 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

EUGENE RHINEHART,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001698

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether the PCR court erred by failing to grant Petitioner a new trial based on newly discovered evidence where the minor in this criminal sexual conduct case later recanted her allegations that Petitioner sexually assaulted her in a conversation with her brother since this evidence satisfies not only the *Jamison* standard, but also the traditional five-factor test used to analyze newly discovered evidence?

2.

Whether Petitioner's *Alford* plea was knowingly, intelligently, and voluntarily made where plea counsel failed to properly advise Petitioner of the direct consequences of his guilty plea, specifically that he was facing a maximum sentence of twenty years imprisonment and that the charge was classified as a violent offense, since Petitioner testified that he would not have entered an *Alford* plea, but would have proceeded to trial if he would have been properly advised of these consequences?

STATEMENT

A Spartanburg County Grand Jury indicted Petitioner at the March 2011 term of General Sessions for criminal sexual conduct with a minor, second degree. App. 66-67. Petitioner pled guilty on October 9, 2012 before the Honorable R. Ferrell Cothran, Jr. App. 1. Assistant Solicitor Amy Goulding represented the state, and James Cheek represented Petitioner. App. 1. Petitioner was sentenced by Judge Cothran to eight years imprisonment. App. 9, ll. 18-21. He did not appeal.

On December 3, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 12-19. The state filed a return to this application dated February 28, 2014. App. 20-23. The matter proceeded to an evidentiary hearing on April 11, 2014 before the Honorable J. Derham Cole. App. 24. Assistant Attorney General Suzanne H. White represented the state, and Christopher D. Brough represented Petitioner. App. 24. By order dated July 25, 2014, Judge Cole denied Petitioner relief. App. 59-65.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR court erred by failing to grant Petitioner a new trial based on newly discovered evidence where the minor in this criminal sexual conduct case later recanted her allegations that Petitioner sexually assaulted her in a conversation with her brother since this evidence satisfies not only the *Jamison* standard, but also the traditional five-factor test used to analyze newly discovered evidence.

Guilty Plea

The solicitor informed the court at the beginning of the guilty plea proceeding that Petitioner was pleading guilty to second degree criminal sexual conduct with a minor pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), and that the state's sentencing recommendation was "a cap of ten years" imprisonment. App. 3, ll. 3-7. After a routine colloquy where the court advised Petitioner of his constitutional rights, the consequences of his guilty plea, and the maximum sentence he faced, the solicitor informed the court of the facts of the case. See App. 4, l. 9 – 6, l. 25.

The solicitor told the court that the alleged events occurred between December 2008 and April 2010 at Petitioner's home. The alleged victim was Petitioner's daughter, Minor, who was between the ages of eleven and twelve years old at the time of the alleged offense. App. 7, ll. 1-5. The solicitor maintained, "The sexual events began with him rubbing between her legs, putting his tongue on her stomach and chest, and also putting his mouth on her mouth. Events escalated to the defendant putting his tongue on her lower private parts as she calls it, and also having intercourse with the victim." App. 7, ll. 7-12.

The court found a factual basis for the plea and that it was freely and voluntarily entered into with the advice of competent counsel. App. 8, ll. 2-5. Plea counsel told the court that Petitioner

was “confident he’d have some fighting chance” at trial, but that he did not want to “drag his relative through a lengthy trial” so he chose to plead guilty “under Alford admitting that there is a possibility that he could be found guilty at trial.” App. 8, l. 1. 17 – 9, l. 1. After accepting the plea, the court sentenced Petitioner to eight years imprisonment. App. 9, ll. 18-21.

PCR Hearing

Petitioner testified at the PCR hearing that he was told by Minor’s mother that Minor is his daughter and he “assumed that she was my child.” App. 30, ll. 12-17. Petitioner denied any guilt and testified that he had no contact with Minor during the timeframe alleged in the indictment, December 2008 until April 2010. App. 30, l. 18 – 31, l. 8; App. 32, ll. 19-21. He testified that “the only reason I pleaded was because I [had] been sitting in jail for two years, and . . . I was sick. I got congestive heart failure, and I was having all kinds of medical issues like I’m having now. That’s the only reason I pleaded guilty. I [had] been sitting there so long.” App. 37, l. 24 – 38, l. 3.

Minor testified that she knew Petitioner and that he is “supposed to be my father.” App. 39, ll. 22-25. She explained that at some point she spoke with law enforcement and individuals from the Children’s Advocacy Center about allegations that Petitioner had been “inappropriate” with her. She was aware that Petitioner was sentenced to serve time in prison as a result of her allegations. App. 40, ll. 1-11.

