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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Eugene C. Griffith, Circuit Court Judge

EDWIN SMALL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000467

JOHNSON PETITION FOR WRIT OF CERTIORARI

Sarah E. Shipe
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ISSUE PRESENTED

Whether the PCR court erred finding petitioner's guilty plea was knowing, voluntary, and intelligent where petitioner was unsure whether he pled guilty to accessory after the fact to murder or accessory after the fact to attempted murder?

STATEMENT

In November 2017, a Florence County grand jury indicted petitioner for attempted murder, accessory before the fact to a felony, and kidnapping. App. 114-115. Petitioner was represented by Marshall Weaver and the state was represented by, assistant solicitor, J. Ryan White. App. 1. On October 2, 2018, petitioner appeared before the Honorable Thomas A. Russo and waived presentment, to the grand jury, and entered a guilty plea pursuant to *North Carolina v. Alford*,[1] for accessory after the fact to murder. App. 1; 11; 13. Petitioner's *Alford* plea was made pursuant to negotiations with the state for a sentence of ten years' imprisonment and the dismissal of all other charges. App. 8. Judge Russo sentenced petitioner to ten years' imprisonment. App. 22.

Thereafter, petitioner filed an application for PCR on May 6, 2019. App. 24-29. An evidentiary hearing was held on September 17, 2020, before the Honorable Eugene C. Griffith, Jr. App. 41. Petitioner was represented by Jonathan Waller and the state was represented by, assistant attorney general, Samuel Key. App. 41.

On March 23, 2022, Judge Griffith signed an order denying PCR. App. 95-108. The court found the guilty plea transcript reflected that petitioner understood the proceedings, interacted intelligently with the plea court and that the information conveyed during the hearing by the plea court cured any possible deficiency or error by defense counsel. The court found petitioner understood the nature of the charge against him, terms of the agreement with the state, and the consequences of pleading guilty and thus found petitioner's guilty plea was freely, knowingly, and voluntarily entered. App. 106-07.

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[1] 400 U.S. 25 (1970).

ARGUMENT

The PCR court erred finding petitioner's guilty plea was knowing, voluntary, and intelligent where petitioner was unsure whether he pled guilty to accessory after the fact to murder or accessory after the fact to attempted murder.

Facts alleged at guilty plea hearing

At petitioner's guilty plea hearing the state alleged the following facts. In September 2016, petitioner gave Raheem Williams a gun and told him to "take care of," Bobby Evans, Jr., whom petitioner and his associates believed was responsible for the theft of several pounds of marijuana. App. 17. Evans was subsequently murdered by Williams. App. 17-18. The state also claimed that after Evans was murdered petitioner, along with others, helped dispose of Williams' clothing and cell phone. When petitioner and his associates discovered that Williams may have been involved in the theft of marijuana, they beat Williams and held him at gunpoint. Ultimately, Williams escaped. App. 18.

Testimony at evidentiary hearing

Petitioner testified at the evidentiary hearing that he was originally charged with attempted murder, accessory before the fact to a felony, and kidnapping. However, he pled guilty to a separate accessory after the fact to a felony charge. App. 54, ll. 4-9. During his guilty plea hearing the underlying facts of the murder of Evans and attempted murder of Williams were read together which caused confusion. App. 56, ll. 1-12. Petitioner was confused and unsure whether he pled guilty to accessory after the fact to murder or accessory after the fact to attempted murder. App. 54, l. 10-55, l. 12. Petitioner acknowledged that he understood what pleading guilty pursuant to *Alford* meant and that he understood the state's offer of ten years non-violent was a good deal as opposed to his option to proceed to trial with a severe potential

sentence if he were convicted. App. 56, ll. 13-21; 58, ll. 3-18.

Petitioner said that he believed defense counsel gave up after informants from the county detention center, where he was being held pretrial, came forward with information in his case. App. 58, l. 19-60, l. 13. Petitioner contended that if defense counsel had not given up on his case he would have gone to trial instead of pleading guilty pursuant to *Alford*. App. 61, ll. 10-20.

