STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Sep 07 2022

S.C. SUPREME COURT

Certiorari to Fairfield County

Honorable Walton J. McLeod, IV, Circuit Court Judge

DONALD V. STEVENSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001518

PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

I. Whether the PCR court erred in denying relief, where the plea court never explained the rights Petitioner was waiving by pleading guilty, where the plea judge incorrectly advised Petitioner about the maximum sentence he was facing, and where plea counsel did not object at any point?

II. Whether the PCR court erred in denying Petitioner a belated appeal pursuant to White v. State[1] where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal?

---

[1] 263 S.C. 110, 108 S.E.2d 35 (1974).

STATEMENT

A Fairfield County grand jury indicted Petitioner on the offense of distribution of methamphetamine in April 2016. App. 91 – 92. Petitioner proceeded to a guilty plea before the Honorable Brian Gibbons on February 22, 2017. App. 1. Creighton Coleman represented Petitioner, and Riley Maxwell appeared on behalf of the state.

Petitioner pled guilty as indicted. As part of his plea, the state agreed to dismiss additional charges. App. 3 ll. 1 – 13. Additionally, the state recommended a three-year sentence. Id. Defense counsel negotiated a deferred sentence so that Petitioner could tend to his father's probate estate. App. 5. l. 18 – App. 6 l. 19.

The state contended the following facts gave rise to Petitioner's arrest: on December 16, 2015, an individual purchased drugs from Petitioner in concert with law enforcement. App. 5 ll. 5 – 12.

The colloquy between the plea judge and Petitioner consisted of a short thirteen questions, many of which were yes-or-no questions. App. 3 l. 20 – App. 5 l. 2. As part of the colloquy, the plea judge asked Petitioner whether he understood that distribution of methamphetamine carries up to a three-year sentence. App. 4 ll. 2 – 4. Following the alleged factual recitation from the prosecutor, the plea judge accepted Petitioner's plea.[2] There was no finding that it was intelligently, freely, or voluntarily made. The matter was adjourned pending sentencing.

A sentencing hearing was held before the same judge with the same attorneys present on May 14, 2018. According to the solicitor, Petitioner fled the state following his plea. App. 13 l.

---

[2] The transcript, as provided from the court reporter, appears to contain a slight formatting error. Upon information and belief, line 16 of page 5 of the Appendix contains the word "plea" as well as another sentence.

7 – App. 14 l. 3. Although mitigation was offered, Judge Gibbons sentenced Petitioner to fifteen years' incarceration. App. 18 ll. 12 – 15.

No direct appeal was filed. On April 3, 2019, Petitioner filed his application for post-conviction relief. App. 20. It contained allegations of ineffective assistance of counsel, including claims that he pled pursuant to a maximum or cap, that his attorney misguided him, and that he was under duress at the time of the plea. App. 23. He also alleged his counsel did not file a direct appeal. The state made its Return on or about October 21, 2019. App. 27. A subsequent amendment to the application was filed through counsel on January 29, 2021. App. 33.

An evidentiary hearing was held before the Honorable Walton J. McLeod, IV on February 3, 2021. Arthur Aiken represented Petitioner, and Michael Davidson appeared on behalf of the state. Petitioner and plea counsel testified at the hearing. The PCR judge heard testimony and argument before taking the matter under advisement. App. 66 ll. 10 – 12. An Order of Dismissal was then filed on July 23, 2021. App. 68.

PCR counsel filed a Rule 59(e), SCRCP Motion to Alter or Amend on August 4, 2021. App. 84. This motion was denied by way of a written Order. App. 88. This Petition follows.

ARGUMENT

I. The PCR court erred in denying relief, where the plea court never explained the rights Petitioner was waiving by pleading guilty, where the plea judge incorrectly advised Petitioner about the maximum sentence he was facing, and where plea counsel did not object at any point.

Relevant facts

At the initial plea in Petitioner's case, the judge failed to explain to Petitioner both the maximum sentence he was facing as well as the rights he would be waiving:

> Q: Distribution of methamphetamine carries **up to three years** in prison, do you understand?
>
> A: Yes, sir.
>
> Q: Understanding that, how do you plea?
>
> A: Guilty, Your Honor.
>
> ...
>
> Q: Did you and [your attorney] go over all of your jury trial rights?
>
> A: Yes, sir.
>
> Q: You understand you give up those rights when you plead guilty?
>
> A: Yes, sir, Your Honor.

