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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Bentley Price, Circuit Court Judge

ANTHONY MCCLAIN,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2022-000028

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's Questions Presented on Certiorari

I. Did the PCR court err as a matter of law in granting post-conviction relief and awarding a new trial to McClain based on a claim that counsel was constitutionally ineffective for failing to adequately challenge the state's notice of intent to seek [a sentence of life] without [the possibility of parole] pursuant to S.C. Code Ann. § 17-25-45 when the state's notice was proper and valid and McClain cannot establish any deficiency nor any prejudice?

II. Did the post-conviction relief court err as a matter of law in granting post-conviction relief and awarding a new trial to McClain based on a claim that his guilty plea was rendered involuntary based on counsel's inadequate handling of his life without parole notice when the record unequivocally established McClain entered a knowing, intelligent, and voluntary plea after multiple days of trial because he did not want to risk a possible life sentence upon conviction based on the state's proper and valid issuance of its intention to seek life without parole pursuant to S.C. Code Ann. § 17-25-45?

Respondent's Questions Presented

I. Does any evidence support the PCR court's conclusion that trial counsel was ineffective for failing to appropriately review and challenge the state's notification of its intention to seek life without the possibility of parole?

II. Does any evidence support the PCR court's conclusion that trial counsel misinformed petitioner regarding his eligibility to be sentenced to life without the possibility of parole and thus rendered petitioner's guilty plea involuntary?

STATEMENT OF THE CASE

On November 2, 2015, respondent, Anthony McClain, was indicted in Charleston County for kidnapping, possession of a weapon during the commission of a violent crime, armed robbery, and two counts of pointing and presenting a firearm. App. 599-624. Aaron Mayer represented Mr. McClain and David Osborne, assistant solicitor, represented the state. App. 31.

On February 17, 2017, the state filed its notice of intention to seek a sentence of life without the possibility of parole (LWOP) pursuant to S.C. Code Ann. § 17-25-45 based on McClain's 1996 federal convictions for "armed carjacking and robbery street weapon."[1] App. 1. On March 10, 2017, defense counsel filed a motion to set aside LWOP. App. 4.

Pretrial motions were heard before the Honorable R. Markley Dennis Jr., on March 10, 2017. App. 31-59. During that hearing, Judge Dennis declined to make a ruling on whether McClain's prior federal conviction of aiding and abetting carjacking was a qualifying conviction that would make him eligible to receive a sentence of LWOP. App. 49, l. 23-50, l. 5.

On March 13, 2017, McClain proceeded to trial before the Honorable Clifton Newman, Jr., and a jury. On March 15, 2017, after three days of trial McClain pled guilty as indicted without negotiation or recommendation by the state. App. 554. The solicitor agreed to withdraw its notice of intention to seek LWOP. App. 555. Judge Newman sentenced McClain to concurrent terms of twenty-two years' imprisonment for armed robbery, twenty-two years' imprisonment for kidnapping, five years' imprisonment for pointing and presenting, and five years' imprisonment for possession of a weapon. App. 595, l. 22-596, l. 16.

Thereafter McClain filed an application for PCR on March 1, 2018. App. 639-45. On July 1, 2021, an evidentiary hearing was held before the Honorable Bentley Price. App 659.

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[1] Throughout the record, including the state's pretrial brief the conviction is referenced as aiding and abetting in carjacking.

McClain was represented by Tommy Thomas and Benjamin Limbaugh, assistant attorney general, represented the state. App. 659.

On November 7, 2021, Judge Price signed and order granting PCR. App. 737-47. On December 12, 2021, Judge Price denied the state's motion to alter or amend and the state's petition to this Court followed. App. 765-66.

ARGUMENT

I. The evidence supports the PCR court's conclusion that trial counsel was ineffective for failing to appropriately review and challenge the state's notification of its intention to seek life without the possibility of parole.

Pretrial discussion of LWOP with Judge Dennis

During the pretrial hearing, before Judge Dennis, the solicitor argued that McClain's federal conviction for aiding and abetting a carjacking pursuant to, 18 U.S.C.A. § 2119 was a predicate offense that, if McClain were convicted of armed robbery and kidnapping at trial, would make him eligible to receive a sentence of LWOP. App. 44-48. The solicitor argued that the federal conviction "sound[ed] a lot like our strong-armed robbery statute," and should be considered a "most serious" offense under the LWOP statute, S.C. Code Ann. § 17-25-45. App. 45, ll. 3-11.

