. 759 (1970), which is that counsel's advice fall within the range of competence demanded of attorneys in criminal cases. Hill, 474 U.S. at 56, 58. The prejudice prong looks to "whether counsel's constitutionally

ineffective performance affected the outcome of the plea process” and requires a showing of a reasonable probability that, but for counsel’s errors, the petitioner would not have pleaded guilty and would have insisted on a trial. Hill, 474 U.S. at 59. Petitioner has the burden to establish both prongs of ineffective assistance of counsel in order to prevail on his claim. Strickland, 466 U.S. at 687.

In evaluating the first prong of the Strickland standard, “the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Strickland, 466 U.S. at 688. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. at 689. Counsel is thus “strongly presumed” to have rendered adequate assistance. Id. Counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Id. at 691. The reasonableness of an attorney’s actions may “be determined or substantially influenced by the defendant’s own statements or actions.” Id.

As noted, the prejudice prong in the plea context “focuses on whether counsel’s ineffective performance affected the outcome of the plea process” and requires a petitioner to show “there is a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.” Hill, 474 U.S. at 59.

Petitioner has not carried his burden under Strickland to demonstrate he received ineffective assistance of counsel. The record is clear that Mr. Harvey and Ms. Hanson counseled Petitioner throughout his proceedings, including his guilty plea. (Resp. Ex. 1, pp. 2-3; Resp. Ex. 2; Resp. Ex. 3; Resp. Ex. 4; Resp. 5; Resp. Ex. 6). Petitioner presented no testimony of either Mr. Harvey or Ms. Hanson to this Court.

In the absence of testimony to the contrary, counsel's actions are presumed to be strategic and strongly presumed to fall within the wide range of reasonable professional assistance. It is extremely difficult to overcome this presumption where counsel does not testify.

Chatman v. Mancill, 280 Ga. 253, 258, 626 S.E.2d 102 (2006).

Contrary to Petitioner's assertions, and as discussed more fully below in connection with ground 2, the record is clear that Petitioner was advised of his constitutional rights prior to entering his guilty plea, and that was done on the record at the plea hearing. Petitioner has not shown what additional information, if any, exists that could have been presented in response to the state's factual basis for the plea. The claims of ineffective assistance of counsel lack merit.

VOLUNTARINESS OF THE PLEA
(Ground 2 of Second Amended Petition)

In ground 2 of his second amended petition, Petitioner alleges that he did not enter his guilty plea knowingly and voluntarily because Petitioner did not understand the constitutional rights being waived, was never asked if he committed

the offense to which he was pleading guilty, and never admitted during the plea that he was in fact guilty.

Findings of Fact

At his August 31, 2004 guilty plea hearing, Petitioner and the State presented to the court a negotiated plea agreement: Petitioner would plead guilty to malice murder and the State would move to dismiss Petitioner's remaining counts, and that the State would recommend (but could not promise) that Petitioner would be housed in a prison in northern Georgia. (Resp. Ex. 5, pp. 13, 16-17). The court then swore-in Petitioner, and the State informed him the range of sentences Petitioner could face on all of his charges, if found guilty; Petitioner indicated he understood. (Resp. Ex. 5, pp. 14-15). The State then asked Petitioner whether he wished accept the negotiated plea agreement presented to the court; Petitioner indicated he did. (Resp. Ex. 5, p. 17). The State inquired further, and Petitioner indicated he understood that he had the right to a trial by jury, and that at that trial he had the right to see, hear, and cross-examine all witnesses, and the right against self-incrimination. (Resp. Ex. 5, pp. 17-18). The State then inquired whether Petitioner's decision to plead guilty was free from coercion; Petitioner indicate it was. (Resp. Ex. 5, p. 19). Then, Petitioner – wholly apprised of the range of sentences he face, and the rights he waived – pled guilty to malice murder. (Resp. Ex. 5, p. 20).

After the State established the factual basis for Petitioner's plea, the court again asked Petitioner, and Petitioner verified that (1) he wished to plead guilty; (2) he understood the sentencing ranges he faced for malice murder, (3) the State could not guarantee where Petitioner would be housed while imprisoned; and (4) Petitioner pled free from coercion. (Resp. Ex. 5, p. 23-24).

Conclusions of Law

Here, the record as a whole shows a valid waiver of the right to a trial by jury, the privilege against self-incrimination, and the right to confront one's accusers under Boykin v. Alabama, 395 U.S. 238 (1969).

A guilty plea that is a compromise by the defendant or entered in order to avoid a harsher sentence is not "compelled" within the meaning of the fifth amendment and does not amount to "coercion" in the legal sense. North Carolina v. Alford, 400 U.S. 25, 31 (1970); Brady v. United States, 397 U.S. 742, 755-757 (1970). The focus of the inquiry is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Alford, 400 U.S. at 31. Petitioner's contemporaneous statements under oath at the guilty plea hearing present a formidable barrier to overcome and "carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63 (1977).

The record as a whole, including Petitioner's contemporaneous statements to the trial court, demonstrates unquestionably that Petitioner knowingly and

intelligently waived his rights to a jury trial, to confront witnesses against him and not to incriminate himself and entered a valid guilty plea.