Minor explained that sometime after Petitioner was sentenced, she had a conversation with Cory Walker, who is “supposed to be my brother.”¹ She had known Walker for some time and considered him to be “a friend-of-the family.” Minor explained that Walker asked her “what had happened between [her] and [Petitioner] and whether or not the allegations were true?” She admitted that she told Walker “**it never happened.**” App. 41, l. 3 (emphasis added). However, she

¹ Cory Walker’s name in the PCR transcript is spelled Corrie Walker.

claimed that she told Walker “it never happened” because she was scared and “didn’t want to tell nobody.” She further claimed that “it wasn’t the truth . . . I said that because I was afraid.” App. 41, ll. 12-24.

Cory Walker testified that Petitioner is his father and that he “believes” Minor is his sister. App. 44, ll. 4-13. He explained, “Well, after all the allegations and stuff went down, you know, that was my sister, as I was told, that was my father. And I reached out to her just to see what was going on. And . . . I talked to her as a brother and just asked her what was going on. And that’s when **I was told nothing happened.** That was just like a brother-and-sister conversation of what was going on.” App. 45, ll. 2-8 (emphasis added). Walker testified that he does not “understand the scared part, because, like I told you, we had a relationship. So, you know, she had nothing to be scared of me about.” App. 46, ll. 16-20.

Walker claimed this conversation took place right after the charges “first happened” and before Petitioner pled guilty. App. 45, l. 13 – 46, l. 1. He testified that he is currently twenty-one years old and that this conversation happened when he was seventeen or eighteen years old. He also explained that he was told Minor is currently sixteen years old, meaning she would have been around twelve or thirteen when this conversation took place. App. 46, ll. 2-15.

Moreover, Walker maintained that he did not tell anyone about this conversation because it “was between me and her and no one else.” He did not tell anyone, including Petitioner, about this conversation until the week of the PCR hearing. App. 47, l. 10 – 48, l. 1. He denied speaking with plea counsel about this conversation before Petitioner pled guilty and continued to maintain that he did not tell Petitioner about the conversation until the week of the PCR hearing. App. 48, ll. 6-18.

Plea counsel, James Cheek, testified that he was never informed before Petitioner’s guilty plea of the conversation between Walker and Minor where Minor recanted. App. 54, l. 22 – 55, l. 4.

However, Cheek suggested that even if he was aware of this recantation he still would have cautioned Petitioner about proceeding to trial because of the video recording of Minor's interview at the Child Advocacy Center. App. 55, l. 5 – 56, l. 21.

Order of Dismissal

Despite citing the long standing five-part test used to analyze newly discovered evidence, the PCR court never directly addressed the test during his analysis. See App. 63.

The PCR court found that both Minor and Cory Walker were credible. The court indicated that it was “convinced” Minor “was truthful when she testified that she did not want to discuss the details of the abuse with Mr. Walker, so she instead told him the abuse had not occurred.” App. 64. The court further found that “more likely than not,” Minor’s “denial was an attempt to protect herself.” App. 64.

Additionally, the PCR court found that the conversation between Minor and Walker was not newly discovered evidence because “the information was discoverable at the time of the plea based on Mr. Walker’s admission that the conversation took place prior to [Petitioner’s] guilty plea.” App. 64. The court further noted that Petitioner “failed to offer any testimony or evidence to indicate that he would have proceeded to trial and . . . that the outcome would have been different, had he been aware of the conversation between Minor and Mr. Walker.” App. 64.

Discussion

The PCR court erred by failing to grant Petitioner a new trial based on newly discovered evidence where the minor in this criminal sexual conduct case later recanted her allegations that Petitioner sexually assaulted her in a conversation with her brother since this evidence satisfies not only the Jamison standard, but also the traditional five-factor test used to analyze newly discovered evidence.

Traditionally in South Carolina to “obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” Jamison v. State, ___ S.C. ___, 765 S.E.2d. 123, 128 (2014) (citing McCoy v. State, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013)) (internal quotation marks omitted).

However, the South Carolina Supreme Court in Jamison found that “the traditional, newly discovered evidence factors are ‘difficult, if not impossible to apply when the moving party pleaded guilty instead of standing trial.’” Id. at ___, 765 S.E.2d at 130 (quoting In Re Reise, 146 Wash.App. 772, 192 P.3d 949, 954 (2008)). Thus, this Court concluded “that the traditional five-factor newly discovered evidence test is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a guilty plea.” Id. at ___, 765 S.E.2d at 129.

Overruling long standing precedent, this Court held, “[W]hen a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only when the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the ‘interest of justice’ requires the applicant’s guilty plea to be vacated.” Jamison, ___ S.C. at ___, 765 S.E.2d. at 130.

Under this new analysis, not considered by the PCR court, Petitioner should be granted a new trial. First, the newly discovered evidence was discovered after Petitioner pled guilty. Specifically, the conversation between Walker and Minor where Minor recanted was not discovered

until the week of Petitioner's PCR hearing in April 2014 when Walker for the first time told someone about the recantation. See App. 47, l. 24 – 48, l. 1. Furthermore, Minor's recantation could not have been discovered in the exercise of due diligence before Petitioner pled guilty in October 2012. Walker testified that "[t]his conversation was between me and her [Minor] and no one else," indicating that he was unwilling until the Petitioner's PCR hearing to tell anyone about the conversation even if the conversation may have been helpful to Petitioner's defense. App. 47, ll. 10-17. Petitioner could not have discovered Minor's recantation unless and until Walker was forthcoming with the information.

Second, the "interest of justice" requires Petitioner's guilty plea be vacated based on this newly discovered impeachment evidence. See Jamison, ___ S.C. at ___, 765 S.E.2d. at 130. Significantly, nowhere in the record, including the solicitor's statement of the facts during Petitioner's guilty plea, is there any suggestion that the state had physical evidence implicating Petitioner in this alleged offense. Therefore, the credibility of the witnesses, especially Minor, would have been of utmost importance. Minor's recantation to her brother would have substantially called into question her credibility and the truthfulness of her allegations. Petitioner's guilty plea made without the knowledge of Minor's recantation constitutes an injustice that should permit Petitioner to disavow his guilty plea. See Id. at ___, 765 S.E.2d at 131.

Furthermore, Petitioner has always maintained his innocence in this case. See App. 32, ll. 19-21. He pled guilty under North Carolina v. Alford, 400 U.S. 25, only "admitting there is a possibility that he could be found guilty at trial."² See App. 8, ll. 22-24. Additionally, plea counsel told the court at Petitioner's guilty plea that Petitioner was only pleading guilty because he did not

² An Alford plea is "a guilty plea accompanied by an assertion of innocence." See Zurcher v. Bilton, 379 S.C. 132, 137, 666 S.E.2d 224, 227 (2008).

want “to drag his relative through a lengthy trial.” App. 8, l. 25. Moreover, Petitioner testified at the PCR hearing that he had no contact with Minor during the timeframe alleged on the indictment, December 2008 through April 2010, and that he only pled guilty because he had been in jail for two years awaiting trial, could not post bond, and was suffering from medical complications due to congestive heart failure. App. 30, l. 25 – 31, l. 11; App. 37, l. 24 – 38, l. 3.

Therefore, the “interests of justice” require Petitioner’s guilty plea be vacated and this case remanded for a new trial.

However, even under the traditional five-factor test used to analyze after discovered evidence that was cited by the PCR court in its order of dismissal, Petitioner should be granted a new trial. As mentioned above, under the traditional five-factor test, to “obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” Jamison, ___ S.C. at ___, 765 S.E.2d. at 128 (citing McCoy, 401 S.C. at 368 n. 1, 737 S.E.2d at 625 n. 1) (internal quotation marks omitted).

As argued above, Minor’s recantation was discovered after Petitioner’s Alford plea and could not have been discovered before his plea because Walker was admittedly unwilling to come forward with this information even if the recantation may have been helpful to Petitioner’s defense. See App. 47, ll. 10-17. It was not until Walker chose to be forthcoming that this evidence was finally discovered. Additionally, this evidence is material to the issue of guilt or innocence, probably would have changed the result if a new trial was granted, and is not merely cumulative or impeaching. As argued above, because the state had no physical evidence implicating Petitioner in this alleged offense, the credibility of the witnesses, especially Minor, would have been of utmost

importance. Minor's recantation to her brother would have substantially called into question her credibility and the truthfulness of her allegations. Not only is this evidence invaluable impeachment evidence, it is also **substantive evidence that the alleged crime never occurred**. Therefore, even if this Court analyzes this newly discovered evidence under the traditional five-factor test, Petitioner's conviction and sentence should be reversed and this case remanded for a new trial.

Petitioner's *Alford* plea was not knowingly, intelligently, and voluntarily made where plea counsel failed to properly advise Petitioner of the direct consequences of his guilty plea, specifically that he was facing a maximum sentence of twenty years imprisonment and that the charge was classified as a violent offense, since Petitioner testified that he would not have entered an *Alford* plea, but would have proceeded to trial if he would have been properly advised of these consequences.