The solicitor averred that if the court "combin[ed] the armed element that [McClain] pled to in relation" to the federal conviction for aiding and abetting a carjacking it would be equivalent to "armed carjacking which would be an armed robbery." App. 46, ll. 13-18. The solicitor opined that McClain had two plea rejections on the record and that was why the matter was before the court, pretrial, because if McClain was considering entering a guilty plea then a ruling was necessary. App. 47, ll. 18-25. He also said, "I'm not one hundred percent sure he's enhanceable." To which, Judge Dennis replied, "I'm not either." App. 48, ll. 1-3. Judge Dennis ultimately ruled the sentencing judge would have the discretion to hear the matter and that could only happen if McClain was convicted. App. 48, ll. 8-11.

Facts alleged at trial

At trial the state alleged that on June 1, 2015, Mr. McClain approached a group of college

students and asked to take their picture. When they refused McClain allegedly pulled out a gun and held it to two of the student's heads. After that, the state claimed, McClain approached Jennifer Johnson in her car and again pulled out a gun. McClain allegedly forced Ms. Johnson to drive him to multiple convenience stores to purchase beer and cigarettes for him. The state claimed that McClain then forced Ms. Johnson to withdraw money from an ATM. Ms. Johnson eventually escaped when McClain exited the car and she found her spare key and drove away. App. 134-43.

Guilty plea

On March 15, 2017, defense counsel alerted the trial court that McClain wished to enter a guilty plea. App. 553, ll. 5-11. The solicitor told the court the state was withdrawing its intention to seek a sentence of LWOP. App. 55, ll. 4-11. The court brought the jury in to observe sentencing stating, "[a]fter the jurors have sat for three days listening to something I like for them to know the end of it so just bring them out and let them participate in the rest of this." App. 559, l. 25; 560, l. 24-561, l. 2.

The trial court asked the jury, by show of hands, how many of them thought McClain made the right decision to plead guilty. Five jurors raised their hands. App. 562, ll. 22-25. The court told the jury that petitioner was facing "the possibility" of LWOP but that the court would have had to evaluate whether it applied if he had been convicted by the jury. App. 563, ll. 4-8. The court, seemingly addressing the jury, said that carjacking under state law is a most serious offense and that if McClain were to have continued with trial the court would have had to determine if federal carjacking amounts to the same as state carjacking. App. 566, ll. 4-11. The court went on to say that McClain has had "a lot weighing on his mind these past few days," regarding whether he would plead guilty or face a sentence of LWOP if the jury found him

guilty. App. 566, ll. 12-21. The solicitor volunteered to the jury the alleged underlying facts of McClain's federal convictions. App. 567.

The court asked the solicitor to give their best argument as to why McClain's federal conviction was a qualifying offense under the LWOP statute. The solicitor acknowledged that they "would have [run] into a little bit of difficulty" if the court "strictly construed" the LWOP statute but contended that the underlying facts of McClain's federal convictions were equivalent to a South Carolina conviction for armed robbery. App. 585-86.

Evidentiary Hearing

Mr. McClain testified at the evidentiary hearing that he was told that he was facing a sentence of LWOP. App. 681, l. 23-682, l. 6. He said that he was confused about sentencing because the trial court indicated there was some doubt as to whether he could be sentenced to LWOP. App. 684, ll. 6-10. It was McClain's understanding at the time that if he pled guilty the state would withdraw its intention to seek a sentence of LWOP but if he continued to trial and was found guilty, he would receive a sentence of LWOP. App. 685, ll. 7-11.

Defense counsel Mayer testified that he was retained to represent McClain in this case. App. 711, ll. 19-21. Regarding the state's intention to seek a sentence of LWOP defense counsel first stated that McClain was eligible under the statute. Defense counsel testified that he thought he had challenged LWOP at every opportunity. App. 724, ll. 3-24. Defense counsel acknowledged that at the time of McClain's trial he did not have a trial partner and was "a one-man band," even though this was a two-person job. Counsel conceded that "it probably wasn't sufficient." App. 725, ll. 3-16.

