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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable William A. McKinnon

Case No. 2022-001117

Jimmy Dean Williams,

Respondent,

vs.

The State of South Carolina,

Petitioner.

Respondent's Return to Petition for Writ of Certiorari

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RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the PCR court properly granted relief based on the violation of Mr. Williams' right to effective assistance of counsel where he was denied multiple rights throughout his guilty plea including his right to communicate privately with counsel.

STATEMENT OF THE CASE

Jimmy Dean Williams pled guilty to assault and battery of a high and aggravated nature. (ABHAN) on October 13, 2020. App. 1, 5. At the time, trial courts were still operating under this Court's emergency order, which dictated the following procedures for virtual guilty pleas:

If the defendant will participate by remote communication technology, the trial court must make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea. If the defendant's counsel will participate by remote communication technology, the trial court must determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present, and the court must ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary. Finally, if other persons will address the court or testify during the plea proceedings by remote communication technology, the court must find that the defendant is knowingly and intelligently waiving any right to have those persons physically present for the plea.

Re: Operation of the Trial Courts During the Coronavirus Emergency, S.C. Sup. Ct. Order dated April 22, 2020 (Shearouse Adv. Sh. No. 17, April 29, 2020) [hereinafter *Coronavirus Order*], at (d)(3). However, the trial court never made any of the stated inquiries, including never asking whether Mr. Williams wished to confer with counsel during the hearing, and never telling Mr. Williams he had the right to ask for that.

The Solicitor noted that the reason the State dropped the charges from attempted murder to ABHAN was based on conversations he had with the victim, Jimmy Williams, Sr. App. 21. Although the victim was readily sympathetic to Mr. Williams, the rest of his family offered extremely damaging statements. Mr. Williams's brother, Cody Williams, expressed his fear for the safety of his wife and son, stating he had a three-page list of things Mr. Williams has done against the family and he did not want Mr. Williams around them. App. 13-14. Cody's wife, Casey, told the trial court that Mr. Williams was on a downward spiral and he had lost custody of his young

daughter. App. 14. She indicated that Mr. Williams's daughter would say her father is "evil" and that he told her he was Satan and she was the spawn of Satan. App. 14. Casey expressed her concern for the safety of the victim and his wife, as well as Mr. Williams's daughter. App.16. She further implored the trial court that "we are asking for the maximum possible, or at least until his daughter is 18 years old so that she can make decisions for herself and realize what, what has happened." App. 16. Brandy Martin, Mr. Williams's half-sister, spoke at length at the hearing, announcing Mr. Williams would not change if he was released and that he was "extremely dangerous." App. 18. She stated he has had "major anger issues" since they were children, and his "extreme personality" did not mix well with drugs. App. 18, 20. Basically, she stated he had no redeeming character, calling him "a thief and a drug addict" with "no life skills" that will "do whatever he can to get what he wants." App. 20. She also painted Mr. Williams as almost abusive in his neglect of his daughter, stating he made her so nervous she would be physically ill, he would lie about taking her to the doctor when she needed medical attention, and he lost custody of her when he was with her while he was high on methamphetamines. App. 19. Brandy referenced other unverified instances of violence against victim and his wife and stated her belief that the stabbing was premeditated. App. 20. She again expressed her fear for her family and his daughter and stated he needs to stay in jail. App. 21. The trial court ultimately sentenced him to the maximum of twenty years' imprisonment. App. 25.

Mr. Williams filed an application for PCR and amended with the assistance of counsel to include allegations that his plea was involuntary; he "never signed an agreement to conduct the hearing via WebEx" and was prejudiced by "everyone else including the Judge" calling in from different locations; and plea counsel failed to mitigate the statements of his family. App. 29-34,

48–49. A hearing was held before the Honorable William A. McKinnon on June 7, 2022. App. 51. Mr. Williams testified at the hearing he was unable to speak to his attorney during the plea. App. 70. He indicated he never signed a consent to have the plea conducted virtually and was never asked by the trial court if he consented to the voluntary hearing. App. 70–71. Instead, counsel told him it would be virtual and never offered details about how it would proceed. App. 67.

The PCR observed that the order permitting virtual guilty pleas included a mandate that the court ensure the defendant had the ability to consult privately with counsel, and it noted its concern that there was nothing in the record to suggest defendant was afforded this opportunity. App. 76–77; *see Coronavirus Order*, at (d)(3).¹ Plea counsel testified that courts typically informed a defendant that if at any time he wished to consult his attorney, there was a system in place that they could do that; however, that colloquy did not appear in Mr. Williams transcript. App. 82.

