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**Feb 16 2023**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

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DeANGELO BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001395

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PETITION FOR WRIT OF CERTIORARI

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## **ISSUE PRESENTED**

Whether the PCR court erred finding petitioner's guilty plea was voluntary where he relied on erroneous advice of defense counsel and where defense counsel now admits petitioner could not have made a voluntary, knowing, and intelligent guilty plea based on the inaccurate advice she gave him?

## STATEMENT

In November 2015, a Charleston County grand jury indicted petitioner for possession with intent to distribute (PWID) heroin. App. 168. In December 2015, a Charleston County grand jury indicted petitioner for resisting arrest, obstruction of justice, and PWID cocaine. App. 170; 172; 174. On April 13, 2016, petitioner pled guilty before the Honorable R. Markley Dennis, Jr., to obstruction of justice, PWID heroin, PWID cocaine, and resisting arrest. App. 1-24.<sup>1</sup> Petitioner was represented by Melissa Gay and the state was represented by assistant solicitor, Charles Condon and assistant solicitor, Scott Maynor. App. 1.

Judge Dennis sentenced petitioner to concurrent terms of fifteen years' imprisonment for PWID heroin; fifteen years' imprisonment for PWID cocaine; three years' imprisonment for obstruction of justice; and one year imprisonment for resisting arrest. App. 22-23.

Thereafter, petitioner filed an application for PCR. App. 25-36. On December 9, 2021, an evidentiary hearing was held before the Honorable Jennifer B. McCoy. App. 39-94. Testimony continued in front of Judge McCoy on February 23, 2022. App. 114-43. Petitioner was represented by Tommy Thomas and the state was represented by assistant attorney general, Lauren Mims and assistant attorney general, Samantha Weidauer. App. 39; 114.

On May 9, 2022, Judge McCoy signed an order denying PCR. App. 144-59. The court held petitioner's plea was not involuntary finding that "the plea transcript reflect[ed]" petitioner knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty. App. 152. The court found petitioner had knowledge of the report that showed there was an insufficient amount of suspected cocaine powder for testing

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<sup>1</sup> The guilty plea hearing reflects that the state dismissed a firearm charge. App. 2, ll. 2-4. However, the order of dismissal does not state what the charge was, and petitioner does not have the indictment.

prior to his plea and still represented that he was guilty and agreed to the state's recitation of the facts. App. 156. Additionally, the court found that despite defense counsel's testimony to the contrary she was not deficient in this case and petitioner was not prejudiced where he received a substantial benefit in exchange for his guilty plea. App 157.

Petitioner made a motion to amend and reconsider on May 19, 2022. Judge McCoy denied petitioner's motion on May 23, 2022.

This petition follows.

## ARGUMENT

The PCR court erred finding petitioner's guilty plea was voluntary where he was induced to plead guilty based on the erroneous advice of defense counsel and where defense counsel now admits petitioner could not have made a voluntary, knowing, and intelligent guilty plea based on the inaccurate advice she gave him.

### *Guilty plea hearing*

During petitioner's guilty plea hearing the court asked the solicitor directly if "the drugs were analyzed and [were] what they claim[ed] to be, heroin and cocaine?" App. 15, ll. 5-8. The solicitor responded, "[t]hat's correct . . . [e]ighteen [baggies] were cocaine [] [t]hree were heroin." App. 15, ll. 9-12. The solicitor continued with the recitation of the facts alleging that petitioner was pulled over for a traffic violation and was found in possession of drugs. He claimed petitioner resisted arrest, including putting drugs in his mouth, and refusing to give them up. The solicitor said petitioner was taken to the hospital and he "chewed" some of the drugs but spit some drugs out. He also asserted petitioner made phone calls from the detention center where petitioner admitted having faked a seizure in the back of the police vehicle and "had in excess of ten grams of cocaine in his mouth." App. 15, ll. 9-25. However, the state failed to admit any evidence of the phone calls during the guilty plea.

The state agreed to dismiss a charge related to a gun found in the car when petitioner was pulled over but otherwise petitioner pled guilty without negotiation or recommendation. App. 10, ll. 6-19. The gun was registered to petitioner's girlfriend who owned the car he was driving at the time of the arrest. App. 18, ll. 3-5.

Defense counsel told the court that she had done an independent investigation in the case and based on that she agreed with his decision to enter a plea of guilty. App. 12, ll. 19-21. The

transcript indicates that petitioner's trial was to begin that day a jury had been selected and defense counsel had made pretrial motions before it turned to a guilty plea. App. 11, ll. 1-10.

