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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable J. Mark Hayes, II, Circuit Court Judge

STORM RILEY BRIAN MCCARTHY,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2023-001157

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

QUESTION PRESENTED

PETITIONER'S QUESTION REPRESENTED

Can the PCR court extend the requirements of *Padilla v. Kentucky*[1] to the judiciary and grant relief to respondent on the basis that the plea court did not advise respondent, a foreign national here on a tourist visa who informed the plea court he had no intention of immigrating to this country, of potential immigration consequences to respondent of his pleas should he at some time in the future change his mind about immigrating to this country?

RESPONDENT'S QUESTION PRESENTED

Whether there was evidence to support the PCR court's finding that Respondent's guilty pleas were not knowingly, intelligently, and voluntarily tendered, where Respondent was not informed the convictions could have negative immigration consequences?

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[1] 559 U.S. 356 (2010).

STATEMENT OF THE CASE

On September 1, 2018, Respondent was cited for driving under the influence (DUI), first offense, (20181100029749), and simple possession of marijuana (20181100029748). On October 9, 2018, Respondent appeared before the Honorable Jonathan Horne, Greenville County Magistrate (plea court), and pleaded guilty without counsel. Respondent was fined. No direct appeal was taken. Respondent subsequently retained counsel, Matthew J. Kappel, Esquire, who moved to vacate the convictions before the plea court on November 20, 2018. The motion was denied. App. 19, ll. 3-17; App. 50, ll. 16-22; App. 1 – 6.

On May 7, 2019, Respondent filed an application for post-conviction relief (PCR). App. 1 – 9. On December 11, 2019, the State made its return. App. 10 – 15. A hearing was held on the mater on January 22, 2020, before the Honorable J. Mark Hayes, II. Matthew Kappel represented Respondent. Taylor Smith represented the State. App. 16. The PCR court took the matter under advisement, and on March 2, 2023, the court issued an order granting PCR. App. 58, ll. 16-17; App. 60 – 65. On March 9, 2023, the State served its motion to alter or amend the judgment. App. 66 – 75. On May 11, 2023, Respondent served his reply. App. 76 – 78. On June 20, 2023, the PCR court issued a modified order granting PCR. App. 79 – 84.

Petitioner filed a petition for writ of certiorari. Respondent now files this return.

ARGUMENT

There was evidence to support the PCR court's finding that Respondent's guilty pleas were not knowingly, intelligently, and voluntarily tendered, where Respondent was not informed the convictions could have negative immigration consequences.

Relevant facts

Respondent was from South Africa. He had family in South Carolina—an aunt, uncle, and cousins. In 2018, Appellant was here on a tourist visa. He was in Greenville County visiting his family and he intended to travel around the United States and Canada, but he was pulled over and charged with DUI and simple possession of marijuana. On October 9, 2018, he appeared without counsel before the magistrate and pleaded guilty to the charges; he was fined. App. 1; App. 20, l. 17 – 21, l. 24; App. 34, l. 14 – 35, l. 9; App. 50, ll. 2-22.

Shortly after the plea hearing, he obtained counsel, who filed a motion to reconsider about five weeks after the plea, and unsuccessfully requested the magistrate court vacate the convictions. Respondent then filed the PCR application in this case. App. 1 – 7; App. 27, ll. 9-12. At the PCR hearing, the court took testimony from: Respondent; the Honorable Jonathan Horne; Jessica Wallace, an immigration attorney; and Deputy Joseph Loveless. App. 17. Respondent and the magistrate judge both had similar recollections of the plea. They agreed the judge went through a plea colloquy and advised Respondent of his rights; he advised Respondent he should get a lawyer; Respondent wanted to go forward without a lawyer; and the judge did not advise Respondent the pleas could negatively affect immigration status. App. 22, l. 3 – 23, l. 18; App. 25, ll. 1-4; App. 27, l. 23 – 30, l. 5; App. 35, l. 10 – 36, l. 5.

