RECEIVED
Mar 28 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

Opinion No. 2024-UP-077

BRITTANY C. FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000143

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Brittany C. Foster, requests that this Court rehear this matter based upon the significant points overlooked and/or misapprehended by this Court.

During the August 2016 term, a Spartanburg County Grand Jury indicted Petitioner Foster for murder, possession of a weapon during the commission of a violent crime, unlawful carrying of a pistol, and possession of methamphetamine. App. 307 – 312. On April 27, 2017, Foster pleaded guilty as indicted before the Honorable Letitia Verdin. App. 1. The plea was entered without negotiations or recommendations. Petitioner was sentenced to serve concurrent

terms of imprisonment of forty years for murder, five years for possession of a weapon during the commission of a violent crime, one year for unlawful carrying of a pistol, and three years for possession of methamphetamine. App. 27, ll. 16-19. On February 27, 2018, Foster timely filed an application for post-conviction relief (PCR). App. 31 – 37. On November 8, 2018, a hearing was held on the matter before the Honorable J. Mark Hayes, II. App. 49. On January 24, 2020, the PCR court issued an order of dismissal. App. 293 – 306. Petitioner filed a petition for writ of certiorari. The State made its return. On January 15, 2021, the Supreme Court transferred the case to this Court pursuant to Rule 243(l), SCACR.

On appeal from the denial of PCR, Foster argued the PCR court erred where it found plea counsel provided effective representation where plea counsel advised Petitioner Foster to plead guilty but he did not advise Foster that she could challenge the admissibility of her confessions at trial, where Foster would have exercised her right to trial had she known she could challenge this critical evidence, and where there was a reasonable probability Foster would have been successful in suppressing her confessions, since counsel's deficient performance resulted in Foster's entry of guilty pleas that were not knowingly, voluntarily, and intelligently tendered. On August 19, 2022, this Court granted certiorari. On February 6, 2024, a three-judge panel of this Court heard oral argument. On March 13, 2024, this Court affirmed the denial of post-conviction relief in *Foster v. State*, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024).

Petitioner respectfully asserts this Court overlooked and/or misapprehended the following points. First, Petitioner Foster asserts this Court misapprehended the PCR court's credibility findings with respect to Foster. In its order of dismissal, the PCR court wrote that its "credibility findings have been applied to the Court's findings and conclusions set forth below." App. 298. Shortly thereafter, the order of dismissal again stated, "Below are the findings in regards to *each*

specific allegation of ineffective assistance of counsel raised by Applicant[.]" App. 300 (emphasis added). Set forth below in the PCR court's order were findings and conclusions as to eight separate and specific claims of ineffective assistance of counsel. The PCR court only found Foster's testimony was not credible as to the fourth allegation. This allegation was the second. *See* App. 300 – 305. The PCR court did *not* find Foster was not credible with regard to her claim that her plea was not knowingly, voluntarily, and intelligently made due to counsel's deficient performance in failing to advise her she could challenge her confessions at trial. However, this Court concluded, "Though the court made its credibility finding under a separate allegation in the order denying PCR, it is clear throughout the entirety of the order that the court did not think Foster was credible." *Foster v. State*, Op. No. 2024-UP-077, n. 1 (S.C. Ct. App. filed March 13, 2024). That was not the case—the PCR court's order stated it was setting forth its credibility findings as to each separate allegation, and then it did so. Foster respectfully asserts this Court overlooked the PCR court's statements explaining how it was applying its findings—each allegation had separate findings.

Moreover, assuming *arguendo* the PCR court's finding on credibility applied to this allegation, the finding was unreasonable and not supported by the record. Foster testified she would have gone to trial if she knew she could challenge the fruit of her unconstitutional stop, search, and interrogation. This Court found "[t]he PCR court had good ground to doubt the genuineness of Foster's assertion that she would have chosen a trial if she had known she could move to have her confession suppressed. The record demonstrates that Foster understood the high probability of an unfavorable trial outcome—thus making it very unlikely she would have gone to trial." *Foster v. State*, Op. No. 2024-UP-077 (S.C. Ct. App. filed March 13, 2024). Respectfully, this Court overlooks the fact that there was no benefit to Foster pleading guilty in

this case, since her guilty pleas were without negotiation or recommendation. Although Foster disputes that the chances of an unfavorable outcome were high at trial, it is undeniable the chances of an unfavorable outcome were guaranteed at a straight-up plea (convictions on all charges). This Court also misapprehends the application of Foster's important and weighty constitutional right to trial. U.S. Const. amend. VI; U.S. Const. Amend. XIV; *see generally Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (right to jury trial in serious criminal cases is a fundamental right); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal").

