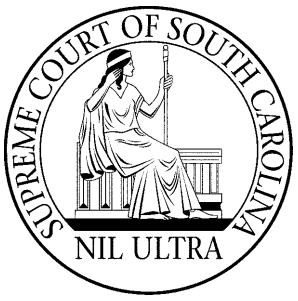

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
July 20, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Caroline Ball Dover, as Special Administrator of the Estate of Dallas Dale Ball, Respondent,

v.

Nellie Ruth Hare Ball a/k/a/ Nell R. Ball, Appellant.

Appellate Case No. 2019-001113

Appeal From Pickens County
W. Greg Seigler, Family Court Judge

Opinion No. 5923
Heard May 3, 2022 – Filed July 20, 2022

AFFIRMED

Keith G. Denny, of Keith G. Denny, P.A., of Walhalla, for Appellant.

Robert Scott Dover, of Law Offices of Scott Dover, of Pickens, for Respondent.

HEWITT, J.: Nell R. Ball (Wife) and Dallas Dale Ball (Husband) had a long and prosperous marriage, but Husband's health deteriorated and doctors eventually recommended he reside in a skilled nursing facility. Husband lacked the funds to pay for his care because the parties placed the marital assets solely in Wife's name throughout the marriage. Wife disagreed with the doctors' recommendation and refused to pay for Husband's care.

This appeal is about whether a conservator or guardian of an incapacitated person, such as Husband, can bring an action in family court for the incapacitated person's separate support and maintenance. The family court found the action could proceed. For the reasons that follow, we agree.

FACTS

Husband and Wife were married in June 1958 and have five emancipated children. Both Husband and Wife were hospitalized as a result of health issues in January 2018. They lived separately from that day forward.

Both were advanced in age at the time of their 2018 hospitalizations. Sadly, Husband died during the pendency of this appeal. The special administrator of his estate, Susan Caroline Ball Dover (Daughter), was substituted as the respondent.

In 2010, Husband granted Wife a durable power of attorney and granted Daughter a healthcare power of attorney. Five years later, in April 2015, the probate court declared Husband an incapacitated person.

Three years after that, in 2018, Daughter petitioned the probate court to appoint her as Husband's conservator and guardian. The probate court found Wife did not have Husband's best interests at heart and granted Daughter's petition. Not long after that, Daughter filed this suit for separate maintenance on her father's behalf.

Wife sought to dismiss the suit. In family court, and here, her main argument was that a guardian cannot bring an action for separate support and maintenance because that sort of claim is "strictly personal." She argued such a suit would only be proper if the person protected by the guardianship indicated a desire for such an action.

Wife also argued that Daughter had a conflict of interest because she was a potential beneficiary of Husband's estate and that this barred her from bringing the case.

The family court denied Wife's motion to dismiss. A contentious trial followed. After that, the family court equitably divided the $3.1 million marital estate.

ISSUE

Whether the family court erred in denying Wife's motion to dismiss a claim for separate maintenance brought on behalf of Husband, an incapacitated spouse, by Husband's conservator and guardian.

"PERSONAL" ACTION

As already noted, Wife's lead argument for dismissing the case is her claim that an action for separate maintenance is strictly personal. Her main authority offered in support of this argument is *Murray by Murray v. Murray*, 310 S.C. 336, 426 S.E.2d 781 (1993), where our supreme court held a conservator could not bring an action for divorce.

We read *Murray* as being driven by the principle that an action to dissolve the marital relationship is different than an action involving someone's real or personal property. After referencing other states' decisions, our supreme court followed the "majority rule" that absent a clear statutory grant of authority to do so, a guardian could not maintain an action to dissolve the incompetent person's marriage. *Id*. at 341, 426 S.E.2d at 784. The "strictly personal" language in Wife's argument comes from *Murray* (and some other cases as well). *Murray* explained, "[t]he theory underlying the majority view is that a divorce action is so strictly personal and volitional that it cannot be maintained at the pleasure of a guardian, even if the result is to render the marriage indissoluble on behalf of the incompetent." *Id*. at 340, 426 at 784.

Though not relevant here, *Murray* did not announce an absolute bar. The court said that a mentally incompetent person who was able to exercise reasonable judgment as to personal decisions and understand the nature of the action could seek a divorce through a guardian if able to unequivocally express the desire to dissolve the marriage. *Id*. at 341, 426 S.E.2d at 784.

