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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Clifton Newman, Circuit Court Judge

Case No. 2022-001151

Herbert Smalls,.....Petitioner,

vs.

State of South Carolina,..... Respondent.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent's brief offers the following arguments: (1) the PCR Court's findings that the record is sufficiently reconstructed is not appealable; (2) the reconstructed record of Petitioner's plea is sufficient to assess his claims; and (3) Petitioner failed to prove his plea counsel was ineffective and as such his plea was intelligently and voluntarily made. Therefore, Petitioner offers this brief reply and will answer each of Respondent's claim in the order they were raised in Respondent's brief.

ARGUMENT

I. Whether Judge Young's order which found the plea hearing record had been sufficiently reconstructed was immediately appealable.

Counsel for Petitioner simply restates that based on her research, she believes that Judge Young's order was not immediately appealable. Counsel further agrees with Respondent that the order did not constitute a final order on the merits of the case pursuant to S.C. Code Ann. §14-3-330. Resp. Br. 7.

II. The Circuit Court erred in finding the plea transcript was sufficiently reconstructed and as such, an incomplete and inconclusive record cannot serve as a sufficient basis to assess Petitioner's claims.

As the Circuit Court did in its order, Respondent bases their argument of the record being sufficiently reconstructed on conclusory statements and theoretical imaginings of what Petitioner's plea hearing *was probably like*. Resp. Br. 8. Petitioner's liberty and due process rights cannot be guaranteed against such conjectural and speculative reasoning.

The record gathered at the reconstruction and PCR evidentiary hearings clearly displays that none of the parties (save for plea counsel who was unavailable due to his death)—including Judge Young or the State's attorneys—really remember in any detail what occurred in Petitioner's plea hearing. Petitioner is not promoting the idea that Judge Young, or the Solicitor's Office, have to remember the exact details of a plea hearing a decade in the past, especially when both the court and State have an inordinate amount of plea hearings each year. However, the extraordinary incompleteness at which Petitioner's record now stands simply cannot serve any meaningful purpose in assessing Petitioner's claims. There is absolute silence as to whether plea counsel addressed Petitioner's mental health issues in court and whether the trial court delved into such issues and their effect on a constitutionally sound plea hearing. Even Petitioner's other counsel on

an unrelated case, Mr. Apostolou, who was the only witness to have a cognizable memory of the plea, could not recall whether Petitioner's mental health and ability to understand the proceedings was addressed by the court or pleas counsel. App. 219-220.

Respondent makes several conclusory statements to defend the inadequacy of the record such as noting that guilty pleas are "predictable" Resp. Br. 9. That may be true in some instances, but in Petitioner's case, we have no evidence that his guilty plea was in fact "predictable." Even Judge Young who testified that he followed the same procedure in each plea hearing, through no fault of his own, really could not remember if his same procedure was interrupted during Petitioner's particular plea and could not remember why he gave Petitioner the specific sentence he received. App. 215-216; 224. Ms. Cardillo of the Solicitor's Office further noted that she had really no idea what went on with Petitioner's plea and admitted because of her pregnancy she was not really paying much attention. App. 194-195; 197-198; 200.

Respondent's brief, the circuit court, and the PCR court are doing exactly what the United States Supreme Court has specifically denoted as impermissible. They are "presuming a waiver" of "important federal rights from a silent record." *Boykin v. Alabama*, 295 U.S. 238, 243 (1969). Simply put, Petitioner's record lacks "the completeness and reliability necessary for this court to engage in meaningful appellate review" and such gaps cannot provide an appellate court and Petitioner with the opportunity to examine the protection of Petitioner's constitutional rights—rights which he does still have, even if he pled guilty and was subject to the "predictable" procedure of guilty pleas taken in court. *State v. Ladson*, 373 S.C. 320, 332, 644 S.E.2d 271, 272 (Ct. App. 2007).

Petitioner respectfully asks this Court to recognize that the record cannot be sufficiently reconstructed as to provide meaningful appellate review and, therefore, grant Petitioner a new trial.

III. The PCR Court did in fact err in concluding Petitioner's guilty plea was entered into knowingly and voluntarily and as such finding that plea counsel was not ineffective.

Respondent claims that Petitioner's assertions of the invalidity of his guilty are "woefully lacking in factual support" and that his claim "is based on speculation." Resp. Br. 26. Respondent ignores the evidence presented as part of the PCR record and bases its conclusions of the speculative nature of the plea hearing record which is woefully inadequate.

Respondent does not argue with, and Petitioner again affirms, that he has suffered from mental illness—bipolar disorder—and a mild to moderate intellectual disability since he was a young boy and suffered from such at the time of the plea hearing. His learning disability and head injury he suffered truncated his schooling where he had to receive special educational accommodations. App. 155-156; 266; 267. While Petitioner may have known he was "in trouble" with the court system, there is no evidence as to Respondent's claim that Petitioner actually understood the gravity and process of waiving his right to a jury trial and pleading guilty. Respondent points out that petitioner had a prior conviction history and according to Respondent's view, this automatically means Petitioner's plea in question was entered into knowingly and voluntarily due to his prior contacts. Resp. Br. 25. Such an argument is "woefully lacking in factual support" and "is based on speculation." Resp. Br. 26. It seems Respondent is confusing Petitioner's competency—his ability to understand the plea proceedings—and Petitioner's knowing and voluntary waiving of his rights—whether he actually did understand the plea proceedings. *See Godinez v. Moran*, 509 U.S. 389, 401, n. 12 (1993). Petitioner's competency

is not at issue. At issue is whether Petitioner did actually understand what he was truly doing in waiving important constitutional rights.

Again, because the plea hearing record is insufficient as to review the actual circumstances of Petitioner's plea, Respondent's conclusory statements about the voluntariness and intelligence of Petitioner's plea cannot be corroborated. The insufficiency of the plea record also lends itself to the ineffective assistance of counsel inquiry. There is no way of assuring that plea counsel effectively addressed Petitioner's mental health in the plea colloquy. Petitioner also does not wish to disparage plea counsel, but there is evidence that something was very much amiss with plea counsel during that time. Mr. Apostolou, who Respondent finds credible in their argument disparaging Petitioner's mental infirmities, stated that plea counsel was experiencing "troubles" and that he had suddenly shut down his law practice and generally disappeared from "around the scene." App. 292. The fact of that matter is—Petitioner who has documented struggles with mental illness and intellectual disability was represented by plea counsel who himself was struggling with unspecified issues. There is simply no guarantee that Petitioner received constitutionally effective assistance of counsel and when coupled with the defective record in this case, the prejudice Petitioner has suffered increases twofold. Frankly, there is no direct evidence to support the finding that Petitioner's plea was knowingly and voluntarily entered as required and that plea counsel was effective and ensured the protection of Petitioner's rights. Therefore, the proceedings cannot be relied upon to produce a just result.

Petitioner respectfully asks this Court to grant him a new trial in light of the invalid plea and ineffective assistance of counsel.

CONCLUSION

Petitioner respectfully requests this Court grant him a new trial.

August 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel certifies that she has provided a copy of this reply brief on Joshua Edwards, of the South Carolina Attorney General's Office, via email on this date, August 26, 2024.

/s/Elizabeth Franklin-Best