STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

George C. James, Jr., Circuit Court Judge

NICHOLAS MACKLEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014- 001389

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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

Were the guilty pleas rendered involuntary by the fact that during the plea the judge reminded Petitioner that the State could still pursue a murder charge against him which carried a life sentence but failed to advise Petitioner that by pleading guilty he waived his right to confront his accusers?

STATEMENT

In March of 2009, the Horry County Grand Jury indicted Macklen for murder, burglary first degree, one count of leaving the scene of a watercraft accident resulting in death and three counts of leaving the scene of a watercraft accident resulting in great bodily injury, indictments #2009-GS-26-1245, 1248, 1270, 1271, 1272, 1273. On May 18, 2010, Macklen appeared before the Honorable Larry B. Hyman, Jr. and pled guilty to all counts except for the murder which was dismissed by the State. (App. p. 18). Sentencing was deferred to June 9, 2010, at which time Judge Hyman, pursuant to the negotiated plea, sentenced Macklen to twenty seven (27) years for burglary first degree, concurrent twenty five (25) years for leaving the scene of a watercraft accident resulting in death, and concurrent ten (10) years sentences for the three counts of leaving the scene of a watercraft accident resulting in great bodily injury.

A timely notice of intent to appeal and a brief filed pursuant to Anders v. California, 386 U.S. 738 (1967). On February 22, 2012, the South Carolina Court of Appeals dismissed the appeal. State v. Macklen, Op. No. 2012-UP-106 (S.C. Ct.App. filed February 22, 2012).

On July 9, 2012 Macklen filed an application for post conviction relief. The State filed a return on September 18, 2012. On March 20, 2014, an evidentiary hearing was held before the Honorable George C. James. Charles Brooks represented Macklen at the PCR hearing. Joshua L. Thomas represented the State. In a written order signed June 4, 2014, Judge James denied relief and dismissed the application. On June 24, 2014, Macklen served a timely notice of intent to appeal. This petition for writ of certiorari follows.

ARGUMENT

The guilty pleas were rendered involuntary by the fact that during the plea the judge reminded Petitioner that the State could still pursue a murder charge against him which carried a life sentence but failed to advise Petitioner that by pleading guilty he waived his right to confront his accusers.

During the PCR hearing Petitioner testified that he had initially been offered a twenty (20) year plea offer but was advised by counsel to reject the offer. (App. p. 109, lines 1-5). After the co-defendant cooperated with authorities and inculpated Petitioner, the plea offer changed from the rejected twenty (20) year plea offer to a plea offer for a negotiated sentence of twenty seven (27) years. (App. pp. 116-117). Petitioner testified, "So I didn't want to take this. So now I'm offered 27 years, you know, later on. So I didn't want to take the plea, and the judge says, well, you know, the murder charge and the burglary charge, you know, you end up with two life sentences off of this. You know, I was sort of coerced into it." (App. p. 107, lines 18-23). Petitioner also testified that he was not advised of his right to confront witnesses against him. (App. p. 109, line 23 – p. 110, lines 1-18).

During the plea colloquy the judge advised Macklen of his right to a jury trial, his right to remain silent, his right to be represented by counsel at trial, his right to challenge evidence and his right to introduce evidence. (App. pp. 24-25). The pleas judge did not, however, advise Macklen of his right to confront his accusers.

The transcript of the guilty plea reflects that several times during the course of the plea colloquy, Petitioner began to weep profusely and at one point the judge recessed court so that Petitioner could gain his composure. (App. pp. 27-29; p. 36). During the plea colloquy the judge told petitioner, "Mr. Macklen, let me remind you that the State had a murder charge against you that the State could still pursue. Uh—You were looking at substantial time –uh—up to life on that—that charge alone. Uh—There's –uh a thing you have to consider that I'm sure you talked with your

attorney about. And that's part of the deal here. Now I want you to tell me that considering all those things, is this, do you feel, in your best interest – what you need to do today?" (App. p. 36).

In the order of dismissal the PCR judge wrote, "The Court finds Applicant failed to demonstrate his plea was not knowingly and voluntarily entered." (App. p. 138). The order then notes that that the issue of the plea judge failing to advise Macklen of his right to confront his accusers was raised on direct appeal. The PCR judge wrote. "To the extent the issue has already been decided by the Court of Appeals, it is not properly raised in post conviction relief. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post conviction relief is not a substitute for an appeal."). (App. p. 138). While the issue of the plea judge failing to advise Macklen of his right to confront his accusers was raised on direct appeal, the Court of Appeals did not decide the issue as there was no objection below to preserve the issue for appellate review. State v. Macklen, Op. No. 2012-UP-106 (S.C. Ct.App. filed February 22, 2012). Post conviction relief is the only appropriate mechanism by which to challenge the voluntariness of the guilty plea. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The PCR judge then wrote, "Regardless, the Court finds the record before it supports a conclusion Applicant's plea was knowingly and voluntarily entered." (App. p. 138). The PCR judge concludes writing, "Nothing in the record indicates Applicant did not intend to plead guilty at the time of the plea." The PCR judge erred. The record reflects that during the guilty plea Macklen wept profusely and had to take a break to compose himself. Macklen continued with the guilty plea after the judge reminded him that the State could still pursue the murder charge which carried a life sentence. During the plea colloquy the judge failed to advise Macklen of his right to confront his accusers. Macklen's emotional state during the plea indicate that he did not intent to plead guilty.

This emotional state combined with the judge's coercive words and the judge's failure to advise of the right to confront accusers render the guilty plea involuntary. Counsel was ineffective in failing to move to withdraw the guilty plea following the judge's coercive words.

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). 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. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Gardner v. State, 351 S.C. 407, 413-14, 570 S.E.2d 184, 187 (2002), this Court wrote:

> This Court and the United States Supreme Court have held that before a court can accept a guilty plea, a defendant must be advised of the federal and state constitutional rights he or she is waiving. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, the right to confront one's accusers, the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. Id.

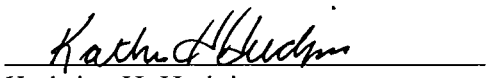
The plea judge failed to advise Macklen of the right to confront his accusers. The plea judge's "reminder" to Macklen about the murder charge and the potential life sentence was improper. See State v. Owens, 362 S.C. 175, 178, 607 S.E.2d 78, 80 (2004) {"Although the trial court must strive to ensure that a criminal defendant's waiver of the right of a jury trial is knowing and voluntary, the court should never inject its personal opinion into that decision.").

The failure to advise combined with the judge's coercive reminder about the murder charge as well as Macklen's reluctance and emotional state during the guilty plea support that the plea was not made voluntarily. Petitioner's guilty plea was involuntarily made in violation of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article I, §14 of the South Carolina State Constitution.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

George C. James, Jr., Circuit Court Judge

NICHOLAS MACKLEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014- 001389

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 this 29th day of December, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of December, 2014.

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

My Commission Expires: October 24, 2021 .