Respectfully, this Court overlooked the fact that Foster had nothing to lose at trial, and thus misapprehended the law in this regard. This Court stated and cited the following in its opinion: "[A] plea was the only rational action for her to take. Under these facts, we agree. *See Padilla v. Kentucky*, 559 U.S. 356, 371-72 (2010) (concluding, to meet '*Strickland*'s high bar,' the 'petitioner must convince the court that a decision to [proceed to trial] would have been rational under the circumstances')[.]" Respectfully, *Padilla* stated: "a petitioner must convince the court that a decision *to reject the plea bargain* would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. at 372 (emphasis added). There was no plea bargain in this case. *Padilla* is not a bar to relief. Proceeding to trial would have been objectively reasonable in this case.

The trial court may not impose a "trial tax" on a criminal defendant and punish them for exercising their constitutional rights. *See Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) ("When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of

discretion."); *Davis v. State*, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999) ("[T]he trial judge, in sentencing petitioner, improperly considered petitioner's decision to proceed with a jury trial."); *State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995) (The "trial judge abused his discretion by considering the fact that appellant exercised his right to a jury trial."). Foster received the same sentences at the plea that she could have received if convicted at trial. And, even if Foster wished to waive her jury trial right, she still could have had a bench trial and moved for suppression.

Petitioner Foster asserts this Court misapprehended the facts and their application to the prejudice standard in this case. Foster had to show that but for counsel's deficient performance, she would not have pleaded guilty "and would have insisted on going to trial to challenge charges grounded on his allegedly involuntary statements." *Shirley v. State*, 306 S.C. at 244, 411 S.E.2d at 216; *see Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process—defendant 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). Foster established this prong through her testimony and through the facts of her conviction (a plea with no recommendations or negotiations; and a plea to all charges). This decision would have been objectively reasonable, as discussed above.

Foster has also shown "a reasonable probability that she would have prevailed in a suppression hearing." *Rollison v. State*, 346 S.C. 506, 509-10, 552 S.E.2d 290, 292 (2001). Had she suppressed the confessions, Foster likely would have been found not guilty at trial. This Court found that "a plea was the only rational action for her to take," since it "seems highly unlikely that suppressing Foster's confession would have materially decreased the odds of an

unfavorable trial outcome. Irrespective of Foster's confession, law enforcement had other evidence pointing to Foster as the shooter, including a co-defendant's statement against her." This is speculation. Foster's codefendant was her boyfriend—he may have refused to testify against her come trial, and if he did not testify, she could have suppressed his confession as to her pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). *See State v. McDonald*, 412 S.C. 133, 139, 771 S.E.2d 840, 843 (2015) ("In *Bruton v. United States*, the United States Supreme Court held that a defendant's Confrontation Clause rights are violated when a nontestifying codefendant's confession that implicates the defendant is admitted during a joint trial.").

In addition, there was a reasonable probability Foster could have been convicted of a lesser offense—voluntary manslaughter—at trial, given her profound intellectual disability and just prior to the shooting, her insight that the decedent had on a prior occasion vaginally and anally raped her. App. 63, l. 25 – 66, l. 15; App. 215 – 225. *See,* e.g., *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (citing *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.").

The PCR court erred where it found plea counsel provided effective representation where plea counsel advised Petitioner Foster to plead guilty but he did not advise Foster that she could challenge the admissibility of her confessions at trial, where Foster would have exercised her right to trial had she known she could challenge this critical evidence, and where there was a reasonable probability Foster would have been successful in suppressing her confessions, since counsel's deficient performance resulted in Foster's entry of guilty pleas that were not knowingly, voluntarily, and intelligently tendered.

Relevant facts

Brittany Foster's charges stemmed from the 2016 death of the decedent, Anthony Biggerstaff. App. 311 – 312. At the time of the decedent's death, Foster was twenty-one years old with a ninth-grade education. App. 6, ll. 11-14. Foster had a history of epileptic seizures, brain damage, and learning disabilities. App. 93, ll. 4-5; App. 88, ll. 7-10. She was sexually abused by her father at the age of eleven, and her mother was addicted to drugs. App. 85, l. 17 – 86, l. 22. Foster became addicted to drugs at the age of fifteen. App. 86, l 23 – 87, l. 1. When Foster was raped by a friend's father at the age of eighteen, the State declined to prosecute because the man "denied it was forced." App. 89, ll. 5-15. "[B]y the time [Foster] hit adolescence [she had been] thrown away by society." App. 106, ll. 17-19.

