ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Beaufort County

Deadra L. Jefferson, Circuit Court Judge

DOMINIC GILBERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002565

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where he pled guilty because he was pressured by plea counsel to waive his constitutional right to a jury trial and accept the state's plea offer and since Petitioner would not have pled guilty but for plea counsel's undue influence?

STATEMENT

A Beaufort County Grand Jury indicted Petitioner at the January 27, 2011 term of General Sessions for attempted murder and possession of a sawed off shotgun. App. 81; App. 93-94. Petitioner pled guilty to assault and battery of a high and aggravated nature (ABHAN) on February 27, 2012 before the Honorable Roger M. Young, Sr. App. 1. The weapons charge was dismissed as part of the plea deal. App. 2, ll.18-23. Assistant Solicitor Meredith Bannon appeared on behalf of the state, and Helen Roper Dovell represented Petitioner. App. 1. Petitioner was sentenced by Judge Young to eight years imprisonment. App. 26, ll. 4-11. Petitioner did not appeal.

On July 16, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 28-34. The state filed a return to this application dated February 25, 2013. App. 35-39. The matter proceeded to an evidentiary hearing on August 30, 2013 before the Honorable Deadra L. Jefferson. App. 40. Assistant Attorney General Ashleigh R. Wilson represented the state, and John M. Tatum represented Petitioner. App. 41. By order dated November 8, 2013, Judge Jefferson denied Petitioner relief. App. 80-92.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty because he was pressured by plea counsel to waive his constitutional right to a jury trial and accept the state's plea offer and since Petitioner would not have pled guilty but for plea counsel's undue influence.

Guilty Plea

Petitioner and his co-defendants, Michael Dilbert and Tremayne Green, pled guilty during the same proceeding on the day in which their joint trial was scheduled to begin. All three were originally charged with attempted murder, but ultimately pled guilty to ABHAN. App. 2, l. 4 – 3, l. 1. Both Green and Dilbert received a negotiated sentence of eight years imprisonment. App. 2, ll. 13-17; App. 2, l. 25 – 3, l. 1. Petitioner was also sentenced to eight years imprisonment despite his refusal to enter into a negotiated plea and despite plea counsel's submission to the judge that Petitioner should be sentenced to only six years. App. 18, l. 24 – 19, l. 1; App. 26, ll. 4-11.

Petitioner indicated at the beginning of the proceeding that he wanted to plead guilty to ABHAN with the understanding that the shotgun charge would be dismissed. App. 3, ll. 18-24. Judge Young then advised each defendant that he had a constitutional right to a jury trial. Judge Young explained, "Each of you gentlemen have some rights that you're giving up when you plead guilty, namely, the right to a jury trial. If you want a jury trial, while we were prepared to start that this afternoon, at that point the state then has to present enough evidence to convince twelve jurors that you are guilty beyond a reasonable doubt. All twelve have to agree that you're guilty in order to convict you, and, if convicted, you have the right to appeal. You can challenge the state's evidence, put up evidence against, testify if you want to, and if you don't want to testify, the judge will instruct the jury not to hold that against you while they are deliberating." App. 4, ll. 8-21.

Petitioner told the judge that he understood these rights, but wished to waive his right to a jury trial and plead guilty.[1] App. 5, ll. 2-7.

After Petitioner told the judge that he was pleading guilty because he was guilty, the following colloquy took place on the record:

> THE COURT: Mr. Gilbert, other than your reduction in charges and the dismissal of the shotgun charge, had anybody promised you anything or threatened you to get you to plead guilty?
>
> DEFENDANT GILBERT: Not threatened me, but kind of like a little sentence.
>
> THE COURT: Well, you were told that I would - - that I had told your lawyer in chambers that we had had discussions. A previous offer had been made for eight years. **I told her that you had a lot better chance of getting something close to that than you did on what you would be sentenced to if you were convicted of attempted murder.** Is that pretty much what you understand?
>
> DEFENDANT GILBERT: Yes, sir.
>
> THE COURT: That you're - - whatever you get, you'll get less than the 30 years.
>
> DEFENDANT GILBERT: Right.
>
> THE COURT: And **it would probably be closer to eight years**?
>
> DEFENDANT GILBERT: Right.
>
> THE COURT: Is that what you understand?
>
> DEFENDANT GILBERT: Yes, sir.

[1] The record **constantly** misidentifies which defendant is speaking. Presumably, this is a result of all three defendants pleading guilty during the same proceeding and because of the similarity between Petitioner's last name and Defendant Dilbert's last name. Fortunately, one can easily identify which defendant is speaking based on the context of the proceeding. For example, when Petitioner stated that he understood his right to a jury trial and wished to waive his right, the speaker is identified as Defendant Green, but based on the context it is clear this was Petitioner speaking. App. 5, ll. 2-7; see also App. 6, ll. 9-13; see also App. 6, ll. 14-16; see also App. 7, l. 10 – 8, l. 6; see also App. 8, ll. 7-14; see also App. 10, ll. 7-11; see also App. 11, ll. 16-20.