In granting PCR, the court concluded that the issue implicated was “not about ineffective assistance of counsel but the complete lack of available counsel during the entry of his guilty plea.” App. 105. The PCR court found specifically credible Mr. Williams’s “testimony that he wanted to speak with Counsel regarding his family members’ statements but was not aware he had the right or ability.” App. 105. It held that the deprivation was not only a constitutional violation, but also violated this Court’s order. App. 105. Based on this deprivation, the PCR court also granted PCR holding that the guilty plea was involuntarily made, finding that because of the inadequate and ineffective assistance of counsel, Mr. Williams could not have entered a guilty plea voluntarily.

¹ At the PCR hearing, the court refers to the April 14, 2020 order as being operative. That order was amended April 22, 2020, but the text of the relevant section was unchanged. *Compare Coronavirus Order, with RE: Operation of the Trial Courts During the Coronavirus Emergency*, S.C. Sup. Ct. Order dated April 14, 2020 (Shearouse Adv. Sh. No. 15, April 15, 2020).

ARGUMENT

The State seems to recognize that the denial of counsel at a critical stage is a structural error that defies a prejudice finding but concludes Mr. Williams’s clear lack of access to counsel is in some way different. It instead contends that perhaps there was a way for them to communicate, and the fact that no one bothered to tell Mr. Williams—the person whose right is at issue—is inconsequential. That simply makes no sense. Mr. Williams was not given the opportunity to communicate with his counsel during the entirety of his guilty plea and it was therefore taken in violation of both constitutional and state law. PCR was therefore properly granted, and this Court should deny the State’s petition.

“In a PCR case, this Court will uphold the PCR court’s factual findings if there is any evidence of probative value in the record to support them.” *Mack v. State*, 433 S.C. 267, 272, 858 S.E.2d 160, 162 (2021). Conversely, the Court “will not uphold the findings when there is no probative evidence to support them [and] will reverse the PCR judge’s decision when it is controlled by an error of law.” *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

Under the Sixth Amendment of the United States Constitution, the “‘right to counsel is the right to effective assistance of counsel.’” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). “The Sixth Amendment right of a defendant to be present at trial best ensures the right to consult with counsel and to confront adverse witnesses.” *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001). “The presumption that counsel’s assistance is essential requires [the Court] to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.” *United States v. Cronin*, 466

U.S. 648, 659 (1984). This is because “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” *Id.* at 654 (1984).

“[A] petitioner asserting a claim of ineffective assistance of counsel must demonstrate either that he was denied counsel at a critical stage of the proceedings or establish the requirements set forth in *Strickland*.” *McKnight v. State*, 320 S.C. 356, 358–59, 465 S.E.2d 352, 353 (1995) (alteration in original) (quoting *Green v. Arn*, 615 F. Supp. 1231, 1235 (N.D. Ohio 1985) (subsequent history omitted)). “Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” *Strickland*, 466 U.S. at 692.

At the outset, the record makes plain that the trial court wholly failed to follow the mandate of this Court in accepting the virtual guilty plea. This Court’s order, which was issued pursuant to the S.C. Const. art. V, § 4, prescribed that the trial court **must**:

- “make a determination that the defendant is knowingly and intelligently waiving his right to be physically present for the plea”;
- “determine that the defendant is knowingly and intelligently waiving any right to have counsel physically present,” and “ensure that the defendant has the ability to consult privately with counsel during the plea proceeding as may be necessary”; and
- “find that the defendant is knowingly and intelligently waiving any right to have [other persons who address the court or testify during the plea proceedings by remote communication technology] physically present for the plea.”

Coronavirus Order, at (d)(3). There is no evidence the trial court made *any* of these findings or determinations regarding Mr. Williams knowingly and intelligently waiving those rights recognized in the *Coronavirus Order*. Literally every caution commanded by this Court to ensure that a

defendant's rights were safeguarded during a worldwide pandemic was ignored.²

Of specific concern to the PCR court was Mr. Williams' inability to communicate with his counsel during the plea hearing. The PCR court properly found this deprivation entitled Mr. Williams to a grant of PCR under Section 17-27-20(A)(1) of the South Carolina Code because by violating his constitutional right to counsel and this Court's order, his "conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State." App. 105.

