

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

R. Knox McMahon, Circuit Court Judge

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OCT 23 2013

S.C. Supreme Court

ORLANDO SHIVER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000475

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Whether the PCR court erred in finding plea counsel provided effective assistance of counsel where plea counsel failed to file a motion to reconsider Petitioner's sentence after Petitioner both called and wrote his plea counsel asking his plea counsel to file such a motion and plea counsel had received new information that the victim would have been satisfied with a much lesser sentence?

- II. Whether the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where plea counsel coerced Petitioner into pleading guilty by informing Petitioner on the day of the hearing, to which Petitioner arrived not knowing if he was showing up for a trial or a plea hearing, that plea counsel would not go forward with a trial for Petitioner even though Petitioner had a defense to the assault and battery with intent to kill charge?

STATEMENT

Indictments

On July 14, 2010, Petitioner Orlando Shiver was indicted on (1) two counts of assault and battery with intent to kill (“ABWIK”); and (2) criminal domestic violence of a high and aggravated nature. App. 105-114.

Guilty Plea

On February 22, 2011, Petitioner appeared before the Honorable Clifton Newman to plead guilty to (1) one count of ABWIK; (2) one count of assault and battery of a high and aggravated nature (“ABHAN”); and (3) one count of criminal domestic violence, second offense. App. 1 – 27. Petitioner was represented by George McElveen, and the State was represented by Assistant Solicitor Craig Pisarik. App. 1.

The State alleged that Petitioner assaulted his estranged wife and her twenty-two month old grandchild following a verbal altercation. App. 6, l. 16 – 7, l. 3. The State alleged that at one point, Petitioner hit his wife’s face with a 10-pound dumbbell causing a major laceration on her face. App. 8, ll. 20-22.

After the State’s presentation of the factual basis for the plea, Petitioner stated to the plea judge that “some things I don’t think I intentionally did or did at all.” App. 25, ll. 7-8.

At the conclusion of the hearing, Judge Newman sentenced Petitioner to (1) eighteen (18) years for ABWIK; (2) ten (10) years concurrent for ABHAN; and (3) one (1) year concurrent for criminal domestic violence, second. App. 26, l. 23 – 27, l. 6.

PCR Application and Evidentiary Hearing

On April 26, 2011, Petitioner filed his application for post-conviction relief (“PCR”). App. 29 – 33. The State filed its Return on May 25, 2011. App. 34 – 39.

On August 17, 2012, an evidentiary hearing was held before the Honorable R. Knox McMahon. App. 40 – 91. Petitioner was represented by Tristan M. Shaffer, and the State was represented by Assistant Attorney General Rob Corney. App. 40. Both Petitioner and his plea counsel testified at the hearing. App. 44, l. 20 – 76, l. 12. In addition, May Francis Shiver, Petitioner's aunt, also testified. App. 77, l. 7 – 85, l. 3.

Petitioner testified that at the time of the incident, he had moved back in with his wife at her request. App. 59, l. 20 – 60, l. 3. On the night of the incident, Petitioner and his wife were drinking and began arguing about their marriage. Petitioner acknowledged that he did hit his wife, she slapped him back; and they started fighting. App. 60, l. 22 – 61, l. 25. Petitioner's wife was scratching and clawing at him, and at one point she tripped over something on the floor and hit her head on the dumbbells sitting at the bottom of the staircase. Petitioner was adamant that he never hit his wife in the face with a dumbbell. App. 62, ll. 11-23. Petitioner also testified that he never held a screwdriver to his wife's neck as the State alleged. App. 63, ll. 6-13.

Petitioner hired his plea counsel a couple of weeks after he was arrested. App. 64, ll. 1-3. Petitioner was expecting that his plea counsel could get the ABWIK charges dropped and that perhaps he could plead guilty to a lesser charge of criminal domestic violence of a high and aggravated nature. App. 64, ll. 7-17.

Petitioner testified that he never wanted to plead guilty to ABWIK. He informed his plea counsel of this on the day of the plea hearing and further informed his plea counsel that he wanted to go to trial on the ABWIK charges because he knew he was not guilty of those offenses. App. 65, ll. 2-17.

Petitioner further testified that when he was transported to the courthouse on the day of the plea hearing, he did not know if he was going to a trial or a plea hearing. App. 65, l. 23 – 66, l. 6. When Petitioner arrived at the courthouse, his plea counsel informed him that the State was going to drop the ABWIK charges on the grandchild down to ABHAN and the count of criminal domestic violence of a high and aggravated nature on his wife to criminal domestic violence, second offense. The ABWIK on his wife would remain. App. 66, ll. 7-17.