In May of 2016, Foster was living with her boyfriend, Keenen Hines (Hines). The two were roommates with the decedent. App. 11, l. 22 – 12, l. 1. Prior to the decedent's death, Foster woke up in "excruciating pain," bleeding from the vagina and rectum. App. 64, l. 24 – 65, l. 6. She asked Hines if the two of them had sex, and Hines said they had not. Hines appeared to become angry with Foster and he accused her of cheating on him with the decedent, who was the only other person in the house. App. 65, l. 8 – 66, l. 8. However, Foster would later discover that Hines likely "sold" her to the decedent when she was "passed out." App. 63, l. 25 – 66, l. 3; App. 22, ll. 4-6.

On May 29, 2016, Hines, Foster, and the decedent were together in the decedent's car. The night would end with the decedent dead in a creek and his car floating in Lake Bowen. App. 13, l. 15 – 14, l. 18; App. 255. After finding the decedent's car in the lake and a suicide note nearby, police began looking for Foster and Hines, since they were the decedent's roommates and had been seen with him that day. App. 11, l. 13 – 14, l. 1.

On May 30, 2016, Investigator Clark interviewed Foster and Hines at the hotel where they were staying. According to Clark, Foster and Hines said they were staying at the hotel because the decedent told them they had to move out. Clark said Foster "made the comment that [the decedent] had made several sexual comments and advances towards her," but that Foster and Hines "were hesitant to talk to me." Clark left after giving them his business card. App. 143; App. 150; App. 164.

Four days later, on June 2, 2016, Foster and Hines were passengers in car driven by Jessica Nesbitt (Nesbitt). The car was pulled over because Officer Henderson could not read the date on the car's paper tag. Nesbitt was in the driver's seat, Hines was in the passenger's seat, and Foster sat in the rear. App. 196. Nesbitt continued driving briefly before she pulled over. App. 99, ll. 15-21; App. 196. After Nesbitt pulled over, Nesbitt looked through purses in the trunk for her driver's license, and Officer Henderson saw a bag of methamphetamine. App. 196. Nesbitt admitted the purse containing the methamphetamine was hers. App. 197. Henderson asked Nesbitt about the presence of any weapons, and Nesbitt said that Hines had a gun. Henderson searched the car and found a gun under the front passenger seat, where Hines had been seated. App. 99, l. 22 – 101, l. 25; App. 196; App. 200. Officers also found marijuana inside a bookbag on the passenger floorboard. App. 197.

Although nothing linked Foster to the gun under Hines' seat, the methamphetamine in Nesbitt's trunk, or the marijuana in the bookbag by Hines, Foster was arrested along with Nesbitt and Hines. App. 200. All three—Nesbitt, Hines, and Foster were charged with unlawful carrying of a pistol, possession of methamphetamine, and possession of marijuana. App. 102, l. 23 – 103, l. 2; R. 13, ll. 2-8; App. 197. Nesbitt was charged with additional drug crimes for more drugs found on her person when she was searched at the jail. App. 197.

After Foster was taken to the jail, Investigator Clark, who had wanted the opportunity to question her again, began to interrogate Foster. Foster, who was under the influence of drugs and alcohol, admitted shooting the decedent. App. 103, ll. 4-15; App. 57, ll. 15-18; App. 59, ll. 2-9; App. 166. Foster was read *Miranda*[1] warnings and officers took her out to look for the body for "a number of hours," but they were unsuccessful. App. 145; App. 166. Foster was taken to the Sheriff's Department and again provided *Miranda* warnings. Investigator Clark obtained a recorded confession from Foster in which she admitted that she had killed the decedent and said Hines helped her dispose of the body. App. 145; App. 166; App. 204; State's Exhibit #4.

Although she initially denied that Hines was in any way responsible for the murder, Foster would later say that Hines gave her the gun, asked her if she was going to let the decedent get away with raping her, and told her, "Do it." App. 66, ll. 12-15; App. 14, ll. 3-6; App. 22, l. 4 – 23, l. 24. Foster had been vaginally and anally raped while living with Hines and Decedent. Given her profound intellectual disability, Hines's taunting just prior to the shooting gave Foster the insight that the decedent was the person who had raped her. App. 63, l. 25 – 66, l. 15; App. 215 – 225.

Hines was questioned and he admitted he helped hide the decedent's body, but he claimed Foster killed the decedent because the decedent "was trying to get with her and she did not like that." App. 145; App. 205 – 211; State's Exhibit #5. Hines showed officers where the decedent's body was located and he was charged with accessory after the fact. App. 145; App. 155.

A pre-trial competency evaluation revealed Foster had depression and a personality disorder. Foster was also diagnosed with alcohol use disorder and amphetamine use disorder.

