ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Georgetown County Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2010-181646

BENJAMIN L. COOPER,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

BRIEF OF PETITIONER

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Attorney General

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ISSUE PRESENTED

The PCR court erred in finding that, because the plea judge's colloquy did not conform to Boykin v. Alabama, Respondent did not plead guilty "and/or" the plea was not voluntary, since the PCR court failed to take into account the entirety of the record including plea counsel's thorough advice to Respondent prior to the plea regarding the charges and his constitutional rights; Respondent's prior background with the criminal justice system and the fact that Respondent had pled guilty in general sessions court before; and the fact that Respondent signed two sentencing sheets prior to his plea which set forth the charges and penalties and indicated Respondent was pleading guilty as indicted without negotiations or recommendations.

STATEMENT OF THE CASE

Respondent was indicted in November 2007 for threatening a public official and resisting arrest. (App. p. 36-37; p. 39). On March 19, 2008, Respondent pled guilty to both charges before the Honorable Edward B. Cottingham. (App. p. 1-22). Judge Cottingham sentenced Respondent to three years for threatening a public official and one year, concurrent, for resisting arrest. (App. p. 20, lines 22-25; p. 35; p. 38). No direct appeal was filed.

Respondent filed an Application for post-conviction relief on October 13, 2008. (App. p. 24-29). The State submitted a Return on December 10, 2008. (App. p. 30-34). An evidentiary hearing was convened before the Honorable Larry B. Hyman, Jr., on July 28, 2009. (App. p. 44-124). On August 17, 2009, Judge Hyman filed an Order Granting Post-Conviction Relief. (App. p. 126-35). Respondent filed a Motion to Alter or Amend the Judgment regarding his denied claims, which included improper grand jury selection and lack of subject matter jurisdiction (App. p. 136-37). Judge Hyman filed an Order Denying Applicant's Motion to Alter or Amend the Judgment on November 30, 2010. The State appealed from the grant of post-conviction relief. Respondent filed a notice of appeal regarding his denied claims. This Court granted certiorari regarding the State's issue on August 8, 2013. This Brief of Petitioner follows.

ARGUMENT

The PCR court erred in finding that, because the plea judge's colloquy did not conform to Boykin v. Alabama, Respondent did not plead guilty "and/or" the plea was not voluntary, since the PCR court failed to take into account the entirety of the record including plea counsel's thorough advice to Respondent prior to the plea regarding the charges and his constitutional rights; Respondent's prior background with the criminal justice system and the fact that Respondent had pled guilty in general sessions court before; and the fact that Respondent signed two sentencing sheets prior to his plea which set forth the charges and penalties and indicated Respondent was pleading guilty as indicted without negotiations or recommendations.

Background

On March 19, 2008, Respondent appeared before Judge Edward B. Cottingham to enter a guilty plea to threatening a public official and resisting arrest. (See App. p. 2; p. 9-10). The plea took place in a special room set up for guilty pleas at the Georgetown County Detention Center. (App. p. 94-95). After stating the indictment numbers and the charges, and after advising the judge that there were no negotiations regarding the sentence to be imposed, the solicitor described the facts of the case. (App. p. 9-11). Respondent and his brother were stopped in the early morning hours of September 21, 2007, after police observed Respondent's brother in the middle of the road taking off his pants. (App. p. 10). Both men were grossly intoxicated. (App. p. 11-13). Respondent's brother was physically combative with the officers, and Respondent cursed at the officers, threatened one of the officers, and resisted arrest.[1] (App. p. 10-14).

After the recitation of the facts, Respondent acknowledged to Judge Cottingham that these were "terrible facts." (App. p. 17, lines 2-4). However, he indicated that was unable to recall the specifics of what occurred that night because he was "pretty

[1] Respondent's counsel was careful to point out that Respondent was not the one who physically assaulted the officers (See App p 12, lines 7-12, p 97-98)

intoxicated" and "woke up the next morning with a bad hangover." (App. p. 17, lines 5-23). After Respondent started to describe what happened with regard to the resisting arrest charge, Judge Cottingham interrupted and asked Respondent why he was standing before him "pleading guilty." (App. p. 18, lines 13-19). Respondent replied that he wanted to "get it over with." (App. p. 18, line 20). Judge Cottingham then stated, "No, that don't get it done." Respondent attempted to explain, but the court stated, "I can't help all that," and asked Respondent's counsel what he wanted to say. (App. p. 18, lines 21-24). The judge and Respondent's counsel then discussed the video of the event, and counsel noted that the video does reveal Respondent's yelling and cursing. (App. p. 19, lines 1-5). Counsel also noted that he was satisfied that there was "at least non-compliance with orders." (App. p. 19, lines 10-11). The parties then clarified that the maximum sentence was five years for threatening a public official and one year for resisting arrest. (App. p. 20, lines 9-16).

