

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

AUG 22 2014

Certiorari to York County

S.C. Supreme Court

John C. Hayes, III, Circuit Court Judge

ARKELLA RENA BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000180

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT4

CONCLUSION11

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where she pled guilty with the understanding it was going to be a "straight up" plea with the assistant solicitor presenting the facts and instead, the elected solicitor personally addressed the court and requested a lengthy prison sentence, and where the state would have proceeded with the same charges against Petitioner's daughter if Petitioner did not plead guilty?

STATEMENT

A York County Grand Jury indicted Petitioner at the February 21, 2013 term of General Sessions for criminal conspiracy and four counts of forgery third or subsequent. App. 79-88. On May 9, 2013, Petitioner pled guilty before the Honorable Paul M. Burch. App. 7. Solicitor Kevin Brackett and Assistant Solicitor Ryan Newkirk represented the state, and Daniel Hall represented Petitioner. App. 7. Petitioner was sentenced by Judge Burch to seven years imprisonment for each count of forgery to be served concurrently and three years concurrent for the conspiracy charge. App. 27, ll. 4-9. She did not appeal.

On July 23, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 30-34. The state filed a return to this application dated October 14, 2013. App. 35-40. The matter proceeded to an evidentiary hearing on December 9, 2013 before the Honorable John C. Hayes, III. App. 41. Assistant Attorney General J. Rutledge Johnson represented the state, and W. Michael Hemlepp represented Petitioner. App. 41. By order dated December 10, 2013, Judge Hayes denied Petitioner relief. App. 74-78.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where she pled guilty with the understanding it was going to be a "straight up" plea with the assistant solicitor presenting the facts and instead, the elected solicitor personally addressed the court and requested a lengthy prison sentence, and where the state would have proceeded with the same charges against Petitioner's daughter if Petitioner did not plead guilty.

Guilty Plea

Prior to Petitioner's guilty plea proceeding, Judge Burch spoke very generally with the entire courtroom about the constitutional right to a jury trial, the Fifth Amendment right to remain silent, the presumption of innocence, and the right to appeal, among other subjects. See App. 10, l. 4 – 14, l. 7. At the start of Petitioner's guilty plea, Assistant Solicitor Ryan Newkirk told the court the state would not be recommending a sentence and that Solicitor Brackett wished to address the court at the proper time. App. 14, ll. 20-23. Judge Burch then reviewed with Petitioner the maximum sentence each charge carried and advised her she was facing up to thirty-five years imprisonment. After Petitioner indicated she was pleading guilty to each charge, Judge Burch accepted her plea finding it was freely, voluntarily, and intelligently entered into with the advice of a competent attorney. App. 15, l. 10 – 18, l. 4.

Assistant Solicitor Newkirk then went over the facts of the case. He explained that a woman lost her purse at a J.C. Penny in Rock Hill and later learned from her bank that several of her checks had been used at local BI-LO stores in York County. This woman notified law enforcement who "pulled the video-surveillance" and "were able to clearly identify Ms. Brown [Petitioner] . . . as the person fraudulently obtaining goods with [the] check." According to Newkirk, "an accomplice,"

who handed Petitioner the checkbook in the video, was Petitioner's twenty-four year old daughter. App. 18, ll. 5-23.

Solicitor Brackett then went through Petitioner's prior record, which consisted almost exclusively of property offenses and, "on the community's behalf," asked the court "to impose a sentence that reflects the significance of her criminal history . . ." App. 19, l. 1 – 21, l. 2.

After Solicitor Brackett spoke, the court noticed that it had inadvertently not reviewed with Petitioner one of the indictments she was pleading guilty to or asked her how she wished to plead. When reviewing this indictment with Petitioner, she was very hesitant and did not respond when the court asked her whether she wanted a jury trial. App. 21, ll. 3-19. Plea counsel subsequently explained to the court, "Your Honor, if I may, Solicitor Brackett informed us just right before we began the plea that he would be speaking and would be talking about information that he received from the community. That's the first time we had heard that information. I did relay that to Ms. Brown about whether she wanted to go forward. He did let me know this morning that he would be - - that he would be asking for that and would be representing the community. We have not received any of that information until he stated that to the Court. She's - - that was news to her, certainly news to me, and so she's just trying to process that. She had indicated to me that she wished to plead guilty to all those charges." App. 21, l. 20 – 22, l. 7.

The court ultimately sentenced her to seven years imprisonment. App. 27, ll. 4-9.

PCR Hearing

At the "PCR hearing, Petitioner testified that she posted bond thirty-two days after her arrest and that plea counsel, Dan Hall, was appointed to represent her shortly thereafter. App. 47, l. 10 – 48, l. 5. She explained that she met with plea counsel approximately five times in his office before her guilty plea. App. 48, ll. 15-22.

Petitioner testified that during her guilty plea proceeding Solicitor Kevin Brackett spoke to the court on behalf of the state. She explained, “It was surprising to me because from my understanding . . . the State wasn’t going to talk against me and I was coming in to do the plea for probation or no more than ninety days. But when he [Solicitor Brackett] come in with the attitude as if I was like a monster. You know he just made me out to be someone that I knew that I wasn’t and I didn’t have no defense and . . . My lawyer didn’t even have a defense.” App. 51, l. 24 – 52, l. 14. Petitioner testified that if she would have known Solicitor Brackett was going to speak to the court about her prior record, she would not have gone forward with the plea. App. 52, l. 25 – 53, l. 5.

Petitioner denied pleading guilty to avoid a lengthy sentence. Instead, she maintained she wanted a jury trial on these charges, but ultimately pled guilty “because they played my daughter against me.” App. 56, l. 17 – 57, l. 6. She later elaborated, “It wasn’t . . . totally a threat but like I said when they put my daughter in it . . . it was either this or that so it took me to say I take the charge so – cause my daughter didn’t have anything to do with it and then it was costing a lot of problems. She got children and it was gonna cost her to be evicted so it – in order for her to come out without being charged, without them having her evicted and no where to stay I did take the plea . . . So [it] ain’t like I come in and I just wanted to take the plea. That’s what they put before me . . . That’s what was done in this case from the beginning to the end.” App. 58, l. 7 – 59, l. 7.

When questioned by the court, Petitioner explained that her daughter was charged with the same offenses Petitioner was charged with, “but they told me if I took the plea that they would dismiss her charges.” The state ultimately dismissed the charges pending against Petitioner’s daughter after Petitioner pled guilty. App. 60, l. 22 – 61, l. 2.

Plea counsel, Dan Hall, testified that he was an assistant public defender and was appointed to represent Petitioner. App. 61, l. 16 – 62, l. 4. He explained that he met with Petitioner five times and discussed with her the nature of the charges and the potential sentence she faced, specifically up to thirty-five years imprisonment. App. 62, ll. 5-25. Hall said he told Petitioner at their April 11, 2013 “meeting that the state would not offer a probationary sentence.” App. 65, ll. 5-7. He maintained the state “had always taken the position that there would be no offer in the case. She would have to plead straight up.” App. 67, ll. 17-19.

Additionally, Hall explained, “[I]t had been told to me that this would be a straight up plea and that the Assistant Solicitor Ryan Newkirk would give the facts. It was not until shortly before the plea that Mr. Brackett informed me that he would be presenting the State’s facts of the case and that he indicated he would be asking for a significant sentence.” App. 63, ll. 4-20. He testified that he was not aware Solicitor Brackett was going to speak until about fifteen minutes before the plea, but Brackett’s presence certainly influenced the court’s decision regarding sentencing. App. 63, ll. 4-10; App. 68, ll. 7-9. Despite finding out Solicitor Brackett would be speaking at her plea, Hall testified that he still thought it was in Petitioner’s best interests to go forward with the guilty plea. App. 69, ll. 13-21.

Furthermore, Hall testified that several times he and Petitioner “talked about the possibility of a trial.” He explained, “[S]he had told me at one of our meetings that she would not plead straight up that she would take her chances at a jury trial.” App. 64, l. 25 – 65, l. 4.

Order of Dismissal

After summarizing the testimony of Petitioner and plea counsel, Dan Hall, the order of dismissal simply states, “Based on the record and the testimony at the Post-Conviction Relief hearing, I find Applicant has failed to carry her burden of proof and failed to prove that, when the

appropriate standards set forth hereinabove are applied, trial counsel's representation of her was ineffective to any degree." The court thus denied Petitioner's PCR application and dismissed it with prejudice. App. 76-78.

Discussion

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where she pled guilty with the understanding it was going to be a "straight up" plea with Assistant Solicitor Newkirk presenting the facts and instead, Solicitor Kevin Brakett personally addressed the court and requested a lengthy prison sentence, and where the state threatened to proceed with the same charges against Petitioner's daughter if Petitioner did not plead guilty.

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)).

Additionally, “[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275-276 (1942)).

In this case, plea counsel’s performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Specifically, plea counsel was ineffective because he failed to ensure Petitioner was entering a guilty plea knowingly and voluntarily. Petitioner testified that the reason she pled guilty was because the state was threatening to prosecute her daughter for the same charges. Petitioner said, “[T]hey told me if I took the plea that they would dismiss her [the daughter’s] charges.” App. 60, l. 22 – 61, l. 2. Furthermore, Petitioner was not aware Solicitor Brackett was going to speak at her guilty plea until immediately before the proceeding and it is apparent from the guilty plea record and her testimony at the PCR hearing that she was extremely surprised by what Brackett told Judge Burch. See App. 21, l. 3 – 22, l. 14; App. 51, l. 24 – 52, l. 18.

Moreover, there is a reasonable probability that but for the state’s promise that it would dismiss the charges pending against Petitioner’s daughter if she pled guilty, Petitioner would not have pled guilty and would have insisted on proceeding to trial. She testified, “[N]o I wasn’t going to plead guilty. I wasn’t going to plead guilty at all.” App. 58, ll. 12-13. She explained that she only pled guilty because her “daughter didn’t have anything to do with it and . . . it was costing a lot of problems. She got children and it was gonna cost her to be evicted . . . in order for her to come

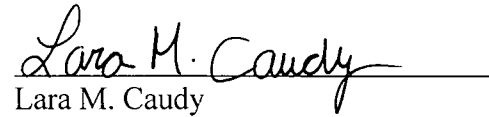
out without being charged, without them having her evicted and no where to stay I did take the plea.” App. 58, l. 20 – 59, l. 3. Furthermore, Petitioner testified that she also would not have gone forward with her guilty plea if she would have known Solicitor Brackett was going to speak to the judge, present her prior record, and request a lengthy sentence. App. 52, l. 25 – 53, l. 5.

As a result of the invalid plea and the resulting prejudice, Petitioner’s convictions should be reversed and she should be granted 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 22nd day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
John C. Hayes, III, Circuit Court Judge

ARKELLA RENA BROWN,

PETITIONER,

V.

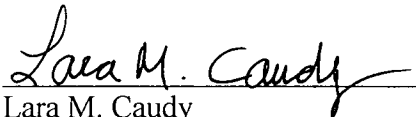
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000180

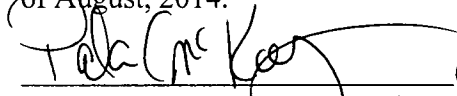
CERTIFICATE OF SERVICE

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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of August, 2014.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of August, 2014.


(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.