STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Florence County

Honorable George M. McFaddin, Circuit Court Judge

LARENZOE TYSHAWN EPPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001299

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding counsel provide constitutionally effective assistance where counsel failed to adequately consult with Petitioner, failed to discuss the concept of mere presence with Petitioner, and failed to investigate Petitioner's co-defendant who had a long criminal history involving narcotics prior to advising Petitioner to enter a guilty plea which rendered his plea unknowing and involuntary?

STATEMENT OF THE CASE

On January 2, 2016, a maintenance worker at the Palmetto Inn was working on the air conditioner in Room 109 when he noticed what appeared to be narcotics in plain view. The maintenance worker contacted the Florence County Sheriff's Office to report what he had seen. Officer Austin Meggs responded to Room 109 at the Palmetto Inn. The room was rented to a Herbert Wilson. A juvenile male opened the door to the room at which point Meggs encountered the "overwhelming odor" of marijuana. Petitioner was also inside of the room. Meggs was given verbal consent by Petitioner and the juvenile to enter and conduct a search of the room. In the bathroom, Meggs noted a quantity of what he believed to be cocaine base or compressed heroin on the sink. Petitioner and the juvenile were detained. Investigator McDowell was called to the scene. App. 27, l. 19-App. 29, l. 11.

McDowell executed a search warrant on Room 109. During the search officers collected narcotics from the bathroom sink, a small box containing heroin that was located under a mattress, a digital scale, and a firearm. The serial number on the firearm matched a gun that was reported stolen out of Richland County. A Honda Acura that was parked outside of the room returned as a stolen vehicle out of Lee County. Petitioner voluntarily turned over his cellphone which contained messages between himself and a man he referred to as "Unc", photographs of himself and the juvenile holding the stolen gun, and pictures of the stolen vehicle. App. 29, l. 12-App. 30, l. 21.

Petitioner was indicted in June 2016 by the Florence County grand jury for one count of trafficking heroin, 28 or more grams, one count of trafficking cocaine base, 10-28 grams, one count of trafficking cocaine, 10-28 grams, one count of possession of a stolen pistol, and one count of possession of a stolen vehicle. App. 38-40. The State, represented by John Jepertinger,

called the case to trial on December 4, 2017, before the Honorable B. Craig Brown and a jury. Petitioner was represented by Scott Floyd. App. 1. Following jury selection, the court was informed that Petitioner would enter a guilty plea to the lesser included offense of trafficking heroin, 4-14 grams, for a negotiated sentence of fourteen years incarceration. App. 21, ll. 1-5.

During the plea, Counsel Floyd informed the court that Petitioner was eighteen at the time of the incident and twenty at the time of the plea. Petitioner had no prior record and had not gotten into any trouble during the pendency of the case. Additionally, Petitioner was a high school graduate with plans to attend technical college to study aviation mechanics prior to the incident. App. 32, l. 21-App. 34, l. 24. After hearing from Petitioner and his family members, Judge Brown imposed the negotiated fourteen-year sentence. App. 36, ll. 13-22; App. 52

Petitioner did not appeal his guilty plea. On November 28, 2018, Petitioner filed a *pro se* application for post-conviction relief. App. 42-48. The State filed a return on April 25, 2019. App. 49-53. PCR Counsel Joshua Bailey filed an amended PCR application on November 30, 2022. App. 54-58. An evidentiary hearing was convened before the Honorable George M. McFaddin, Jr., on December 12, 2022. The State was represented by Danielle Dixon. Petitioner was represented by Counsel Bailey. App. 59.

Petitioner testified that he was arrested on January 2, 2016, and retained Todd Rutherford in early March 2016. App. 65, ll. 7-19. Over a year into the representation Mr. Rutherford informed Petitioner a conflict existed, and he could no longer represent him. Petitioner eventually learned that Mr. Rutherford had also been representing his co-defendant in the case, Herbert Wilson. Mr. Rutherford was relieved, and Scott Floyd was appointed to the case in September 2017. Petitioner recalled one meeting with Counsel Floyd prior to jury selection and

Petitioner's guilty plea which occurred two months later on December 4, 2017. App. 65, l. 20-App. 68, l. 10.

Petitioner wanted to go to trial but was told by Counsel Floyd that he did not have a defense, so he lost confidence in his decision. Petitioner maintained that he only learned that none of the fingerprint evidence from the room matched him and that the room was rented in Wilson's name after he received his discovery motion once he was in SCDC. He also stated that he only learned about the concept of mere presence after he was in prison doing research. He stated that if he had known about the favorable, exculpatory evidence, that he would have gone to trial. App. 71,l. 6-App. 74, l. 3; App, 77, ll. 16-22.

Counsel Floyd testified that he met with Petitioner the day he was appointed to his case and that he believed he met with him one more time prior to trial. He averred that they "went over all the stuff in person" during a meeting. App. 83, ll. 4-24. When asked if he discussed mere presence with Petitioner Counsel Floyd responded "certainly, I was going to ask for a mere presence charge had the case come to trial." App. 86, ll. 4-7. He went over constructive possession with Petitioner and went over all of the discovery he had with Petitioner. App. 86, ll. 8-13. He said it was Petitioner's decision to enter a guilty plea. App. 87, ll. 13-16.

Counsel Floyd confirmed that no drugs were found in Petitioner's actual possession at the time of his arrest. Any statements made by Petitioner indicated that if drugs were in the room, they belonged to someone else. App. 88, ll. 2-18. Counsel Floyd did not investigate or contact Wilson because he was represented by Mr. Rutherford. He was aware that Wilson had pending drug charges and that Mr. Rutherford was conflicted off of the case but he did not know any details of the case. He had no recollection that Wilson had pled a month before Petitioner's trial

and could not state if he had discussed Wilson's plea with Petitioner. App. 89, l. 10-App. 92, l. 16.