Petitioner then informed his plea counsel that he still wanted to go to trial, but his plea counsel told him “I can’t argue your case. You’ve got to take this plea.” App. 66, ll. 20-22. Petitioner wanted to fight the ABWIK charge as to his wife because he never hit her with a dumbbell, but he felt that he was put in a corner because his plea counsel would not argue his case at trial. App. 68, l. 20 – 69, l. 16. If his plea counsel had not told Petitioner that he could not argue his case, Petitioner would have went to trial. App. 69, ll. 17-19.

Petitioner also stated at the evidentiary hearing that after his plea hearing and sentence, he learned from his aunt that his wife had only wanted Petitioner to be sentenced to five (5) years. He called his plea counsel to inform him of that fact and thought his plea counsel could do something about reducing his sentence, but he never heard from his plea counsel again. App. 70, l. 11 – 71, l. 9. Petitioner also wrote his plea counsel a letter postmarked March 2, 2011 requesting his plea counsel to file a motion to reconsider the sentence, but plea counsel did not file any such motion. App. 49, ll. 19-24; 51, ll. 5-22; 57, ll. 7-11.

Petitioner’s aunt, May Francis Shiver, testified at the evidentiary hearing she stayed in contact with Petitioner’s wife after the guilty plea hearing and that the day of the plea

hearing, Petitioner's wife called her and said she would have been happy if Petitioner had received only five (5) years. Ms. Shiver then spoke with Petitioner's plea counsel that afternoon and informed him about her conversation with Petitioner's wife where the wife relayed that she would have been satisfied with a maximum sentence of five (5) years. App. 79, l. 10 – 81, l. 13. Ms. Shiver said that Petitioner's plea counsel said he would call Petitioner's wife, but Ms. Shiver never heard from Petitioner's plea counsel again. App. 83, ll. 9 – 22.

Plea counsel testified at the evidentiary hearing that he knew Petitioner was not looking to plead the case right from the start. App. 46, ll. 15-20. Plea counsel also acknowledged that Petitioner's aunt may have called him after the sentencing with the information that Petitioner's wife would have been satisfied with a sentence of only five (5) years, but plea counsel conceded he never spoke with Petitioner's wife about this information after the sentencing. App. 56, ll. 2-22.

At the conclusion of the testimony, Petitioner's PCR counsel argued to the PCR court that Petitioner's plea counsel provided ineffective assistance of counsel for failing to request a motion for reconsideration of the sentence after plea counsel received information that the Petitioner's wife did not want him to have to serve the eighteen (18) year imposed sentence. At that point, there was a reasonable probability that the plea judge would have reduced the sentence based upon this new information. Therefore, plea counsel was ineffective for failing to file such a motion. App. 85, l. 18 – 86, l. 2.

Furthermore, Petitioner's PCR counsel argued that Petitioner's guilty plea was involuntary and coerced by his attorney after his plea counsel informed Petitioner that he would not argue his case at trial. App. 86, ll. 3-10.

At the conclusion of the evidentiary hearing, the PCR judge took the case under advisement and requested proposed orders from each side. App. 90, ll. 18-19.

Order of Dismissal

On February 13, 2013, Judge McMahon filed his Order of Dismissal, finding that Petitioner had not established any constitutional violations or deprivations that would require the court to grant Petitioner's PCR application. Judge McMahon denied and dismissed Petitioner's PCR application. App. 94-103.

This petition for writ of certiorari follows.

ARGUMENT

- I. **The PCR court erred in finding plea counsel provided effective assistance of counsel where plea counsel failed to file a motion to reconsider Petitioner's sentence after Petitioner both called and wrote his plea counsel asking his plea counsel to file such a motion and plea counsel had received new information that the victim would have been satisfied with a much lesser sentence.**

Almost immediately following Petitioner's sentencing at the guilty plea hearing, Petitioner's plea counsel learned information from Petitioner's aunt that Petitioner's wife would have been satisfied with a maximum sentence of five (5) years instead of the eighteen (18) sentence imposed by the plea judge. App. 56, ll. 2-22; 79, l. 10 – 81, l. 13. Petitioner both called and wrote his plea counsel asking him to file a motion for the plea judge to reconsider the sentence based upon this new information, but plea counsel did not do so. App. 49, ll. 19-24; 51, ll. 5-22; 57, ll. 7-11; 70, l. 11 – 71, l. 9.