We are convinced that *Murray* does not control and that a suit for separate support and maintenance is meaningfully different than a suit for divorce. We already have a case on that point. This court's decision in *Brewington v. Brewington*, 280 S.C. 502, 506, 313 S.E.2d 53, 55 (Ct. App. 1984), rejects as "inappropriate" the argument that separate maintenance and support is "personal" like a suit for divorce. *Brewington* correctly explains that legal separation does not terminate the marriage

relationship. *Id*. Our neighboring state of Georgia has said the same thing. *See Moore v. Moore*, 53 S.E.2d 343, 344 (Ga. 1949) (noting a suit for alimony is not "personal" like a suit for divorce).

Indeed, *Brewington* favorably cites a New York case correctly observing that while a suit for divorce ends the marital relationship, a suit for separate support and maintenance is sometimes necessary to enforce the marital obligation of support. *Kaplan v. Kaplan*, 176 N.E. 426, 427 (N.Y. 1931) (cited by *Brewington*, 280 S.C. at 506, 313 S.E.2d at 55). That is Daughter's basic contention here. She argues this proceeding is about granting Husband the financial means to care for himself because Wife refuses to use marital assets to support Husband. There is no effort to challenge the validity of Husband and Wife's marriage.

There may be a case somewhere rejecting a guardian or conservator's attempt to bring a separate support and maintenance claim on the grounds that it is personal like a claim for divorce, but we have not found it. Given the distinctions and reasoning we mentioned above, we respectfully reject Wife's argument that the reasons given in *Murray* for disallowing a divorce claim required the family court to dismiss the claim Daughter brought here.

CONFLICT OF INTEREST

Wife claims Daughter had a conflict of interest because Daughter is a potential beneficiary of Husband's estate. She argues that *if* a separate maintenance action could be filed on Husband's behalf, a guardian ad litem (GAL) for the incapacitated person is the only person who should be permitted to bring such a case.

Here as well, we respectfully disagree. The probate court put safeguards in place when it made Daughter the conservator and guardian for her father. The court ordered Daughter to inventory her father's assets, place all funds in a restricted account, and provide an annual accounting and budget. The court also required Daughter to post a bond.

The family court was actively involved in the case as well. At the outset, Daughter asked the court to hold a hearing and determine whether this action for separate support and maintenance was in Husband's best interests. Both Wife and Daughter asked the family court to appoint a GAL. The GAL testified at trial, supported the lawsuit, and said the court should divide the marital estate.

There was no exploration or evidence at trial about any conflict of interest, nor was there extensive argument about the details of any conflict on appeal to this court. Instead, Wife's argument is that the language in *Murray* mandates the case be dismissed.

Wife's argument is drawn from a footnote in the opinion summarily stating that only a GAL could bring a divorce action because the incompetent party's attorney-in-fact (his son) had a clear conflict of interest. 310 S.C. at 342 n.1, 426 S.E.2d at 784 n.1. We do not think that language controls here. For one, Daughter is a court-appointed conservator and guardian serving under the probate court's supervision. Second, a GAL *was* appointed, and the GAL testified the suit should proceed. We do not think the simple fact that Daughter was a potential beneficiary of her father's estate mandates dismissal of this case that was brought solely for the purpose of securing funds necessary to provide for his well-being.

CONCLUSION

For the foregoing reasons, the family court's decision is

AFFIRMED.

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Carl Ray Fraley, Appellant.

Appellate Case No. 2019-001296

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5924
Heard June 9, 2022 – Filed July 20, 2022

AFFIRMED

Stanley T. Case, of Butler Means Evins & Browne, PA, and Richard W. Vieth, of Henderson Brandt & Vieth, PA, both of Spartanburg, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Respondent.

HEWITT, J.: Carl Ray Fraley was accused of four sex crimes but pled guilty to first-degree assault and battery under *North Carolina v. Alford*, 400 U.S. 25 (1970). Part of his sentence included evaluation for whether he should register as a sex offender. The circuit court ordered registration. Fraley argues the court erred and claims the court's factual findings lack evidentiary support.

Our standard of review is abuse of discretion. *See In re M.B.H.*, 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010) (reviewing registration under this standard).

Fraley first argues that there is no risk he will reoffend because he did not commit a sex crime in the first place. He relies on the fact that he pled guilty under *Alford*.