THE COURT: But nobody promised you anything, did they?
DEFENDANT GILBERT: No, sir.

THE COURT: And nobody threatened you, did they?

DEFENDANT GILBERT: No, sir.

THE COURT: And they told you I haven't made up my mind on what the sentence is, but I'm going to listen to it and the state has said they still want to argue perhaps for some more time, but I haven't made up my mind one way or another, but **I indicated to your lawyer that it would probably be closer to eight than it would be to 30**. Is that what you understand?

DEFENDANT GILBERT: Yes, sir.

MS. DOVELL: And, your honor, if I may, it's always been my understanding that a straight up plea is without recommendations or negotiations. I understand the state's position, but that's always just been my understanding.

THE COURT: Okay. Well, that's hopefully what I meant to convey, is that they're going to recommend eight years on Mr. Green. Mr. Gilbert [sic] has negotiated plea for eight years, but your sentence is what I decide it will be.

DEFENDANT GILBERT: That ain't what I was told.

MS. DOVELL: That's what he just explained to you, that it's - - he did talk about this, and that's what he just told me.

THE DEFENDANT [GILBERT]: ***I want a jury trial.***

THE COURT: Again, I'm not trying to convince you one way or another, Mr. Gilbert, I am just trying to make sure you understand. I'm not saying what I'm going to give you at this point, I just told your lawyer that if you had an attempt to get close to eight years, that **you really ought to take it because if you were convicted of attempted murder, you would probably get close to 30 years.** But I don't know what I'm going to sentence you to at this point, and I'm just getting across to you that there are no promises made to you as to what your sentence will be. Do you understand that?

THE DEFENDANT [GILBERT]: Yes, sir.

THE COURT: At least you indicated that to me.

THE DEFENDANT [GILBERT]: Yes, sir.

MS. DOVELL: If I may too, I've explained to my client it gives me the opportunity to argue for less than eight.

THE COURT: That is true as well.

MS. DOVELL: Whereas the other two don't have that opportunity.

THE COURT: She's free to argue for less, the state is free to argue for more. Okay? All right.

App. 8, l. 15 – 11, l. 15 (emphasis added).

The judge later asked plea counsel whether Petitioner understood what he was doing, specifically that he was waiving his right to a jury trial and pleading guilty to which plea counsel answered, "Yes, sir." App. 13, ll. 16-19. Judge Young then found Petitioner's guilty plea was freely, voluntarily, and intelligently made. App. 13, ll. 24-25.

After the solicitor told the judge the facts of the case, plea counsel presented mitigation evidence on behalf of Petitioner and requested the judge sentence Petitioner to six years imprisonment. App. 17, l. 3 – 19, l. 2. The judge ultimately sentenced Petitioner to eight years imprisonment, which is the same sentence his two co-defendants received. App. 26, ll. 4-11.

PCR Hearing

Petitioner testified at the PCR hearing that he was reluctant to go through with a guilty plea. He said, "[Plea counsel] told me I should take the guilty plea. **I told her I wanted to go to trial, go through with a jury trial, but she insisted that I take the guilty plea.**" Petitioner explained that plea counsel brought in other people to try to convince him to plead guilty, including Petitioner's mother, Petitioner's twin brother, and other attorneys. Petitioner testified that in February 2012, he ultimately decided to go through with the guilty plea. However, Petitioner explained that in the

middle of his guilty plea he stated in open court that he wanted a jury trial. App. 48, l. 2 – 49, l. 14 (emphasis added).

On cross-examination, Petitioner stated that it was "kind of sort of" his decision to plead guilty. He explained, "Since I first met [plea counsel], I told her that I don't want to seek a plea. I told her, since day one, that I don't think I would ever take a plea. So that was it." App. 52, ll. 1-6. Petitioner testified further that he told the judge "I wanted to plead guilty after the fact that they persuade me to take one after I told them I wanted a jury trial." Petitioner also said, "I wasn't threatened but I was kind of where I got a lesser plea. App. 52, ll. 7-23.

Plea counsel, Helen Roper Dovell, testified, "Early on in the process, I received a plea offer from the state and the plea offer at first was actually what he - - the sentence that he received. I remember several - - I think it was maybe the month before Mr. Gilbert decided to plead guilty, he was given an offer to plead to assault and battery high and aggravated for a negotiated six years. My client indicated that he wanted to think about it at the time, maybe talk to his mom - - I called his mom to see if she could speak with him, et cetera - - and ultimately, he decided that he did not want to take that offer." App. 59, ll. 7-22.

Dovell testified that Petitioner's case was scheduled for trial on the day he pled guilty. She said she explained to Petitioner that if he proceeded to trial and was found guilty of attempted murder "he probably would have been sentenced more towards the higher end of closer - - somewhere closer to thirty years than closer to eight years." Dovell further testified, "[I]t was my understanding that while I could not promise him exactly what a judge would sentence him to, that he would probably receive a sentence of about eight years. And that is what I relayed to him at that time. I did have him speak with both of my bosses, Traci Campbell and Gene Hood. I did have his mom and his brother speak with him about it. And I will admit that **I did everything that I could**

to try to convince him of the wisdom of taking the plea offer. Now, if he felt that that was threatening or coercive, I can't say." App. 60, l. 9 – 61, l. 9 (emphasis added).

