

Nov 27 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
 Erick Edward Wells, #281942,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2016-CP-23-3282

RESPONDENT'S MOTION TO
RECONSIDER, ALTER, OR AMEND
PURSUANT TO RULE 59(e), SCRC

20 SEP 24 AM 10:46
 FILED
 RICHLAND COUNTY
 CLERK OF COURT
 W. McBRIDE
 C.C.P. & G.S.

This matter comes before this Court by way of an application for post-conviction relief filed on July 22, 2014, by Erick Edward Wells (Applicant). A hearing on this application was held in the Richland County Court of Common Pleas before the Honorable Jean Hoefer Toal, acting circuit court judge, on December 7, 2016. By written order filed September 5, 2019, and received by Respondent on September 9, 2019, this Court granted post-conviction relief and remanded the matter to the Richland County Court of General Sessions for a new trial, finding plea counsel was ineffective due to “law enforcement’s failure to answer Counsel’s legitimate requests for information – particularly regarding the discharge of one of the officers’ firearms during the service of the search warrant.”

Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRC, would respectfully show unto this Court:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In February 2014, the Richland County Grand Jury indicted Applicant for trafficking crack cocaine – ten to twenty-eight grams,

third or subsequent offense (2014-GS-40-00724). In April 2014, the Richland County Grand Jury indicted Applicant for failure to stop blue light/siren – first offense (2014-GS-40-01713). Additionally, Applicant waived presentment of one count of possession/attempt to possess crack cocaine – first offense (2014-GS-40-01711). Theodore N. Lupton, Esquire represented Applicant.

On April 2, 2014, Applicant pleaded guilty to possession of less than one gram of meth or cocaine base – third offense; failure to stop for a blue light/siren; and the lesser-included offense of trafficking crack cocaine – more than ten grams but less than twenty-eight grams, second offense. The Honorable R. Ferrell Cothran, Jr., sentenced Applicant to ten years for possession of less than one gram of meth or cocaine, three years for failure to stop for a blue light, and fifteen years for trafficking, to be served concurrently.

A notice of appeal was filed with the South Carolina Court of Appeals. Theodore N. Lupton, Esquire perfected the appeal by filing an Anders¹ brief. The Court of Appeals affirmed the Applicant's conviction and sentence on June 27, 2014. State v. Erick Wells, Op. No. 2014-000853 (S.C. Ct. App. filed June 27, 2014). The Remittitur was sent on July 15, 2014.

CURRENT ACTION

On July 22, 2014, Applicant filed an application for post-conviction relief, alleging ineffective assistance of plea counsel had resulted in the entry of his guilty plea involuntarily. On March 1, 2016, Respondent served its return, requesting an evidentiary hearing on Applicant's claims of ineffective assistance of plea counsel and involuntary guilty plea.

An evidentiary hearing was convened in the Richland County Court of Common Pleas on December 7, 2016, before the Jean Hoefler Toal. Applicant was present at the hearing and

¹ Anders v. California, 386 U.S. 738 (1967).

represented by Anna Good (Browder), Esquire. The State was represented by Assistant Attorney General Jessica E. Kinard. Applicant and his former plea counsel Theodore N. Lupton both testified. At the conclusion of the hearing, this Court orally granted relief, finding Lupton was ineffective and his ineffectiveness was induced by law enforcement's failure to answer his discovery request regarding the accidental discharge of an officer's service weapon during the service of the search warrant at Applicant's home. This Court granted Applicant a new trial.

The Court requested counsel for Respondent and Applicant work together to draft a proposed order. By written order filed September 5, 2019, this Court granted post-conviction relief and remanded the matter to the Richland County Court of General Sessions for a new trial. This motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRPC, follows.

ARGUMENT IN SUPPORT OF RECONSIDERATION

Respondent moves this Court to reverse its earlier decision and deny post-conviction relief because Applicant failed to meet his burden of establishing counsel was constitutionally ineffective.

