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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Guilty Plea Judge
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

Appellate Case No. 2013-002297

Tobias Aaron Jones,Respondent,

v.

State of South Carolina,Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Beattie B. Ashmore, S.C. Bar #10419
650 East Washington Street
Greenville, South Carolina 29601
(864) 467-1001
Beattie@BeattieAshmore.com
Attorney for Respondent

Alan Wilson
Attorney General

Karen C. Ratigan, S.C. Bar #68331
Senior Assistant Deputy Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3737
Attorneys for Petitioner

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QUESTIONS PRESENTED

- I. THE POST CONVICTION RELIEF JUDGE DID NOT ERR IN FINDING THAT THE RESPONDENT MET HIS BURDEN OF PROVING PLEA COUNSEL'S REPRESENTATION WAS DEFICIENT.
- II. THE POST CONVICTION RELIEF JUDGE DID NOT ERR IN FINDING THE RESPONDENT MET HIS BURDEN OF PROVING HIS GUILTY PLEA WAS INVOLUNTARY.

STATEMENT OF THE CASE

The respondent's plea counsel, Richard Breibart, was federally indicted and convicted for defrauding numerous clients, evidencing a pattern of lies and deceit. United States v. Richard Breibart, 3:12-cr-00723 (D.S.C.); App. at 54. He represented the respondent during the height of his extensive pattern of defrauding and lying to his clients. This Court suspended his license to practice law and prohibited him from accessing any trust accounts, escrow accounts, operating accounts, and other law office accounts. In the Matter of Richard J. Breibart, Appellate Case No. 2012-212123 (Order No. 2012-06-01-01). Breibart's pattern of lies and deceit in dealing with the respondent completely undermines confidence in the criminal justice system.

Prior to his guilty plea, Breibart was admitted to the Mental Health Unit of the Federal Medical Center in Butner, North Carolina. Breibart, 3:12-cr-00723, Entry No. 62. Breibart's federal criminal case was delayed in order for the Bureau of Prisons to conduct a competency examination and evaluation. (App. at 54). The day of the respondent's post-conviction relief hearing, Breibart pled guilty in federal court. *See* Breibart, 3:12-cr-00723; App. at 54. He was sentenced to 63 months of imprisonment and ordered to pay over two million dollars in restitution to numerous clients. Breibart, 3:12-cr-00723.

As found by the post conviction relief court, Breibart's pervasive lying to clients infiltrated the respondent's case here. (App. at 55-57). Breibart sold himself as a "big shot" lawyer in South Carolina who had a lot of connections in the State House and who was known throughout the State. (App. at 36). The respondent paid Breibart \$20,000.00 for his representation. (App. at 36). While Breibart's representation was deficient in

every respect, he committed the ultimate sin of a criminal defense attorney when he told the respondent that a suppression motion had been denied, when, in fact, no such motion was ever filed. (App. at 55). He also said that he had “connections” to law enforcement, prosecutors, and the South Carolina legislature, when in fact he had no such “connections.” (App. at 55). He told the respondent that the respondent would serve no more than five years of the ten-year sentencing recommendation because the legislature was in the process of changing the statute by eliminating the 85% rule. (App. at 57). He further lied to the respondent by claiming that then Solicitor Bob Ariail was under Federal investigation and therefore Ariail would not allow the respondent to cooperate with Federal officials in an effort to achieve a reduced sentence, although the respondent was in a position to render cooperation. (App. at 57).

The respondent does not need to show actual prejudice. Frett v. State, 298 S.C. 54, 57, 378 S.E.2d 249, 257 (1988) (a showing of actual prejudice “may be exempted where counsel’s ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary”).

I. THE POST CONVICTION RELIEF JUDGE DID NOT ERR IN FINDING THAT THE RESPONDENT MET HIS BURDEN OF PROVING PLEA COUNSEL’S REPRESENTATION WAS DEFICIENT.

“[A]ny evidence of probative value is sufficient to uphold the PCR judge’s findings.” Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (citing Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984); *see also* Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013) (the “PCR court’s ruling should be upheld if it is supported by any evidence of probative value in the record”). The evidence here supports the post conviction relief court’s findings.

The respondent testified at his post conviction relief hearing. (App. at 34-51, 54). No other testimony was taken, and the respondent's testimony was therefore uncontroverted. (App. at 33-52, 54). The post conviction relief court carefully observed the respondent and listened to his testimony and found that his testimony was credible. (App. at 54).