He admitted that he "had very little experience" and that the potential of McClain receiving a sentence of LWOP raised the stakes of the case. App. 716, l. 14-717, l. 7. When

asked again about whether McClain was eligible to be sentenced to LWOP defense counsel answered, "according to the state's argument, he was" and then he stated, "I didn't have much experience in assessing those things." App. 718, ll. 19-25. Counsel said that he "didn't have a lot of clarity" regarding sentencing though he had "high hopes" that McClain would not receive a sentence of LWOP. App. 720, ll. 2-12.

Discussion

There is evidence in the record that supports the PCR court's finding that defense counsel was ineffective where he failed to adequately challenge and argue against the state's intention to seek a sentence of LWOP.

A two-prong test for determining effective assistance of counsel has been set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must show that counsel's performance was deficient. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688. The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To prove trial counsel's performance was deficient, an applicant must show "counsel's representation fell below an objective standard of reasonableness." *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

"[T]he Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes." *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427

(2009). "[A]n accused is entitled to counsel's considered and reasonable judgment." *Id.* "In fact, uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State." *Id.*

Defense counsel was deficient in his representation of McClain where he was, admittedly, unsure whether LWOP applied in McClain's case. Counsel was candid with the PCR court that he had "high hopes" McClain would not receive a sentence of LWOP but did not have clarity on the matter. Instead of doing the necessary legal research to be confident about McClain's sentence exposure if convicted defense counsel went into trial, where McClain was facing multiple serious charges, on "hopes" that he would not receive a sentence of LWOP which was patently unreasonable. *See Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009).

Moreover, while defense counsel filed a motion pretrial to challenge the validity of the state's notification of LWOP, he failed to make any argument on the motion during the pretrial hearing. Although it would have been futile, because McClain had already forgone trial for a guilty plea, defense counsel also failed to respond to the solicitor's argument regarding LWOP during sentencing. Defense counsel would have known the state was unsure whether or not McClain's prior federal conviction rose to the level of most serious charge because the solicitor admitted it multiple times and both the pretrial court and trial court seemed to struggle with the matter.

McClain was prejudiced by defense counsel's deficiency where he was effectively forced to plead guilty without negotiation or recommendation by the state for fear that if he continued trial, he would receive a sentence of LWOP. The prejudice is further evidenced by the surprising polling of the jury during McClain's sentencing where only five jurors raised their hands in

agreement that he "made the right decision to plead guilty." App. 562, ll. 19-5.

The LWOP statute provides:

> (A) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either: (1) one or more prior convictions for: (a) a most serious offense; or (b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section; or (2) two or more prior convictions for: (a) a serious offense; or (b) a federal or out-of-state conviction for an offense that would be classified as a serious offense under this section.
> (B) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for: (1) a serious offense; (2) a most serious offense; (3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or (4) any combination of the offenses listed in items (1), (2), and (3) above.

S.C. Code Ann. § 17-25-45

When a prior conviction is for an offense not found in § 17–25–45, trial judges can look to the elements of the prior offense to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement. *See State v. Lindsey*, 355 S.C. 15, 583 S.E.2d 740 (2003); *State v. Washington*, 338 S.C. 392, 526 S.E.2d 709 (2000). The federal statute for carjacking provides:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall (1) be fined under this title or imprisoned not more than 15 years, or both.

18 U.S.C.A. § 2119. South Carolina's armed robbery statute provides:

> A) A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably

> believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence. (B) A person who commits attempted robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned not more than twenty years.

S.C. Code Ann. § 16-11-330.

The state argued pretrial and during sentencing that petitioner's federal conviction of aiding and abetting a carjacking was the equivalent of our armed robbery statute. Notwithstanding the doubt of the pretrial court, trial court, and even the solicitor the elements of McClain's prior federal conviction for aiding and abetting carjacking are not equivalent to the elements of our crime of armed robbery. The most glaring difference in the federal carjacking statute and in the state armed robbery statute is that the federal statute does not include reference to being armed with a weapon.