Defense counsel Weaver acknowledged that only a small portion of his practice, twenty to twenty-five percent, was in criminal law. Counsel stated petitioner first had a public defender representing him, and Weaver was later appointed because of a conflict of interest where the public defender's office was representing co-defendants in the same case. App. 71, ll. 7-22. Counsel recalled that the case was set for trial, but the judge postponed the trial due to Hurricane Matthew and that is when the state offered petitioner ten years. App. 74, l. 17-75, l. 11. Counsel asserted that petitioner pled guilty after petitioner, himself, negotiated with the state to have the conviction be "nonviolent," and the state agreed. App. 75, ll. 10-22.

Counsel first stated that the crime petitioner pled guilty to was accessory after the fact to the murder of Evans. He later appeared confused about the underlying felony that petitioner pled guilty to accessory after the fact and said, "the state never specified the underlying offense," and "the state just said a general provision of accessory after the fact." App. 88, ll. 3-19.

Discussion

The PCR court erred in finding petitioner "knew the nature of the charges against him" pursuant to the requirements of *Boykin v. Alabama*,[2] and *Pittman v. State*,[3] where neither counsel nor petitioner knew if the guilty plea of accessory after the fact was as to murder or attempted murder.

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2 395 U.S. 238 (1969).

3 337 S.C. 597, 524 S.E.2d 623 (1999)

A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency. *Hill v. Lockhart*, 474 U.S. 52 (1985). Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements. *Id.*

The two-part *Strickland v. Washington*, 466 U.S. 668, (1984) test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973) and *McMann v. Richardson*, 397 U.S. 759 (1970). The prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, to satisfy the prejudice requirement, the applicant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 US at 58-59.

The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969). In addition to the requirements of *Boykin*, **a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense**, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (emphasis added); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In *State v. Armstrong*, 263 S.C. 594, 211 S.E.2d 889 (1975), this Court held that before a guilty plea may be accepted, the court must be certain the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea. *Anderson v. State*, 342 S.C. 54, 57, 535

S.E.2d 649, 651 (2000).

Petitioner's guilty plea pursuant to *Alford* could not have been knowing, voluntary, or intelligent where he did not know the nature and crucial elements of the offense because he was unsure whether his accessory after the fact plea was as to murder or attempted murder. *See Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (stating that "[i]n addition to the requirements of *Boykin*, a defendant entering a guilty plea **must be aware of the nature and crucial elements of the offense**, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." (emphasis added)). There is nothing in the record to support the PCR court's finding that petitioner's guilty plea was knowing, voluntary, or intelligent.

Petitioner was originally indicted for attempted murder, accessory before the fact to a felony, and kidnapping. He was asked during the hearing to waive presentment to accessory after the fact to murder. Then all the underlying facts, as to the murder of Evans and attempted murder of Williams, are read into the record. The actual charge is discussed only at the beginning of the hearing when the state read the indictment and after the court merely asked petitioner if, understanding the charge and the punishment associated with it, he still wished to plead guilty. Petitioner's response, "I understand the plea." Petitioner's testimony at the evidentiary hearing was that he understood he was pleading guilty pursuant to *Alford* but did not understand the nature of the charges against him.

Additionally, defense counsel's testimony at the evidentiary hearing supported petitioner's assertion that he did not know the underlying felony that he was pleading guilty to on the day of his guilty plea hearing. Defense counsel was deficient where he failed to advise petitioner regarding the underlying crime that he pled guilty to and the court's colloquy with

petitioner did not cure this deficiency where the charge or elements were not discussed. Petitioner was prejudiced where he testified that but for counsel's failure, he would not have pled guilty and would have continued to trial.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be granted to allow full briefing on the issue.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of September, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Edwin Small states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Eugene C. Griffith, which was held on Sept. 17, 2020, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Edwin Small.

Respectfully Submitted,

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of September, 2022.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 12th day of September, 2022.