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

App. 221 – 222. Foster attended special education classes as a child. App. 218. She had a significant history of cutting herself. App. 219. The psychologist noted Foster had "deficits" in her understanding of the legal system and opined that she might need education regarding the legal process. App. 224.

Foster's counsel advised that she plead guilty, straight up. App. 109, ll. 15-21; App. 113, l. 17 – 114, l. 20; App. 121, l. 20 – 122, l. 1. On April 27, 2017, Foster did so. App. 1. No negotiations had been entered and no recommendations were made. App. 4, ll. 12-14. Foster was sentenced to serve concurrent terms of imprisonment of forty years for murder, five years for possession of a weapon during the commission of a violent crime, one year for unlawful carrying of a pistol, and three years for possession of methamphetamine. App. 27, ll. 16-19. At the plea hearing, the solicitor misspoke and said that Nesbitt's car had been pulled over for an expired tag. Plea counsel did not correct this misstatement of fact. App. 12, ll. 6-12; App. 99, ll. 15-18. Nesbitt was actually pulled over because Officer Henderson said he could not see the expiration date on her temporary tag—the tag was not expired. App. 196; App. 99, ll. 15-18; App. 115, ll. 6-22.

Foster filed an application for post-conviction relief (PCR). App. 31 – 37. A hearing was held on the matter. Foster testified that plea counsel never advised her that she could challenge the admissibility of her statements if she went to trial. Foster said defense counsel never mentioned a *Jackson v. Denno*[2] hearing and he never mentioned that a trial judge could, in some circumstances, keep a confession out of a trial. App. 60, l. 20 – 61, l. 2. "It was never stated that my – that my confessions could be suppressed, ever." App. 69, ll. 18-19. Foster said that if she

[2] *Jackson v. Denno*, 377 U.S. 368 (1964).

had known she could challenge her confessions at trial, she would have taken the case to trial. App. 69, ll. 22-25; App. 70, ll. 4-12.

Plea counsel[3] was asked if he had explained to Foster that she might have a "suppression issue that she could only argue if she went to trial?" and he said, "I don't know if we had that discussion . . ." App. 120, ll. 19-24. PCR counsel asked plea counsel a second time if he specifically recalled discussing with Foster that she waived her right to challenge her confessions if she pleaded guilty rather than going to trial, and he responded, "Well, first of all, I didn't think we had a good suppression issue. But I did say you're – and I tell all my clients you're going to be giving up any rights to challenge any of the evidence, statements, or anything. And I think the judge – every judge goes through that very well in this State." App. 121, l. 20 – 122, l. 5.

The PCR court took the matter under advisement and issued an order wherein the fifteen exhibits that were entered by the State at Foster's plea hearing were made part of the record of the PCR hearing.[4] App. 129 – 130; App. 131 – 283. PCR counsel filed a brief in which she argued that the exhibits showed Foster "had a strong search and seizure argument which could likely have resulted in the suppression of her confession as fruit of the poisonous tree," or as involuntarily made. App. 286; App. 289.

PCR counsel also noted that if Foster "lost her pre-trial suppression motion, she would have had a strong appellate issue if she had not pled guilty." App. 289. PCR counsel argued that

---

[3] Foster alleged plea counsel told her if she did not plead guilty, she would be "hung" by the trial judge. Plea counsel said he would have advised something similar but he would likely have used the word "hanged." However, plea counsel said he did not think he said that—he would have told her she would get life. App. 109, ll. 15-17; App. 113, ll. 3-16. The PCR court found Foster's testimony that she pleaded guilty based on this advice from counsel was not credible. App. 303.

[4] Copies of the paper exhibits, including the incident reports, are included in the Appendix. Copies of the photographic exhibits are included in the Appendix and are also on file with this Court. The exhibits recorded on video, including Foster's interview with police officers and Hines' interview with police officers, are also on file with this Court.

plea counsel provided deficient performance when he advised Foster she should plead guilty based on his opinion that she would be convicted at trial, since his opinion was "based on a mistake of law." App. 290. PCR counsel also noted that plea counsel did not dispute Foster's "testimony that they had not discussed suppression issues or her chances to keep out the confession if she went to trial. Nor did [counsel] dispute [Foster's] testimony that if she had known that she had a suppression issue, she would not have pled and instead insisted on going to trial." App. 290.

On January 24, 2020, the PCR court issued an order of dismissal. App. 293 – 306. In the order of dismissal, the PCR court addressed, *inter alia*, Foster's allegation that counsel was ineffective for "[a]dvising the Applicant to plea without explaining that she may have been able to get her confession suppressed as fruit of the poisonous tree or because it was not voluntarily made due to the fact her statement was given when she was incompetent because of her mental health issues and the fact that she was actively under the influence of drugs." App. 301. The order of dismissal stated that the traffic stop "in which the applicant was a passenger that resulted in the applicant being taken into custody would not have been successful if challenged at a trial." App. 301. "Also, her confession to the murder is unrelated to the stop. It is far more probably [sic] that she was going to be questioned by police about the murder, not because she was a passenger in the vehicle where a gun and drugs were found, but rather because she and her boyfriend had been roommates with the deceased." App. 301.