Where Petitioner requested his plea counsel to file a motion to reconsider and his plea counsel had information that would have been relevant for a judge to consider in determining whether Petitioner's sentence should be reduced, plea counsel's representation was deficient where he failed to perfect the filing of a motion to reconsider the sentence on Petitioner's behalf. See Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991) (holding counsel was ineffective for failing to file an appeal where the defendant desired an appeal, but counsel took no action to secure an appeal on his behalf); see also Jones v. State, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009) (“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think . . . that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. . . .”) (internal citations omitted); Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995) (“One extraordinary circumstance which would require counsel to advise a defendant

of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal.”).

In this case, Petitioner inquired about filing a motion to reconsider his sentence and reasonably demonstrated to his plea counsel that he was interested in seeking a reduction of his sentence based upon the information that his wife would have been satisfied with a much lower sentence of five (5) years.

The record demonstrates that there is a reasonable probability that but for plea counsel’s deficient performance, Petitioner would not have been denied his desire to seek a reduction in his sentence. Accordingly, the PCR court erred in holding that plea counsel provided effective assistance of counsel in not filing a motion to reconsider Petitioner’s sentence where the evidence presented at the evidentiary hearing unquestionably establishes that Petitioner requested his plea counsel to file such a motion.

II. The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where plea counsel coerced Petitioner into pleading guilty by informing Petitioner on the day of the hearing, to which Petitioner arrived not knowing if he was showing up for a trial or a plea hearing, that plea counsel would not go forward with a trial for Petitioner even though Petitioner had a defense to the assault and battery with intent to kill charge.

At the evidentiary hearing, Petitioner testified that he was coerced into pleading guilty. App. 68, l. 20 – 69, l. 19. Petitioner testified:

Q: And what were his [plea counsel] exact words regarding your case and whether or not you should go to trial?

A: He said he couldn't argue it.

Q: He said he couldn't argue your case.

A: He could not argue my case.

Q: Okay. Why did you decide to plead guilty?

A: [Plea counsel] said he could not argue my case and I was facing fifty years. So if he can't argue my case and I go to trial, then that mean I'm going to lose.

Q: Did you feel pressured to plead?

A: Well, it - - it put me in a corner and - - and they was going to - - he said they offer you twelve years on the plea, but I didn't want to plead to assault and battery with intent to kill. But if he couldn't argue my case and I was - - and that mean he'll lose the trial, then that mean I'll be facing fifty years.

Q: Why didn't you want to plead to assault and battery with intent to kill?

A: Because I – I shouldn't have been charged with it.

Q: Why – why shouldn't you have been charged with that?

A: Because didn't intend to kill anyone.

...

Q: If you went to trial, what - - what would you have testified to about the incident?

A: About the incident? I would - - I would have testified because they - - they solely based it upon me picking up a dumbbell and hitting her in the head and I didn't do that.

Q: Okay. You would have testified that you did not do that?

A: I did not do that.

App. 68, l. 11 – 69, l. 16.

Further evidence that Petitioner did not intend to plead guilty to the ABWIK charge against his wife was his statement to the guilty plea judge at the guilty plea hearing that he did not “intentionally [do] or [do] at all the things” the State alleged he did. App. 25, ll. 7-8.

In addition, showing up at a hearing not knowing if it is a plea hearing or a trial demonstrates that Petitioner did not have sufficient time to make a fully informed, knowing, voluntary, and intelligent decision on whether to plead guilty, especially where Petitioner is suddenly faced with his plea counsel's unwavering decision not to proceed with a trial for Petitioner even though Petitioner still wanted to take his case to trial. App. 65, l. 23 – 66, l. 6.

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969).

“In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, “the voluntariness of a guilty plea is not determined by an

examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

Furthermore, “[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (citing Hill, 474 U.S. at 57-59); See Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant’s guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel).

In this case, plea counsel coerced Petitioner into pleading guilty by telling Petitioner that he could not argue Petitioner’s case at trial even though Petitioner had considerable dispute with the State’s evidence. Petitioner felt backed into a corner where he showed up at the hearing not even knowing he if was facing trial that day or if he was expected to plead guilty and his retained attorney was abruptly backing out of representing Petitioner in a trial. Petitioner unequivocally testified at the PCR evidentiary hearing that had his plea counsel not informed Petitioner that he could not argue his case, Petitioner would have proceeded to trial. App. 69, ll. 17-19.

Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty. See Boykin, 395 U.S. 238 (finding a defendant’s decision to plead guilty must be knowingly, voluntarily, and intelligently made).

CONCLUSION

For the reasons set forth herein, Petitioner Orlando Shiver respectfully requests this Court to grant his Petition for Writ of Certiorari and allow full briefing on the issue.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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ORLANDO SHIVER,

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APPELLATE CASE NO. 2013-000475

CERTIFICATE OF SERVICE


I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and on Mr. Orlando Shiver, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 23rd day of October, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd
day of October, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.