ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

ANTHONY TOMMY WILSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014-000068

PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
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

ISSUE PRESENTED

Whether plea counsel's failure to adequately advise Petitioner regarding his ability to challenge the admissibility of his confession and file a motion to suppress Petitioner's confession made to police when he was only fourteen years old and where Petitioner told the police investigator that he only understood his Miranda rights "a little bit" violated Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT

Indictments

On June 4, 2009, Petitioner Anthony Tommy Wilson was indicted by the Florence County Grand Jury for (1) murder; (2) first degree burglary; (3) armed robbery; (4) possession of a weapon during the commission of a violent crime; and (5) conspiracy. App. 91-93.

Guilty Plea

On March 12, 2012, Petitioner appeared before the Honorable Thomas A. Russo to plead guilty to the charges of murder and first degree burglary. As a part of the negotiated plea, the State dismissed the charges of armed robbery, possession of a weapon during the commission of a violent crime, and conspiracy. On the murder charge, Petitioner entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). App. 1-25. Petitioner was represented E. Guy Ballenger, and the State was represented by Solicitor E.L. Clements, III. App. 1.

The State provided the factual basis of the plea. The offense occurred on August 24, 2008, and at the time of the incident, Petitioner was only fourteen (14) years old. Petitioner was waived up through the Family Court system, and the Family Court judge ordered that Petitioner should be tried as an adult. If he had not been tried as an adult, Petitioner would have only faced incarceration until he turned twenty-one (21) years old. At the time of the offense, Petitioner was only around 5'4" tall and 125 pounds. App. 15, l. 19 – 16, l. 3.

David Johnson, a twenty-two (22) year old, was the leader of several young boys, including Petitioner, and he convinced Petitioner to go through the decedent's window

because Petitioner was the smallest of the boys. Petitioner allegedly went through the window and unlocked the front door for the others to come inside. They were planning to steal things out of the house and came upon the decedent asleep in her bed. App. 3, ll. 14-16; 16, ll. 4-10.

Johnson and Petitioner went into the room. Johnson sat on the decedent and had a pillow over the decedent's head part of the time. The State alleged that Johnson gave a knife to Petitioner and told Petitioner to show Johnson that he was not a punk. Johnson told Petitioner to stab the decedent, and Petitioner allegedly stabbed the decedent one time. Petitioner handed the knife back to Johnson and left the room. Later, Johnson came back and got Petitioner off the porch swing and told Petitioner to help him put the body in the car, and Petitioner rode with Johnson where they put the decedent's body in a ditch near Malloy Street. App. 16, ll. 11-21. The State did not believe that Petitioner would have ever been involved in the incident except for Johnson. App. 16, ll. 22-23.

The State did not know which actual wound killed the decedent and that is the reason why Petitioner chose to enter an Alford plea on the murder charge. App. 17, ll. 18-20. The Solicitor acknowledged that Petitioner never had any propensity for violence. App. 18, ll. 5-6.

Judge Russo found that the State provided a substantial factual basis for the guilty plea and accepted Petitioner's guilty plea. App. 21, ll. 3 – 10. Pursuant to the negotiated plea, Judge Russo sentenced Petitioner to thirty (30) years each for murder and first degree burglary with the sentences to run concurrent. App. 24, ll. 13 – 24. Petitioner did not appeal his guilty plea.

Application for Post-Conviction Relief and Evidentiary Hearing

Petitioner filed his application for post-conviction relief ("PCR") on August 9, 2012. App. 27 – 33. The State filed its Return on October 8, 2012. App. 34 -38. Petitioner filed an amended PCR application on September 5, 2013, alleging that Petitioner "was denied the effective assistance of counsel guaranteed by South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution in that plea counsel failed to adequately investigate and move to suppress [Petitioner's] confession." App. 39-42.

An evidentiary hearing was held before the Honorable William H. Seals, Jr. on October 9, 2013. App. 43-69. Petitioner was represented by Joshua A. Bailey, and the State was represented by Assistant Attorney General Joshua L. Thomas. App. 43. Both Petitioner and his plea counsel testified at the evidentiary hearing. App. 47-69.

Petitioner testified that he wanted to challenge the confession that he gave to law enforcement. He gave this confession on August 27, 2008. Petitioner testified that only Detective Godwin was present when he gave his confession. App. 48, ll. 12-24.

Petitioner was at the Florence County Complex when he was questioned by the investigator about the case. When the investigator began discussing the case with Petitioner, Petitioner said that he was at first not read his Miranda[1] rights when the investigator started mentioning the case. The investigator read Petitioner his Miranda rights just before Petitioner gave his recorded statement. Petitioner then gave a detailed confession as to his involvement in the case in the recorded statement. App. 48, l. 25 – 49, l. 23. That statement was transcribed and submitted as an exhibit at the PCR evidentiary hearing. App. 71-81.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

When the investigator asked Petitioner if he understood his Miranda rights, Petitioner's response to the investigator's question was "a little bit." App. 49, l. 24 – 50, l. 4; 71. Petitioner testified at the evidentiary hearing that he did not understand his right to remain silent:

Q: What rights did you not understand when he read them to you?