As to whether counsel should have advised Foster she could challenge the voluntariness of her confessions, the order of dismissal concluded that Foster had not met her burden of proof as to establishing *Strickland* prejudice since she "presented no evidence, other than her own

statement that she was 'extremely high' at the time of her arrest, to support a finding of incompetency." App. 301 – 302.

The PCR court found Foster's testimony that she pleaded guilty based on a statement from counsel that she would be hung at trial was not credible. App. 303.

Discussion

In order to provide reasonably effective assistance under prevailing professional norms, in this case: (1) plea counsel was obligated to inform but failed to inform Foster that she could challenge the admissibility of her confessions at trial, and that when she pleaded guilty she gave up the rights to do so; and (2) plea counsel was required to have a correct understanding of the law before advising Foster to plead guilty but counsel did not, since he did not know that there was a reasonable probability Foster's confessions would be suppressed under these circumstances.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). 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).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he

two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

First, plea counsel was deficient when he did not advise Foster that she could challenge the admissibility of her confessions at trial. Foster testified plea counsel never mentioned that a trial judge could keep a confession out of a trial under certain circumstances. App. 60, l. 20 – 61, l. 2. "It was never stated that my – that my confessions could be suppressed, ever." App. 69, ll. 18-19. Plea counsel did not dispute Foster's testimony; he was asked if he explained to Foster that she might have a "suppression issue that she could only argue if she went to trial?" and counsel said, "I don't know if we had that discussion . . ." App. 120, ll. 19-24. PCR counsel was asked again whether he specifically recalled discussing the possibility of suppressing Foster's confessions with her and he did not—counsel only said that he would have told Foster what he generally tells all of his clients, that "you're going to be giving up any rights to challenge any of the evidence, statements, or anything." Plea counsel said he considered colloquies by judges sufficient to inform defendants of their rights. App. 121, l. 20 – 122, l. 5. The plea judge did not mention suppression in her colloquy with Foster. App. 5, l. 2 – 6, l. 25; App. 15, l. 5 – 16, l. 18.

In order for Foster to knowingly and intelligently plead guilty and waive her rights to challenge the evidence against her she needed to understand what challenging statements meant: that her confessions might not be heard by the jury if she went to trial. Notably, the psychologist who evaluated Foster for competency to stand trial concluded that Foster had deficits in her understanding of the legal system and might need "education" regarding "some aspects of the legal system." App. 224. Plea counsel's performance was deficient, since he did not advise Foster the trial judge could suppress her confessions so that they would not be used against her at trial (or that if the trial judge did not, she could potentially prevail on direct appeal). Defense

counsel provides ineffective assistance where counsel fails to inform the defendant "prior to his guilty plea that his statements may have been made involuntarily, and, if so, would be inadmissible at trial." *Shirley v. State*, 306 S.C. 241, 244, 411 S.E.2d 215, 216 (1991). *See McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts").

The evidence against Foster primarily consisted of her confessions, her codefendant Hines' statement against her, and evidence that she was with Hines and the decedent the day of his death. *See* App. 143 – 168; App. 194 – 211; State's Exhibit #4; State's Exhibit #5. Thus, Foster's confessions were the key evidence against her. Plea counsel's advice left her with the mistaken understanding that the confessions would be admitted at trial as a matter of course. Plea counsel's deficient performance left Foster without a "voluntary and intelligent choice among the alternative courses of action open to the defendant," since she did not know she could challenge critical evidence against her at trial. *Hill v. Lockhart*, 474 U.S. at 56. Foster did not have an "understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. at 466. Therefore, her pleas of guilty were not knowingly, voluntarily, and intelligently entered.

Second, plea counsel was ineffective for advising Foster she should plead guilty based on his erroneous understanding that Foster's confessions were unlikely to be suppressed. App. 109, ll. 15-21; App. 113, l. 17 – 114, l. 20; App. 121, l. 20 – 122, l. 1. "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). The State entered fifteen exhibits, including law enforcement's incident reports about the case. App. 9, l. 3 – 11, l. 12; App. 131 –

283; State's Exhibits #4 – 5; State's Exhibits #7 – 10. These exhibits, which were before the PCR court, show there was a reasonable probability that Foster's confessions could be suppressed. Alternate grounds for suppressing Foster's confessions, which will be discussed below, were her unlawful arrest, the unlawful stop, fruit of the poisonous tree, involuntariness and coercion. Moreover, the confessions were not admissible under the inevitable discovery doctrine.