Respondent testified the judge asked him where he was from, what his plans were in the U.S., and whether he intended to stay in the U.S. Respondent stated he told the judge he was

going to travel around the U.S. and then return to South Africa. Respondent testified if he had known the pleas could affect his ability to remain in or immigrate to the U.S., he would have consulted an immigration attorney, and after speaking with the attorney, he would have requested a jury trial. App. 22, l. 17 – 24, l. 17. Respondent explained he did not decide that he wished to try to remain in the U.S. until approximately two or three months after the plea, although he could not remember exactly. App. 25, ll. 12-20.

The Honorable Jonathan Horne testified that Respondent stated he was from South Africa, and Judge Horne asked him about his plans in the U.S. According to Judge Horne, Petitioner stated he had family here, wanted to travel to Niagara Falls, and was going to return home to South Africa. App. 29, ll. 1-20; App. 34, l. 16 – 35, l. 9. Judge Horne agreed that was the extent of the "conversation with him regarding his immigration status." Judge Horne did not recall that he ever advised Respondent the pleas could have "possible immigration consequences." App. 29, l. 1 – 30, l. 5.

Judge Horne reviewed Plaintiff's Exhibits # 1 and #2, which were "SCCA685" "forms the judicial administration gives the magistrates to work with." The judge agreed the forms were a guide given to magistrates to ensure guilty pleas are freely and voluntarily given. Judge Horne stated the forms reflected that "immigration status may be affected" by guilty pleas. Judge Horne stated he did not go through this form with Respondent or have it in front of him during the plea hearing. App. 30, l. 6 – 34, l. 13; App. 36, l. 6 – 39, l. 6. These exhibits are located at pp. 88 – 89 of the Appendix.

Jessica Wallace, an immigration attorney with Ibrahim and Rao in Atlanta, also testified. App. 41 – 42, l. 19. Wallace and her firm practiced exclusively in immigration law. App. 41, ll. 18-19. Wallace primarily represented individuals in "family immigration and removal defense";

in other words, "deportation defense." App. 43, ll. 2-16. PCR counsel asked Wallace what she would advise a South African client here on a tourist visa about the consequences of pleading guilty to DUI and simple possession of marijuana. Wallace testified as follows:

> I would advise that individual that **the simple possession of marijuana would make him deportable from the United States if he were convicted.** I would also advise him that **the marijuana conviction would make him inadmissible to the United States with his tourist visa in the future** and with any other type of visa that he sought in the future. That would be my main advice. The DUI could also cause him discretionary issues if he were applying for entry into the United States again as well.
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> . . .
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> **[T]he marijuana conviction is actually a statutory bar to admission** into the United States. That bar can be waived but only if the individual has a spouse or parent who is a lawful permanent resident or U.S. citizen who would suffer extreme hardship. **The DUI is not a statutory bar to admission to the United States, however,** every time someone applies for admission at customs or at a consulate for a visa **there is a discretionary element and the officer can deny that visa in discretion based on criminal history.**

App. 45, l. 19 – 46, l. 24 (emphasis added). Wallace clarified that "admission" includes someone who is "already in the United States and seeks an adjustment of status. That's also considered applying for admission as a permanent resident." App. 47, ll. 7-12. Wallace stated there are "significant" immigration consequences with regard to pleading guilty to DUI and simple possession of marijuana. App. 48, ll. 2-8. The State did not cross-examine Wallace at all: "I have no questions, Your Honor." App. 48, l. 15.

In summation, PCR counsel argued that as a non-citizen defendant, Respondent should have been advised there may be immigration consequences of pleading guilty. Counsel cited to the Bench Book forms that were admitted, which note that as a result of pleading guilty, "your immigration status may be affected." Counsel argued that "the due process clause requires guilty pleas to be entered voluntarily, knowingly, intelligently," and that was not the case here. App. 53, l. 3 – 54, l. 8; App. 89; App. 57, l. 14 – 58, l. 15. The State argued that the plea court was not

required to advise Respondent about the possibility of immigration consequences, since those were "collateral consequences." The State also argued the Bench Book form was a "formality." App. 54, l. 11 – 57, l. 12.