A: My right to remain silent.

Q: Okay. Now, he told you that you had the right to remain silent, correct?

A: Yes, sir.

Q: Mr. Wilson, what did you interpret that to mean?

A: I really didn't understand what it meant.

Q: Okay.

A: I could have tell [sic] him what he just told me, but I - - I didn't know that I didn't have to talk to him.

Q: Okay. If you would have understood the right to remain silent, would you have talked to him that day?

A: No, sir.

App. 50, ll. 5 – 18.

Petitioner testified that he was only fourteen (14) years old when he gave his statement. App. 50, ll. 23-24. Petitioner said he was interviewed from about 11:30 to 3:30/4:00 o'clock or for about a five hour period. He said he was not offered any food during that time period but was offered a cup of water. App. 52, ll. 4-21.

Petitioner acknowledged that he had been in trouble previously for shoplifting in 2005 when he was twelve (12) years old. He said the police did not interview him regarding the shoplifting charge and no one ever read him his Miranda rights when he was

arrested for the shoplifting charge. App. 50, l. 25 – 51, l. 13. Petitioner testified that he completed school through the seventh grade. App. 51, ll. 14-17.

Petitioner testified that he did discuss his confession with plea counsel and even discussed filing a motion to suppress the confession. Plea counsel, however, never filed such a motion and never explained to Petitioner why he did not file such a motion. App. 53, ll. 13-24. Petitioner specifically requested his plea counsel to file a motion. App. 53, l. 25 – 54, l. 2. Had his plea counsel filed a motion to suppress the confession and that motion been granted, Petitioner would not have pled guilty but would have insisted on going to trial. App. 54, ll. 3-8. Because his plea counsel did not file a motion to suppress the confession, Petitioner did not feel comfortable going to trial so he pled guilty instead. App. 56, ll. 18-24.

Plea counsel testified that at the waiver hearing, he did question Detective Godwin on the statement that Petitioner gave to him. Plea counsel mentioned that Petitioner had a potentially lower intelligence as reflected in some of the Department of Juvenile Justice reports. Plea counsel testified that the Family Court judge found the statement admissible or at least used the statement in making its determination as to whether or not Petitioner should be waived to General Sessions Court. App. 61, l. 10 – 62, l. 2.

Plea counsel conceded that Petitioner had a compelling argument that his confession should have been suppressed where he said that he only understood his Miranda rights "a little bit." App. 62, ll. 9-13.

Plea counsel testified that he discussed the statement with Petitioner several times, but he ultimately encouraged Petitioner to plead guilty and obtain the benefit of the thirty (30) year sentence. App. 62, l. 17 – 66, l. 5. He said it was Petitioner's decision to plead

guilty, but plea counsel was the one who told Petitioner, "I think this guilty plea's [sic] in your best interest." App. 66, ll. 6-7; 68, ll. 8-9. Plea counsel said that once Petitioner decided to plead guilty, any motion to suppress Petitioner's statement was moot. App. 68, ll. 14-16.

Order of Dismissal

On December 10, 2013, Judge Seals issued his Order of Dismissal denying Petitioner's PCR application. App. 82-90. Judge Seals found Petitioner's allegation that plea counsel was ineffective for failing to suppress the statement and advising Petitioner to plead guilty to be without merit. Judge Seals also found that Petitioner was not prejudiced by his plea counsel's ineffectiveness because any motion to suppress Petitioner's confession would have likely been denied. App. 87-89.

This petition for a writ of certiorari follows.

ARGUMENT

Plea counsel's failure to adequately advise Petitioner regarding his ability to challenge the admissibility of his confession and file a motion to suppress Petitioner's confession made to police when he was only fourteen years old and where Petitioner told the police investigator that he only understood his Miranda rights "a little bit" violated Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Plea counsel did not provide Petitioner with effective assistance of counsel where plea counsel did not properly advise Petitioner that his confession to police could be successfully challenged and suppressed at trial. Instead of filing a motion to suppress Petitioner's confession, as Petitioner requested plea counsel to do, plea counsel encouraged Petitioner to plead guilty to murder and first degree burglary even though the State's case against Petitioner would have been severely hampered without Petitioner's confession.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " Cherry, 300 S.C. at 117, 386 S.E.2d

at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

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 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("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.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31(1970)). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

"The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). "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).

In this case, Petitioner's plea counsel was ineffective in encouraging Petitioner to plead guilty instead of filing a motion to suppress Petitioner's confession where this confession would have been suppressed at trial. Petitioner testified that he would have insisted on going to trial instead of pleading guilty had his plea counsel filed a motion to suppress his confession. App. 54, ll. 3-8

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." Therefore, a statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966); Dickerson v. United States, 530 U.S. 428 (2000). The purpose of Miranda is to prevent "government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." Arizona v. Mauro, 481 U.S. 520, 529–30 (1987).