Foster's confessions were the product of an unlawful seizure since police officers lacked probable cause to arrest her for the drugs or weapon found in Nesbitt's car. Probable cause must be more than mere suspicion; it must be a fair probability determined by the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Arrests cannot be made without probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981). Although police had probable cause to arrest Nesbitt and Hines, they did not have probable cause to arrest Foster. When Nesbitt looked through the trunk for her driver's license, the officer spotted methamphetamine in a purse that Nesbitt admitted was her own. App. 196. Nesbitt told Officer Henderson that Hines had a pistol in the car, and officers found the pistol under Hines' seat. Officers also found marijuana in a bookbag on the floor of the passenger's compartment, where Hines was sitting. App. 196 – 197. These facts did not provide probable cause to arrest and question Foster. Foster's arrest was unlawful. U.S. Const. amend. IV; U.S. Const. amend. XIV; *Michigan v. Summers*, 452 U.S. at 700; *see also Dunaway v. New York*, 442 U.S. 200, 216-19 (1979) (officers violated Fourth and Fourteenth Amendments when they seized defendant without probable cause and took him to the police station; defendant's confession, which was obtained absent significant intervening events, should have been suppressed).

Foster's arrest led to her interrogation and confessions. First, Foster said she shot the decedent prior to being provided *Miranda* warnings, when police initiated questioning; and second, Foster gave a more detailed statement that she shot the decedent after police provided *Miranda* warnings. State's Exhibit #4; App. 145; App. 166. However, the provision of *Miranda* did not attenuate the taint of Foster's unconstitutional arrest. "[T]he fact that the confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest." *Taylor v. Alabama*, 457 U.S. 687, 690 (1982). "In this situation, a finding of 'voluntariness' for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis." *Id.* In other words, just because Foster was given *Miranda* warnings did not make her subsequent confession admissible, since she was in custody pursuant to an unconstitutional seizure.

When determining whether *Miranda* warnings assure that a confession was of sufficient free will so as to purge the primary taint of an unlawful arrest, the court must determine whether the confession was "obtained by exploitation of the illegality of [the accused's] arrest." *Brown v. Illinois*, 422 U.S. 590, 600 (1975). The factors to be considered include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* at 603-04. In *Taylor v. Alabama*, 457 U.S. at 691, the United States Supreme Court held that intervening circumstances were not sufficient to break the causal connection between an arrest and confession where six hours had elapsed between the arrest and the confession, *Miranda* warnings were given, and the accused was allowed to visit with his girlfriend. Here, as in *Taylor*, Foster's confessions were obtained by exploitation of her arrest. The temporal proximity of her statements was close to the time of her arrest, and there were no intervening circumstances sufficient to attenuate Foster's unlawful arrest from her

confessions. She was in police custody throughout and she never spoke with a lawyer. App. 145; App. 166; App. 103, ll. 4-15. The purpose of the questioning was an investigatory expedition undertaken via an unconstitutional seizure.

The PCR court erred in finding Foster's confessions were unrelated to the stop. Foster had already been questioned by Investigator Clark about the decedent's death two days before and she did not incriminate herself. App. 164. It was not until she was arrested in the traffic stop that she confessed. Foster's confessions were evidence derived from her unreasonable seizure since police did not have probable cause to arrest her, and the confessions would likely have been suppressed at trial as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963). The remedy for an unlawful arrest is the suppression of evidence seized as a result of the arrest, along with any leads or evidence derived from the arrest. *Whiteley v. Warden*, 401 U.S. 560, 568-69 (1971). Plea counsel was ineffective for failing to recognize the strength of the suppression issue in this case based on Foster's unlawful arrest.

Alternatively, Foster could have successfully suppressed her confessions based on the unlawful stop of Nesbitt's car since the facts did not provide reasonable suspicion to stop Nesbitt's car. A traffic stop is a seizure under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). As a passenger, Foster had standing to challenge the traffic stop, her own seizure, and evidence derived from that seizure. *Brendlin v. California*, 551 U.S. 249, 257 (2007). Officer Henderson's incident report stated that he pulled over Nesbitt's car because, "I could not see the expiration date on the tag." App. 196. However, no traffic violation was reported, Henderson never claimed there was anything wrong with how the tag was displayed, and the tag was not expired.