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)). An applicant who pleads guilty with the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)

(citing Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994); Hill v. Lockhart, 474 U.S. 52 (1985)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56.

In its ruling on the record and in the Order Granting Post-Conviction Relief, this Court found plea counsel was ineffective, "and this ineffectiveness was induced by law enforcement's failure to answer Counsel's legitimate requests for information – particularly regarding the discharge of one of the officers' firearm during the service of the search warrant."² This Court also found "Applicant's plea was not voluntarily given because said failure deprived Applicant of the benefit of full discovery prior to entering his plea."

This Court also found Applicant's plea involuntary on the two additional grounds pleaded by Applicant – (1) "Counsel Lupton refused to talk to me on any kind of defense level[]s," and (2) "Counsel further prejudiced me when he did not fully go over my Rule (5) evidence with me." However, this Court oral ruling did not address any findings of fact or conclusions of law specifically as those issues, nor does its Order Granting Post-Conviction Relief.

Respondent respectfully asserts this Court's order is based on numerous legal and factual errors, and this Court's grant of post-conviction relief should be reconsidered and denied.

² Notably, Applicant did not allege a Brady violation in his application, nor was it argued at the evidentiary hearing. Brady v. Maryland, 373 U.S. 83 (1963) (holding the government's withholding of evidence material to the determination of the defendant's guilt or innocence violates the defendant's right to Due Process). Accordingly, Respondent respectfully asserts, to the extent this Court relied on the principles of Brady in granting relief, such relief is improper, and the Court should reverse its decision on that ground as well. See Southern Railway Co. v. Coltex, Inc., 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) ("The sole issue is whether a trial judge *ex meru moto* can grant a new trial on a ground not raised by a party. We hold he cannot.").

Applicant Failed to Establish Counsel Was Constitutionally Ineffective and His Guilty Plea Was Involuntary Because Counsel Received All Available Discovery

In its order granting relief, this Court found, law enforcement failed to answer Counsel's legitimate requests for information – particularly regarding the discharge of one of the officers' firearm during the service of the search warrant – and this failure deprived Applicant of the benefit of full discovery prior to entering his plea, rendering the plea involuntary. In its ruling on the record, this Court relied upon a March 1, 2004, memorandum from the South Carolina Supreme Court which admonished solicitors to immediately stop the practice of conditioning plea offers to defendants on foregoing discovery. PCR Ex. 2; PCR Tr. p. 43.

Respondent respectfully asserts this Court's ruling is erroneous because the uncontroverted testimony at the evidentiary hearing was that plea counsel had received all of the discovery in existence regarding the discharge incident, as well as verbal confirmation that no internal investigation had been done, which explained the lack of an incident report or investigative report. Plea counsel testified he filed a motion to compel seeking fourteen different items of discovery. PCR Tr. p. 35. The first four items sought information or documentation regarding a use-of-force investigation of the weapon discharge, any internal affairs investigation or investigation by another similar entity, and information from the General Counsel for the Richland County Sheriff's Office. PCR Tr. p. 35.

Regarding the discovery he ultimately received in the case, plea counsel testified at the hearing as follows:

[T]he first three, regarding use of force investigation of the shooting, as well as internal affairs or other entity investigation, I never got anything related to that, and *my understanding was that there was nothing ever done. . . . [N]othing was provided because nothing happened*, which gets to number 4.

Then-legal-counsel, for the sheriff's department, Scott Hayes, was the one who basically made the decisions in the case. . . . [S]o, in a sense I got number 4 and found out there would be nothing for the first three. . . .

I was told at the time of the shooting that they called their legal counsel, Scott Hayes, and that he did things. . . . Nothing was written about that. This was verbal information that I received. . . . Which I had no reason to doubt.

PCR Tr. pp. 35-36 (emphasis added). However, plea counsel also received a two-paragraph report prepared by the officer who discharged the gun, documenting his version of how the discharge happened, and recording that he notified his supervisor immediately thereafter. PCR Tr. p. 27.