To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda. See State v. Goodwin, 384 S.C. 588,

601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002). In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted).

The United States Supreme Court has observed that a defendant may waive his Miranda rights provided the waiver is made voluntarily, knowingly, and intelligently. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Moran v. Burbine, 475 U.S. 412, 421 (1986).

It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The prosecution must show that the accused understood the

rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010)(citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

The evidence presented at the PCR evidentiary hearing indicated that Petitioner did not voluntarily and knowingly waive his rights and speak to Detective Godwin. Petitioner was only fourteen (14) years old when he gave his statement to Detective Godwin. App. 50, ll. 23-24. Only he and Detective Godwin were present in the room when Petitioner gave his confession. App. 48, ll. 15-24; 71-81. Petitioner was interrogated for about five hours and only given a cup of water during that time. App. 52, ll. 4-21. Petitioner had only completed up to the seventh grade. App. 51, ll. 14-17. Petitioner's plea counsel confirmed at the evidentiary hearing that Petitioner had lower intelligence. App. 61, ll. 18-19.

When Detective Godwin asked Petitioner if he understood his Miranda rights including his right to remain silent, Petitioner responded, "A little bit." App. 71. Even though Petitioner told Detective Godwin that he only understood his rights "a little bit," Detective Godwin did not take the time to further explain to Petitioner what his rights were and that he did not have to talk with the police and that he could ask for an attorney. Instead, Detective Godwin had Petitioner give his confession. App. 71-72.

At the evidentiary hearing, Petitioner testified that he did not really understand what it meant that he had the right to remain silent. App. 50, ll. 8-15. Petitioner said that if had known that he did not have to speak with police and tell them anything that he would not have talked to Detective Godwin that day. App. 50, ll. 16-18. Therefore, the PCR court's ruling that Petitioner presented no evidence that he was of limited intelligence and did not understand that he could refuse to talk to the police is not supported by the evidence

presented at the evidentiary hearing. App. 88. The facts of Petitioner's case are different from those in State v. Pittman, 373 S.C. 527, 569, 647 S.E.2d 144, 166 (2007) where this Court held that the defendant presented no evidence, other than his age, supporting his claim that his confession was involuntary. In Petitioner's case, Petitioner actually let Detective Godwin know that he did not fully understand his rights.

While Petitioner testified that he had been in trouble before for shoplifting, he was never interviewed by police or read his Miranda rights during that incident. The PCR court's ruling that Petitioner's experience with prior police investigations indicated that Petitioner understood his Miranda rights is therefore also not supported by the evidence where Petitioner had never been advised of his Miranda rights before. App. 50, l. 25 – 51, l. 13; 88.

Petitioner was a fourteen (14) year old juvenile of lower intelligence who told Detective Godwin that he only understood his Miranda rights "a little bit" before giving a confession. Petitioner's speaking to Detective Godwin was not made with a full awareness of the nature of the rights he was giving up and the consequences of such an act.

"Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and ... compel him to speak where he would not otherwise do so freely. Indeed, the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed . . . . That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile." J.D.B. v. North Carolina, 131 S. Ct. 1394, 2401 (2011) (internal citations omitted).

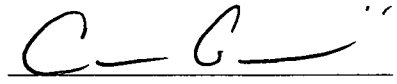
Juveniles "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them" and "are more vulnerable or susceptible to . . . outside pressures than adults." Id. at 2403 (internal citations omitted). The United States Supreme Court has further recognized that "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." Id.

Plea counsel's advice to Petitioner to accept the thirty (30) year plea deal for murder and first degree burglary instead of advising Petitioner that his confession could be successfully suppressed and not be used against him at trial constituted deficient performance. Petitioner would not have pled guilty and would have insisted on proceeding to trial had his plea counsel given him proper advice about the admissibility of his confession and had plea counsel moved to suppress the confession. Petitioner's confession was crucial to the State's case against Petitioner and without that confession, the State's case against Petitioner would have been severely hindered. See Dupree v. State, 305 S.C. 285, 408 S.E.2d 215 (1991) (holding defense counsel was ineffective for failing to pursue whether petitioner's statement to police was involuntary especially where petitioner's statement was crucial evidence to the State's case). Accordingly, because of plea counsel's ineffective performance which prejudiced Petitioner, Petitioner is entitled to the grant of post-conviction relief and a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Anthony Tommy Wilson respectfully requests this Court to grant his Petition for a Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of August, 2014.

STATE OF SOUTH CAROLINA
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ANTHONY TOMMY WILSON,

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APPELLATE CASE NO. 2014-000068

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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Anthony Thomas Wilson #350120 at Lee Correctional Institution, this 7th day of August, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this
7th day of August, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.