While *Alford* affords defendants the right to plead guilty when they cannot or will not admit their guilt, a guilty plea entered pursuant to *Alford* carries the same effect as a "regular" guilty plea or a guilty verdict. *See Alford*, 400 U.S. at 37 ("[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual . . . may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."); *Zurcher v. Bilton*, 379 S.C. 132, 136, 666 S.E.2d 224, 227 (2008) ("[S]o long as a factual basis exists for a plea, the Constitution does not bar sentencing a defendant who makes a calculated choice to accept a beneficial plea arrangement rather than face overwhelming evidence of guilt."); *id*. at 137, 666 S.E.2d at 227 ("[T]he entry of an *Alford* plea at a criminal proceeding has the same preclusive effect as a standard guilty plea."). Had Fraley been sued in civil court over the facts stated in his assault and battery indictment, the court would have given his *Alford* plea preclusive effect at summary judgment.

We must respectfully disagree with the argument that the court abused its discretion by considering the fact that Fraley pled guilty to crimes of a sexual nature, even when Fraley pled guilty under *Alford*. We note that the assault and battery indictment clearly delineated the sexual nature of the allegations and charged Fraley with "nonconsensual touching of the private parts either under or above clothing, with lewd and lascivious intent."

Fraley's second argument is that the State did not show "good cause" for ordering him to register as a sex offender. *See* S.C. Code Ann. § 23-3-430(D) (2007) (providing that when a person pleads guilty of an offense not listed in the statute, such as first-degree assault and battery, the plea court "may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor"). Our supreme court has determined good cause under the statute "means only that the judge must consider the facts and circumstances of the

case to make the determination of whether or not the evidence indicates a risk to reoffend sexually." *In re M.B.H.*, 387 S.C. at 327, 692 S.E.2d at 542.

Dueling experts testified for and against requiring Fraley to register. The State's evaluator, Dr. Lee, ultimately concluded that the court should require Fraley to register if the court was of the opinion that the original allegations made against Fraley were true. Fraley's expert, Dr. Gunter, saw no definitive data supporting that Fraley committed a sexual offense and believed the allegations brought by the alleged victim had serious credibility issues.

We may or may not have come to the same conclusions as the plea court, but we do not see how we could say the court abused its discretion. In the written order denying reconsideration, the court explained that it considered all of the facts and circumstances of the case, and there is undoubtedly some evidence supporting the court's bottom-line conclusion that there was "good cause" for Fraley to register. *See In re M.B.H.*, 387 S.C. at 327, 692 S.E.2d at 542 ("The judge relied on the professional findings and recommendations in [the appellant's psychosocial] report in concluding good cause existed for placing Appellant on the registry."); *id*. at 327, 692 S.E.2d at 542-43 ("The record is clear that the judge considered all the facts and circumstances of this case, both aggravating and mitigating, in determining that there is a risk of sexual reoffense."). While Dr. Lee did not give an unequivocal recommendation that Fraley should register, she *did* recommend requiring registration if the court believed the allegations against Fraley were true. We are not aware of any authority saying the court should discount such an opinion or that the court abuses its discretion if it relies on such an opinion, acknowledges the defendant pled guilty, and orders registration.

We see this case as different from *In re Christopher H.*, a recent case where this court reversed an order requiring registration as a sex offender. 432 S.C. 600, 607, 854 S.E.2d 853, 856 (Ct. App. 2021) (finding that because the *only* evidence of risk indicated a low risk and the evidence overwhelmingly indicated registration was not appropriate, the sentencing court abused its discretion in ordering registration). Here, Dr. Lee cited certain factors as indicating a diagnosable sex-related disorder and noted other factors as counseling against registration. She ultimately opined that registration should be required if Fraley was guilty of the allegations against him because that was clear proof of a diagnosable sex-related disorder. We do not think the court gave the State a pass on the burden to show "good cause." If the burden

proved lighter here, it was because Fraley's guilt was a key fact, and Fraley had already pled guilty.

CONCLUSION

The plea court did not abuse its discretion in requiring Fraley to register. Fraley's sentence is

AFFIRMED.

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Pate, Employee/Claimant, Appellant,

v.

College of Charleston, Employer, and State Accident Fund, Carrier, Respondents.

Appellate Case No. 2019-001064

Appeal From The Workers' Compensation Commission

Opinion No. 5925
Heard April 12, 2022 – Filed July 20, 2022

REVERSED AND REMANDED

Stephen Benjamin Samuels, of Samuels Reynolds Law Firm LLC, of Columbia and Max Capper Sparwasser, of Max Sparwasser Law Firm, LLC, of Mount Pleasant, both for Appellant.