PCR Hearing

Petitioner testified at the PCR hearing that he repeatedly told plea counsel he would not plead guilty "because I'm not guilty." App. 32, ll. 6-9. However, plea counsel told Petitioner during one of their meetings that he was going to speak with the solicitor and determine whether the solicitor was willing to recommend a probationary sentence. App. 31, l. 23 – 32, l. 2. Petitioner maintained that he eventually told plea counsel that he would plead guilty just to "get this over with and get out of jail." App. 32, ll. 3-4.

Additionally, Petitioner testified that plea counsel never told him that by pleading guilty under North Carolina v. Alford, 400 U.S. 25, to second degree CSC with a minor he was facing up to twenty years imprisonment or that the charge was classified as a violent offense. App. 37, ll. 3-6. He testified, "I always thought it was [up to] ten years that I was pleading to." App. 34, ll. 11-12. Moreover, Petitioner testified that if he would have known all of the consequences of pleading guilty, he would never have pled guilty and "would have went to trial." App. 32, ll. 16-24.

Plea counsel, on the other hand, testified that he did advise Petitioner that second degree CSC with a minor carried up to twenty years imprisonment, but that he negotiated a sentence recommendation with the solicitor of a "cap of ten years." App. 49, ll. 15-24; App. 51, ll. 5-9. He

also maintained that Petitioner was fully aware of the consequences of pleading guilty and that he believed Petitioner's guilty plea was entered freely and voluntarily. App. 51, ll. 3-9; App. 51, l. 20 – 52, l. 2.

Order of Dismissal

The PCR court found that plea counsel “discussed the elements and nature of the charge with [Petitioner], as well as potential sentences [Petitioner] could receive.” The court further found that “the record is clear that [Petitioner] pled guilty freely and voluntarily with full knowledge of the consequences he faced.” The court ultimately found Petitioner failed to meet his burden of proof as to this claim. App. 62-63.

Discussion

Petitioner's Alford plea was not knowingly, intelligently, and voluntarily made where plea counsel failed to properly advise Petitioner of the direct consequences of his guilty plea, specifically that he was facing a maximum sentence of twenty years imprisonment and that the charge was classified as a violent offense. Moreover, Petitioner was prejudiced by plea counsel's deficient performance because he testified that he would not have entered an Alford plea, but would have proceeded to trial if he would have been properly advised of the direct consequences of pleading 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 marks and citations 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). “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.” Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000)) (internal quotation marks omitted).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56. 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, 393 S.C. at 572-574, 713 S.E.2d at 615 (citing Roddy, 339 S.C. at 33, 528 S.E.2d at 420).

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 properly advise Petitioner that second degree CSC with a minor carried up to twenty years imprisonment and that it was classified as a violent offense. Without

knowledge of all the direct consequences of pleading guilty pursuant to Alford, Petitioner could not make a knowing and intelligent choice about whether to plead guilty or proceed to trial.

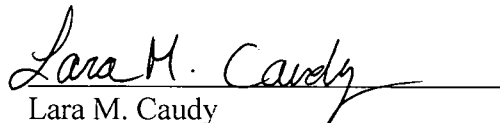
Moreover, there is a reasonable probability that but for plea counsel's deficient performance, Petitioner would not have pled guilty, but would have insisted on proceeding to trial. Petitioner testified that he would not have pled guilty had he been fully informed of the consequences of pleading guilty. App. 32, ll. 16-24. Thus, Petitioner was prejudiced by plea counsel's deficient representation. Lockhart, 474 U.S. at 59.

As a result of Petitioner's involuntarily guilty plea and the resulting prejudice, his conviction and sentence should be reversed and this case remanded to the Spartanburg 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 issues presented. Petitioner ultimately asks this Court to reverse his convictions and sentence and remand for a new trial or, in the alternative, Petitioner requests this Court remand his case to the PCR court to issue an order in compliance with Jamison v. State, 765 S.E.2d. 123 (2014), in regard to the first issue raised by Petitioner.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

EUGENE RHINEHART,

PETITIONER,

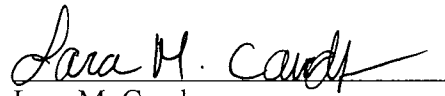
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

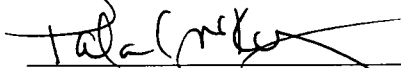
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of January, 2015.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of January, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.