App. 4 ll. 2 – 22 (emphasis added).

Distribution of methamphetamine carries a maximum sentence of **fifteen years**, as evidenced by the sentence the plea judge would end up imposing as well as the applicable statute, S.C. Code Ann. § 44-53-375(B)(1). Furthermore, Petitioner would not have known whether plea counsel exhaustively covered the extent of his trial rights. Critically, the plea judge neglected to cover all of the rights Petitioner was waiving, and plea counsel failed to intervene.

Petitioner's guilty plea was made unknowingly and involuntarily under Strickland v. Washington, 466 U.S. 668 (1984). "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted). "In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 101, 102 (2013).

Federal and state courts have long recognized the principle that a guilty plea must be intelligently and voluntarily entered to be valid. In Bokyin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court added the requirement that the record must affirmatively disclose that a defendant who pleaded guilty, entered his plea understandingly and voluntarily. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). A defendant must be advised of the constitutional rights he is waiving; he must be made aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers. Boykin, supra.

In State v. Armstrong, this Court recognized the finality of a guilty plea when proper safeguards have been afforded a defendant in a criminal proceeding. 263 S.C. 594, 211 S.E.2d 889 (1975). Generally, "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." Id. at 598, 211 S.E.2d at 891. This Court also acknowledged that the "court's warning should include an

explanation of the defendant's waiver of constitutional rights and a realistic picture of all sentencing possibilities." Id.

In accordance with Boykin, this Court held in State v. Lambert a guilty plea may not be accepted unless it is voluntarily and understandingly made. 266 S.C. 574, 225 S.E.2d 340 (1976). All that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him. Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995).

Unless an objection is lodged, this matter is typically unpreserved for direct appeal. See State v. Bradley, 263 S.C. 223, 209 S.E.2d 435 (1974) (finding defendant who failed to assert at trial that his guilty plea was involuntarily entered, was precluded from consideration of such claim on appeal). In State v. McKinney, 278 S.C. 107, 292, S.E.2d 598 (1982), this Court declined to review for compliance with Boykin's requirements stating that absent a timely objection at a plea proceeding, the unknowing and involuntary nature of a guilty plea can only be attacked through the more appropriate avenue of post conviction relief. Therefore, plea counsel was deficient in failing to object or move to vacate the plea.

In Pittman v. State, this Court affirmed the grant of post-conviction relief where a defendant's guilty plea was neither voluntary nor knowing. 337 S.C. 597, 524 S.E.2d 623 (1999). A short opinion, it nonetheless stands for a meaningful proposition and lays out a roadmap for relief in the case at bar.

Pittman was indicted for numerous offenses: assault and battery with intent to kill, possession of a gun during the commission of a violent crime, armed robbery, and criminal conspiracy. 337 S.C. 597, 599, 524 S.E.2d 623, 624. He pled guilty as charged to each of those offenses. Id. The plea judge sentenced him to twenty years total, and Pittman then filed a PCR

application. Id. Much like Petitioner, he alleged involuntary guilty plea and ineffective assistance of counsel. Id.

At the outset, this Court noted how Pittman's plea transcript *alone* was sufficient to provide relief: "[I]n this case, the transcript of Pittman's guilty plea on its face provides enough evidence to hold Pittman's plea was not voluntary or knowing." Id. This Court further elucidated:

> The transcript also indicates the trial judge did not advise Pittman of the crucial elements of the charged offenses. Furthermore, the court's failure to inform Pittman that the armed robbery charge carried a mandatory minimum sentence of ten years, seven without the possibility of parole, renders the plea involuntary.

Id. at 600, 524 S.E.2d at 625 (internal citations omitted).

Pittman cited to Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991) and State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) as relevant and favorable authorities. Notably, in Pittman, the solicitor's remark regarding the minimum sentence—made near the end of the plea—was not sufficient enough to overcome the involuntary and unknowing nature of Pittman's plea. 337 S.C. 597, 600, 524 S.E.2d 623, 625.