The petitioner complains that the respondent presented no evidence concerning a suppression motion. (Petitioner's Brief at 5). The petitioner misses the point. The merits of a suppression motion have never been relevant. If the respondent argued that a valid suppression issue existed but was never pursued by Breibart, then the respondent would acknowledge that a valid suppression argument should have been presented at the post conviction relief hearing, therefore demonstrating Breibart's ineffectiveness. However, the respondent has established that Breibart lied to him and he was told a suppression motion had actually been filed and denied, when in fact no such motion had ever been filed. (App. at 55). Therefore, the respondent did not enter a knowing and voluntary plea, and his decision to plead guilty was based upon false – and absolutely critical – information provided by his own lawyer. (App. 56-57). The respondent had his case dismissed at a preliminary hearing yet waived all of his constitutional rights at his guilty plea based on Breibart's deceit. (App. at 55). He was never afforded the opportunity to decide to go to trial and challenge the State's case because his lawyer lied to him.

Throughout its brief, the petitioner states that the post conviction relief court found that Breibart "misadvised" the respondent in various respects. (Petitioner's Brief at 4, 5, 6, 7). However, Breibart did not simply "misadvise" the respondent. As the post

conviction relief court found, Breibart actively lied to the respondent about crucial aspects of his case. (App. at 55-57).

The petitioner also attempts to equate this case with Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994), in which trial counsel failed to bring a suppression motion. (Petitioner's Brief at 5). However, the respondent's argument - - and the post conviction court's holding - - was *not* that Breibart was ineffective and the respondent was prejudiced by Breibart's failure to bring a suppression motion. Instead, the respondent's plea was based on Breibart's material misrepresentations, including Breibart's lie that a critical component of the respondent's defense had failed. (App. at 55). As indicated above, Breibart lied to the respondent about filing a suppression motion, when in fact no such motion had been filed. (App. at 55). He told respondent that the suppression motion was denied by the trial court, when in fact, it was never even brought before the court. (App. at 55). The respondent's plea was therefore not voluntarily, knowingly, and intelligently entered due to Breibart's lies. The respondent based his decision to waive all of his constitutional rights - including the right to a jury trial - based upon the lies of his own lawyer.

The respondent's testimony supports the post conviction relief court's finding that Breibart lied in stating the respondent would serve no more than five years of the ten-year sentencing recommendation. (App. at 39-40, 47). The petitioner claims that the guilty plea cured any error because the respondent was advised of the sentence range for the charge. (Petitioner's Brief at 6). However, as the respondent testified and the post conviction relief court held, Breibart directed the respondent not to address the trial court with any concerns. (App. at 41-44, 57). Breibart lied and told the respondent that if he

addressed the trial court, he would receive 25 years imprisonment. (App. at 41-44, 57). At the time of the respondent's sentencing plea, the respondent trusted Breibart and did not know he was lying. (App. at 49). Therefore, Breibart's lies were not cured.

Similarly, Breibart lied when telling the respondent that then Solicitor Bob Ariail was under Federal investigation and therefore Ariail would not allow the respondent to cooperate with Federal officials in an effort to achieve a reduced sentence. (App. at 57). Despite the petitioner's contention, the respondent testified that he had sufficient information to enable him to cooperate with the Federal officials. (App. at 41). A Federal official even acknowledged that he was willing to help the respondent with a reduced sentence in exchange for the respondent's cooperation. (App. at 41). The post conviction relief court found the respondent's testimony to be credible. (App. at 54). There is evidence in the record to uphold the post conviction relief court's findings. *See Cherry*, 300 S.C. at 119, 386 S.E.2d at 626; App. at 40-41.

As mentioned above, Breibart lied to the respondent and told him that if he exercised his right to allocute, he would receive 25 years imprisonment. (App. at 43-44, 47). The respondent was silenced by his own lawyer. Therefore, when the sentencing court asked the respondent if he wanted to tell the court anything, he replied "no." (App. at 12). The right to allocute is constitutionally based and must be afforded at all stages of sentencing. *See United States v. Jackson*, 923 F.2d 1494, 1496 (11th Cir. 1991) (at sentencing "this right to be present and speak is constitutionally based"); *United States v. Luepke*, 495 F.3d 443, 451-52 (7th Cir. 2007) ("the denial of the right to allocution is the kind of error that undermines the fairness of the judicial process") (citing *United States v. Muhammad*, 478 F.3d 247, 251 (4th Cir. 2007)); *Muhammad*, 478 F.3d at 250 ("even