Judge Cottingham stated that, in light of Respondent's prior record, which included assault and battery of a high and aggravated nature, criminal domestic violence, disorderly conduct, and two charges of providing false information to police, he was sentencing Respondent to three years for threatening a public official and one year, concurrent, for resisting arrest. (App. p. 20, lines 9-24). The judge then made the video of the incident a part of the record as Court's Exhibit #1. (App. p. 21, lines 10-19). The judge noted that "[n]o jury in the world could find [Respondent] not guilty based on what I saw in the video." (App. p. 21, lines 24-25).

At his PCR hearing, Respondent claimed that his guilty plea was involuntary and unintelligent because the plea judge failed to go through the usual plea colloquy with him and did not specifically elicit a response from him regarding his guilt. (See App. p. 9-22;

p. 18, lines 18-23; p. 55-83). Respondent claimed that the judge's failure to elicit a satisfactory response from him regarding why he was pleading guilty meant that the judge did not determine whether or not Respondent was pleading guilty. (See App. p. 68, line 13 – p. 69, line 3). Respondent also claimed that he never voluntarily waived any constitutional rights since neither the judge nor counsel explained any rights to him. (See App. p. 68-74).

Respondent's plea counsel testified that he had absolutely no doubt that he fully discussed all relevant matters with Respondent prior to the plea, including the facts of the case and the elements of the offenses, the discovery, possible defenses at trial, the possible sentences, and Respondent's options with regard to either pleading guilty or going to trial. (See App. p. 88-115). He also explained, and Respondent understood, Respondent's constitutional rights, including the right to a jury trial, right to testify or not testify, right to call and confront witnesses, and that Respondent was presumed innocent and that the State bore the burden of proof at trial. (App. p. 108-109). Counsel noted that Respondent signed two sentence sheets prior to the plea indicating his intent to plead guilty, and he pointed out that the sentence sheets listed each offense and the range of penalties. (App. p. 35; p. 38; p. 86, lines 5-15; p. 96, lines 17-24; p. 113, lines 8-12). Counsel testified that Respondent made his own free, voluntary, knowing, and intelligent choice to waive his constitutional rights and plead guilty. (See App. p. 113, line 8 – p. 114, line 2). Counsel stated that he did not see any reason to object to the lack of a regular plea colloquy since Respondent wanted to waive his rights and plead guilty that day. (App. p. 114, lines 1-8).

The PCR court, relying upon Boykin v. Alabama, 395 U.S. 238 (1969), found that, "[o]bviously, the Applicant in this case did not plead guilty and/or did not

understand that he was pleading guilty." (App. p. 134, lines 1-2; see p. 132-34). The court focused on the fact that the plea judge "attempted to ask the Applicant about his intentions to plead guilty, but never completed this line of questioning." (App. p. 133; see also p. 100, line 8 – p. 102, line 13; p. 121, line 6 – p. 122, line 12). The court distinguished the case of James v. State, 377 S.C. 81, 85, 659 S.E.2d 148, 150 (2008), on the ground that, in that case, there was a written plea sheet describing the defendant's rights, which stated the offenses and listed the maximum penalties, and which reflected the defendant's affirmative response to a question asking if he was pleading guilty freely and voluntarily. (See App. p. 133). The PCR court concluded that, "the Applicant has established that counsel rendered ineffective assistance," because "notwithstanding that counsel discussed with the Applicant the charges and his constitutional rights, he should have ensured that the plea record reflected these things." (App. p. 134-35).

Discussion

"A defendant who pleads guilty on the advice of counsel may collaterally attack the voluntariness of his plea only by showing that (1) counsel was ineffective and that (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty." Burnett v. State, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003). It is axiomatic that "the voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). If there is any

evidence to support the findings of the PCR judge, those findings must be upheld. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, where there is no evidence of probative value to support the findings of the PCR judge, the ruling will not be upheld. Richardson v. State, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993).