Pittman also explored whether plea counsel's discussions with his or her client could have cured the fatal nature of the plea:

> In addition, Pittman did not fully understand the nature of the constitutional rights being waived. Pittman's testimony at the PCR hearing was uncontradicted in that he met with his attorney only twice for approximately twenty minutes.
> ...
> Pittman's attorney had little recollection of the exact nature of matters discussed during meetings with the Defendant. Although Pittman signed a "checklist for guilty plea," the date on this document is one month prior to the court appearance and entrance of the guilty plea. The list does not include the crimes Pittman was charged, the elements of the charged crimes, or a statement about mandatory minimum penalties. Further, these defects were not cured by information provided at the guilty plea.

Id. (internal citations omitted).

In the instant case, plea counsel failed to advise Petitioner of his right to remain silent at trial. App. 49 ll. 13 – 17. Similarly, counsel failed to notify him that the state would be required to bring in witnesses and have a trial in open court. App. 49 ll. 22 – 25. Petitioner was not told that he has the right to cross-examine the state's witnesses, nor was this explained in the terms of a right of confrontation. App. 50 ll. 1 – 7. Notably, Petitioner candidly testified that he would have gone to trial had he been fully informed of his rights. App. 50 ll. 8 – 13.

Under the second step of the inquiry, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). "In other words, in order to satisfy the 'prejudice' requirement, the [petitioner] must show that 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." Id. Petitioner's testimony satisfies this prong.

Given the chance to cross-examine Petitioner, the state instead elected to ask him only seven questions. App. 53 l. 17 – App. 55 l. 16. Although counsel testified that he informed Petitioner of his rights, he had no notes or records to support that claim. App. 59 ll. 2 – 13. Notably, and as will be discussed below, counsel could not recall whether he spoke with Petitioner regarding an appeal. App. 59 ll. 14 – 18.

Plea counsel's alleged conversations with Petitioner cannot be relied upon to cure the deficient colloquy. The plea judge was unaware of them at the time, meaning he could not have found that the plea was knowingly, voluntarily, and freely made. As a result, the inadequate colloquy that failed to mention the specific rights Petitioner was waiving resulted in an unknowing and involuntary plea.

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)). To ensure the defendant understands the consequences of his guilty plea, the trial judge usually questions the defendant about the facts surrounding the crime and punishment that could be imposed. Id. at 434-435, 405 S.E.2d at 392. 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). See, e.g., Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge).

Petitioner was not made aware of the full and complete consequences of pleading guilty. He was not advised by the plea judge about the right to confrontation, the right against self-incrimination, or even the right to a jury trial. As a result, the PCR court should be reversed and Petitioner's case remanded for a new trial.

II. The PCR court erred in denying Petitioner a belated appeal pursuant to White v. State where the evidence showed Petitioner never knowingly and voluntarily waived his right to a direct appeal.

Relevant facts

Petitioner's PCR application contained an allegation that he asked plea counsel for an appeal, but one was not filed. App. 22. At the PCR evidentiary hearing, Petitioner testified that he requested an appeal immediately after he was sentenced:

> Q: After your sentencing, did you have any conversation with [plea counsel] about an appeal?
>
> A: Yes, sir. In that instant, the gavel dropped, the judge said that, I spun on him and said "Appeal this." And then we went into the backroom where the holding cell was, a little side room I guess the jury room and sat in there for a few moments and talked.

App. 51 l. 21 – App. 52 l. 2.

Petitioner further detailed an additional conversation he had with counsel wherein counsel suggested Petitioner file a PCR application. App. 52 ll. 4 – 12. Petitioner testified counsel did not spend any time with him explaining his right to an appeal. App. 52 l. 16 – App. 53 l. 9.

Plea counsel was retained. App. 56 ll. 21 – 23. The retainer agreement was not made an exhibit at the PCR hearing, nor were there any substantive references to Petitioner's file. Notably, plea counsel *could not recall whether Petitioner requested an appeal or whether they spoke about his right to an appeal.* App. 59 ll. 14 – 18; App. 63 ll. 19 – 21.