Thus, Respondent respectfully asserts this Court's finding that plea counsel was constitutionally ineffective because *law enforcement* failed to respond to his discovery requests is factually incorrect. Counsel testified he believed he had received all discovery that existed on the issue of the weapon discharge. PCR Tr. p. 35. Importantly, Applicant failed to introduce any evidence establishing responsive documentation or information existed that was not disclosed to plea counsel. Because of this failure, there is no evidence in the record to support this Court's finding the discovery request was not answered. Indeed, the uncontroverted evidence introduced at the PCR hearing is that the request was answered – plea counsel did not receive much documentation because it simply did not exist. PCR Tr. p. 35. However, the State turned over the information it did have, both orally and in writing. PCR Tr. p. 35.

Therefore, because this Court's finding plea counsel was ineffective due to law enforcement's failure to respond to his discovery requests is unsupported by the record, this Court should reverse its ruling and deny relief. See *Palacio v. State*, 333 S.C. 506, 513, 511

S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing).

Applicant Failed to Establish Counsel Was Constitutionally Ineffective and His Guilty Plea Was Involuntarily Entered Where Counsel Reviewed All Discovery Counsel Received With Applicant and Applicant Was Apprised of Outstanding Discovery Requests Before Entering His Plea

In its ruling on the record and the Order Granting Post-Conviction Relief, this Court found “Applicant’s plea was not voluntarily given because [the failure of law enforcement to answer plea counsel’s discovery request] deprived Applicant of the benefit of full discovery prior to entering his plea.” This Court also cited to a March 1, 2004, memorandum from the South Carolina Supreme Court which admonished solicitors to immediately stop the practice of conditioning plea offers to defendants on foregoing discovery. PCR Ex. 2; PCR Tr. p. 43. The practice referred to in this memorandum is not what happened in Applicant’s case, and the memorandum therefore does not support this Court’s finding.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both.” Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.”

Dalton, 376 S.C. at 138, 654 S.E.2d at 874 (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). The standard 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.” North Carolina v. Alford, 400 U.S. 25, 31 (1970). Where a defendant is represented by counsel during the plea process and enters his plea with the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice “was within the range of competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56.

In this case, plea counsel candidly testified he filed the motion to compel discovery not just to seek information, but also to “point out to [the solicitor] problems he had in his case to basically facilitate what [Applicant] was wanting, which was a better offer.” PCR Tr. p. 25. Plea counsel testified:

I did discuss with [Applicant] what we had, what I felt was missing that we could get, and what we could do with the information. And I explained to him that we had certain defenses related to the lack of information and the possibility that I felt that the sheriff’s department was pressing the issue because... they had the shooting incident, the negligent discharge... that they had not potentially properly investigated, and that they were trying to basically make him to be a bad guy to avoid problems related to the shooting incident.

We went over all of that, and I explained these are the things that we could do at trial. However, I explained to him that he had six prior drug convictions, three... that were showing for PWID, although he disputed one of them as actually being a possession and three possessions. So, he would be a trafficking third and above, which carries twenty-five-to-thirty years mandatory time, and it’s eighty-five percent time. . . .

[W]e discussed the fact that balanced against all these issues we have if we go to trial, we have the problem that if those issues don’t work and you get convicted, you would face a mandatory minimum of twenty-five years. Ultimately, we ended up with an offer... range of ten-to-twenty on a trafficking second. . . . [A]nd I was hoping for a ten-year sentence. Unfortunately, [Judge Cothran] gave us fifteen.

PCR Tr. pp. 29-30. Plea counsel also explained he would have continued to press the discovery issues had the case gone to trial, but he had been given all of the information he needed to prepare the trafficking case, and the “missing” information regarding the accidental weapon discharge “was not worth pressing... at a trial because it didn’t go to the substance of whether he was guilty or innocent.” PCR Tr. p. 41. Plea counsel explained he further advised Applicant the State “had a solid case of guilt” on the trafficking charge, and “the plea was in [Applicant’s] best interest to minimize the amount of time he’d have to spend in prison.” PCR Tr. p. 32.

