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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable Walton J. McLeod, IV, Circuit Court Judge

DAVID JAMES LAMONT BRICE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001527

JOHNSON PETITION FOR WRIT OF CERTIORARI

SARAH E. SHIPE
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ISSUE PRESENTED

Whether the PCR court erred finding defense counsel was not ineffective where petitioner was unaware that the intent to commit a crime was an element of first-degree burglary and at his guilty plea hearing petitioner denied he had the intention to commit a crime rendering petitioner's guilty plea unintelligently made?

STATEMENT

On July 9, 2018, petitioner waived indictment by a grand jury and pled guilty to first degree burglary before the Honorable Roger L. Couch. App. 1; 4, ll. 21-22; 5, l. 14-6, l. 18; 147-48. Petitioner was represented by Philip Smith and Raia Hirsch. The state was represented by Ryan Newkirk. App. 1. Pursuant to a negotiated sentence range of fifteen to forty years, Judge Couch sentenced petitioner to twenty-five years' imprisonment. App. 39, l. 24-40, l. 2; 149.

Thereafter, petitioner filed an application for PCR on February 4, 2019. App. 59-67. An evidentiary hearing was held on December 9, 2022, before the Honorable Walton J. McLeod, IV. App. 76-120. Petitioner was represented by Michael Lifsey and the state was represented by assistant attorney general, Cruise Mitchell. App. 76.

On August 15, 2023, Judge McLeod signed an order denying PCR. App. 124-46. The court denied all four allegations of ineffective assistance of counsel raised by petitioner and found petitioner's "claims [were] without merit." App. 130.

Regarding the allegation raised in this petition, the court found petitioner was "properly informed" of all of the elements of first-degree burglary where defense counsel credibly testified, he discussed the elements with petitioner, petitioner signed a plea waiver form, and petitioner's testimony at the evidentiary hearing refuted his allegation. App. 139. The court further found petitioner admitted guilt at his guilty plea and that it was "undisputed" petitioner entered a dwelling without consent at nighttime." App. 140-41. The court also held that even if petitioner "did not precisely admit guilt . . . the allegation still fail[ed] as a matter of law," citing to *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

This petition follows.

ARGUMENT

The PCR court erred finding defense counsel was not ineffective where petitioner was unaware that the intent to commit a crime was an element of first-degree burglary and at his guilty plea hearing petitioner denied he had the intention to commit a crime rendering petitioner's guilty plea unintelligently made.

Guilty plea proceeding

At petitioner's plea hearing the state alleged that on June 20, 2016, "in the early hours of the morning, complainant, Blondell Boozer, told law enforcement petitioner broke into her home through a window and threatened her with a knife. App. 22, ll. 10-19. Police found petitioner nearby and transported him to a hospital because he was believed to be suicidal. App. 22, l. 24-23, l. 8.

Two exhibits were entered during petitioner's guilty plea hearing. App. 3; 7, l. 10-10, l. 21. Court's exhibit 1 is South Carolina Department of Mental Health (S.C. DMH) evaluation of petitioner's capacity to stand trial. App. 42-50. In the evaluation Dr. Kaustubh Joshi concluded, that in his opinion, petitioner "has a factual as well as rational understanding of the legal system and sufficient present ability to rationally assist his attorney in the preparation of a defense." App. 50. Dr. Joshi also opined petitioner understood the proceedings against him. App. 50.

Court's exhibit 2 is a second S.C. DMH evaluation of competency to stand trial. App. 51-58. In this evaluation Dr. Alicia Hall opined similarly to Dr. Joshi that petitioner understood the charge and legal proceedings. App. 57.

Defense counsel told the plea court Ms. Boozer and petitioner were in a romantic relationship and petitioner often stayed overnight at her home. App. 26, ll. 22-24; 29, ll. 9-23; 30, ll. 2-16. The night of the incident petitioner found out about infidelity and became jealous.

App. 26, l. 22-27, l. 3. 28, l. 22-29, l. 8.

Petitioner admitted that he entered Ms. Boozer's home but denied he had a knife or intended to hurt Boozer. App. 23, ll. 17-22. Petitioner told the plea court he went to the house and knocked on the door, requesting to come in and sleep because he was tired and ready for bed. He stated that he was "not gonna do anything." When Boozer refused to let him inside he told her he was going to call the police and subsequently entered through the window. Petitioner maintained he did not intend to harm Boozer. App. 37, l. 11-39, l. 1.

