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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2019-CP-23-02586

Storm Riley Brian McCarthy,

Respondent,

v.

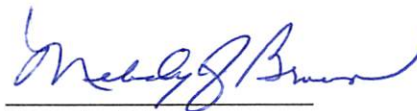
State of South Carolina,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order of the Honorable J. Mark Hayes, II *granting Post-Conviction Relief with Consideration of SCRCR Rule 59(e)* dated May 31, 2023, and filed on June 20, 2023. The state received a copy of the filed Order on June 20, 2023.

July 19, 2023



Melody J. Brown
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
Mbrown@scag.gov

Other Counsel of Record:
Matthew J. Kappel, Esquire
114 Whitsett Street
Greenville, South Carolina 29601
(864) 467-9595
matt@kappellaw.com

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Storm Riley Brian McCarthy)
)
vs.)
)
State of South Carolina,)
)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CA No.: 2019-CP-23-02586

**MODIFIED ORDER GRANTING
POST CONVICTION RELIEF
WITH CONSIDERATION OF
SCRCP RULE 59(e) MOTION¹**

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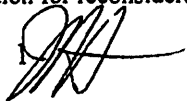
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SHERIFF'S OFFICE

Background

The Applicant is a citizen of South Africa and entered the United States with a tourist visa. On or about September 1, 2018, the Greenville County Sherriff's Office arrested the Applicant for Simple Possession of Marijuana (hereinafter "SPM") and Driving Under the Influence (hereinafter "DUI"). The Applicant appeared before the magistrate judge on October 9th without counsel. Prior to pleading guilty, the judge discussed, among other things, Applicant's right to a jury trial and Applicant's country of origin and his plans to travel in the US and return to South Africa. The Applicant waived his right to a jury trial and pleaded guilty to both charges. The Court sentenced Applicant to fines of \$420.00 and \$1,017.00, respectively.

Applicant filed this Application for Post-Conviction Relief on May 7, 2019 wherein Applicant alleged the magistrate judge erred in failing to advise him that his immigration status may be affected by pleading guilty. Applicant further alleged that had he known of the immigration consequences he would have pleaded not guilty and demanded a jury trial. The State filed a return on January 2, 2020 urging the court deny Applicant relief.

¹ In accordance with SCRCP Rule 59(f), the present motion for reconsideration is made without oral arguments.



Hearing

This court convened a hearing on January 22, 2020. The following individuals testified:
The Applicant, the magistrate judge, immigration lawyer Jessica Wallace and Joseph A. Lovelace of the Greenville County Sheriff's Office.

Immigration Lawyer

The Applicant offered Ms. Wallace an experienced immigration lawyer for the purpose of offering an opinion as to the immigration consequences to non-US citizens for criminal convictions for SPM and DUI. In particular, the Applicant wished Ms. Wallace provide the court an opinion of how these convictions would affect a foreign national in the United States on a tourist visa.

Ms. Wallace testified that she works for Ibrahim and Rao, LLP which is an immigration law firm out of Atlanta Ga. Ms. Wallace also testified that she has worked for approximately 8 years exclusively in immigration law and has previously appeared in post-conviction proceedings to offer testimony regarding immigration consequences for criminal convictions.

The State did not object to Ms. Wallace's testimony.

Ms. Wallace testified that a conviction for SPM and DUI would have negative immigration consequences for the Applicant. Ms. Wallace stated a conviction for SPM is by statute a crime of inadmissibility and would cause the Applicant to lose his visa. Applicant's only hope to escape the negative consequence for the SPM is to apply for a waiver, which is rarely granted. Alternatively, DUI is not a statutory bar, but one that is discretionary. In other words, the Department of Homeland Security (hereinafter "DHS") can deny relief for the Applicant if they feel it appropriate. Ms. Wallace stated the Applicant would have an


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opportunity avoid the negative immigration consequence if he can convince DHS to use their discretion to overlook the DUI conviction.

In summary, Ms. Wallace testified there are significant negative immigration consequences for Applicant's convictions. Ms. Wallace characterized the SPM as catastrophic because it makes the Applicant statutorily unable to adjust his status, extend his status or return to the United States after a trip abroad. Ms. Wallace further stated the DUI conviction is highly problematic but inadmissibility is discretionary rather than mandatory. Lastly, Ms. Wallace testified that should Applicant's petition for a waiver for the SPM or appeal to DHS's discretion be denied, Applicant would be forever barred from returning to the United States.

Applicant's Testimony

The Applicant testified that entered the United States on a tourist visa. The Applicant further testified that he has family in the Greenville area who are both US citizens and permanent residents.

The Applicant testified that he appeared before the magistrate judge at his initial court date. The Applicant recalled that he discussed his country of origin and that he informed the court that he planned to travel in the United States and return to South Africa. Applicant further testified that he changed his mind about trying to stay in the United States a few months after his court date. Applicant also testified that the judge did not advise him that pleading guilty to SPM or DUI could negatively affect his immigration status.

The Applicant testified that had he known SPM or DUI could negatively affect his immigration status, he would have asked the judge for additional time to seek the advice of an immigration lawyer. Applicant further testified that had he known the SPM and DUI will have

A handwritten signature in black ink, appearing to be the initials 'JM' followed by a long horizontal stroke.

negative immigration consequences, he would have pleaded not guilty and requested a jury trial.