Margaret Mary Urbanic, of Clawson & Staubes, LLC and Mikell Holbrook Wyman, of Wyman Law Firm, LLC, both of Charleston; Page Hilton, of South Carolina Legislative Counsel, of Wedgefield; and Kirsten Leslie Barr, of Trask & Howell, LLC, of Mount Pleasant, all for Respondents.

HEWITT, J.: This is an appeal from the Workers' Compensation Commission. The case is about whether the commission properly limited Patricia Pate to an award for a back disability and whether the commission erred when it determined she has lost a lesser degree of the use of her back than she claimed.

There is ample evidence Pate's back injury affects other parts of her body. It was thus a legal error for the commission to reject Pate's request that she be allowed to consider an award under the "general disability" regime by summarily stating her claim was limited to the back without providing any analysis.

Pate also argues the only conclusion supported by the evidence is that she is permanently and totally disabled. Though the restrictions in this case are extensive, we do not think we can say the forty percent loss of use finding is clearly erroneous. As noted above, the commission has not yet done a substantive weighing of Pate's claim under the general disability regime. We therefore reverse and remand for the commission to evaluate Pate's claim for a general disability award.

FACTS

We will try to abbreviate the facts as much as possible. Pate worked at the College of Charleston's copy center. She hurt her back at work in December 2011.

The injury was severe enough to warrant surgery in May 2012. Pate's surgeon assigned a forty percent impairment rating to the spine and a thirty-six percent rating to the whole person.

Pate's long-term treatment regimen after surgery included sacroiliac (SI) joint injections, trigger point injections, epidural steroid injections, a TENS unit, and pain medications (OxyContin, Percocet, and Tizanidine). For reasons that matter later in our analysis, we will mention that the surgeon said he increased Pate's impairment rating by ten percent in an effort to account for chronic pain caused by the injury.

Pate returned to work but remained on pain medication and received injections approximately every two months. In August 2014—over two years after Pate's back surgery—the authorized treating physician referred Pate to a clinical psychologist for an evaluation and possible treatment for depression. He also started Pate on an antidepressant and nerve pain medication, noting Pate was significantly depressed.

The next point we should mention is that Pate was hospitalized shortly after that (in September 2014) with blood clots in her lungs. This resulted in increased pain medication and prevented her from receiving her injection therapy for several months. The blood clots also prevented her from working.

Pate was approved to return to work in December 2014, but for only four hours per day; four days per week; no lifting more than fifteen pounds; no bending, squatting, crawling, or pushing heavy objects; and with a reevaluation scheduled two weeks later. Pate's restrictions did not change. The College placed her on leave without pay in January 2015 after determining that it could not accommodate her restrictions.

The case had a lengthy journey at the commission. Pate alleged injuries to her back, legs, and psyche (depression). The College admitted an injury to Pate's back only. The College also claimed the blood clots in Pate's lungs were an "intervening act" and that all of Pate's current medical treatment and impairments resulted from the clots, not from her back injury.

The single commissioner agreed with the College that Pate's embolisms were an intervening event, awarded the case as a "back only" claim, and did not award any future medical treatment. Pate appealed. The appellate panel affirmed in part, reversed in part, and remanded. The panel reversed the single commissioner's finding that the blood clots were an intervening act and remanded for the single commissioner to determine Pate's degree of disability and to award causally related medical treatment.

On remand, the single commissioner found Pate's injury only affected her back, that she sustained a forty percent permanent partial disability, and that Pate was entitled to future medical treatment including SI joint injections, trigger point injections, epidural steroid injections, a TENS unit, pain medication, and a lumbar back brace.

Pate appealed to the appellate panel again, raising the same arguments she raises here. The appellate panel affirmed. This appeal followed.

ISSUES

1. Whether the commission erred in finding this was a "single member" case and limited Pate to an award for a back injury.

2. Whether the commission erred in failing to find Pate permanently and totally disabled; either because of her extensive restrictions or because the commission allegedly erred in concluding she had not lost more than fifty percent of the use of her back.

THE SINGLE MEMBER DEFENSE

The Workers' Compensation Act has two methods of compensation. General disability is codified at sections 42-9-10 and -20 of the South Carolina Code (2015). Scheduled recovery is codified at section 42-9-30 of the South Carolina Code (2015).

If a worker with a single injury to a body part listed in the scheduled recovery statute—say, a back or arm injury—wishes to pursue a general disability award, the worker must show that the injury affects other parts of the worker's body. *Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994); *Singleton v. Young Lumber Co.*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). Pate made such a claim here. She claims her back injury has caused pain radiating into other parts of her body and pain-related depression.