The PCR court took the matter under advisement. An order of dismissal was filed on July 11, 2023. App. 96-103. The PCR court found that Petitioner had failed to show that Counsel Floyd was ineffective in failing to communicate with him, prepare a defense, and investigate the case. The PCR court found credible Counsel Floyd's testimony that he met with Petitioner twice and had "phone contact" with him, that he explained actual and constructive possession to Petitioner, and that Counsel Floyd's plan to request a mere presence charge if the case went to trial was reasonable under prevailing professional norms. The court also found that Petitioner could not show prejudice. App. 102.

ARGUMENT

The PCR court erred in finding counsel provide constitutionally effective assistance where counsel failed to adequately consult with Petitioner, failed to discuss the concept of mere presence with Petitioner, and failed to investigate Petitioner's co-defendant who had a long criminal history involving narcotics prior to advising Petitioner to enter a guilty plea which rendered his plea unknowing and involuntary.

"A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); see also Strickland v. Washington, 466 U.S. 668, 691 (1984). When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland v. Washington, 466 U.S. at 690. Therefore, "at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (emphasis in original).

The failure of counsel to investigate and advise a defendant of possible defenses can constitute deficient performance. See Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991) (holding failure to investigate possible defenses constituted ineffective assistance of counsel); See Also Fry v. State, 217 So. 36 1139 (Fla. Dist. Ct. App. 2017) (holding a claim of ineffective assistance of counsel for failure to advise a defendant of a potential defense can state a valid claim if defendant was unaware of the defense and can establish that a reasonable probability exists that [she] would not have entered the plea if properly advised). In Cobbs v. State, *supra*, this Court held that counsel was deficient for failing to investigate and explain to Cobbs the

possibility of a valid double jeopardy defense. Importantly, the inquiry did not turn on whether or not Cobbs in fact had a valid double jeopardy defense. This Court was clear that the *possibility* that such a defense existed required counsel to investigate it and explain it to the defendant. Id. at 302, 408 S.E.2d at 225.

"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). "A voluntary choice presupposes some knowledge of the consequences of the choice, and a plea of guilty may therefore be held to be involuntary if the defendant was not informed by his lawyer of his defenses to the criminal charges." Evans v. Meyer, 742 F.2d 371, 375 (7th Cir. 1984). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill, 474 U.S. at 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pled guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (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). In

reviewing the PCR court's decision, this Court is concerned only with whether there is any evidence of probative value to support the decision. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

Counsel Floyd's failure to explain the concept of mere presence and failure to investigate Petitioner's co-defendant constituted deficient performance. Petitioner did not rent the room where the narcotics were located but was merely in the room at the time police arrived on scene. The concept of mere presence was something that should have been fully explained to Petitioner prior to any plea or trial as it was a vital part of his defense to the charges. At the PCR hearing Counsel Floyd could only state that he had intended to ask for a mere presence charge if the case went to trial. He never affirmatively stated that he discussed the concept, which was critical to the case, with Petitioner. Petitioner testified he never heard about the concept until he was in prison and if he had known about it, along with the evidence that exculpated him, he would have gone to trial.

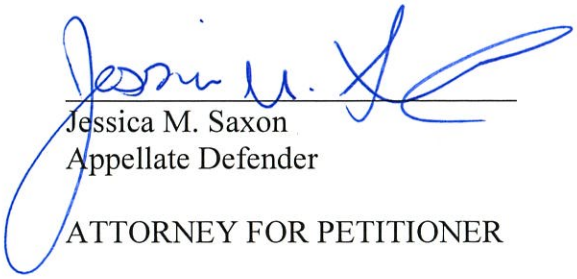
Petitioner's argument that he was merely present was bolstered by the fact that the room was rented to Herbert Wilson, an individual with a lengthy criminal history involving drugs. However, Counsel Floyd failed to investigate Wilson because he was represented by counsel. This was not reasonable for two reasons. First, investigating Wilson did not require Counsel Floyd to speak with him while he was represented. Counsel Floyd could have researched his background, talked with individuals who knew Wilson, and investigated why he rented the room at the Palmetto Inn. Second, Wilson pled guilty a month prior to Petitioner's trial. Any impediment to speaking with Wilson because he was represented was at that point removed. However, Counsel Floyd still did not investigate Wilson prior to advising Petitioner to enter a guilty plea.

Importantly Petitioner had no prior record. He was entirely dependent upon Counsel Floyd to navigate the unfamiliar waters of the criminal justice system. However, the pair met at most, only twice. Such a brief amount of time in consultation was not reasonable considering the seriousness of the charges and Petitioner's unfamiliarity with criminal law. The failure to adequately consult with Petitioner, explain mere concept, and investigate Wilson was deficient performance.

Regarding prejudice, Petitioner's uncontradicted testimony at the PCR hearing was that he would have gone to trial but for Counsel Floyd's errors. Supporting that testimony is the fact that Petitioner had gone through the process of jury selection the morning that he entered his plea. Counsel Floyd did not testify that Petitioner never wanted to go to trial nor did the State offer any evidence to the contrary. The PCR court's finding that Petitioner could not establish prejudice was directly refuted by the record. Petitioner has shown both deficiency and prejudice. He is entitled to a new trial.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully request that this Court grant the petition for writ of certiorari to allow full briefing of the issue.



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This 20th day of June, 2024.