Additionally, the state's argument on appeal that the McClain's federal conviction for aiding and abetting a carjacking is the functional equivalent to the elements of our state statute for carjacking is not preserved for appeal. *See Knight v. Waggoner*, 359 S.C. 492, 597 S.E.2d 894 (Ct. App. 2004) (arguments made for the first time on appeal are not preserved for review). No argument was made by the state during trial or at McClain's evidentiary hearing regarding the state statute for carjacking, it was argued for the first time in the state's motion to alter or amend and was not specifically ruled on in the PCR court's blanket order denying the state's motion.

II. The evidence supports the PCR court's conclusion that trial counsel misinformed petitioner regarding his eligibility to be sentenced to life without the possibility of parole and thus rendered petitioner's guilty plea involuntary.

Evidentiary hearing

Mr. McClain testified that his plan was to go to trial because he maintained his innocence of these allegations. App. 672, ll. 13-19. McClain maintained throughout his testimony that his guilty plea was not voluntary and the sole reason he pled guilty was because defense counsel convinced his family and friends that if he did not, he would likely be convicted and receive LWOP. App. 685, ll. 18-24; 688, ll. 16-25; 699, l. 20-700, l. 20. In McClain's mind his choice was to plead guilty or continue trial and receive LWOP. App. 691, l. 22-692, l. 3.

Defense counsel conceded that the state taking LWOP off the table was "one of the considerations" for McClain entering a guilty plea. App. 719, ll. 8-10. Counsel's testimony regarding whether he recommended McClain plead guilty was at best unclear. First he stated that he was surprised McClain wanted to plead guilty but that he wanted to be supportive. App. 721, ll. 8-13. Later he said he might have had conversations with McClain's family where he tried to convince them to tell McClain to plead guilty. App. 726, ll. 1-15. Finally, he testified that it was possible that he was selfishly excited about a plea deal and "would have expressed that" to McClain. App. 727, ll. 4-18

One of McClain's family members Ms. Tisdale was prepared to give testimony regarding the pressure defense counsel asserted in order to convince McClain to plead guilty. However, the court stated, "[t]o be honest with you . . . nothing she's going to say is going to affect or change my mind at this point." App. 728, ll. 17-24. After the parties made their arguments, the court ruled that it would grant Mr. McClain PCR and made findings on the record. The court

found defense counsel conceded that he did not know whether McClain was facing LWOP. The court found it was "highly ineffective that [counsel] allowed him to go in there and plead straight up to these charges while [McClain was] already at trial." The court found that defense counsel was, admittedly, in over his head. The court also found that McClain's guilty plea was not given freely and voluntarily due to the misinformation given by defense counsel that induced him to plead guilty. App. 733-34

Discussion

The PCR court correctly found trial counsel was ineffective as argued above and there is evidence in the record that supports the PCR court's finding that McClain's guilty plea was involuntary where he was misinformed regarding whether a sentence of LWOP was appropriate under the law.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea. *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980)). Although the trial court is not required to direct defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of the guilty plea. *State v. Lambert*, 266 S.C. 574, 225 S.E.2d 340 (1976). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be

accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993).

When determining issues relating to guilty pleas, the appellate court will consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984). Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone but is determined from both the record made at the time of the entry of the guilty plea, and from the record of the PCR hearing. *Id.*

The PCR court correctly found that McClain was induced to plead guilty because of trial counsel's confusion regarding whether he was eligible to be sentenced to LWOP. The record supports the court's conclusion that McClain did not have a full understanding of the consequences of his guilty plea. *See Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). It is undisputed that what McClain was told by counsel and what he understood at the time of his guilty plea was that if he did not plead guilty and instead chose to continue with trial, he would be sentenced to LWOP.

McClain stated multiple times during his evidentiary hearing that he would have continued with trial were it not for counsel coercing his family to convince him to plead guilty because if convicted he would surely receive a sentence of LWOP. *See Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). Moreover, trial counsel admitted that he may have been excited about the prospect of McClain taking a guilty plea in a trial where he felt he was not able to sufficiently represent him and that excitement might have been expressed to McClain's family in order to induce him to plead guilty instead of continuing with trial.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny certiorari.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR RESPONDENT

This 12th day of August, 2022.