The record indicates no less than forty physician notes about Pate having nerve pain in places other than her back. They commonly reference pain in her left leg and hip. There are also numerous references in the record to various symptoms radiating from Pate's back to her knee, diminished sensation throughout her left lower extremity, and stabbing pain in her buttocks and thigh. A functional capacity evaluation reported that Pate exhibited an altered gait secondary to pain. We mentioned in the earlier background that the authorized treating physician added ten percent to his impairment rating for Pate's back because of her chronic pain, prescribed Pate an antidepressant, and referred her to a psychologist. The psychologist confirmed a diagnosis of major depressive disorder. There is thus no doubt that the record contains ample markers of a colorable claim that the effects of Pate's back injury extend beyond her back.

Neither the single commissioner nor the appellate panel gave any analysis in deciding this was a single member case. The commission's decision simply proclaims "[t]his is a single-member injury affecting Claimant's lower back only" and that Pate was limited to the scheduled recovery statute.

The law instructs us to affirm the commission's factual findings unless they are clearly erroneous in view of the reliable, probative, and substantial evidence in the record. S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2021). But the law also instructs that the commission's final decision must include "a concise and explicit statement of the underlying facts" that support its findings. S.C. Code Ann. § 1-23-350 (2005); *see also Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) ("The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings."). Here, we have no idea why the commission rejected Pate's argument that her back injury was causing complications in other parts of her body. We cannot say whether the commission erred or was correct in its reasoning. The commission gave no reasoning in its order.

The College argues we can affirm because the only conclusion supported in the record is that Pate's leg pain was off-and-on, mild, and that no physician has diagnosed Pate with a mental injury related to the work accident. We respectfully disagree. The references to complications in other parts of Pate's body show up in records throughout her multi-year course of treatment, and two physicians—Dr. Nolan and Dr. Kee—diagnosed Pate with depression. Dr. Nolan was the authorized treating physician for Pate's back injury. Dr. Kee is the psychologist who evaluated Pate at Dr. Nolan's request. Dr. Nolan prescribed Pate an antidepressant. The pertinent records have repeated references to Pate's back injury and the complications caused by the back injury. We do not think it is fair to say that the evidence in the record leads unquestionably to the finding that Pate's back injury affects nothing more than her back.

PERMANENT AND TOTAL DISABILITY

Pate's second argument is that rather than remand, we should find she is permanently and totally disabled either because of her extensive restrictions or because the commission allegedly erred in concluding she had not lost more than fifty percent of the use of her back.

We will take these arguments in reverse. Under the scheduled recovery statute, a worker who has lost more than fifty percent of the back is presumed to be permanently and totally disabled. *See* § 42-9-30(21). The commission found Pate sustained permanent partial disability of forty percent of her back. This

corresponded precisely with the impairment rating to the spine assigned by Pate's surgeon.

Several things support Pate's argument that her award must be greater than her medical impairment. She points us to a medical authority explaining that impairment ratings should not be used to estimate the degree of disability. *See generally* Linda Cocchiarella & Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* 9 (5th ed. 2000). She also points us to numerous cases where the disability awards exceed the impairment ratings. *E.g. Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68-69, 332 S.E.2d 211, 212 (1985) (affirming a finding of greater than fifty percent loss of use of the back when highest rating to back was twenty to thirty percent).

Even if we found it was error to limit Pate's award to the precise amount of her impairment rating, we do not think we could go so far as to say the evidence in the record supports no conclusion other than that Pate has lost more than fifty percent of the use of her back. Pate claims it is clear that she is permanently and totally disabled and that we can "work backwards" from that to conclude that she must have lost more than fifty percent of the use of her back. We are not so sure. Would we say the commission clearly erred if it found Pate had lost forty-eight percent of her back but that Pate was permanently and totally disabled because of the effects her back injury caused in other parts of her body? We do not know, and we do not have that sort of order before us. Weighing impairment ratings as part of arriving at a percentage of disability strikes us as a task that the Legislature envisioned entrusting to members of the commission, not to us.

There is certainly evidence of permanent and total disability in the record. The restrictions are extensive, and total disability does not require helplessness. "The generally accepted test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably sta[bl]e market for them does not exist.'" *Wynn v. Peoples Nat. Gas Co. of S.C.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961) (quoting *Lee v. Minneapolis St. Ry. Co.*, 41 N.W.2d 433, 436 (Minn. 1950)).

