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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Charleston County

Honorable G. Thomas Cooper, Circuit Court Judge

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JARRET GRADDICK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000448

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# BRIEF OF PETITIONER

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## ISSUE PRESENTED

Whether the PCR court erred in denying relief, where Petitioner was coerced into pleading guilty under Alford by plea counsel and the plea judge, where the plea judge opined that Petitioner would die in prison unless he pleaded guilty, and where his resulting plea was neither freely nor voluntarily made?

## STATEMENT

Petitioner was indicted on two kidnapping charges and two armed robbery charges by a Charleston County grand jury on April 9, 2012. App. 163 – 170. Petitioner maintained his innocence throughout the process. App. 20 ll. 11 – 13. On July 7, 2014, he pleaded guilty before the Honorable Roger M. Young, Sr. App. 1. Jennifer Shealy appeared on behalf of the state, and Andrew Grimes represented Petitioner. At the time of the plea, Petitioner was already incarcerated. App. 2 ll. 5 – 14. At the outset of the plea, Petitioner moved to have plea counsel relieved.[1] App. 2 ll. 5 – 17. In response, the plea judge characterized the plea offered by the state as "quite significant" and explained the three-strike concept. App. 2 l. 24 – App. 3 l. 21. Continuing to try and convince Petitioner to take the plea, the court calculated how long Petitioner had to serve and suggested that if he accepted it, he would have "a possibility of getting out and going to the movies and getting married and having a family." App. 4 l. 17 – App. 7 l. 5.

After a break and subsequent discussion with plea counsel, Petitioner pleaded guilty under Alford.[2] The terms of the plea as outlined by the state were that Petitioner would receive a sentence of twenty years to be served concurrent to one another and his previous sentence. App. 11 ll. 12 – 23. Before imposing a sentence, the plea court assured Petitioner it was a "good offer" for him to accept. App. 21 ll. 15 – 20. The plea court then sentenced Petitioner to twenty years' concurrent. Id.

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1 The plea judge never ruled on the motion. During the plea colloquy, Petitioner indicated that he was "[n]ot really" satisfied with plea counsel's representation. App. 13 ll. 10 – 12.

2 North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Petitioner filed an application for post-conviction relief on February 2, 2017. App. 24 – 57. It contained allegations of ineffective assistance of counsel as well as "coerced guilty plea." App. 26. The state made its Return on or about July 6, 2017. App. 58 – 65.

An evidentiary hearing was held on December 3, 2018 before the Honorable G. Thomas Cooper, Jr. App. 66. James Falk represented Petitioner, and Kelly Oppenheimer appeared on behalf of the state. Petitioner, his two co-defendants: Preston Swinton and Kenneth Murray, and the solicitor testified at the hearing.[3]

The PCR court took the matter under advisement and requested proposed orders. App. 139 l. 25 – App. 140 l. 8. An Order of Dismissal was filed on March 13, 2019. App. 145 – 162.

This petition follows.

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[3] Plea counsel passed away prior to the hearing.

## STANDARD OF REVIEW

The PCR court's findings of fact are entitled to deference and will be upheld when there is any evidence of probative value to support them. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Reversal is warranted where no evidence of probative value supports the PCR court's decision. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999). Questions of law, are reviewed *de novo*, and an appellate court will reverse when the PCR court's decision is controlled by an error of law. Jordan, supra.

## ARGUMENT

**The PCR court erred in denying relief, where Petitioner was coerced into pleading guilty under Alford by plea counsel and the plea judge, where the plea judge opined that Petitioner would die in prison unless he pleaded guilty, and where his resulting plea was neither freely nor voluntarily made.**

Relevant facts

At every turn, Petitioner was coerced into accepting the plea. The plea judge spoke at length about why Petitioner should plead guilty. Plea counsel strongly encouraged Petitioner to plead guilty. On the day of the plea, Petitioner felt as if he had no choice; he felt pressure from the court, his counsel, and the prosecution which resulted in an involuntary guilty plea.