Magistrate Judge

The magistrate judge testified that he recalled the Applicant's case and that he reviewed various rights with the Applicant prior to his guilty plea. The judge specifically recalled reviewing Applicant's right to a jury trial and self-representation and that a lawyer could benefit him. The judge further recalled reviewing Applicant's immigration status and his plans to travel to Niagara Falls and ultimately return "home" to South Africa. The judge, however, stated the Applicant wanted to get this matter behind him and plead guilty. The judge, however, could not specifically recall informing the Applicant that pleading guilty to SPM and DUI could have negative immigration consequences.

GCSO Deputy Joseph A. Lovelace

Deputy Lovelace testified on behalf of the State. Deputy Lovelace provided background information regarding Applicant's arrest and his first appearance in court. Deputy Lovelace stated that Applicant planned to travel in the United States and then return to South Africa.

Law/Analysis

The seminal case governing the notification of non-US citizens of the immigration consequences of criminal convictions is Padilla v. Kentucky, 559 U.S. 356 (2010). Essentially, the US Supreme Court stated lawyers who do not advise non-US citizen clients of the immigration consequences of pleading guilty are deficient and ineffective under Strickland v. Washington, 466 U.S. 668 (1984). The basis for this opinion is grounded in the notion that "deportation is an integral part—indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Padilla v.



Kentucky, 559 US at 364. Additionally, “Our law has enmeshed criminal convictions and the penalty of deportation...” *Id.* at 365-66. Moreover, “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *Id.* at 368 (quoting INS v. St. Cyr, 533 U. S. 289, 323 (2001)).

The accused in Padilla was represented by counsel. However, advising any non-US citizen that there may be immigration consequences of pleading guilty applies to pro-se defendants as well. First, a court must require a guilty plea is valid by ensuring the plea is entered into freely and voluntarily. Anderson v. State, 535 S.E.2d. 649 (2000) (quoting Boykin v. Alabama, 395 U.S. 238 (1969)). “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.’ ” Kolle v. State, 690 S.E.2d 73 (2010); Hill v. Lockhart, 474 U.S. 42, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). In South Carolina, the Summary Court Judge’s Bench Book (“SCJBB”) states “the court must be able to show in the court record that the accused both understood his offense and its possible consequences” Vickery v. State, 258 S.C. 33, 186 S.E.2d 827(1972) (emphasis added). Pursuant to SC Magistrate’s Court Form “SCCA 685” entitled “Guilty Plea Information,” “possible consequences” requires the magistrate judge to advise the accused that “there may be collateral consequences of a conviction” including the accused’s “immigration status may be affected.”

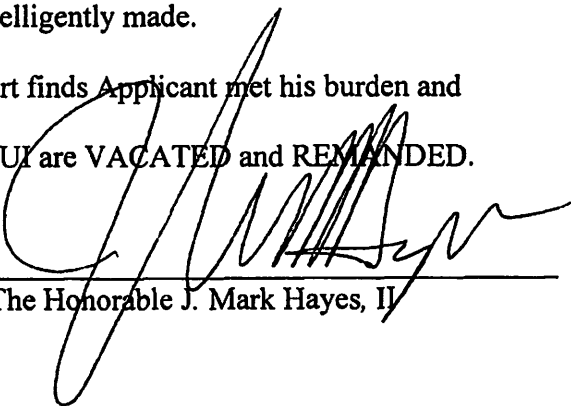
Here, I find the judge did not advise the Applicant that his immigration status may be affected by pleading guilty. Moreover, the Applicant testified he would have sought out an immigration lawyer for advice had he known there were potential immigration problems. In

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fact, there are significant immigration consequences in this instance that will dramatically impact the Applicant. Moreover, the SPM conviction statutorily classifies the Applicant as inadmissible and therefore is not collateral in nature but rather a direct penal consequence of his guilty plea.²

Padilla, Kolle and SCCA 685, all support the notion that “deportation is an integral part—indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” Padilla, 559 US at 364. This case is yet another example of how seemingly nonserious offenses can dramatically affect a non-US citizen.³ Any non-US citizen’s guilty plea cannot be deemed voluntary and intelligently made unless he has been advised by counsel that there may be possible immigration consequences; however, in a case where there is a pro se, non-US citizen defendant, the presiding judge is then given the obligation to warn the defendant that there may be immigration consequences. Therefore, if a presiding judge does not warn a pro se, non-US citizen defendant that there may be possible immigration consequences due to pleading guilty to a crime, the subsequent guilty plea cannot be deemed to be voluntary and intelligently made.

Based upon the above, this court finds Applicant met his burden and
THEREFORE his convictions for SPM and DUI are VACATED and REMANDED.



The Honorable J. Mark Hayes, II

May 31, 2023
Spartanburg, South Carolina

² In Padilla, the Supreme Court did not distinguish between direct and collateral consequences in defining the scope of constitutionally “reasonable professional assistance” required under Strickland. *Id.*, 559 U.S. at 357.

³ The State argued that a Court’s obligations to a non-US citizen to ask the Padilla questions is somehow tied to the end result of the case. In this case the State argues that because the defendant only received a fine as a result of his guilty plea, a court should be excused from asking the Padilla questions. This Court disagrees with the State’s logic.

Copy mailed to
Attorney General / Matt Kappel
on 6 / 20 / 2023