But as we noted in the section discussing the single member defense, the commission has not evaluated Pate's claim for compensation under the general disability regime. Though we do not wish to prolong this case for the parties or to add to the

commission's workload, we hold it is not appropriate for us to evaluate the merits of this argument before the commission has spoken.

We respectfully reject the College's argument that Pate's blood clots in her lungs are an intervening cause of her present ailments as a matter of law and that we can avoid Pate's claim for permanent and total disability. The appellate panel rejected this argument, and we likewise reject the College's contention that the only conclusion with support in the record is that Pate's current and substantial work restrictions have no relation to her back injury.

CONCLUSION

For the foregoing reasons, we reverse and remand. We do not wish to prevent the commission from following whatever procedures it deems appropriate for expeditiously adjudicating the claim. We envision that, at a minimum, the commission will evaluate the substance of Pate's general disability claim.

REVERSED AND REMANDED.

THOMAS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Theodore Wills, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-000054

ON WRIT OF CERTIORARI

Appeal From Horry County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5926
Heard March 9, 2022 – Filed July 20, 2022

AFFIRMED

William G. Yarborough, III and Lauren C. Hobbis, both of William G. Yarborough, III, Attorney at Law, LLC, of Greenville, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Chelsey Faith Marto, both of Columbia, for Respondent.

KONDUROS, J.: In this action for post-conviction relief (PCR), Theodore Wills, Jr. (Petitioner) argues the PCR court erred in concluding he did not receive ineffective assistance of counsel. Petitioner asserts trial counsel's performance was

deficient because his advice to enter into a proffer agreement was based on an erroneous and unreasonable interpretation of the agreement. We affirm.

FACTS

On October 13, 2001, the Horry County Police Department arrived in a remote part of the county and found a deceased young male lying face down in a vacant lot. Law enforcement identified the victim as Julian Lee and determined he had been shot in the back twice. On November 1, 2001, officers arrested Petitioner on charges of accessory to murder after the fact and obstruction of justice in connection with Lee's death.

On August 25, 2005, the State offered a proffer agreement[1] to trial counsel. Under the agreement, Petitioner would provide a statement regarding his knowledge of Lee's murder and help the State prosecute the other individuals involved. In return, the State would consider his cooperation in the disposition of his pending charges[2] and would not seek any additional charges against him in connection with Lee's murder. Additionally, the State would not use Petitioner's proffer session statement against him if he fully complied with the terms of the proffer agreement.

As part of the proffer agreement, Petitioner had to submit to a polygraph examination. If the results of the polygraph examination indicated that Petitioner had been deceptive or that he shot Lee, the terms of the proffer agreement would be "null and void" and the State could use Petitioner's proffer session statement "for any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial[,] . . . and impeachment." The

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[1] "A 'proffer agreement' is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly referred to as a 'proffer session.'" *State v. Wills*, 409 S.C. 183, 186 n.4, 762 S.E.2d 3, 4 n.4 (2014) (Beatty, J., dissenting) (quoting *United States v. Lopez*, 219 F.3d 343, 345 n.1 (4th Circ. 2000)). The direct appeal of Petitioner's conviction, quoted here, was a 3-2 decision by our supreme court affirming the use of Petitioner's proffer session statement in the State's case-in-chief. *Id.* at 185, 762 S.E.2d at 4. Now Chief Justice Beatty authored a dissenting opinion in which he stated he "would find that a breach of a proffer agreement on the part of the defendant permits the State to use a defendant's plea statements only for purposes of impeachment." *Id.* at 205, 762 S.E.2d at 15 (Beatty, J., dissenting).

[2] Petitioner remained incarcerated while his charges were pending.

proffer agreement designated the State as the only party that would determine if Petitioner's proffer session statement contained any inconsistency or deception.

Petitioner and trial counsel signed the proffer agreement on August 26, 2005, and Petitioner provided a statement later that day in the presence of trial counsel. In the video-recorded statement, Petitioner claimed he drove Donnell Green, Mark Willard, and Lee to the murder scene during the early morning hours of October 13, 2001. Petitioner alleged he and Lee believed the plan was to rob some drug dealers and "score some quick cash." Petitioner claimed he saw Willard shoot Lee and heard a second shot while running away.