The plea judge opined on Petitioner's chances on appeal and listed multiple reasons why he thought Petitioner should accept the plea:

> I know you're in a place right now that you don't want to be, but I don't think you're going to be getting out of there anytime soon, because if you got a new trial, they're just going to bring you back and try you, go through all that again, and you may or may not get the same 20-year suspended, but it's going to be a few years before anything good can come out of your current situation, best case scenario.
>
> Now, the State has said in this offer to you that they will give you, or they will ask the judge to sentence you, to 20 years and let that run concurrent with the current sentence that you're doing. All right? So that means you don't have to worry about life without parole. That means, roughly, you know, when you are around 40 years old or so, you will get out.
>
> That means get out of jail, and as long as you don't commit any other offenses, you'll get to enjoy life just like everyone else, but if you get convicted of one of these charges that you're facing at the end of this month, getting out and going to the movies, getting married, going to see ball games, having a family, that's never going to be an option for you.
>
> You will spend the rest of your life in jail until you are a very old man and die of old age or you get killed in prison, but going out the way normal people do, that's not going to be an option to you if you get convicted at the end of this month. So

> in less than 30 days, you'll know the answer. Most people don't know the answer of that they'll be doing at the end of their life, but - - how you will die, I don't know, but where you will die, I got a pretty good idea: It will be in prison.

App. 5 l. 10 – App. 6 l. 15. The plea judge then plainly asked Petitioner why he would elect to go to trial rather than proceed with the plea. App. 6 l. 16 – App. 7 l. 10. In response, Petitioner unambiguously responded that he was innocent and not involved with any of the alleged crimes. App. 7 ll. 11 – 12. His co-defendants would testify accordingly at the evidentiary hearing in his post-conviction relief matter. The plea court then broached the subject of an Alford plea while simultaneously suggesting that going to trial would be a bad decision:

> Well, that's a good reason. That is a perfectly good reason, and if you didn't do it, I can't say that I blame you and go to trial. But there is a downside to making a bad decision. You can - - Mr. Grimes can tell you, you can make a plea called an Alford plea in which you stand up before the judge and say, I didn't do it. I am innocent of these charges, but the State has made me a really good offer, and I need to take that offer because the downside to not taking this offer is bad. And so even though I'm telling you, Judge, exactly what you just told me, I didn't do it, I want you to just give me that 20-year sentence anyway because I'm already doing 20. **It's a no-brainer**.

App. 7 ll. 13 – 25 (emphasis added). Petitioner noted that he had never been informed of this option. App. 8 ll. 1 – 2. Adding force to the push to get Petitioner to plea, the plea judge indicated he was unlikely to grant Petitioner's motion to relieve his attorney. App. 8 ll. 3 – 16. Soon thereafter, the plea judge found that Petitioner's plea was freely, voluntarily, and intelligently made. App. 16 ll. 19 – 21.

The court then heard the allegations as set forth by the state. App. 16 l. 23 – App. 18 l. 13. According to the solicitor, three masked men robbed the former Piggly Wiggly in Mount Pleasant on July 25, 2011. Id. The state contended Petitioner was one of those men. App. 18 ll. 14 – 18.

At the evidentiary hearing, Petitioner remarked that the plea judge's comments, among other things, led him to plead guilty. App. 90 ll. 11 – 22. When asked by the PCR court why he wanted his PCR application to be granted, Petitioner offered a simple but resounding answer: "I honestly did not do this crime." App. 93 ll. 7 – 12.

Plea counsel only met with Petitioner three or four times on these charges. App. 73 ll. 4 – 5. Although Petitioner repeatedly professed his innocence, plea counsel suggested that he plead guilty. As Petitioner plainly set forth at the evidentiary hearing and as established at his plea, he did not want to plead guilty. App. 73 ll. 15 – 19. Nonetheless, both plea counsel and the plea judge coerced him into pleading. App. 75 ll. 4 – 16; App. 78 ll. 12 – 19.

Justin Hembry, a sergeant with the Mount Pleasant Police Department, was similarly responsible for injecting coercion into Petitioner's case. App. 76 l. 13 – App. 77 l. 7. Preston Swinton was one of Petitioner's co-defendants. App. 95 l. 25 – App. 96 l. 16. At the evidentiary hearing, Swinton admitted to being present at the Piggly Wiggly and noted that Petitioner was not there. Id. Swinton's statement suggesting Petitioner was at the Piggly Wiggly was not only coerced by Hembry, it was written by him as well; Swinton only signed it. App. 96 l. 17 – App. 98 l. 22; App. 100 ll. 10 – 23. Furthermore, Swinton's statement was taken after he had requested counsel. App. 102 l. 15 – App. 103 l. 3. Swinton testified repeatedly that Petitioner was not there. App. 98 ll. 6 – 8.