though Muhammad had addressed the court at the original sentencing hearing, he had a renewed right to allocute at resentencing”); United States v. Moree, 928 F.2d 654, 655-56 (5th Cir. 1991) (“we have consistently held that a defendant’s rights to be present and to allocute at sentencing, which are of constitutional dimension, extend to resentencing proceedings”); Presbury v. Wyoming, 226 P.3d 886, 888 (Sup. Ct. Wyo. 2010) (recognizing that the right to allocution is “constitutionally protected”); Schutter v. Soong, 873 F.2d 66, 87 (Sup. Ct. Hawaii 1994) (“Once a defendant is denied the opportunity to be heard, this denial of due process cannot be corrected later at a motion for reconsideration”).

South Carolina law is clear. A defendant’s waiver of constitutional rights must be established by a complete record. Narciso v. State, 397 S.C. 24, 33, 723 S.E.2d 369, 374 (2012) (“A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant’s counsel, or both”); Brannon v. State, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001); Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992). Here, there was nothing on the record establishing that the respondent voluntarily, knowingly, and intelligently waived his right to allocute. Instead, Breibart told the respondent that if he or his parents spoke at sentencing, he would receive 25 years imprisonment. (App. at 43-44, 47). Had the respondent and/or his parents been given the opportunity to speak, the court could have imposed the mandatory minimum seven years rather than the recommended 10 years.

The petitioner argues that it is speculation whether the respondent or his parents speaking at the sentencing hearing would have changed the outcome. (Petitioner’s Brief

at 8). However, the respondent need not show prejudice in light of this constitutional defect. Penn. v. Thomas, 553 A.2d 918, 919 (Pa. Sup. Ct. 1989) (“we reject the Commonwealth’s argument that one who stands convicted of a crime and who is denied an opportunity to address the sentencing court must somehow demonstrate prejudice thereby. What effect the exercise of the right of allocution might have on the subjective process of sentencing can never be known with such certainty that a reviewing court can conclude there was no prejudice in its absence”); Presbury v. Wyoming, 226 P.3d 886, 887-88 (Wyo. Sup. Ct. 2010) (“Federal courts have recognized that in the absence of an opportunity to allocute being given, it is almost impossible to ascertain what the effect of the opportunity would have been had the error not occurred”) (citing United States v. Luepke, 495 F.3d 443, 451 (7th Cir. 2007) (when there has been a violation of the right to allocute, a reviewing court should presume prejudice when there is any possibility that the defendant would have received a lesser sentence had the district court heard from him before imposing the sentence); United States v. Prouty, 303 F.3d 1249, 1252 (11th Cir. 2002) (“prejudice must be found if a defendant has not been given the opportunity to speak to the court when the possibility of a lower sentence existed”); United States v. Jarvi, 537 F.3d 1256, 1262 (10th Cir. 2008) (“The government concedes that a denial of allocution is per se prejudicial and requires a remand without an investigation of prejudice”).

Although the respondent need not show prejudice, if Breibart had not lied to the respondent, there is a reasonable probability that the outcome of his sentencing proceedings would have been different. As the Fourth Circuit stated:

When a defendant was unable to address the court before being sentenced and the possibility remains that an exercise of the right of allocution could

have led to a sentence less than that received, we are of the firm opinion that fairness and integrity of the court proceedings would be brought into serious disrepute were we to allow the sentence to stand.

United States v. Cole, 27 F.3d 996, 999 (4th Cir. 1994). The Supreme Court has also addressed the importance of the right of allocution: “The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.” Green, 365 U.S. at 304; *see also* Hawaii v. Schaefer, 184 P.3d 805, 813 (Ct. App. Hawaii 2008) (“[w]e also expressed doubt that the denial of presentence allocution can ever be harmless error”); United States v. Rucker, 395 Fed.Appx. 970, 974, 2010 WL 3623553 (unpublished) (4th Cir. 2010) (case remanded for resentencing because the possibility remained that the defendant “could have received a lower sentence if he had the right of allocution”).