As seen, the court ultimately issued a modified order granting PCR. The order cited the testimony of Wallace, whom it characterized as "an experienced immigration lawyer," and noted the "State did not object to Ms. Wallace's testimony." App. 80. Regarding Wallace's testimony, the order stated, *inter alia*, that "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 Applicant to lose his visa . . . DUI is not a statutory bar, but one that is discretionary." App. 80. The order stated, "In summary, Ms. Wallace testified there are significant negative immigration consequences for Applicant's convictions." App. 81.

Among other cases, the order quoted *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010), 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.'" App. 82 – 83. The order also discussed caselaw regarding the knowing, voluntary, and intelligent choice which a guilty plea must represent. App. 83. The order also cited to the form from the Bench Book introduced at the hearing. App. 83. The order concluded Respondent's pleas were not "voluntarily and intelligently made," since he was a non-citizen who would have sought advice from an attorney if he was aware of potential for immigration consequences. App. 83 – 84. The order found there were "significant immigration consequences in this instance that will drastically affect the Applicant." App. 84. The order concluded that when a non-citizen, pro se

defendant is not warned there may be possible immigration consequences due to pleading guilty, his plea is not voluntarily and intelligently made. App. 84.

Discussion

The State first argues Respondent has "waived and abandoned" the claim in this case. The State posits Respondent should have raised it on direct appeal. *See* State's Petition for Writ of Certiorari at 7 – 8. This claim has not been waived or abandoned. Respondent was pro se at the plea hearing. Respondent did not know what he did not know. No one objected to the colloquy. No notice of direct appeal was filed and served within the time frame for appealing as nothing was objected to and as Respondent was pro se. Once Respondent was represented by counsel, counsel filed an untimely motion to reconsider and brought up this new matter. Due to issue preservation principles, this matter could not have been addressed on direct appeal—it was not timely raised to and ruled upon by the trial court. *See* Rule 18, SCRMC (notice of appeal must be served and filed within thirty days of judgement when judgment announced in the presence of the parties); Rule 19, SCRMC (providing post-trial motions including motions for a new trial and motions to alter or amend the judgment must be filed within ten days after notice of the judgment). *E.g.*, *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). A person convicted of a crime who claims the conviction was in violation of the Constitution may seek relief through PCR. S.C. Code Ann. § 17-27-20(A). *See,* e.g., *Fortune v. State*, 428 S.C. 545, 559, 837 S.E.2d 37, 45 (2019) (claim not based on ineffective assistance of counsel is cognizable for PCR). This matter was properly before the PCR court.

The State next argues Respondent's plea was knowing, voluntary, and intelligent because he did not need to be informed there could be negative immigration consequences from the plea. The State argues *Padilla* has not been extended to the judiciary. *See* Petition for Writ of Certiorari at 8; 10 – 15. The State argues Respondent has not shown prejudice because did not intend to immigrate at the time of the plea. *See* Petition for Writ of Certiorari at 17 – 19. The State also argues negative immigration consequences are collateral, not direct consequences of the pleas. *See* Petition for Writ of Certiorari at 19 – 20. Respondent was from South Africa. He was here on a tourist visa. His guilty pleas made him deportable; they had "significant" adverse immigration effects. He was unaware the pleas would affect his ability to remain in or reenter the U.S. Notably, Respondent told the plea judge he intended to continue to travel within the U.S. The PCR court did not err in finding Respondent did not make a knowing and intelligent choice to plead guilty on these facts.

"The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (citing *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)). The Supreme Court "will uphold the findings of the PCR judge when there is any evidence of probative value to support them." *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "An appellate court must give deference to the PCR court's factual findings, and must uphold them if there is any evidence of probative value to support them." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The appellate courts of this state defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them; they review questions of law de novo, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

In this case, the PCR court credited Respondent's testimony that he would not have pleaded guilty had he known for the potential for immigration consequences. App. 83 – 84. It also credited Wallace's *unchallenged* testimony regarding the significantly adverse immigration consequences of guilty pleas to DUI and simple possession of marijuana. It was undisputed Respondent was not advised of the potential for immigration problems when he entered his pleas. The PCR court's findings are entitled to deference and should be upheld. *Cherry v. State*, 300 S.C. at 119, 386 S.E.2d at 626; *Smalls v. State*, 422 S.C. at 180–81, 810 S.E.2d at 839.