Inasmuch as Petitioner attempts to allege that there are other rights besides the Boykin rights that he did not understand, such an allegation fails to state a claim for relief in habeas corpus, as the requirement that Petitioner be informed of additional rights is not of constitutional dimension, and habeas relief is available only for constitutional violations. Wilson v. Kemp, 288 Ga. 779, 781, 707 S.E.2d 336 (2011) (“[T]here are several ‘constitutional’ rights that may come into play with a guilty plea, see Uniform Superior Court Rule 33.8, but only the failure to inform a defendant of the three particular constitutional rights set forth in Boykin can support an award of habeas relief.”).

Likewise, Petitioner’s allegations that he was never asked if he committed the offense to which he was pleading guilty, and never admitted during the plea that he was in fact guilty, provide no basis for relief. Petitioner pled guilty to the malice murder. (Resp. Ex. 5, p. 20). Nothing in the state or federal constitution requires that a defendant admit guilt or the commission of the offense to effect a valid guilty plea. See Alford, 400 U.S. at 36. “A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence.” United States v. Broce, 488 U.S. 563, 569 (1989).

Based on the foregoing, this ground lacks merit.

II. LACK OF FACTUAL BASIS
(Ground 3 of Second Amended Petition)

In ground 3 of his second amended petition, Petitioner alleges that there was insufficient evidence to support the Petitioner's guilty plea, in that the factual basis outlined by the prosecutor² did not support the acceptance of a plea of guilty to malice murder.

Findings of Fact and Conclusions of Law

Petitioner's claim that there was not a sufficient factual basis fails to state a claim for relief under O.C.G.A. § 9-14-42, as it does not allege a violation of a state or federal constitutional right. Whether the trial court establishes on the record a factual basis for the guilty plea does not enter into the determination of the constitutional validity of the plea under Boykin. State v. Cooper, 281 Ga. 63, 64, 636 S.E.2d 493 (2006). The requirement that there be a factual basis for a guilty plea is imposed by Uniform Superior Court Rule 33.9, and any alleged violation of Superior Court Rule 33 is not cognizable in habeas corpus as the Rule is not of constitutional dimension. Britt v. Smith, 274 Ga. 611, 612, 556oi S.E.2d 435 (2001).. Ground 3 of the second amended petition provides no basis for relief.

² The prosecutor set out the factual basis for the guilty plea during the plea hearing. (Resp. Ex. 5, pp. 20-22).

III. BREACH OF PLEA AGREEMENT
(Motion to Amend; Ground 4 of Second Amended Petition)

In both his motion to amend and in ground 4 of his second amended petition, Petitioner alleges that the State breached the negotiated plea agreement, in that the State agreed to comply with an affirmative requirement of a recommendation to the Department of Corrections as to where Petitioner was to be housed; and the State failed to dismiss the remaining charges per the negotiated plea.

Findings of Fact

During the plea proceeding, the prosecutor informed the court of the plea agreement. (Resp. Ex. 5, pp. 15-16). The State agreed to move to dismiss the remaining counts if Petitioner pled guilty to malice murder. (Resp. Ex. 5, p. 13). The final disposition shows that the court sentenced Petitioner on the malice murder and dismissed the remaining charges. (Resp. Ex. 1, p. 1).

Petitioner also stated that, as part of the plea agreement, he wanted the State “to try to help [him] stay in north Georgia,” at Phillips State Prison or Hayes State Prison. (Resp. Ex. 5, p. 16). Petitioner conceded that he understood that the Georgia Department of Corrections would decide where he would be incarcerated, and all the prosecutor could do was recommend where Petitioner be housed. (Resp. Ex. 5, p. 17).

At the sentencing hearing, the prosecutor stated that he had prepared a letter to the Department of Corrections to the effect that the State recommended that

Petitioner be housed in an appropriate facility closest to his home of Jasper, Georgia; he had showed the letter to Petitioner and his counsel, and stated that he intended to sign it as soon as the Court imposed sentence and planed to mail it to Alan Adams, Correctional Division Director, at the Georgia Department of Corrections. (Resp. Ex. 6, p. 3). Petitioner's counsel again noted that one of the terms of the plea agreement was the State's recommendation about where the sentence would be served. (Resp. Ex. 6, p. 4). The prosecutor told the court again that he would mail the letter as soon as the court pronounced sentence. (Resp. Ex. 6, p. 4).

Petitioner produced no evidence at the hearing that the State had breached this agreement. Neither he nor any of his witnesses testified that the prosecutor had failed to send the letter as he had agreed to do, nor did Petitioner tender any evidence at all to this effect.

Petitioner is not entitled to relief on the ground raised in both his motion to amend and in the ground 4 of his second amended petition.

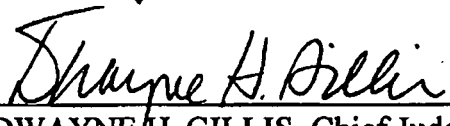
CONCLUSION

Wherefore, the habeas corpus petition is denied.

If Petitioner desires to appeal this order, he must file an application for a certificate of probable cause to appeal with the Clerk of the Georgia Supreme Court within thirty (30) days of the date this order is filed. Petitioner must also file a notice of appeal with the Clerk of the Coffee County Superior Court within the same thirty (30) day period.


The Clerk of the Superior Court is hereby directed to mail a copy of this order to counsel for Petitioner, Respondents, and the Attorney General's office.

SO ORDERED, this 16 day of June, 2016.



DWAYNE H. GILLIS, Chief Judge
Waycross Judicial Circuit

Prepared by:



Michael A. Oldham
Assistant Attorney General
Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-5734

**Additional material
from this filing is
available in the
Clerk's Office.**