In this case, the PCR judge erred in granting relief because he considered the plea transcript in a vacuum. Although the PCR judge cited to Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984), in his order, and noted that "the transcript of a plea hearing cannot be viewed in isolation but must be considered in the full context of the record," the judge failed to follow this maxim. The PCR judge obviously found credible plea counsel's testimony that he explained all relevant matters to Respondent, including the elements of the charges, Respondent's constitutional rights, and the potential penalties. (See App. p. 87-114; p. 122, lines 17-20; p. 130; p. 135). However, the judge failed to take this into account in evaluating whether or not the plea was voluntary. The judge also failed to properly consider the fact that Respondent signed two sentencing sheets prior to the plea which set forth the charges and penalties and indicated Respondent was pleading guilty as indicted without negotiations or recommendations. (App. p. 35; p. 38; p. 96, lines 17-21; p. 121-22). Finally, the judge failed to take into account that Respondent had prior experience with the criminal justice system and had, in fact, pled guilty in general sessions court before. (See App. p. 85, line 23 – p. 86, line 3; p. 109, lines 10-21). Instead of properly considering all of these factors, the court essentially concluded that the plea could not be voluntary because the plea record itself was lacking. (See App. p. 121, line 1 – p. 122, line 12; p. 134-35).

The PCR court's conclusion is at odds with well-established case law. As mentioned above, an attorney's advice prior to a plea, and any other relevant evidence

procured at a PCR hearing, can supplement a plea record that does not comply with Boykin v. Alabama.[2] See, e.g., Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972); Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984); Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000); see also Brown v. State, 340 S.C. 590, 595, 533 S.E.2d 308, 310 (2000) (the review of whether or not the waiver of a statutory or constitutional right was voluntary "'is better left to a post conviction relief proceeding where the facts surrounding the trial can be fully explored.'") (citation omitted); Lambert v. State, 260 S.C. 617, 619-20, 198 S.E.2d 118, 119 (1973) (Boykin's requirement that an affirmative record be established showing the plea to be voluntary was met by the testimony at the post-conviction relief hearing indicating that the defendant had been fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty).

In Vickery v. State, the South Carolina Supreme Court stated that Boykin v. Alabama does not hold that the failure of a plea judge to make a full record affirmatively showing the voluntariness of a plea necessarily requires vacation of the plea. Vickery, 258 S.C. at 35, 186 S.E.2d at 828. To the contrary, if evidence is presented at a post-conviction relief proceeding that the defendant was "fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty," the conviction should not be reversed. Id. at 36, 186 S.E.2d at 828. In Respondent's case,

[2] There are numerous cases stating that erroneous advice given to a defendant by an attorney can be "cured" by a judge's plea colloquy See, e g , Wolfe v State, 326 S C 158, 485 S E 2d 367 (1997) The reverse is also true, that is, where a plea colloquy is deficient, an attorney's advice given before the plea can supplement and "cure" the deficiencies in the plea record See e g , Hunter v State, 316 S C 105, 109-110, 447 S E 2d 203, 205-206 (1994) (although the plea judge gave erroneous information to the defendant during the plea, the plea was not involuntary or unknowing where Petitioner received correct information from defense counsel prior to his plea) (*abrogated on other grounds by* Simpson v State, 329 S C 43, 495 S E 2d 429 (1998)), Carter v State, 329 S C 355, 362, 495 S E 2d 773, 777 (1998) ("Further, respondent's counsel had correctly informed respondent of the sentencing possibilities, therefore, respondent cannot complain that his pleas were not voluntarily and knowingly entered ")

the PCR judge erred and violated Vickery by concluding that although counsel fully advised Respondent regarding the charges and the waiver of his constitutional rights, relief was warranted because the plea transcript did not reflect these things. (See App. p. 134-35).

Furthermore, the PCR judge incorrectly focused on the fact that the plea judge failed to elicit an admission of guilt from Respondent. (See App. p. 121, line 1 – p. 122, line 7). However, an admission of guilt was not required. See James v. State, 377 S.C. at 84, 659 S.E.2d at 150 ("it is well-settled that a defendant need not admit guilt in order to enter a valid guilty plea") (citation omitted); see also State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013) ("The primary thrust of the *Alford* decision is that a defendant may voluntarily and knowingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit he participated in the acts constituting the crime."). In that vein, contrary to the PCR judge's line of thinking (see App. p. 100, line 12 – p. 101, line 11), Respondent could properly decide to plead guilty in order to "get it over with" since this was a perfectly valid reason to enter a plea; moreover, Respondent's statement to this effect at the plea served as further evidence that Respondent clearly understood he was entering a plea of guilty.[3] (See App. p. 18, lines 18-22; p. 134). Cf. Deal v. State, 338 S.C. 455, 527 S.E.2d 112 (2000) (the fact that a defendant may have entered his guilty plea in order to obtain his release from lock-up does not render the plea involuntary).

Plea counsel thoroughly advised Respondent regarding the guilty plea, the elements of the offenses, the possible penalties, and Respondent's constitutional rights.