The PCR court's conclusion that Respondent, who was from South Africa, was unable to knowingly and intelligently waive his right to trial without being apprised there might be immigration consequences, was not error. Neither was its conclusion that the immigration consequences were direct consequences, although the "collateral" versus "direct" distinction as portrayed by the State in its Petition obscures the issue here—the issue is whether the plea was knowing and intelligent. The State's attempt to cast the matter as one of whether *Padilla* extends to the judiciary also obscures the issue. As discussed below, *Padilla* recognized immigration consequences may be more important than prison time to a foreign defendant.

The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). "[T]he 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). To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). "In order for a defendant to knowingly and

voluntarily plead guilty, he must have a full understanding of the consequences of the plea." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citations omitted).

"We have long recognized that deportation is a particularly severe 'penalty,' but it is not, in a strict sense, a criminal sanction." *Padilla v. Kentucky*, 559 U.S. at 365 (cleaned up). Deportation is "intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century[.]" *Id.* at 365-66. "Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." *Id.* at 366. "We too have previously recognized that preserving 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 (cleaned up).

South Carolina courts recognize the importance of a conviction's impact on immigration in ensuring the voluntariness of guilty pleas entered by foreign defendants. SCCA 685, the guilty plea information form from the Summary Court Bench Book is a judicial recognition of this. As seen, Respondent introduced this form at his PCR hearing. App. 88 – 89. In addition to summary courts, general sessions courts also advise foreign defendants there may be immigration consequences to their pleas. *See Taylor v. State*, 422 S.C. 222, 229, 810 S.E.2d 862, 865 (2018) (During the plea hearing, before accepting Petitioner's guilty plea, the plea court stated that a guilty plea could subject Petitioner "to being removed from this country" and could affect Petitioner's "right to remain here."). Absent apprisal his pleas could impact his immigration status, Respondent's pleas were not knowingly, intelligently, and voluntarily tendered on these facts.

Finally, the State surprisingly appears to argue that there are not negative immigration consequences from pleading guilty to DUI and simple possession of marijuana. The State cites the fact that Respondent had not already been deported at the time of the PCR hearing for this proposition. The State also now seemingly disagrees with Wallace's testimony that the marijuana conviction made Respondent deportable, although it notes this area of the law is "complex[]." App. 16 – 17. The State did not challenge Wallace's testimony at all at the PCR hearing. As seen, Wallace testified the marijuana conviction made Respondent deportable and inadmissible to the U.S. in the future. She testified the DUI conviction could also negatively affect immigration status. The State offered no contrary testimony of its own on this subject and it did not argue Wallace's testimony was incorrect. The State did not even cross-examine this witness. The State provided nothing for the PCR judge to consider on immigration consequences; the court only had before it Wallace's testimony. Therefore, there was no evidence to support a contrary finding by the PCR judge regarding immigration consequences. A number of immigration consequences are attendant to these pleas, as explained by Wallace. These pleas affected Respondent's ability to remain in the U.S. They affected his ability to immigrate to the U.S. They affected his ability to come back and visit family another time. The PCR court's finding that there are significant immigration consequences to Respondent's pleas is supported by the record. *Cherry v. State*, 300 S.C. at 119, 386 S.E.2d at 626; *Suber v. State*, 371 S.C. at 558, 640 S.E.2d at 886.

The PCR court did not err in granting respondent relief. E.g., *Taylor v. State*, 422 S.C. at 229, 810 S.E.2d at 865 (Petitioner, a Jamaican citizen, was entitled to PCR where he "had made it crystal clear that his decision to plead guilty turned on the prospects of deportation," but counsel failed to advise him deportation was presumptively mandatory for the charge to which

he pleaded guilty); *Hill v. Lockhart*, 474 U.S. at 56 (decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant).

Respectfully, certiorari is not warranted here.

CONCLUSION

For the reasons above, the petition for writ of certiorari should be denied.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR RESPONDENT

This 13th day of May, 2024.