The Fourth Amendment prohibits an officer from stopping a car because it has a temporary tag unless he has an objective, particularized and articulable suspicion to believe the tag is expired or the occupants of the car are involved in criminal activity. *State v. Butler*, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000). In *Butler*, this Court addressed the State's argument that "the mere presence of a 'temporary tag' on a car is reasonable suspicion that the car is either unregistered, uninsured, or is otherwise involved in criminal activity." *Butler*, 343 S.C. at 202–03, 539 S.E.2d at 416. This Court found it did not and "h[e]ld that the mere presence of a temporary tag on the back of a car, without more, is insufficient to provide a reasonable suspicion that the driver is violating registration or insurance laws or that the driver is otherwise involved in criminal activity." *Id.*

The Fourth Circuit Court of Appeals has addressed a traffic stop identical to the case at hand—due to an officer being unable to read a temporary tag—and found the search and seizure there to be unreasonable. In *United States v. Wilson*, 205 F.3d 720, 722 (4th Cir. 2000), a police officer pulled over a car because he could not read the expiration date on a temporary tag, although the officer had not seen anything illegal about the tag or the operation of the car, and there was no evidence that the tag was improperly displayed. The Fourth Circuit cited *Delaware v. Prouse*, 440 U.S. 648, 663 (1978), noting that "the Fourth Amendment does not allow a random, discretionary automobile stop that is unsupported by articulable, reasonable suspicion of a violation." *Wilson*, 205 F.3d at 723. "An objective assessment of the facts and circumstances of this stop compels the conclusion that the officer lacked any articulable, reasonable suspicion that a violation had occurred. Simply put, he saw nothing wrong, and he suspected nothing." *Id.* at 724. "Upholding a stop on these facts would permit the police to make a random, suspicionless stop of any car with a temporary tag. The Fourth Amendment does not afford the police such

unbridled discretion." *Id.* The contraband discovered in the defendant's car pursuant to the stop should have been excluded from trial. *Id.*

Here, as in *Wilson*, there was no reasonable suspicion—Officer Henderson only stopped the car because he could not read the expiration date on the temporary tag. App. 196. Officer Henderson lacked a reasonable, articulable suspicion to pull the car over. Foster's detention and subsequent interrogation pursuant to the stop were unlawful. *Wilson*, 205 F.3d at 723; *Prouse,* 440 U.S. at 663; *Butler*, 343 S.C. at 202–03, 539 S.E.2d at 416. *See also Florida v. Royer*, 460 U.S. 491, 501 (1983) ("statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will"). Foster's confessions were evidence derived from the unreasonable stop and would likely have been suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. at 484-86; U.S. Const. amend. IV; U.S. Const. amend. XIV.

Moreover, Foster had yet another alternative ground for suppression—that her confessions were involuntary—since she was under the influence of drugs and alcohol at the time they were made, she was uneducated, she had a history of mental illness, and she suffered from brain damage caused by epileptic seizures. App. 6, ll. 11-14; App. 88, l. 7 – 93, l. 5; App. 57, l. 15 – 59, l. 9. A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, and she has the right to object to the use of the confession and have a fair hearing on the issue of voluntariness. *Jackson v. Denno*, 378 U.S. 368, 376–77 (1964).

The use of a defendant's confession offends due process if his will has been overborne and his capacity for self-determination critically impaired. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973). "In determining whether a defendant's will was overborne in a particular

case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. A totality of the circumstances inquiry may include consideration of the accused's intelligence and education. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). Proof that an accused was intoxicated at the time she made a confession renders the statement inadmissible as a matter of law, where the accused's intoxication is such that she did not realize what she was saying. *State v. Saxon*, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). As seen, Foster did not complete high school, had a history of mental illness, and had brain damage. In addition, she was intoxicated from ingesting both drugs and alcohol. The PCR court erroneously conflated competency with voluntariness in its order of dismissal here. App. 301 – 302. However, while Foster's mental illness and brain damage did not render her incompetent, it did weigh in favor of involuntariness.

The unconstitutional stop and arrest of Foster was coercive. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (coercive police activity is necessary predicate to finding confession is not voluntary within the meaning of the Due Process Clause). Courts weigh the degree of coercion against an accused's degree of vulnerability. *See, e.g., Payne v. Arkansas*, 356 U.S. 560, 567 (accused described as "mentally dull"); *Blackburn v. Alabama*, 361 U.S. 199, 200-201 (1960) (defendant with history of severe mental illness); *Columbe v. Connecticut*, 367 U.S. 568, 620 (1961) (illiterate defendant with mental age of a nine-year-old). Here, Foster's myriad vulnerabilities were exploited by her coercive unlawful arrest. Foster's confessions would likely have been suppressed as involuntary. *Denno*, 378 U.S. at 376-77.