The State ignores the fact that the plea was conducted contrary to the *Coronavirus Order* and therefore the conviction and sentence were adjudicated in violation of state law. Although the PCR court grounded the grant of PCR on a Sixth Amendment violation, it additionally found that the lack of communication was in violation of the *Coronavirus Order*. App. 105. The State has not appealed, or even mentioned, this conclusion and it is therefore the law of the case. *Smith v. State*, 413 S.C. 194, 196, 775 S.E.2d 696, 697 (2015) (holding an unappealed ruling is the law of the case). This violation, along with the resulting prejudice discussed *infra*, present an additional ground on which this Court could affirm the PCR court's order.

And the arguments presented by the State fail. The State focuses on the constitutional

² Mr. Williams testified at the PCR hearing that plea counsel told him his plea would be virtual, but he was never informed he had a right to be physically present. App. 68. His plea counsel similarly testified he "explained to him that [they] would all be in different locations and that it would be virtual and that there was nothing [he] could do about it." App.81. That is wholly incorrect under the Court's order, which plainly acknowledges a defendant's right to be physically present for their plea. As evidenced by his PCR testimony on cross-examination, Mr. Williams felt uncomfortable with the virtual format but had no idea that there was an option for him to ask for an in-person hearing. Accordingly, plea counsel was deficient for failing to apprise Mr. Williams of his rights and requesting an in-person hearing, as Mr. Williams would have preferred. Although this issue was never explored below, it is additional sustaining ground apparent in the record. See 243(g), SCACR.

violation, attempting to reframe the issue as a failure of evidence that he was denied his right to speak to counsel, arguing “the record remains silent concerning the PCR court’s primary concern: whether a direct line of communication between Williams and Counsel existed” and suggesting that there must be evidence Mr. Williams was “explicitly forbidden from speaking with Counsel.” State’s Br. 7, 10. There are many rights waived during a guilty plea and whether a defendant was afforded due process is determined by considering whether those rights were voluntarily and intelligently waived, not whether they were actively withheld. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (“Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one’s accusers. We cannot presume a waiver of these three important federal rights from a silent record.” (citations omitted)). It is therefore incumbent upon a court to ensure the defendant is aware of their rights and has chosen to waive them, a process that should be on the record in the form of a colloquy with the court. *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) (“A defendant’s knowing and voluntary waiver of a statutory or constitutional right must be established by a complete record; and may be accomplished by colloquy between the court and the defendant, between the court and defendant’s counsel, or both.”).

The State nevertheless suggests he could have simply *interrupted* the court he is entreating for mercy in sentencing. State’s Br. 9 (“Williams never attempted to interrupt the proceedings and request the Court permit him to speak with Counsel.”). The assumption that a defendant should have the wherewithal to know and assert all his rights at trial is antithetical to our

jurisprudence consistently acknowledging that the right to counsel emanates from the reality that people do not generally know how to assert their rights or when they can, including the right to counsel.³ *Carnley v. Cochran*, 369 U.S. 506, 513(1962) (“[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.”); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (“The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused’s ignorant failure to claim his rights removes the protection of the Constitution.”). This well-established belief that a defendant is entitled to be informed of his rights to ensure they are not curtailed is further reflected in this Court’s order specifically instructing trial courts to ensure a defendant can privately consult with his counsel during the plea.

Furthermore, contrary to the State’s claims, evidence in the record supports the PCR court’s conclusion that there was a “complete lack of available counsel during the entry of his guilty plea.” App. 105. Mr. William’s testified he wanted to speak with counsel but was not aware he had the right or ability, and the PCR court found that testimony credible. App. 105. Plea counsel similarly testified that there was no evidence Mr. Williams knew that there was a way for him to contact his attorney and the trial court never offered to grant that opportunity. App. 82. (“[I]t’s a standard colloquy that judges give defendants that at any time should the defendant want to speak

³ The State similarly asked Mr. Williams at the hearing “why didn’t [he] interrupt the Court and state that [he] wanted to wait until [he] could have it in person.” App. 74. Mr. Williams was sitting alone with a Web-ex video, waiting to admit to guilt to a crime and beg for leniency. It is rather incredible to assume a person in that vulnerable situation would feel he is in any position to just pipe up and demand rights he does not know he has. Furthermore, the trial court was specifically charged with the duty to ensure a defendant is apprised of these rights and should not proceed absent a knowing and intelligent waiver.

with their lawyer that we have a system in place where there are phones at the jail . . . I didn't see that in the transcript.”). He further testified that “[i]n the virtual setting, absent the judge saying [he] could call [his] lawyer, [plea counsel did not] know what else could have been done about that.” App. 82. As the PCR court noted in its order, the State admitted there was no mention of private telephone communications between Mr. Williams and his counsel or that he had the right to privately confer with counsel during the plea. App. 77, 103. Accordingly, the PCR court's findings are well-supported by the record.