[3] Plea counsel explained that although Respondent had previously stated he wanted to take the case to trial, and had been satisfied with delaying the case as long as possible, after he was placed in jail on the bench warrant he apparently changed his mind and just wanted to deal with the charges and plead guilty (See R p 111, lines 1-8, p 112, lines 17-25)

(See App. p. 87-114). He also testified at the PCR hearing that Respondent made his own free and voluntary choice to waive his constitutional rights and plead guilty to the charges. (App. p. 113, lines 8-12). The plea record itself contains the factual basis for the plea and also contains an advisement to Respondent regarding the possible penalties for each offense. (See App. p. 10-20). Additionally, Respondent had experience with the criminal court system and, significantly, had pled guilty in general sessions court before. (See App. p. 85, line 23 – p. 86, line 3; p. 109, lines 10-21). State v. Herndon, 403 S.C. at 91, 742 S.E.2d at 379 n1 ("Whether a choice is informed and reached without inappropriate pressure—that is, whether it is voluntary—depends on the information known and options open to the defendant, including what he has learned out of court.") (citation omitted); see also Wroten v. State, 301 S.C. 293, 294-95, 391 S.E.2d 575, 576 (1990) (pointing out that when the trial judge fails to make a specific inquiry to the defendant regarding whether or not he is proceeding voluntarily, it is appropriate to look to the entire record to determine "whether other facts show petitioner had sufficient background or was apprised of his rights by some other source"). The two sentencing sheets signed by Respondent prior to the plea – indicating the offenses to which Respondent was pleading and the possible sentences – further evidenced Respondent's knowing and voluntary agreement to plead guilty. (See App. p. 96, lines 17-24; p. 108, lines 4-16). See James v. State, 377 S.C. at 85, 659 S.E.2d at 150 (the fact that the defendant signed three sentence sheets prior to his plea "further undercuts the proposition that Respondent never pled guilty"). Finally, despite the fact that the judge did not use particular language to accept the plea, the judge accepted the plea as free and voluntary when he imposed the sentences.[4] (See App. p. 20, lines 17-25; p. 124, lines 2-7). See id.

[4] Respondent admitted this in his testimony at the PCR hearing (R p 86, lines 19-21)

at 85, 659 S.E.2d at 150 (finding that the plea judge's imposition of a sentence clearly evidenced that the court accepted Respondent's plea as voluntary); see also Gaines v. State, 335 S.C. 376, 380-81, 517 S.E.2d 439, 441-42 (1999); State v. Lambert, 266 S.C. 574, 580, 225 S.E.2d 340, 342 (1976).

Therefore, despite the fact that a typical Boykin v. Alabama colloquy was not specifically set forth at Respondent's plea, the plea was nevertheless freely, voluntarily, knowingly, and intelligently made. Because Respondent's plea was free and voluntary, Respondent failed to prove the requisite prejudice. See Leon v. State, 379 S.C. 448, 451, 666 S.E.2d 260, 261-62 (Ct. App. 2008) (in order to satisfy the "prejudice" requirement in the context of a guilty plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty but would have insisted on going to trial). Had plea counsel urged the trial judge to conduct a typical Boykin v. Alabama plea colloquy, the end result would have been the same.

In sum, the PCR judge erred in granting relief to Respondent because a review of the entire record as required by Vickery v. State reveals that Respondent did in fact plead guilty and he did so freely, voluntarily, knowingly and intelligently.[5]

[5] To the extent the trial judge considered the plea to be involuntary because Petitioner did not personally view the videotape prior to his plea, this was also error (See App p 134) See Hyman v State, 397 S.C 35, 723 S E 2d 375 (2012) (nondisclosure of a videotape to a defendant personally did not render his plea involuntary where his attorney watched the tape)

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court reverse the order granting post-conviction relief.

Respectfully submitted,

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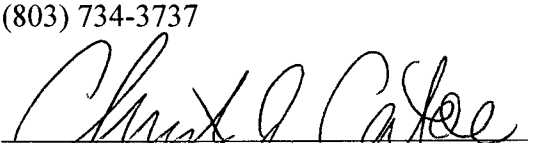

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November 8, 2013

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PROOF OF SERVICE

I hereby certify that I have served the **Brief of Petitioner** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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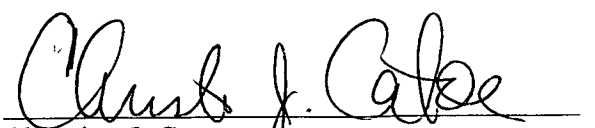
This 8th day of November, 2013.



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