Kenneth Murray was Petitioner's other co-defendant. App. 106 l. 21 – App. 107 l. 18. His charges were dismissed by the solicitor. App. 109 ll. 8 – 13. Similar to Swinton, Murray indicated that Petitioner was not there. Id. Also comparable was Hembry's coercion of Murray. Id. Murray was held at the police station for over ten hours in handcuffs until he gave an involuntary statement. Id. He was neglected and not provided food or water. App. 115 l. 18 –

App. 116 l. 3. When the solicitor was unable to coerce Murray into pleading, his charges were dismissed. App. 117 ll. 1 – 15.

The solicitor noted that she met with Petitioner and his counsel. App. 16 l. 23 – App. 17 l. 12. She refused to offer anything less than a twenty-year sentence, despite Petitioner's request. Id. As such, Petitioner felt as if he had no other option but to plead guilty under Alford.

The Order of Dismissal denied relief as to this allegation, finding Petitioner entered into the plea freely, voluntarily, and intelligently. App. 159 – 162.

Discussion

A coerced plea violates a defendant's fundamental constitutional rights. Waley v. Johnston, 316 U.S. 101, 104, 62 S.Ct. 964, 86 L.Ed. 1302 (1942). "By encouraging a particular agreement, a judge may feel personally involved and thus, resent the defendant's rejection of his advice." U.S. v. Cannady, 283 F.3d 641 (4th Cir. 2002) (quoting United States v. Daigle, 63 F.3d 346, 348 (5th Cir. 1995).

"[W]hen a [petitioner] claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, [he] can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " Lee v. United States, 137 S.Ct. 1958, 1965, 198 L.Ed.2d 476 (2017) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

"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, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 208 (1985) (citations omitted). The United States Supreme Court has declared that "[w]aivers of

constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747, 756 (1970). In Brady, the Court declined to hold that "a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." Id. at 751, 90 S.Ct. at 1470, 25 L.Ed.2d at 758.

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea. Boykin v. Alabama, 395 U.S. 238, 241, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000).

Our Supreme Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

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, 89 S.Ct. 1709, 23 L.Ed.2d 274 (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. The South Carolina Supreme 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.

Similar to Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999), the plea judge here did not advise Petitioner of the crucial elements of the charged offenses. Coupled with the above, this renders Petitioner's plea involuntary. A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged. Brady, 397 U.S. 742, at 748, 90 S.Ct. 1463, at 1468, 25 L.Ed.2d 747; McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1170—1171, 22 L.Ed.2d 418 (1969). That admission may not be compelled. Since the plea is also a waiver of trial and a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant—it must be an intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.' Brady v. United States, 397 U.S., at 748, 90 S.Ct., at 1469, 25 L.Ed.2d 747.

In Rolen v. State, our Supreme Court held counsel was deficient in failing to move to withdraw Petitioner's guilty plea. 384 S.C. 409, 683 S.E.2d 471 (2009). Rolen requested a jury trial and only decided to plead guilty after counsel advised him that the impaneled jury would likely find him guilty. Petitioner repeatedly asserted his innocence during the plea hearing before the plea judge sentenced him. The Court held that "at this point in the hearing, it was clear that Petitioner wanted to withdraw his guilty plea." Id., 384 S.C. 409, 413, 683 S.E.2d 471, 473–74 (2009).

A trial just may participate in the plea bargaining process if he follows guidelines to minimize the fear of coercion. Those guidelines come from the American Bar Association and are set forth in Harden v. State of South Carolina, 276 S.C. 249, 277 S.E.2d 692 (1981). One of the guidelines includes the following prohibition:

> (f) All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694–95 (1981)

In the matter at hand, the plea judge interjected his personal opinions into the process and encouraged Petitioner to plead guilty. Petitioner was coerced by the plea judge's extraneous comments which impermissibly influenced his decision.

The plea court's participation in this case was inherently coercive. The remarks made to Petitioner from the plea court undoubtedly communicated to him that the judge desired a plea. This raised the possibility, even if only in Petitioner's mind, that a refusal to accept the plea judge's preferred disposition would be punished. Petitioner likely feared rejecting the plea, as

that could have decreased his chances of obtaining a fair trial before a judge whom he has challenged. Petitioner's charges could have been dismissed like Murray's had counsel investigated his case and advised Petitioner accordingly. Because that did not take place, and because Petitioner was coerced into pleading guilty, his plea was not freely, voluntarily, or intelligently made.

## CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse the PCR court's dismissal and grant him a new trial.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of December, 2022.