However, the State then contends that it was error for the PCR court to fail to engage in a prejudice analysis, and further asserts there was no prejudice. Although prejudice was certainly demonstrated, because Mr. Williams was denied of any ability to communicate with counsel for the entire hearing, prejudice is properly implied. Access to counsel is an essential part of ensuring defendant receives a fair hearing and that is the overarching concern of this analysis. *Cronic*, 466 U.S. at 658 (“[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.”). The question of prejudice is therefore undertaken where it is a necessary part of that ultimate inquiry of fairness. For that reason, the Supreme Court has acknowledged there are “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Id.* An established circumstance is the denial of counsel at a critical stage of trial. *See McKnight*, 320 S.C. at 360, 465 S.E.2d at 354.

Preventing a defendant from communicating with counsel has been recognized as an abridgement of the defendant's right to counsel that does not require a separate showing of prejudice. *Geders v. United States*, 425 U.S. 80, 92–93 (1976) (Marshall, J., concurring) (“[A]

defendant who claims that an order prohibiting communication with his lawyer impinges upon his Sixth Amendment right to counsel need not make a preliminary showing of prejudice. Such an order is inherently suspect, and requires initial justification by the Government.”); *see also Coplton v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951) (“It is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.”). The facts here are unusual, but the issue not unforeseen. The problems should have been avoided by the trial court following this Court’s directives, which were surely designed to prevent the need for this type of litigation. Yet though the issue arises in distinct circumstances, the nature of the deprivation is familiar. Mr. Williams was denied the assistance of counsel during the entry of his guilty plea by virtue of his inability to communicate privately with his attorney throughout the hearing. Accordingly, because communication with counsel is an indelible part of the right to counsel, Mr. Williams does not need to show prejudice to demonstrate he did not receive a fair hearing.

Still, even if this Court disagrees, prejudice is apparent in the record. No one expected his family to speak with the vitriol that specifically characterized the testimony of Mr. Williams’s sister-in-law and his half-sister. Although the State passes it off by stating Mr. Williams “knew his family would speak against him,” content matters. Specifically, his half-sister’s statements made him out to be a violent monster since childhood, yet Mr. Williams stated he did not meet her until he was fourteen and she did not have a relationship with his father (the victim) or the family, even though she characterized her testimony as borne out of concern for them. App. 64. He was unable to share that with his counsel to mitigate the impact of her testimony. He was similarly blindsided by his half-sister and his sister-in-law spoke extensively about how damaging his presence was to

his young daughter and they literally asked the court to keep him in jail to get her away from him. App. 64. Although the State tries to downplay the need for discourse by stating plea counsel was not surprised by the statements, plea counsel testified he “didn’t think they would refer to his daughter thinking he was the devil” or discuss how she had been traumatized by this and other events. App. 81-82. Plea counsel had no way of addressing those issues because he had no independent knowledge of whether those statements were true. *See* App. 91. Because Mr. Williams had no opportunity to discuss with plea counsel how to deal with those characterizations, they were not squarely addressed. Furthermore, Mr. Williams and his counsel could have discussed attempting to withdraw the plea considering the comments and his father’s decision not to speak. The PCR court specifically found that a private conference between plea counsel and Mr. Williams “may have changed the outcome of the hearing.” App. 106. Or they could have determined it would be helpful to invite his father to speak on his behalf to soften the language of the rest of the family since he was the victim and to clarify he did *not* want his son to receive the maximum despite the fact Casey stated “we” request the maximum, which Brandy echoed in saying he needed to stay in jail.

CONCLUSION

Mr. Williams was denied multiple rights during his guilty plea, including his right to consult with counsel and he was therefore denied effective assistance of counsel. The PCR court therefore properly granted him relief, and he respectfully asks that this Court deny the State’s petition.

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February 7, 2023