Breibart’s ineffectiveness was so pervasive “as to render a particularized prejudice inquiry unnecessary.” Frett, 298 S.C. at 57, 378 S.E.2d at 257; *see also* Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (“When counsel’s deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice”) (citing Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002)). Breibart’s “conduct so undermined the proper functioning of the adversarial process” that it did not produce a just result. Taylor, 404 S.C. at 359, 745 S.E.2d at 101. There is ample evidence of probative value to support the post conviction relief court’s finding, therefore it must be upheld. (App. at 33-42); Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

II. THE POST CONVICTION RELIEF JUDGE DID NOT ERR IN FINDING THE RESPONDENT MET HIS BURDEN OF PROVING HIS GUILTY PLEA WAS INVOLUNTARY.

A plea must be “voluntarily, knowingly, and intelligently entered.” Hyman v. State, 397 S.C. 35, 43, 723 S.E.2d 375, 379 (2012). In a futile attempt to show that the respondent’s plea was voluntary, knowing, and intelligent, the petitioner focuses on the plea hearing transcript. (Petitioner’s Brief at 8-9). However, “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.” Hyman, 397 S.C. at 44, 723 S.E.2d at 379 (quoting Roddy v. State, 339 S.C. 29, 33, 528 S.E. 418, 420 (2000)). At the time of the plea hearing here, the respondent did not know of Breibart’s pervasive lies and deceit. (App. at 49). The record of a routine plea colloquy is cast in a different light when it is discovered that the respondent was represented by a pathological liar.

“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.’” Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (quoting Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). Here, Breibart lied to the respondent about filing a suppression motion, when in fact no such motion had been filed. (App. at 55). He told respondent that the suppression motion was denied by the trial court, when in fact, it was never even brought before the court. (App. at 55). It is unimaginable for the petitioner to contend that this was a knowing and

voluntary plea when the court has ruled that Breibart lied to the respondent about the supposed denial of a suppression motion.

Further, Breibart said that he had “connections” to law enforcement, prosecutors, and the South Carolina legislature, when in fact he had no such “connections.” (App. at 55). He told the respondent that the respondent would serve no more than five years of the ten-year sentencing recommendation because the legislature was in the process of changing the statute by eliminating the 85% rule. (App. at 57). He lied to the respondent by claiming that then Solicitor Bob Ariail was under Federal investigation and therefore Ariail would not allow the respondent to cooperate with Federal officials in an effort to achieve a reduced sentence. (App. at 57). Each one of these facts alone, much less combined, make it obvious that the plea did not represent a voluntary and intelligent choice.

It is clear that the respondent’s plea was not voluntarily, knowingly, and intelligently entered. There is ample evidence of probative value to uphold the post conviction relief court’s finding. *See Cherry*, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

This Court should deny the petitioner’s Petition for Writ of Certiorari and uphold the post conviction relief court’s holding.

Respectfully submitted,



Beattie B. Ashmore
State Bar No.: 010419
650 E. Washington Street
Greenville, South Carolina 29601

Beattie@Beattieashmore.com
(864) 467-1001
(864) 672-1406 (fax)

April 10th, 2014
Greenville, South Carolina

Attorney for respondent

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Guilty Plea Judge
The Honorable Robin B. Stilwell, Post-Conviction Relief Judge

Appellate Case No. 2013-002297

Tobias Aaron Jones,Respondent,

v.

State of South Carolina,Petitioner.


CERTIFICATE OF SERVICE

I, Rhonda Bell, certify that I have today served the within Return to Petition for Writ Certiorari and Appendix upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Karen C. Ratigan
P.O. Box 11549
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served this 11th day of ~~March~~, 2014.

April


Rhonda M. Bell
Legal Assistant to Beattie B. Ashmore
650 East Washington Street
Greenville, South Carolina 29601
Rhonda@BeattieAshmore.com
(864) 467-1001

BEATTIE B. ASHMORE, P.A.

ATTORNEY AT LAW

650 E. WASHINGTON STREET
GREENVILLE, SOUTH CAROLINA 29601

TELEPHONE (864) 467-1001
EMAIL: Beattie@BeattieAshmore.Com

RECEIVED

APR 15 2014

The Honorable Daniel Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

S.C. SUPREME COURT

**Re: Tobias Aaron Jones v. State of South Carolina
Appellate Case No. 2013-002297**

Dear Mr. Shearouse:

Enclosed please find an original and six (6) copies of the Return to Petition for Writ of Certiorari to be filed in the above referenced matter.

Please contact me with any questions or concerns.

Sincerely,



Rhonda Bell
Legal Assistant to Beattie B. Ashmore

Enclosures

Cc: Karen Ratigan, Senior Assistant Deputy Attorney General
Tobias Jones
William & Gail Jones