Additionally, Dovell maintained that she informed Petitioner of the consequences of his plea before he pled guilty and advised him of his constitutional right to a jury trial, his right to remain silent, and his right to confront the witnesses against him. Dovell said that Petitioner never indicated that he did not understand his rights.

On cross-examination, Dovell agreed that she "felt very strong with regard to [Petitioner] pleading guilty." App. 65, ll. 115-18. However, she conceded that Petitioner was **"very reluctant"** to plead guilty so she brought in Petitioner's mother, brother, and Gene Hood, the circuit public defender, to convince Petitioner that he should plead guilty. Dovell explained that due to the influence of these individuals, Petitioner reluctantly agreed to plead guilty. App. 66, ll. 2-24. Dovell also acknowledged that Petitioner interrupted the guilty plea proceeding and asked for a jury trial. App. 66, l. 25 – 67, l. 3.

Order of Dismissal

The PCR court found Petitioner's guilty plea was entered freely and voluntarily with a full understanding of the consequences of his plea. The court noted that Petitioner was advised on the record during his guilty plea of the potential sentence he was facing and his constitutional right to a jury trial. The court also noted that Petitioner stated on the record that he was guilty and that he was not threatened or coerced into pleading guilty, nor was he promised anything for his plea. App. 90.

The court ultimately found Petitioner had not established any constitutional violations or deprivations occurred before or during his guilty plea and sentencing proceeding. The court also held that plea counsel was not deficient and that Petitioner did not suffer any prejudice. The court denied Petitioner relief. App. 91.

Discussion

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to the improper influence and pressure plea counsel placed on Petitioner to get him to waive his right to a jury trial and plead guilty. Further, Petitioner was prejudiced by plea counsel's undue influence because, as Petitioner's testimony indicated, if plea counsel had not "insisted" Petitioner plead guilty, he would have invoked his right to a jury trial. App. 48, ll. 12-15. This case is also unusual because the plea judge joined with defense counsel on the record to strong-arm Petitioner into pleading guilty and waiving his right to a jury trial. See App. 8, l. 23 – 9, l. 2; see also App. 9, ll. 5-10; see also App. 9, l. 23 – 10, l. 1; see also App. 10, ll. 21-25; see also State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant "an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities." State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). "Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently." Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). "The longstanding test for determining the validity of a 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) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59. "[T]he 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, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

In this case, Petitioner was induced into pleading guilty by the undue pressure plea counsel placed on Petitioner to get him to plead guilty. This undue influence prevented Petitioner's guilty plea from being knowingly and voluntarily made and, consequently, rendered it invalid. See Berry, 381 S.C. at 635, 675 S.E.2d at 427. Plea counsel testified that she "did everything that [she] could to try to convince [Petitioner] of the wisdom of taking the plea offer." She even admitted that she had two other attorneys in her office, Traci Campbell and Gene Hood, talk to Petitioner in an effort to convince him to plead guilty. She also had Petitioner's mother and brother speak with him. App.

61, ll. 3-9. A reasonably competent criminal defense attorney would not have placed this improper pressure on Petitioner to get him to plead guilty and would not have prevented him from making a voluntarily decision regarding whether he should waive his right to a trial by jury.

Additionally, there is a reasonable probability that but for plea counsel's undue influence, Petitioner would not have pled guilty and would have insisted on proceeding to trial. See Lockhart, 474 U.S. at 59. Petitioner testified that he told plea counsel that he "wanted to go to trial," but plea counsel "insisted" he plead guilty. App. 48, ll. 12-15. Thus, Petitioner was prejudiced by plea counsel's improper pressure. It was *only* because of plea counsel's insistence that Petitioner pled guilty.

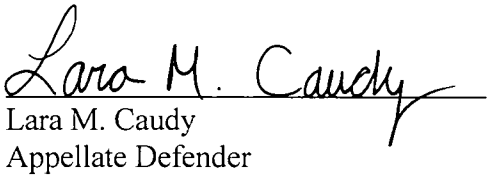
Furthermore, the guilty plea record suggests that Petitioner did not freely and voluntarily waive his right to a jury trial. During the middle of the guilty plea proceeding, Petitioner unequivocally stated, "I want a jury trial." App. 10, l. 17. After Petitioner said that he wanted a jury trial, the judge never went back through with Petitioner his right to a jury trial nor asked Petitioner whether he still wished to waive his constitutional right to a jury trial and plead guilty. Petitioner's request was not properly or fully addressed on the record. The judge should have further inquired into whether Petitioner wished to waive his right to a jury trial and plead guilty.

As a result of the invalid plea and the resulting prejudice, Petitioner's conviction should be reversed and this case remanded to the Beaufort County Court of General Sessions for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Deadra L. Jefferson, Circuit Court Judge

DOMINIC GILBERT,

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V.

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RESPONDENT

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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of May, 2014.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day of May, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .