

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

DAVON A. CLARK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000751

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred finding defense counsel was not ineffective where petitioner was not advised of the maximum sentence he could receive, and the record supports that he was unaware that his sentences could be run consecutively resulting in invalid guilty plea?

STATEMENT

On August 25, 2016, petitioner waived presentment to the grand jury on all three indictments and pled no contest to throwing bodily fluids while in custody and pled guilty to, two counts of first degree criminal domestic violence (CDV) before the Honorable William P. Keesley. App. 1-6. Petitioner was represented by Theo Williams and the state was represented by assistant solicitor, Bradley Pogue. App. 1. Judge Keesley sentenced petitioner to concurrent terms of one year imprisonment for throwing bodily fluids while in custody and ten years' imprisonment for each count of first degree CDV. App. 32.

There after petitioner filed an application for PCR on February 22, 2017. App. 35-43. An evidentiary hearing was held February 20, 2018, before the Honorable J. Derham Cole. App. 133. Arthur Aiken represented petitioner and Caroline Scramton, assistant attorney general, represented the state. App. 133.

On September 16, 2020, Judge Cole signed an order denying PCR. App. 168-83. The court found petitioner "received complete and well-founded advice by counsel in advance of, and during plea hearing." Court found petitioner did not establish that he was prejudiced by counsel's advice regarding sentencing where the catalyst for the guilty plea was not the advice of counsel, but some other factor. App. 174-75.

Petitioner filed a motion to reconsider, which was denied on April 6, 2022. App. 197.

This petition follows.

ARGUMENT

The PCR court erred finding defense counsel was not ineffective where petitioner was not advised of the maximum sentence he could receive, and the record supports that he was unaware that his sentences could be run consecutively resulting in invalid guilty plea.

Relevant facts

At petitioner's guilty plea hearing the state alleged that on January 23, 2016, petitioner was involved in a physical altercation with former girlfriend, Lameka Stevenson. The state claimed petitioner waited for her and followed her to a dead-end road where he pulled her out of her car, punched her, and threw her on the ground. Stevenson's injuries were a broken finger and bruising. App. 10-12. The second count of alleged CDV occurred on April 9, 2016 and involved another woman petitioner was romantically involved with, Chandrika Waters. In this instance the state alleged that petitioner and Waters were at a party and petitioner got jealous because Waters was talking to another person. Later that day, petitioner showed up at Waters' home and assaulted her in the front yard. App. 12-13.

The state alleged that while petitioner was being detained on the CDV charges he tried to spit on an officer while officers attempted to restrain him because he had threatened to take his own life. App. 14-15.

During petitioner's colloquy with the court, defense counsel indicated that petitioner might not understand that the sentence for throwing bodily fluids was required to be run consecutive to his other sentences. App. 21, ll. 2-6. The court gave defense counsel a few minutes to discuss this with petitioner. After a short recess petitioner told the court that he understood that the sentence he would receive for throwing bodily fluids would be run consecutive to his other sentences. App. 21, ll. 20-24.

The plea court explained to petitioner that each count of domestic violence carried up to ten years' imprisonment, were classified as a violent, and required that petitioner have his DNA entered in the "central computer registry." App. 22-23. After the colloquy petitioner declared that he wanted to enter his guilty plea as to each offense. App. 23, ll. 21-24. Judge Keesley sentenced petitioner to a total of twenty-one years, consecutive terms of ten years' imprisonment for each of the CDV charges and one year imprisonment for the throwing of bodily fluids charge. App. 32-33.

At the beginning of the evidentiary hearing PCR counsel argued that defense counsel was ineffective where he gave "inadequate advice" to petitioner regarding sentencing where petitioner was not told that he could receive consecutive time for the two counts of CDV. App. 135, l. 21-136, l. 6. PCR counsel asserted petitioner was not aware that his total sentence exposure was thirty-five years' imprisonment. App. 136, ll. 4-5.

Petitioner testified that he was not advised that he could receive consecutive time on the two CDV charges and contended that if he had known that all three sentences could be run consecutively, he would not have pled guilty. App. 139, ll. 3-9. Petitioner said that during the hearing defense counsel explained that he could receive consecutive time for the throwing bodily fluids charge. App. 139, l. 21-22. Petitioner testified that he made the decision to plead guilty that day moments before he went before the judge. App. 143. Petitioner had prior discussions with defense counsel about the charges against him but did not recall that was told the maximum sentence exposure that he faced. App. 144. Petitioner maintained that at the time he pled guilty he was not aware that he could receive more than ten years' imprisonment. App. 150.

Defense counsel testified that he was hired to represent petitioner on these charges. App. 151. He said that he met several times with petitioner, and they spoke on the phone often.

During their meetings and conversations counsel said that petitioner expressed that he was suffering greatly in jail. App. 153. Counsel stated that petitioner had been held for a time without bond and was “suffering” and just wanted to “get it over with.” Counsel said that he explained to petitioner that he did not have to plead guilty because his bond was set and he could make bond. He claimed that he advised petitioner that he should not plead guilty, but that petitioner seemingly did not understand and made the decision on his own to plead guilty that day. App. 154-58.

Counsel testified that he explained the charges to petitioner and the maximum sentence exposure that he faced. App. 153, ll. 12-20. He specified that petitioner understood the total number of years each charge carried. App. 154, ll. 22-24. Regarding sentencing counsel testified that he told petitioner “that he had two charges which carried ten years, he had one charge which carried fifteen [years].” App. 156, ll. 1-2. He admitted that the plea court never told petitioner he was facing thirty-five years’ imprisonment. App. 163, ll. 13-20. Counsel testified that after the guilty plea he filed a motion to reconsider sentence because he “thought it was too much,” but that the motion was ultimately denied. App. 158, ll. 14-22.

Discussion

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. *Boykin v. Alabama*, 395 U.S. 238 (1969). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights they are waiving. *Id.* 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. *Id.*

Although the trial court is not required to direct defendants attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of his guilty plea. *Pittman v. State*, 337 S.C. 597, 599–600, 524 S.E.2d 623, 625 (1999).

The test for determining the validity of a guilty plea based upon alleged ineffective assistance of counsel is whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and whether there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty. *Hill v. Lockhart*, 474 U.S. 52 (1985); *Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991). “A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases.” *Richardson v. State*, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993).

Petitioner’s guilty pleas were invalid where neither counsel nor the court advised him of the maximum sentence exposure he faced. *See Pittman v. State*, 337 S.C. 597, 599–600, 524 S.E.2d 623, 625 (1999). Defense counsel was deficient where he failed to advise petitioner that he could be sentenced to up to thirty-five years’ imprisonment. The PCR court erred finding petitioner “received complete and well-founded advice by counsel in advance of, and during plea hearing.” At the guilty plea it was clear to both the court and to defense counsel that petitioner did not understand that a conviction for throwing bodily fluids would necessarily be run consecutively. Counsel spoke up to the plea court and took time to explain that to him during the recess. After that conversation petitioner told the court he understood that the sentence for throwing bodily fluid would be run consecutive to his other sentences. However, it was never

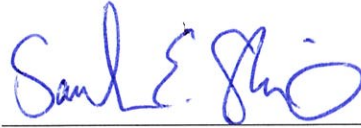
explained to petitioner that both CDV sentences could be run consecutive to each other and thus petitioner reasonably believed they would be run concurrently. Additionally, the plea court never told petitioner that he was facing a maximum sentence of thirty-five years' imprisonment.

At the PCR hearing defense counsel testified that he had discussed the maximum sentencing exposure with petitioner but then went on to clarify that he discussed the maximum sentence for each charge. Counsel's testimony at the PCR hearing did not refute petitioner's assertion that he did not understand that all his sentences could be run consecutively when he chose to plead guilty.

Petitioner was prejudiced by defense counsel's deficiency where he testified that had he known that all of his sentences could be run consecutively, and his exposure was thirty-five years' imprisonment he would not have pled guilty. The PCR court erred finding petitioner did not establish that he was prejudiced by counsel's advice regarding sentencing where the catalyst for the guilty plea was not the advice of counsel, but some other factor. Counsel's testimony at the PCR hearing was that petitioner simply wanted to be out of the county detention center and went against his advice when he pled guilty. However, his discussion with the plea court at the guilty plea hearing contradicts his PCR testimony. During the guilty plea when the court asked counsel if he agreed with petitioner's decision to plead guilty he affirmed that he did. App. 6, ll. 14-16.

CONCLUSION

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



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This 10th day of November, 2022.