

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County
Thomas A. Russo, Circuit Court Judge

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OCT 27 2015

S.C. Supreme Court

TIMOTHY FARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000230

PETITION FOR WRIT OF CERTIORARI

JOHN H. STROM
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ISSUE PRESENTED

Whether Petitioner's Sixth Amendment right to the effective assistance of counsel was violated, and Petitioner suffered a constructive denial of his right to counsel, where defense counsel failed to subject the State's case to any adversarial scrutiny and independent investigation; thus coercing Petitioner into an involuntary guilty plea?

STATEMENT

Indictments

On December 4, 2008, Petitioner, Timothy Farris was indicted for three counts of criminal solicitation of a minor. App. 280 - 281.

Guilty Plea and Sentence

On March 9, 2011, Petitioner pled guilty to one count of criminal solicitation of a minor before the Honorable Paul M. Burch. App. 1 - 17. Matthew Swilley represented Petitioner at the hearing. Assistant Attorney General Jason Anders represented the State. Prior to being represented by Swilley, Petitioner was represented by Tonya Copeland Little. App. 188 - 189.

Judge Burch sentenced Petitioner to five years of incarceration, suspended upon time served and the completion of four years of probation. App. 15, ll. 24 - 16, ll. 9. As a result of his guilty plea, Petitioner was placed on the sex offender registry. *Id.*

PCR Application

On September 24, 2012, Petitioner filed an application for post-conviction relief (PCR) alleging that counsel Swilley was ineffective for failing to subject the State's case to meaningful adversarial testing, failing to independently investigate the State's case, and for failing to adequately prepare for Petitioner's case. App. 18 - 23. Petitioner made no allegations of ineffectiveness against Little. On January 15, 2013, the State filed a Return requesting that Petitioner's application be dismissed as untimely. App. 24 - 29.

Probation Termination

On January 23, 2013, a probation revocation hearing was held before the Honorable J. Michael Baxley. App. 30 - 43. Richard Jones represented Petitioner. The State was represented by Probation Agent Chad Beard.

The State alleged that Petitioner failed to attend mandatory counseling and refused to accept responsibility for his actions. App. 35, ll. 6-17. Petitioner countered that he had been advised by counsel not to participate in the counseling as any admission could jeopardize his pending PCR action. App. 38, ll. 16 - 39, ll. 16. Petitioner specifically informed the court that he was never given a copy of the State's evidence against him. *Id.*

After conferring with counsel and Agent Beard outside Petitioner's presence, Judge Baxley terminated Petitioner's probation, but advised Petitioner against proceeding with his PCR application. App. 41, ll. 8 - 42, ll. 5; App. 55.

Conditional Order of Dismissal

On January, 28, 2013, Judge Baxley ruled that Petitioner's PCR application was untimely and issued a conditional order of dismissal. App. 48 - 50. Petitioner filed a timely *pro se* Reply to the Conditional Order of Dismissal. App 51 - 61.

After receiving no response from the court, Petitioner filed a Motion for Summary Judgment with a memorandum in support that included an "Applicant's Affidavit in Support of Motion for Summary Judgment;" a "Separate Statement of Undisputed Facts in Support of Applicant's Motion for Summary Judgment;" an affidavit from a social worker; a motion for an expedited hearing with an attached proposed order, and a Notice of Intent to File Petition for Writ of Mandamus. App. 62 - 135.

Judge Baxley rescinded the conditional order of dismissal by written order dated January 10, 2014. App. 136 - 139.

PCR Evidentiary Hearing

On July 24, 2014, an evidentiary hearing was held before the Honorable Thomas A. Russo. App. 136 - 219. Petitioner was represented by Tristan Schaffer and the State was represented by

Joshua Thomas. Petitioner and defense counsels, Tonya Copeland Little and Matthew Swilley, all testified at the hearing.