*Evidentiary hearing*

Petitioner testified that after his arrest he hired Melissa Gay to represent him. App. 45, l. 9-46, l. 2. Petitioner asserted that his defense in this case was that the stop was improper because he did not commit a traffic violation. App. 46, ll. 15-22. Petitioner testified Ms. Gay did not represent him on the traffic violation charges and that he was found not guilty of the traffic violation after he pled guilty on the charges at hand. App. 48, l. 10-49, l. 17.

Petitioner maintained throughout his testimony that he had planned to go to trial on these charges but for defense counsel Gay's advice to plead guilty. App. 50, ll. 6-11; 52, ll. 10-17; 66, ll. 13-17; 70, ll. 9-12; 75, l. 3-76, ll. 10; 78, ll. 2-8. 80, ll. 11-19; 83, l. 25-84, l. 2. Petitioner testified that although Gay had seen all the forensic reports<sup>2</sup> regarding the drug analysis, she advised him that the state would not drop the charge of PWID cocaine. App. 63, l.6-66, l. 24. Gay continued to recommend petitioner plead guilty assuring him that this was the best outcome for him versus going to trial. App. 67, ll. 8-12.

Melissa Gay testified that she did not believe petitioner made the decision to plead guilty voluntarily where he did not understand the consequences of his guilty plea and where he did not have accurate information.<sup>3</sup> Ms. Gay acknowledged that she did not advise him correctly regarding the charge of PWID cocaine. She explained that at the time she most likely advised him that it was best for him to plead guilty to obstruction of justice, PWID heroin, PWID cocaine, and resisting arrest in the context of all of the charges he was facing but she now

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<sup>2</sup> App. 95-113.

<sup>3</sup> Ms. Gay began her testimony at the first evidentiary hearing, but the court ultimately continued it until another day so that she had the opportunity to review the file and was prepared to testify. App. 90-93.

understands that the state could not have prosecuted a case of PWID cocaine, and she should not have advised him to plead guilty. App. 123-24. She admitted that she should have handled this case differently because it is clear petitioner could not have been convicted where there was no evidence of cocaine. App. 126. She admitted that while she had the forensic report, she did not give petitioner the “right information” at the time of his guilty plea. App. 128, ll. 3-20.

### *Discussion*

The PCR court erred finding petitioner “knew the nature of the charges against him, the terms of the plea agreement, and the consequences of pleading guilty,” where defense counsel, Melissa Gay, testified unequivocally that she gave petitioner inaccurate information, and he therefore could not make a voluntary, knowing, and intelligent guilty plea.

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 he or she is waiving. *Id.* Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) and *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). 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.* *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999).

Counsel was admittedly deficient where she advised petitioner to plead guilty to a charge

that she testified was not prosecutable. The PCR court found counsel's testimony credible regarding her frequency of visits with petitioner, her preparation for trial, and her discussion of the case with petitioner. However, the court found counsel's testimony and opinion of her own actions as counsel were "not probative." Moreover, the order mischaracterized the testimony of counsel which was simply that in hindsight she misadvised him about PWID cocaine specifically and admits that she should not have advised him that pleading guilty was in his best interest. Her testimony was not, as the order stated, that she believed she was ineffective for failing to negotiate the plea offer due to the insufficient amount of suspected cocaine available for testing.

The record is replete with probative evidence that defense counsel Gay was deficient where she advised petitioner to plead guilty to a crime which the state could not have prosecuted, which rendered petitioner's guilty plea invalid. Petitioner testified counsel advised him that pleading guilty was the best course of action even where counsel had the forensic report showing there was no evidence of cocaine. Counsel readily admitted she misadvised petitioner. Petitioner supplemented his testimony with exhibits that corroborated his and counsel's testimony. None of this was cured by the plea court where the court was wrongly told by the state that the substance found *had been tested and was cocaine*.

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984). *Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367,

370 (1997).

Counsel Gay testified that she advised petitioner from a “global” perspective that pleading guilty to the four charges would benefit him. The PCR court noted that petitioner did benefit from the dismissal of the gun charge related to this incident. However, petitioner had a defense to the gun charge and was prepared to go to trial. The state’s dismissal of that charge was not the sole inducement for petitioner to plead guilty. Counsel’s testimony corroborated petitioner’s that he was advised to plead guilty when he should not have been. It is clear from both petitioner and counsel’s testimony and from the forensic reports admitted as exhibits that the state could not have prosecuted a case of PWID cocaine where there was an insufficient amount of substance to analyze.

Petitioner was prejudiced where there is a reasonable probability that but for counsel’s misinformation, he would not have pled guilty and would have insisted on trial. Petitioner testified to that over and over in the evidentiary hearing. It is apparent from the transcript of the guilty plea hearing petitioner was prepared to go to trial the very day of his guilty plea. Petitioner entered exhibits at his hearing that supported his own testimony and that of counsel that there was no evidence of cocaine.

**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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Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of February, 2023.