Finally, Foster's confessions were not admissible under the inevitable discovery exception to the exclusionary rule. Under that exception, if a preponderance of the evidence demonstrates that evidence ultimately would have been discovered by lawful means, then any

evidence obtained without a valid search warrant should be admitted. *Nix v. Williams*, 467 U.S. 431, 444 (1984). Investigator Clark had already used lawful means to question Foster the day after the decedent's death and she did not confess. App. 143; App. 150; App. 164. It was only when Foster was unlawfully seized that she confessed. No evidence was presented that the State would have inevitably obtained Foster's confession absent these coercive circumstances.

Plea counsel provided deficient representation when he advised Foster to plead guilty to murder, *in exchange for nothing*, based on his incorrect conclusion that attempts at suppressing Foster's confessions would be unsuccessful.

To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). A PCR applicant shows prejudice where but for counsel's deficient performance, he would not have pleaded guilty "and would have insisted on going to trial to challenge charges grounded on his allegedly involuntary statements." *Shirley v. State*, 306 S.C. at 244, 411 S.E.2d at 216. Here, Foster testified that plea counsel did not discuss the possibility of suppressing her confessions and that she would have gone to trial had she known of this possibility. App. 69, l. 22 – 70, l. 12. When it addressed this allegation of ineffective assistance in the order of dismissal, the PCR judge did not find her testimony as to this matter to lack credibility. The PCR court did find Foster's testimony to lack credibility as to her allegation that she would not have pleaded guilty but for counsel's advice that she would be "hung" if she went to trial, but that was the only allegation upon which

the court made an adverse credibility finding. App. 302. Foster's testimony about the lack of a discussion regarding suppressing her confessions was not disputed by plea counsel. Plea counsel was asked twice about it, and said he could not recall having such a discussion with Foster but he advises clients they are waiving their rights and he expects that plea colloquies with the court adequately cover these matters. App. 120, l. 19 – 122, l. 5. Foster showed prejudice per *Hill*, *Frierson* and *Harden*, and per *Shirley*, *supra*.

Where a PCR applicant claims ineffective assistance of counsel based on counsel's failure to challenge a search and seizure where the applicant pleaded guilty, and where the solicitor's rendition of facts at the plea show no constitutional error, this Court has held that the applicant must show that "had his trial attorney challenged the frisk, there is a reasonable probability that she would have prevailed in a suppression hearing." *Rollison v. State*, 346 S.C. 506, 509-10, 552 S.E.2d 290, 292 (2001). Assuming *arguendo* that *Rollison* applies, because, as discussed *supra*, counsel did not correct the solicitor's incorrect statement at the plea hearing that the car was stopped for an expired tag, even under *Rollison*, Foster has shown prejudice. *See* App. 12, ll. 6-21; App. 99, ll. 15-18. There was a reasonable probability her confessions would have been suppressed: based on her unlawful arrest; based on the improper stop; and based on the involuntariness of her confessions. *Michigan v. Summers*, 452 U.S. at 700; *Delaware v. Prouse*, 440 U.S. at 663; *Jackson v. Denno*, 378 U.S. at 376–77.

Foster's pleas were not a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. at 56. The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. Foster did not receive effective assistance here. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. at 686.

Petitioner respectfully requests this Court rehear the matter and reverse her convictions.

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

This 28th day of March, 2024.

RECEIVED
Mar 28 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

BRITTANY C. FOSTER,

PETITIONER

V.

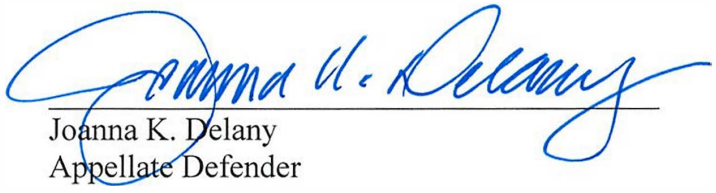
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000143

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Shayla Joan Flores, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Brittany C. Foster, #372413, at Camille Griffin Graham Correctional Center, 4450 Broad River Road, Columbia, SC 29210, this 28th day of March, 2024.



Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

From: Stock, Chris
To: "shaylaflores@scag.gov"; Jordan Hickman
Cc: Delany, Joanna; Warren, Kaylynn
Subject: 2020-000143 Brittany C. Foster v. The State Petition for Rehearing and COS
Date: Thursday, March 28, 2024 5:10:04 PM
Attachments: 2020-000143 Brittany C. Foster v. The State Petition for Rehearing and COS.pdf

---

Ms. Flores,

Please find attached for service the Petition for Rehearing for Brittany C. Foster's appeal which will be filed today with the Court of Appeals.

Thank you.
Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330