Petitioner's Testimony

Petitioner testified that he was asleep at his grandparents' residence in Waxhaw, North Carolina, when he awoke to three law enforcement officers entering his room. App. 155, ll. 5-25. Petitioner recalled that the police immediately searched his room, seized his computer, and informed him that he was being charged with criminal solicitation of a minor. *Id.*

When asked, Petitioner admitted that he had used Yahoo Messenger, but denied ever chatting with someone he knew was under eighteen. App. 155, ll. 22 - 156, ll. 18. Petitioner was twenty years old at the time of his arrest and had no prior criminal record. *Id.* After being arrested, Petitioner immediately requested an attorney, but was not appointed one for several days.

At the evidentiary hearing, Petitioner testified that once Tonya Copeland Little was appointed, she did not speak with him for several months. App. 157. Petitioner stated that she did not provide him with any of the State's discovery materials. *Id.* Petitioner did not remember if Little ever showed him the transcripts of the "chat logs" at issue in his case. App. 159, ll. 9-18. Petitioner testified that Little never told him there was a video of the chat-logs. *Id.* Copeland informed Petitioner that he was facing up to thirty years in prison and would have to register as a sex offender if he was convicted. App. 158 ll. 20 - 159, ll. 4.

When Little left the public defender's office, Petitioner was without representation for eight to nine months. App. 160, ll. 8-19. Swilley was appointed on February 24, 2011. On Swilley's instigation, Petitioner pled guilty on March 9, 2011, only thirteen days into Swilley's representation. *Id.* at ll. 20-25. In their only face-to-face meeting, Swilley gave Petitioner a copy of the chat-log

transcripts, but did not show Petitioner the videotaped screen shots of the online chat. App. 161, ll. 7-11.

At their only meeting, Swilley advised Petitioner that “the State had a slam dunk case . . . and that I should plead guilty. . . there was almost a certainty that the attorney-general would win. [Swilley] said the attorney general’s [child sex crime] task force had almost a 100 percent conviction rate.” *Id.* at ll. 17-24. Petitioner reiterated that counsel Swilley, “told me there was nothing we could do,” to defend his case. App. 136, ll. 3-8.

Petitioner recalled that it was after this meeting and receiving such a bleak assessment from his new attorney that Petitioner decided to plead guilty. *Id.* at ll. 11-20. Petitioner recollected that, following his guilty plea, it took the intervention of a *pro bono* lawyer to prod Swilley into turning over Petitioner’s entire discovery file. App. 165, ll. 14 - 166.

It was only after receiving a copy of the discovery that Petitioner became aware that there was a several minute gap in the videotaped screen shots of the online chat. App. 172 - 174. Neither Little or Swilley informed Petitioner of the gap. *Id.* Moreover, Petitioner discovered that Detective John Spect, the officer who posed as a thirteen year old girl in the chat room, never mentioned his avatar’s age in “her” conversations with Petitioner. App. 167, ll. 5-22. Instead, Spect’s character claimed to be seven years younger than the age indicated on Petitioner’s chat profile. App. 169, ll. 2-15.

Testimony of Counsel Little

Little testified that she met with Petitioner approximately four times over the course of her representation. App. 185. She believed that she filed a discovery motion in Petitioner’s case and that she received a DVD videotape of Petitioner’s alleged chat with Spect. *Id.* Little did not

specifically recall if she showed Petitioner the video, but did recall giving him a copy of the chat transcripts. App. 186, ll. 3-6.

Little alleged that Petitioner confessed to her that he participated in the chats, but claimed that he was abusing prescription pills at the time and had no intention of actually trying to meet the imaginary thirteen year old played by Spect. App. 186, ll. 10 - 187, ll. 20. Little stated that Petitioner struggled with the decision of whether to stand trial or plead guilty. App. 190, ll. 20 - 191, ll. 21.

On cross-examination, Little could not recall whether she researched the Yahoo chat room user agreement, which required that all participants affirm that they are eighteen years of age. App. 194, ll. 21 - 195, ll. 25. Little confessed she was not computer savvy and did not attempt to hire an expert. App. 190, ll. 9-15. Instead, she relied on advice from a criminal defense list serve to assess the strength of the State's case. App. 192 - 193.

