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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Robert J. Bonds, Circuit Court Judge

MATTHEW M. OLIVER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001386

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by the fact that on the morning of trial counsel advised Petitioner that the jury had been selected without Petitioner present, that the jury picked was all white, that it was impossible to be found not guilty by this jury, and, if found guilty, the judge would impose a sentence of 105 years?

STATEMENT

In September of 2014, the Dorchester County Grand Jury indicted Petitioner, Matthew Miguel Oliver, for trafficking in methamphetamine over 400 grams and trafficking in cocaine base over 28 grams but less than 100 grams, indictments #2014-GS-18-861, 862. (App. pp. 47-50). In May of 0f 2017, the Dorchester County Grand Jury indicted Petitioner for trafficking in cocaine over 400 grams. (App. pp. 51-52). On June 13, 2017, Petitioner appeared before the Honorable Diane Schafer Goodstein and pled guilty to the lesser included offense of trafficking in methamphetamine over 28 grams but less than 100 grams, as charged on trafficking in cocaine base over 28 grams but less than 100 grams, and the lesser included offense of trafficking in cocaine, over 28 grams but less than 100 grams. Petitioner also pled guilty to possession with intent to distribute marijuana but that charge was not included in the post-conviction relief [PCR] application. (App. p. 140, n. 1). Three weapons charges were dismissed. (App. p. 11, lines 16-23). Michael T. Bolus[1] represented Petitioner at the plea. Ryan D. Templeton prosecuted the case. Pursuant to a negotiated range of sentence with the State of between fifteen (15) and twenty (20) years, Judge Goodstein sentenced Petitioner to seventeen (17) years concurrent on each charge. (App. p. 3, lines 10-11, pp. 53-55). The notice of intent to appeal was not filed.

On June 1, 2018, Petitioner filed a PCR action that was not signed or notarized. (App. pp. 56-71). On June 14, 2018, Petitioner filed a second application identical to the first except signed and notarized. (App. p. 72, n. 1). The PCR judge merged the two applications and treated the second as an amendment. (App. p. 89, lines 7-25). The State filed a return and partial motion to dismiss on September 3, 2020. (App. pp. 72-82). On May 16, 2022, an evidentiary hearing was held before the Honorable Robert J. Bonds. Leslie Therese Sarji represented

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[1] Plea counsel Michael T. Bolus passed away before the PCR hearing. (App. p. 88, lines 5-16).

Petitioner at the PCR hearing. Samantha Jo Weidauer represented the State. In a written order signed On September 19, 2022, Judge Bonds denied relief and dismissed the application. (App. pp. 138-158). A timely notice of intent to appeal was filed on October 4, 2022. This petition for writ of certiorari follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by the fact that on the morning of trial counsel advised Petitioner that the jury had been selected without Petitioner present, that the jury picked was all white, that it was impossible to be found not guilty by this jury, and, if found guilty, the judge would impose a sentence of 105 years.

At the beginning of the PCR hearing PCR counsel told the judge, "We also intend to proceed on the basis that his plea was rendered involuntary by undue pressure that Mr. Bolus put on him to plead guilty; erroneous information that he gave my client. As far as the posture of the case, and just sort of a heads up, Mr. Bolus informed my client – and I believe the testimony will bear this out – that he had already picked a jury and that there was no way he could win with the jury that he had gotten." (App. p. 87, line 22 – p. 88, lines 1-4).

At the PCR hearing the assistant solicitor who prosecuted the case testified that on the morning of trial, after the defense lost a suppression motion, they were ready for trial but never selected a jury. (App. p. 119, line 22 – p. 120, lines 1-25). The assistant solicitor confirmed that a jury panel was present but no jury was selected. (App. p. 123, line 20). The assistant solicitor testified that he intended to revoke the plea offer at the suppression hearing but decided not to. (App. p. 128, lines 17-19).

At the PCR hearing Petitioner testified, "At the time I went to court on June 13th, 2017, I was there scheduled for my trial. I wasn't there for a plea. All pleas had expired by that point." (App. p. 91, lines 15-17). Petitioner further testified:

> When I got to the courthouse, I was in the holding cell waiting for my mother to give me the change of clothes so that I could go in and pick my jury. Before I was able to even change into my clothes, my lawyer came in and advised me that

> the jury had already been picked without my presence; that it was an all-white[2] jury; and I couldn't win; that if I go into court and proceed with the proceedings and I would lose then I would get 105 years consecutively; that my best bet was to take 17 years.
>
> I told him, Let's proceed with trial. From that point he left. My mother comes into the visiting room, which kind of threw me off. I'm like, I don't even want to see you right now. She's like, Hey, you need to listen to what the lawyer's saying. This is what's going on. The only black face in the room was the bailiff.

(App. p. 91, line 23 – p. 92, lines 1-11).

During the PCR hearing counsel for the State asked Petitioner, "So on the day of your plea you did want to take advantage of that negotiated range, is that your testimony here today?" (App. p. 107, lines 8-9). Petitioner answered:

> Initially, no. After my lawyer's advice, after my lawyer's counsel, after my lawyer notifying me that the jury had already been selected with me and it was impossible for me to win, yes, I wanted to exercise that option then. But before then, when I was already ready for trial without any manipulation, without 105 years, an all white jury, and all of those things, I was in there, set, ready to go to trial, and for the fact that my lawyer did not tell me the things that he told me, without a doubt in my mind we would have went to trial.

(App. P. 107, lines 10-18).