When the solicitor asked Petitioner if he knew why Willard shot Lee, trial counsel asked to confer with Petitioner in private. After the proffer session resumed, Petitioner continued to deny shooting Lee but revealed he knew some drug dealers had placed a bounty on Lee for stealing money from them. Petitioner admitted that he had talked with the drug dealers about the bounty and that he had told Willard about the bounty before October 13, 2001. Petitioner also admitted he knew Willard planned to kill Lee but claimed he did not know when Willard would do it. Petitioner divulged that he and Willard each collected a bounty of $5,000 for Lee's death, and Green had thrown the gun used to kill Lee into the intercoastal waterway.

On September 19, 2005, Petitioner submitted to a polygraph examination. An intern at the State Law Enforcement Division (SLED) administered the examination, and a SLED agent reviewed the results. The SLED agent determined that Petitioner had been deceptive when he (1) denied he lied when he stated Willard shot Lee and (2) denied he shot Lee. Based on the SLED agent's assessment, the State claimed the proffer agreement was null and void, and a grand jury indicted Petitioner for Lee's murder.

At trial, the State disclosed it intended to use Petitioner's proffer session statement as part of its case-in-chief. Trial counsel objected to the admission of the statement and noted Petitioner gave it as part of a plea agreement. Trial counsel also asserted the proffer agreement was inherently flawed because Petitioner's truthfulness was determined by an unreliable polygraph examination.

In response to the objection, the trial court held a hearing pursuant to *Jackson v. Denno*.[3] Afterwards, the trial court ruled the State could show the recording of

[3] 378 U.S. 368 (1964).

Petitioner's proffer session to the jury but prohibited both sides from making any reference to the polygraph examination. Over Petitioner's objection, the trial court allowed the jury to view the entire proffer session during the State's case-in-chief. The State did not present any other evidence that tied Petitioner to Lee or corroborated Petitioner's proffer session statement.

The jury found Petitioner guilty as charged, and the trial court denied Petitioner's motion for a new trial. Petitioner appealed and argued the trial court erred in allowing the State to use his proffer session statement in its case-in-chief because it undermined the purpose and policy of Rule 410, SCRE.[4] Our supreme court affirmed Petitioner's conviction, ruling "a criminal defendant may waive the protections afforded by Rule 410[, SCRE]," and "[P]etitioner's [p]roffer [a]greement, entered with the advice and consent of counsel, waived the protections of Rule 410, SCRE." *Wills*, 409 S.C. at 185, 762 S.E.2d at 4.

Petitioner filed a PCR application and asserted he had received ineffective assistance of counsel. At Petitioner's PCR hearing, trial counsel testified he believed the proffer agreement "would get [Petitioner] out and, basically, the case would end" as long as Petitioner was truthful during his proffer session. Trial counsel stated he frequently advised clients to enter into proffer agreements and there was nothing unusual in the terms of Petitioner's proffer agreement that "jumped out" to him.

Regarding the polygraph examination, trial counsel admitted that "looking back on it in hindsight, that would be one area [where he] could've done things differently." Trial counsel recalled questioning the polygraph results but explained he did not arrange for Petitioner to take another one because Petitioner remained incarcerated and trial counsel wanted to keep the test "private so that the State wouldn't know about it." Trial counsel felt Petitioner had always been truthful with him and testified he still did not think Petitioner "was the trigger man."

On cross-examination by the State, trial counsel conceded that in "hindsight, maybe it would've been better to give [Petitioner] some other advice." Nevertheless, trial counsel stated he felt the proffer agreement was the best course of action for Petitioner to take based on his firm belief that Petitioner had been truthful with him. Trial counsel stated he would advise a similarly situated client

[4] Rule 410(4), SCRE, prohibits the admission of "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty . . . ."

to enter into a proffer agreement but conceded he "would be a lot stronger on the science and the procedure behind the polygraph . . . [i.e.,] how to go about challenging it better and making a stronger argument to the judge."

Hixson, the solicitor originally assigned to the case,[5] testified he offered Petitioner the proffer agreement because the State had little evidence in the case.[6] Hixson acknowledged "[t]he case itself was thin enough that absent [Petitioner] being a trigger man, there wasn't a lot of potential liability he was facing." Hixson testified he usually told defendants during a proffer session to "tell the truth" and specifically recalled telling Petitioner, "[D]on't straddle the fence here. You understand if you're telling the truth and you're not the trigger man involved in it, then you're only . . . dealing with . . . accessory type charges."