As discussed above, the “missing” information regarding the accidental discharge did not exist. Thus, Applicant, in fact, had all of the discovery that existed on the issue, and he discussed how he could use that at trial with plea counsel. This is not a situation of a solicitor conditioning a plea offer on a defendant’s agreement to forego discovery in his case. Counsel testified repeatedly he received all the discovery on the trafficking issue and the other two charges, and the only information he felt was missing was information related to the tangential issue of the accidental discharge, which did not go to Applicant’s guilt or innocence. PCR Tr. pp. 32, 41.

The record clearly reflects Applicant voluntarily chose to plead guilty because he wanted to avoid a mandatory minimum sentence of twenty-five years. Counsel unequivocally testified at the PCR hearing Applicant “was aware of what we had, what we didn’t have, what we could argue, and... would be arguing, and he made the decision that he didn’t want to risk that. He wanted to try to get the ten-year sentence, which I feel was a reasonable decision.” PCR Tr. p. 42. Applicant addressed the plea court and asked for mercy, telling the plea judge when plea counsel told him he was facing twenty-five-to-thirty years on these charges, “I was scared to go

to jail for that much time.” Plea Tr. p. 17. Reduction of actual sentencing exposure is a legitimate reason for choosing to plead guilty. See Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992) (“[A]lthough petitioner pled guilty to avoid a possible death sentence, the plea was entered with knowledge of the sentences attendant to the guilty plea and so was knowing and voluntary.”); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (pointing out that the imposition of the difficult choice between going to trial and pleading guilty is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas).

Notably, during the plea hearing, Applicant was specifically asked if there were “any issues about [the State] not giving you something you think you’re entitled to,” and Applicant answered, “No, sir.” Plea Tr. p. 6. Furthermore, plea counsel addressed the issue of the accidental discharge on the record at the plea hearing, explaining why Applicant reacted by diving away from the officers as they entered his house. Plea Tr. p. 14.

Thus, the record reflects Applicant had full discovery as to all of the issues in his case, Applicant and plea counsel reviewed the discovery together, and plea counsel used that discovery to advocate zealously on his behalf to obtain a favorable plea offer, which was Applicant’s ultimate goal. This Court’s finding the plea was not entered voluntarily either because Counsel did not appropriately review the discovery, its implications, and potential defenses with Applicant, or because Applicant did not have sufficient discovery to enter a plea, is unsupported by the record, and this Court should reverse its finding and deny relief.

CONCLUSION

Based on all the foregoing, Respondent respectfully requests this Court reconsider its prior ruling and reverse its previous grant of post-conviction relief and remand of this case back to the court of general sessions for a new trial. Instead, this Court should deny relief. In the alternative, if the Court declines to reverse its prior ruling, this Court should issue an amended order containing findings of fact and conclusions of law as to the two additional grounds upon which it granted relief. See Fishburne v. State, Op. No. 29711 (S.C. Sup. Ct. filed July 31, 2019) (“[T]he order must include findings of fact and conclusions of law as to all issues raised by an applicant.”).

Respectfully submitted,

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September 19, 2019



RECEIVED

Nov 27 2023

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

September 19, 2019

The Honorable Jeanette W. McBride
Clerk of Court, Richland County
PO Box 2766
1701 Main Street, Room 205
Columbia, SC 29202

Re: Erick Edward Wells v. State of South Carolina
2014-CP-40-4543

Dear Ms. McBride:

Enclosed please find an original **Respondent's Motion to Reconsider, Alter, or Amend Pursuant to Rule 59, SCRPC** for filing in your office. Please forward me a **time-stamped copy** back to our office.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General

Enclosures

Cc: Honorable Jean Hoefler Toal
Anna Good Browder, Esquire