Petitioner's mother testified that counsel told her that her son could not win with this jury and that her son would receive a sentence of a 105 years. (App. p. 111, line 21 – p. 112, 113, 114, lines 1-20). She testified that when she told her son what the lawyer said a bailiff was also present. (App. p. 114, lines 9-13). She testified, "The bailiff said, I've worked here 25 years. You're not going to get off with this jury. You're not going to – it's not going to work. You're going to get 105 years." (App. p. 114, lines 15-17). On cross examination the mother agreed that she assumed a jury had not yet been picked. (App. p. 115, line 23 – p. 116, lines 1-2). Petitioner, however, believed a jury had been picked. (App. p. 92, lines 1-5). Petitioner's

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[2] The South Carolina Department of Corrections Inmate locator lists Petitioner's race as black.

mother testified that she believed Petitioner had been misled and coerced. (App. p. 116, lines 13-15).

In denying relief the PCR judge wrote in the order of dismissal:

> The plea court entered into a thorough colloquy with Applicant. Specifically, Judge Goodstein explained to Applicant the constitutional rights he waived by pleading guilty, including the right to: remain silent, against self-incrimination, challenge the State's evidence, have counsel cross-examine witnesses, present a defense, challenge any searches or seizures Applicant did not believe appropriate, and the right to a jury trial. (Plea Tr. 26-28). Applicant informed the plea court he understood he waived those rights and others not enumerated when pleading guilty. (Plea Tr. 28). Applicant also informed the plea court he understood the charges he was pleading to and indicated he understood the minimum and maximum sentence associated with the charge (Plea Tr. 15-16,21-23,25). Judge Goodstein further informed Applicant two of the offenses he was pleading to were classified as violent and most serious. (Plea Tr. 13-18). Applicant advised the court he had not been threatened, intimidated, or promised anything in exchange for his guilty plea and confirmed that he had had enough time to make up his mind. (Plea Tr. 31-32). When questioned whether he had been truthful with the court in his answering of the Court's question. (Plea Tr. 35). Applicant further indicated all answers had been his own. (Plea Tr. 35). Though Applicant told the plea court he wished he could have spoken with Counsel longer, he further testified he believed Counsel had investigated his case. Counsel had done everything he should have and could have done to properly represent Applicant, and indicated he was fully satisfied with Counsel's representation. (Plea Tr. 32-33). Additionally, this Court finds that Applicant throughout the plea transcript confirmed he understood he was present to plead guilty and that that was his intention.
>
> This Court fmds the plea transcript reflects Applicant understood the proceedings, interacted intelligently with the plea court, and entered his guilty plea knowingly and Applicant has failed to present any valid reason why he should be able to depart from the above statements made during his guilty plea. See Crawford v. United States, 519 F.2d 347,350 (4th Cir. 1975), overruled on other grounds by United States v. Whitley, 759 F.2d 327 (4th Cir. 1985) (finding that the accuracy and truth of an accused's statements at a guilty plea proceeding are "conclusively" established unless he makes some reasonable allegation why this should not be so).
>
> Based on the foregoing, the record contradicts Applicant's assertion his plea was involuntary as a result of ineffective assistance of counsel. Thus, based on the evidence presented at tie PCR hearing ^d the record of the plea proceeding, this Court finds Applicant's plea was freely, knowingly, and voluntarily entered into. Accordingly, Applicant's request for relief by way of this allegation is DENIED.

(App. pp. 156-157). The PCR judge erred. Plea counsel was ineffective in advising Petitioner that an all white jury had already been selected outside of Petitioner's presence and that Petitioner could not be acquitted by this jury. This coupled with the comments by the bailiff and the threat of consecutive time rendered the guilty plea involuntary.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full

understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

At the time of the PCR hearing plea counsel had passed away and could not testify. (App. p. 88, lines 5-16). The assistant solicitor confirmed that a jury panel was present but no jury was selected. (App. p. 123, line 20). Petitioner, however, did not know that the jury had not yet been selected. Petitioner testified that on the morning of trial counsel advised Petitioner that the jury had been selected without Petitioner present, that the jury was all white, that it was impossible to be found not guilty by this jury, and, if found guilty, the judge would impose a sentence of 105 years. (App. p. 91, line 23 – p. 92, lines 1-11). Petitioner's erroneous belief

that a jury had been selected without him present continued during the plea colloquy when the plea judge told Petitioner, "And Mr. Oliver, if you wanted a jury trial, you would have a jury trial. And in fact, that jury trial it would be left up to you whether you wanted to testify or not testify. And if you chose to go to trial and not testify – **and the jury is downstairs and I was scheduled to try this case.**" (App. p. 27, lines 12-16, emphasis added).

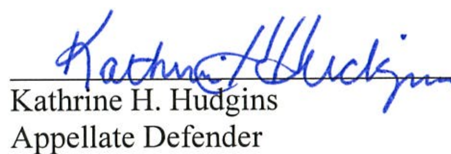
Plea counsel's erroneous advice that an all white jury had been selected without Petitioner present rendered the guilty plea involuntary. The error was compounded by the comments of the bailiff and the threat of consecutive sentencing.[3] Petitioner testified that, but for counsel's erroneous advice, he would not have pled guilty and would have insisted on going to trial. (App. p. 107, lines 10-18).

The erroneous advice given by plea counsel is analogous to the incorrect sentencing advice given in Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) and the incorrect parole eligibility advice given in Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). As in the Alexander and Hinson, the erroneous advice in the present case requires a new trial. The PCR judge erred in refusing to grant relief.

[3] The plea judge correctly advised Petitioner that his maximum sentence exposure was 95 years. (App. p. 22, lines 11-12).

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



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This 15th day of March, 2023.