Hixson stated he was "really stunned" when Petitioner admitted he participated in a "murder for hire." Hixson recalled thinking he "made a big mistake" by offering the proffer agreement because it limited the purposes for which Petitioner's proffer session statement could be used. Hixson believed Petitioner had been truthful during the proffer session "because he was so forthright" and was surprised when he learned the polygraph results indicated Petitioner had been deceptive. Hixson testified the proffer agreement's polygraph examination requirement would have been normal.

While the PCR court acknowledged the proffer agreement ultimately did not inure to Petitioner's benefit, it noted "proper analysis of an allegation of ineffective assistance of counsel requires this [c]ourt to make every effort to set aside the distorting effect of hindsight and consider the decisions of counsel based on the information and circumstances available to him at the time they are made." The PCR court observed that Petitioner, trial counsel, and Hixson all testified the proffer agreement was advantageous to Petitioner and noted trial counsel had no indication the proffer agreement would fail because of Petitioner's dishonesty or disability. The PCR court also noted trial counsel "effectively and zealously" argued against the admissibility of Petitioner's proffer session statement in the State's case-in-chief at trial and preserved the objection for direct appeal. The PCR

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[5] Hixson recused himself from the case because he was concerned he could be called to testify about statements he made during Petitioner's proffer session.
[6] Hixson recalled the State's main evidence was a report that someone saw a car similar to Petitioner's car enter and leave the area where officers discovered Lee's body.

court reasoned Petitioner's arguments "were not adequate to turn the opinion in the [s]upreme [c]ourt and, as such, this [c]ourt cannot now conclude that they would have done so at the trial level." Accordingly, the PCR court denied Petitioner's application for PCR relief. This court granted Petitioner's petition for a writ of certiorari.

STANDARD OF REVIEW

"In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRCP. "[An appellate court] gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo, and [an appellate court] will reverse the PCR court's decision when it is controlled by an error of law." *Id.*

LAW/ANALYSIS

Petitioner argues the PCR court erred in concluding he did not receive ineffective assistance of counsel. Specifically, Petitioner asserts counsel was deficient in (1) his interpretation of the proffer agreement's benefits to Petitioner and (2) not understanding a trial court could find the proffer agreement waived the protections of Rule 410, SCRE, and allowed the State to use Petitioner's proffer session statement in its case-in-chief.[7] We disagree.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514. "Failure to make the required showing of either

[7] While the efficacy of polygraphs was discussed at the PCR hearing, Petitioner does not assert trial counsel was ineffective for advising him to enter into a proffer agreement with a polygraph examination requirement or for failing to schedule another polygraph examination.

deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland v. Washington*, 466 U.S. 668, 700 (1984).

Trial counsel's performance "is measured by an objective standard of reasonableness." *Taylor*, 404 S.C. at 359, 745 S.E.2d at 102. "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 challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "The court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. Further, "[trial c]ounsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S. at 690). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Id.*

Here, the PCR court properly determined Petitioner did not receive ineffective assistance of counsel. Trial counsel testified he advised Petitioner to enter the proffer agreement because it would have mitigated the consequences of his pending charges and prevented the State from bringing additional charges against Petitioner for Lee's murder. Trial counsel understood Petitioner had to be truthful during his proffer session and had no reason to believe Petitioner's polygraph examination results would indicate he had been deceptive. Trial counsel believed Petitioner had been truthful to him because he had known Petitioner and his family for "a long time," and Petitioner's proffer session statement was consistent with what Petitioner privately told trial counsel. Therefore, trial counsel articulated a valid reason for advising Petitioner to enter the proffer agreement.

While trial counsel admitted in hindsight he might have advised Petitioner differently and would have been more rigorous in understanding and arguing polygraph science, trial counsel maintained he thought the proffer agreement was the best option for Petitioner because he was convinced Petitioner had been truthful. Additionally, when trial counsel advised Petitioner to enter the proffer agreement, it was not settled law in South Carolina that defendants could waive the protections of Rule 410, SCRE, for more than impeachment purposes. Trial counsel argued effectively enough to preserve that issue for direct appeal and could not have known our supreme court would ultimately rule defendants could waive

those protections. Indeed, "[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 challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Thus, the PCR court properly determined trial counsel's performance was not deficient because trial counsel articulated a valid reason for advising Petitioner to enter the proffer agreement. Accordingly, the PCR court properly denied Petitioner's application for PCR relief, and Petitioner's conviction for murder is

AFFIRMED.

WILLIAMS, C.J. and VINSON, J., concur.