Discussion

This petition has been prepared in accordance with the South Carolina Appellate Court Rules. According to Rule 243(i)(2), SCACR:

> When the post-conviction relief judge has found that the applicant is not entitled to a White v. State review, the petition shall raise the question of waiver of the right to a direct appeal along with all other post-conviction relief issues petitioner seeks to have reviewed. The petition shall also contain a "Statement of Issues on Appeal" listing the issues to be raised if a White v. State review is granted; this statement of issues shall comply with the requirements of Rule 208(b)(1)(B). Briefing of the direct appeal issues will not be allowed unless certiorari is granted on the issue.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-740 (2010). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in [Anders]." Id. (quoting Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). Following a guilty plea, when there is reason to think a defendant would want to appeal or when the defendant reasonably demonstrated an interest in appealing, there is a constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Roe v. Flores– Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995).

"[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores–Ortega, 528 U.S. 470, 480 (2000). In White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) this Court held that a defendant must knowingly and intelligently waive the right to appeal from his conviction and sentence. Since then, this Court has announced two distinct standards for evaluating ineffective assistance of counsel claims for failure to file an appeal. For convictions following a trial this Court has held that "[i]n the absence of an

intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). For guilty pleas, this Court has held that "absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

"The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Weathers, 319 S.C. at 61, 459 S.E.2d at 839. In Turner v. State, 380 S.C. 223, 224; 670 S.E.2d 373, 374 (2008) this Court clarified that the standards articulated in Roe v. Flores-Ortega, *supra*, were examples of extraordinary circumstances that triggered counsel's duty to consult with a defendant about his direct appeal rights. In Roe v. Flores-Ortega, *supra*, the United States Supreme Court defined "consult" to mean that counsel advised "the defendant about the advantages and disadvantages of taking an appeal" and made a "reasonable effort to discover the defendant's wishes." The Court noted that if counsel had not consulted with the defendant at all then "the court must ask whether that failure itself constitutes deficient performance." Roe v. Flores-Ortega, 528 U.S. at 471.

In Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010), this Court found the PCR court erred in denying Simuel a belated appeal following his trial. At the PCR hearing counsel testified that he "normally discusses an appeal with defendants after trials but was not sure whether he did so with Petitioner." Id. at 270, 701 S.E.2d at 739. He further testified that Simuel never asked him to file an appeal. Id. at 269, 701 S.E.2d at 739. Much like the matter at hand, the PCR court found counsel's testimony credible and Simuel's testimony not credible. The court found that based on the testimony of counsel, Simuel was not entitled to a belated

appeal because he did not request counsel file an appeal on his behalf. Id. This Court reversed the decision of the PCR court and granted Simuel a belated appeal. Id. Footnote 1 reiterated the above dichotomy regarding an attorney's obligations following a plea versus a trial. Id.

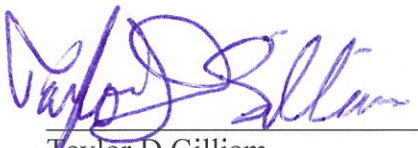
Petitioner demonstrated an interest in appealing. Furthermore, extraordinary circumstances should have caused plea counsel to file a notice of appeal. Petitioner was reeling from the death of his father and the death of a friend, as well as extensive personal difficulties. Although there were no objections or motions at the plea, counsel should have filed a notice of appeal to preserve any issues his client wished to raise on direct appeal. The plea judge quintupled Petitioner's sentence from the original three-year recommendation to the maximum of fifteen years. The PCR judge erred, because Petitioner evidenced an interest in appealing and because extraordinary circumstances were present such that counsel should have known to file a notice of appeal.

STATEMENT OF ISSUES ON APPEAL

Whether the trial court erred in sentencing Petitioner to the maximum sentence, where the sentence was capricious, where Petitioner was struggling with grief and anxiety, and where the sentence was arbitrary based upon the allegations provided by the prosecution?

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court grant certiorari to allow for further briefing.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of September, 2022.

RECEIVED

Sep 07 2022

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this 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."

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 7th day of September, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Fairfield County

Honorable Walton J. McLeod, IV, Circuit Court Judge

DONALD V. STEVENSON,

PETITIONER

V.

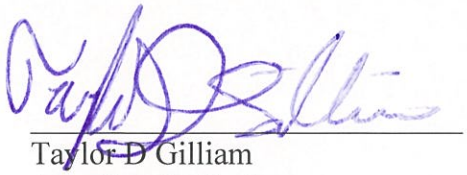
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001518

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and Appendix in the above referenced case have been served upon D. Russell Barlow, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); on Donald V. Stevenson, #237814, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 7th day of September, 2022.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER