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S.C. Supreme Court

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR RESPONDENT

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QUESTION 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 OF THE CASE

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. The petition for writ of certiorari was filed on December 29, 2014. The State filed a return on March 12, 2015. This reply 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.

In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. While Boykin does not require the trial judge direct the defendant's attention to each and every constitutional right and obtain a separate waiver of each, the record must establish that the guilty plea was entered voluntarily and knowingly. The record in the present case fails to establish that the guilty pleas were entered voluntarily.

The record reflects that the trial judge failed to advise Petitioner of his right to confront his accusers. The record reflects that 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). The record 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).

When determining issues relating to guilty pleas, the Appellate 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). 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. Id. If there is any evidence to support the findings of the PCR judge, those findings must be upheld. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, where there is no evidence of probative value to support the findings of the PCR judge, the ruling will not be upheld. Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Viewing the entire record of both the guilty plea transcript and the post conviction relief hearing transcript, there is no evidence of probative value to support the finding of the PCR judge. The record fails to establish that the guilty pleas were entered voluntarily.

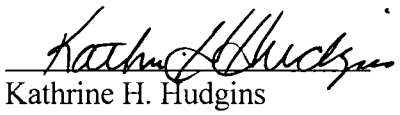
During the guilty plea Macklen wept profusely and had to take a break to compose himself. Macklen continued with the guilty plea **after** the judge reminded him that the State could still pursue the murder charge which carried a life sentence. Macklen testified at the PCR hearing that he was coerced into pleading guilty. Macklen 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). While plea counsel testified at the PCR hearing that he explained the right to cross examine witnesses, during the plea colloquy the judge failed to advise Macklen of his right to confront his accusers. .Macklen's 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.

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 RESPONDENT.

This 23rd day of March, 2015

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CERTIFICATE OF SERVICE

I certify that a true copy of the reply to the return to petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire, this 23rd day of March, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 23rd day
of March, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021