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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge

WILLIAM HOWARD FUNDERBURKE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001061

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where Petitioner only pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) because plea counsel failed to properly investigate and prepare a defense to the allegations against him, and where Petitioner was prejudiced because he would have proceeded to trial if counsel was adequately prepared?

STATEMENT OF THE CASE

A Horry County grand jury indicted Petitioner in August 2017 for second degree criminal sexual conduct with a minor and in March 2018 for third degree criminal sexual conduct with a minor. App. 27. The state alleged Petitioner sexually abused his stepdaughter between August 1999 and August 2002 when his stepdaughter was between the ages of thirteen and sixteen years old. The state claimed Petitioner committed a sexual battery or attempted to commit a sexual battery by performing oral sex on his stepdaughter and digitally penetrating her vagina. Petitioner's stepdaughter did not disclose this alleged abuse until she was roughly thirty years old. App. 10, ll. 9-16.

The week before Petitioner's case was scheduled to be called for trial, the assistant solicitor offered to allow Petitioner to plead guilty to criminal solicitation of a minor without a sentence recommendation. The offer was based on Petitioner's alleged admission to police that he offered to perform oral sex on his stepdaughter when she was fifteen years old. App. 10, ll. 16-20. If Petitioner pled to criminal solicitation of a minor, the state would dismiss Petitioner's pending charges for second and third degree criminal sexual conduct with a minor. App. 63, l. 22 – 63, l. 2.

On June 11, 2018, the day Petitioner's case was to be called for trial, Petitioner appeared before the Honorable Benjamin Culbertson, waived presentment to the grand jury, and pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to criminal solicitation of a minor. App. 1; App. 3, ll. 2-19. C. Leigh Andrew represented the state. James Stanko represented Petitioner. App. 1. Judge Culbertson sentenced Petitioner to eight years suspended upon the service to two years imprisonment and five years' probation. App. 16, ll. 13-16. The judge also

ordered Petitioner to register as a sex offender. App. 16, ll. 22-24. In exchange for his plea, the state dismissed the criminal sexual conduct with a minor charges.

On March 18, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 19-26. The state filed a return and motion to dismiss on June 28, 2019 and an amended return on July 18, 2022. App. 27-45. An evidentiary hearing was convened on September 6, 2022 before the Honorable Kristi Curtis. App. 46. Assistant Attorney General Chelsey Marto represented the state. James Falk represented Petitioner. App. 46.

Petitioner testified that he met with plea counsel the Thursday before his case was to be called to trial. During this meeting, counsel told Petitioner about the state's plea offer. App. 53, l. 25 – 54, l. 2. Counsel also played clips from Petitioner's interrogation with police and encouraged Petitioner to accept the plea offer. Petitioner testified that he asked plea counsel "where's the defense you were supposed to plan." However, it became clear to Petitioner that trial counsel had not developed a defense. App. 54, l. 3 – 55, l. 21. There was no discussion whatsoever about a defense strategy during this meeting. App. 57, ll. 22-23. Petitioner ultimately decided to accept the state's offer to plead because plea counsel did not "feel like he could win" if Petitioner proceeded to trial. Plea counsel also "convinced" Petitioner "that [he] would stand a better chance of getting probation if [he] took the plea deal." App. 57, ll. 2-16.

James Stanko, Petitioner's plea counsel, testified that the case was essentially the stepdaughter's word against Petitioner's word. According to Stanko, he and Petitioner had a "lengthy discussion about how [they] could effectively attack [the stepdaughter's] truthfulness." Stanko maintained that Petitioner did not provide him with any potential witnesses so the strategy was to attack the stepdaughter's credibility through cross-examination. Petitioner also planned to testify if he proceeded to trial. Stanko believed it was in Petitioner's "best interest to

take the stand and explain for himself," particularly since Petitioner had no prior record with which he could be impeached. App. 62, l. 2 – 63, l. 13.

During their discussion on whether Petitioner should accept the state's offer, Stanko advised Petitioner that he faced a longer and harsher sentence if he proceeded to trial given the severity of the charges pending against him than if he pled guilty to criminal solicitation of a minor. App. 67, ll. 16-22. He told Petitioner it was in his best interest to accept the offer the state made. App. 64, ll. 18-22.

By order filed May 30, 2023, the PCR court denied Petitioner relief. App. 73-85. The court found Petitioner's "plea was entered freely, knowingly, intelligently, and voluntarily." App. 81. In so finding, the court emphasized the colloquy during Petitioner's plea proceeding between Petitioner and the plea judge in which Petitioner indicated he understood the charge, his rights, and the consequences of his conviction. The PCR court also emphasized trial counsel's testimony at the evidentiary hearing that Petitioner pled "because he was afraid of a harsher sentence at trial" and that Petitioner "understood what he was doing by pleading." App. 81.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made since Petitioner only pled pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) because plea counsel failed to properly investigate and prepare a defense to the allegations against him, and since Petitioner was prejudiced because he would have proceeded to trial if counsel was adequately prepared.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This 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." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing 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. 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." Pittman, 337 S.C. at 599, 524 S.E.2d at 624 (citing Boykin, 395 U.S. 238). Additionally, "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. (citing Boykin, 395 U.S. 238).

"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 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

"[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 v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)) (alteration in original).

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where Petitioner only pled pursuant to Alford because plea counsel failed to properly investigate and prepare a defense to the allegations against him. Petitioner had no choice but to plead guilty since counsel did not "feel like he could win" if Petitioner proceeded to trial. Plea counsel also "convinced" Petitioner "that [he] would stand a better chance of getting probation if [he] took the plea deal." App. 57, ll. 2-16.

Petitioner was prejudiced by counsel's deficient performance because he would have proceeded to trial if counsel was adequately prepared instead of pleading pursuant to Alford.

Because there is no evidence to support the PCR court's ruling that Petitioner's plea was entered freely, knowingly, intelligently, and voluntarily, this Court should reverse Petitioner's conviction and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. Petitioner ultimately requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of January, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for William Howard Funderburke states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on September 6, 2022 before Judge Kristi F. Curtis, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests the Court relieve her as counsel for William Howard Funderburke.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

s/ Lara M. Caudy
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