

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

D. Garrison Hill, Circuit Court Judge

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S.C. Supreme Court

BILLY JOE HANNAH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001517

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where plea counsel coerced a guilty plea by forcing Petitioner to agree with the State's recitation of the facts, with which Petitioner strongly disagreed, and where plea counsel coerced Petitioner into reaffirming his guilty plea two days after the plea hearing when the State sought to amend Petitioner's sentencing sheets in order to reflect that Petitioner had pled guilty to two violent offenses when Petitioner believed he was pleading to two non-violent offenses?

STATEMENT OF THE FACTS

On January 23, 2011, Petitioner lost control of his vehicle. App. 6, ll. 1-7. The vehicle traveled down a steep embankment striking several trees and sustaining heavy damage. *Id.* at ll. 7-16. Petitioner's best friend and passenger, James Sullivan, was killed. *Id.* Sometime after the accident, a passing motorist found Sullivan deceased in the front seat and dialed 911. *Id.* Petitioner was not present at the scene of the accident.

Petitioner suffered serious injuries to his head and shoulder resulting in significant blood loss. App. 12, ll. 9-12. After the car came to a stop, Petitioner was disoriented and walked to a nearby residence to for help. *Id.* No one was home. *Id.* Petitioner then came across Ryan Atkinson who was fishing at a stream down the road from the accident. App. 10, ll. 19 – App. 11, ll. 4. Atkinson gave him a ride to James Anderson's house, a friend of Petitioner. App. 12, ll. 18 – App. 13, ll. 3. Petitioner asked Anderson's son to call 911 and go to the accident scene, while Anderson took Petitioner home to his wife who would then take him to the hospital. App. 10, ll. 17 – App. 11, ll. 7. Once Petitioner was home, Petitioner called 911 to report the accident and took a shower. App. 8, ll. 1-23. Petitioner's wife then took him to the scene of the accident. App. 9, ll. 12-13.

When Petitioner returned to the accident, the highway patrol had already identified Petitioner's wife as the owner of the vehicle. App. 9, ll. 9-24. Petitioner was placed under arrest and taken to a hospital for medical treatment. *Id.* A blood sample revealed that Petitioner had a blood alcohol content of .11. *Id.* Subsequent accident reconstruction determined that Petitioner was traveling fifty-three mph in a forty-five mph zone when he lost control and that the vehicle had no mechanical defects. App. 9, ll. 17 – App.10, ll. 13. Petitioner told the highway patrol, in a videotaped statement, that Sullivan was breathing when Petitioner left the accident scene. *Id.*

The State would contend at Petitioner's plea hearing that Petitioner had failed to tell Atkinson that Sullivan was still in the vehicle. App. 8, ll. 12-21. The State also alleged that Petitioner told Anderson that he was injured when he fell off of a horse and that Anderson's son had passed Petitioner's wrecked car and recognized it. App 8, ll. 21 – App. 9, ll. 7. At some point after taking Petitioner home, Anderson allegedly went to the accident. App. 9, ll. 9-10. Once there he allegedly told law enforcement that the vehicle belonged to Petitioner and that he had taken Petitioner home. *Id.*

Indictment

On September 13, 2011, Petitioner was indicted by the Greenville County Grand Jury for felony driving under the influence resulting in death and leaving the scene of an accident resulting in death. App. 106; App. 110.

First Guilty Plea

Petitioner was initially represented by Mike McKennon. App. 72, ll. 6-20. While represented by McKennon, Petitioner agreed to plead guilty to both charges. *Id.* at ll. 22-25. McKennon believed that Petitioner could expect house arrest and probation. *Id.* The State agreed to make no recommendation as to sentencing and that the offenses would be categorized as non-violent. App. 54; App. 59. The plea hearing was held before Judge Verdin on October 13, 2011 and petitioner was sentenced to two concurrent terms of ten years imprisonment. App. 56; App. 58.

On October 14, 2011, McKennon filed a Motion to Withdraw the guilty plea alleging the State breached the plea agreement by inviting "inquiry by the Court as to a sentence recommendation which was then articulated by the Assistant Solicitor in derogation and breach of the Plea Negotiation and Agreement". App. 59. Petitioner would specifically recall that "[McKennon] come in [to visit Petitioner in jail] with a piece of paper that I wasn't sure what it was.

He said, 'sign this. We got screwed.' He said, 'you should have got house arrest and probation' . . . come to find out later on, it was a motion to withdraw my plea." App. 72, ll. 22-25. On June 4, 2012, Judge Verdin vacated Petitioner's guilty plea by a consent order. App. 60 – App. 61.

Second Guilty Plea

After vacating his first guilty plea, Petitioner hired Chip Price to represent him. App. 86, ll. 2-24. On June 26, 2012, Petitioner pled guilty to both charges before the Honorable Edward W. Miller. The State was represented by Assistant Solicitor Sara-Lee Drawdy who would not agree to any plea conditions. App. 86, ll. At the hearing, Petitioner objected to the State's inflammatory recitation of their version of the facts accusing Petitioner of not seeking help for Sullivan and of lying to Atkinson, Anderson, and his wife about the accident. App. 10, ll. 16 – App. 11, ll. 4. Petitioner admitted that he left the scene of the accident, but disputed the State's contention that he failed to try to get help for Sullivan. App. 4, ll. 5-14; App. 10, ll. 19 – App. 11, ll. 6.

Judge Miller then rejected Petitioner's guilty plea, stating that "[Petitioner's] not admitting to it now so I don't know why we're takin' the plea." App. 11, ll.10-11. After a brief bench conference, Petitioner and Price discussed the plea off the record. App. 11, ll. 10 – App. 14, ll. 5. Petitioner would recall at the PCR hearing that Price told him "you have to go back and tell that what the Solicitor was saying is true.' And what the Solicitor [was] saying was not exactly true at all." App. 76, ll. 3-8. When court recommenced, Petitioner accepted the State's version of the facts and reaffirmed his guilt. App. 14, ll. 1-21. When asked by the judge, Petitioner attributed his objections to being scared and "addled" by the State's allegations. *Id.*

Judge Miller then accepted Petitioner's guilty plea and sentenced Petitioner to two concurrent terms of twenty five years imprisonment, suspended on the service of twelve years with three years of probation. App. 28, ll. 11-18.

Hearing to Amend Sentencing Sheets

Two days after pleading guilty, the State realized that the sentencing sheets signed by the Petitioner did not reflect that Petitioner's offenses were violent crimes. App. 48, ll. 1-20. The State then demanded that Petitioner's sentencing sheets be modified to correct their omission. *Id.* Price had never advised Petitioner that he was pleading to violent offenses. App. 49, ll. 6-13; App. 52 – App. 55.

On June 28, 2012, Petitioner was brought before Judge Miller for a second hearing. Price assured the court that he had explained to Petitioner the implications of pleading guilty to a violent offense, such as being ineligible for work release or a "minimum custody institution". App. 48, ll. 1 – App. 49, ll. 13. Petitioner indicated that still wished to plead guilty, stating "I guess I'll just have to take it and go with it. . . I don't want to make it any worse than it is." At the PCR hearing, Petitioner reflected that at the time of the modification he was "disheartened, crushed," by the loss of his best friend. App. 79, ll. 3-19. Miller accepted the modification and initialed the violent crime box on Petitioner's sentencing sheet. App. 50, ll. 14-24; App. 53.

PCR Application and Evidentiary Hearing

On March 7, 2013, Petitioner filed his application requesting post-conviction relief (PCR) alleging ineffective assistance of counsel resulting in Petitioner entering an involuntary guilty plea. App. 37 – App. 61. The State filed its return on July 12, 2013. On April 23, 2014, an evidentiary hearing was held before the Honorable D. Garrison Hill. App. 68 – App. 95. The Petitioner was represented by Brian P. Johnson and the State was represented by Karen C. Ratigan. Petitioner and Price both testified at the PCR evidentiary hearing.

Petitioner stated that Price coerced him into accepting the State's allegations that he failed to seek help for Sullivan and lied to Atkinson and Anderson about the accident; in order to

push through the guilty plea. App. 75, ll. 9 – App. 76, ll. 24. Petitioner said that Price ordered him “go back and tell [the court] that what the Solicitor was saying is true.” *Id.* Further, Petitioner testified that Price told him pleading guilty to violent offenses “ain’t going to make no difference.” App. 79, ll. 3-6. Petitioner also testified that he had relied on Price’s assurance as he had no prior exposure to with the criminal justice system. App. 77, ll. 5 – App. 79, ll. 6. Petitioner stated that the sentencing sheets from his first guilty plea were marked non-violent and had a parole date. App. 84, ll. 2-25. Thus, he assumed that the second guilty plea would also be to non-violent offenses, since the charges were the same. *Id.*

Price recalled that he had his investigator visit Petitioner several days before the plea hearing to have Petitioner to sign the sentencing sheets. App. 93, ll. 3-9. Price conceded that he failed to discuss with Petitioner whether the offenses were violent or non-violent and just assumed that the solicitor had correctly filled out the sheets. App. 88, ll. 2-15. Price alleged that once the State notified him that the sentencing sheets had to be amended, he explained to Petitioner “what his options were And Judge Miller gave him the option of vacating his pleas and starting over, if he chose to do so.” App. 94, ll. 6-12.

Price also recalled that the solicitor was angry at Petitioner for vacating the earlier guilty plea and refused to offer any deals or recommendations. *Id.* at ll. 20-25. Price claimed that he advised Petitioner that the court would expect him to admit guilt, but Price denied telling Petitioner what to say. App. 89, ll. 10-19. Price acknowledged that Petitioner did not understand why Judge Miller refused to accept his guilty plea and that Price had encouraged Petitioner to tell the truth. App. 89, ll. 20 – App.90, ll. 24.

Order of Dismissal

Judge Hill denied Petitioner's application by an order filed on May 23, 2014. App. 97 – App. 103. In denying Petitioner's relief, the PCR court summarily concluded that Petitioner failed to meet his burden of proving that Price coerced a guilty plea or that Price coached Petitioner responses to the judge's questions. App. 100. The PCR court also determined that Price was not ineffective for failing to advise Petitioner that he was pleading guilty to violent offenses or in trying to secure Petitioner's consent to amending the sentencing sheets. App. 102.

This Petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where plea counsel coerced a guilty plea by forcing Petitioner to agree with the State's recitation of the facts, with which Petitioner strongly disagreed, and where plea counsel coerced Petitioner into reaffirming his guilty plea two days after the plea hearing when the State sought to amend Petitioner's sentencing sheets in order to reflect that Petitioner had pled guilty to two violent offenses when Petitioner believed he was pleading to two non-violent offenses.

Counsel rendered ineffective assistance of counsel by coercing Petitioner into pleading guilty despite Petitioner disagreeing with the State's factual allegations and by coercing Petitioner into reaffirming his guilty plea when the State sought to amend Petitioner's sentencing sheets to reflect that Petitioner was pleading guilty to two violent offenses. *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard to guilty plea challenges).

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, 90 S.Ct. 1463, 1474 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *See Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of

competence demanded of attorneys in criminal cases i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty.” *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing *Hill v. Lockhart*, 474 U.S. at 56–58). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Furthermore, “[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a 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.” *Rolen v. State*, 384 S.C. 409, 683 S.E.2d 471 (2009) (citing *Hill*, 474 U.S. at 57-59); *See Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant’s guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by counsel).

“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). Specifically, “the 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, 572-74, 713 S.E.2d 611, 612-15 (2011).

In this case, defense counsel coerced Petitioner into pleading guilty by telling Petitioner to admit to the State’s recitation of the facts and to later accept the amendment of his sentencing sheets to indicate that Petitioner had pled to two violent offenses. App. 77, ll. 13-20; App. 84, ll. 2-8. As the PCR hearing transcript makes clear, Petitioner believed that he would have the opportunity to put forward his recollection of the accident. App.10, ll. 19 – App. 13, ll. 19. When this was

disallowed, Petitioner stated that counsel told him that he had to accept the State's version of the case and to go through with the guilty plea. App. 81, ll. 4 – App. 82, ll. 24. Petitioner admitted to the plea judge that he was scared and “addled” while pleading guilty. App. 14, ll. 1-12.

Petitioner testified at the PCR hearing that he had no prior criminal record and that he was totally reliant counsel's advice and guidance. App. 77, ll. 5-20. Further, plea counsel admitted that he did not advise Petitioner that he was pleading guilty to a violent offense prior to the State seeking to amend the sentencing sheets. App. 78, ll. 10-16. Petitioner was assured by counsel that the amendment of his sentencing sheets would not impact his early release qualifications or parole eligibility. App. 77, ll. 13-20; App. 84, ll. 2-8. It was on this understanding that he affirmed his guilty plea on June 28, 2012. *Pittman*, 337 S.C. at 598, 524 S.E.2d at 624.

In this case, an “unsound result” occurred because plea counsel's coerced Petitioner's guilty plea and coerced Petitioner's affirmance of his guilty plea while not advising Petitioner on the sentencing consequences of his guilty plea to two violent offenses. *See Boykin*, 395 U.S. 238. Petitioner recalled at the evidentiary hearing that “[plea counsel] tells me, ‘Just go with [the amendment]. I'll ride with you. It's -- it'll be okay’ . . . Well, that's what I did.” App. 77, ll. 13-15. *Ray v.* 303 S.C. at 376, 401 S.E.2d at 152.

Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when “there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pled guilty and would have insisted on going to trial.” App. 68 – 69; *Hill*, 474 U.S. at 57-59; *See Boykin*, 395 U.S. 238.

CONCLUSION

Based on the foregoing reason, Billy Hannah's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of February, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
D. Garrison Hill, Circuit Court Judge

BILLY JOE HANNAH,

PETITIONER,

V.

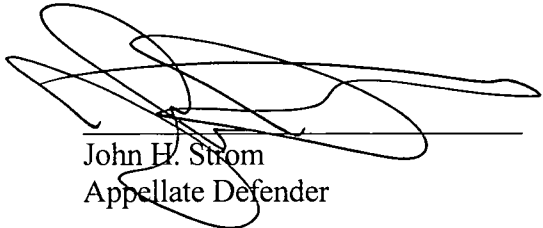
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001517

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 Karen Ratigan, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 19th day of March, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of March, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.