Testimony at evidentiary hearing

During the evidentiary hearing petitioner testified regarding his understanding of first-degree burglary. Petitioner stated that he went to Ms. Boozer's "late that night" and tried to enter the house. App. 82, ll. 22-23. He said Ms. Boozer told him to leave but he needed to get in and "go to sleep, get some clothes so [he could] change for work the next morning." App. 82, l. 23-84, l. 3. Ms. Boozer would not let petitioner in so he threw "a brick through the window [] went in [] and changed clothes." App. 83, ll. 3-8. Petitioner contended that if he had understood that burglary first requires that he enter the home with the intention to commit a crime inside he would not have pled guilty but would have insisted on a jury trial. App. 84, ll. 19-24.

Both of petitioner's former defense counsels were called to testify at petitioner's hearing. Philip Smith testified that he explained all of the elements of first-degree burglary to petitioner before his guilty plea hearing. App. 94, ll. 17-25. He asserted that petitioner took the guilty plea because he did not want to risk receiving a life sentence if convicted at trial. App. 105, ll. 9-14.

Mr. Smith stated that after the incident Ms. Boozer's home appeared to be in disarray and there was a knife in photographs of the scene, although he admitted petitioner denied the knife belonged to him. App. 95, ll. 9-25. Counsel Smith testified the evidence he saw was enough to

demonstrate to a jury that petitioner entered at night and “the throwing of the food and all those sorts of things” confirmed petitioner had the intention to commit a crime. App. 96, ll. 1-15. Smith did acknowledge that petitioner did not think his actions were criminal, but that they were nonetheless unlawful. App. 104, ll. 3-25.

Raia Hirsch testified that she was involved in petitioner’s case to assist with communications between petitioner and Mr. Smith. She stated she believed petitioner pleading guilty was in his best interest. Ms. Hirsch said she helped explain the terms of the plea deal to petitioner. App. 113, ll. 1-10.

At the conclusion of the hearing PCR counsel argued it was clear petitioner never admitted to burglary at his guilty plea hearing. App. 117, l. 20-118, l. 1. He asserted that pleading guilty should be the client’s decision and not the decision of attorneys regardless of what a defense attorney may think is best for the individual. He concluded that it was concerning that “[petitioner] with limited intellectual functioning [was] allowed [to plead guilty] and [was] sentenced to twenty-five years.” App. 118, ll. 5-20.

Discussion

The PCR court erred in finding petitioner “admitted guilt during the plea colloquy” pursuant to the requirements of *Boykin v. Alabama*,¹ and *Pittman v. State*,² where the record reflects petitioner did not understand that an element of first-degree burglary included the intent to commit a crime within, which renders his guilty plea invalid.

A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and

¹ 395 U.S. 238 (1969).

² 337 S.C. 597, 524 S.E.2d 623 (1999)

second, evidence that the applicant was prejudiced by that deficiency. *Hill v. Lockhart*, 474 U.S. 52 (1985). Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements. *Id.*

The two-part *Strickland v. Washington*, 466 U.S. 668, (1984) test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*, 411 U.S. 258 (1973) and *McMann v. Richardson*, 397 U.S. 759 (1970). The prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, to satisfy the prejudice requirement, the applicant must show 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*, 474 US at 58-59.

The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and **intelligently**. *Boykin v. Alabama*, 395 U.S. 238 (1969) (emphasis added). 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. *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (emphasis added); *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991). In *State v. Armstrong*, 263 S.C. 594, 211 S.E.2d 889 (1975), this Court held that before a guilty plea may be accepted, the court must be certain the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

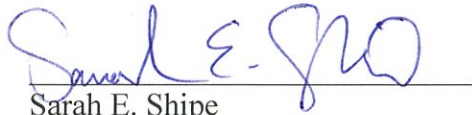
Petitioner's guilty plea could not have been knowing, voluntary, or intelligent where he

did not know the crucial elements of the charged offense. Petitioner did not understand intent to commit a crime was an element and has consistently denied he intended to commit a crime. *See Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (stating that “[i]n 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.” (emphasis added)). There is nothing in the record to support the PCR court’s finding that petitioner’s guilty plea was knowing, voluntary, or intelligent.

Petitioner was prejudiced where he testified that but for counsel’s failure, he would not have pled guilty and would have continued to trial.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be granted to allow full briefing on the issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of January, 2024.

STATE OF SOUTH CAROLINA
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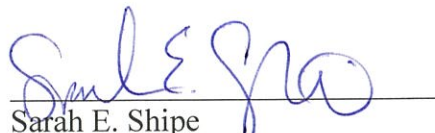
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David James Lamont Brice states:

1. She is 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 before Judge Walton J. McLeod, IV, which was held on December 9, 2022, 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 that the Court relieve her as counsel for David James Lamont Brice.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of January, 2024.

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."



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This 25th day of January, 2024.