Testimony of Counsel Swilley

Swilley testified that he joined the Fourth Circuit Public Defenders Office shortly after graduating from law school in 2009. App. 199, ll. 25 - 200, ll. 10. Swilley remembered that he and Little talked casually about Petitioner's case while she represented him, he specifically recalled their joint assessment that Petitioner, "was pathetic. And he just whined a lot and, you know. But, you know he didn't belong on the [sex offender] registry." App. 200, ll. 20-23. Swilley claimed that, based on his review of Petitioner's file, he believed the case was "on the fringe of solicitation." App. 201, ll. 1-2.

Consistent with Petitioner's testimony, Swilley admitted that he told Petitioner the State's case was, "a slam dunk against him." App. 203, ll. 11-16. Swilley claimed he based this assessment on having reviewed the Defender Data file on the case. App. 207, ll. 8-17. However, Swilley had no recollection of having reviewed the videotaped screen shots of the chat room conversations. *Id.*

at ll. 14-19. He also repeatedly admitted that he never showed the video footage to Petitioner. App. 208, ll. 9-11; App. 211, ll. 25 - 212, ll. 1.

Further, Swilley freely conceded that he did not know what any of the computer related information provided by the State during discovery meant:

Q: [D]id you review . . . the Yahoo logs with the IP addresses?

A: If it was in discovery, I went through it.

Q: Did you know what any of it meant?

A: No.

App. 214, ll. 5-10. He further conceded that he had no experience in “computer forensics or tracking IP addresses.” App. 213, ll. 14-21. Swilley did not recall ever discussing possible defenses with Petitioner. App. 210, ll. 23 - 211, ll. 4.

Most troublingly, Swilley summarized his independent investigation of Petitioner’s case as follows:

Well as far as an *independent investigation, I met with [lead investigator] John Specks [sic] at a social event* actually. And *we had talked about the case. He basically verified everything that was in [his] report.* And Investigator Spect, you know, pretty much stressed to me that he didn’t think that Michael needed to go to prison either. I think he basically said I don’t think this kid ever really planned on doing anything with anybody. But I mean, you know, he did solicit. [Spect] was of the belief that [Petitioner] did violate the statute.

But he told me he thought he was just a loser and that, you know, he really wasn’t a threat to anybody.

App. 214, ll. 9-23 (*emphasis added*).

Throughout his testimony at the evidentiary hearing, Swilley repeatedly stressed that Petitioner “openly conceded to the fact that it was him” in the chats and that Petitioner’s admission of guilt, led Swilley to urge Petitioner to plead guilty with the threat that he could receive three

consecutive ten year sentences. App. 203, ll. 3-20. At the evidentiary hearing, Swilley did not hide his disdain for Petitioner, repeatedly describing him as “pathetic,” “a loser” or iteration thereof. App. 200, ll. 13-23; App. 214, ll. 9-23; App. 203, ll. 6-10.

Depressingly, Swilley testified that, despite advising Petitioner at the time that his case was hopeless and he should plead guilty or risk receiving three consecutive ten year sentences, “*in retrospect now, my opinion has changed. Me now, I think I could have won* [Petitioner’s] case. I didn’t think it was a great chance, but I think it could have happened.” App. 209, ll. 21-24 (*emphasis added*).

Order of Dismissal

On December 19, 2014, the PCR court denied Petitioner’s application in a written order of dismissal. App. 220 - 233. The court ruled that Petitioner had failed to prove that counsel Swilley was ineffective due to the brevity of his representation and his failure to investigate or prepare Petitioner’s case over the course of his two week representation of Petitioner. App. 229. ¹

¹ The PCR court’s order of dismissal cites *Avery v. Alabama*, 308 U.S. 444 (1940). App. 230. *Avery* is an interesting historical case, but has little relevance given that seventy-five years of right to counsel jurisprudence that has since passed it by.

Avery was arrested for his wife’s murder on a Monday. *Id.* at 447. He was appointed two local attorneys as he was facing the death penalty, the only cases for which Alabama appointed counsel. He was tried, convicted, and sentenced to death on Thursday. *Id.* at 448 - 449. The defense presented no evidence, but did request a continuance to allow time for investigation. The motion was denied. The only reason Avery was not tried on Wednesday, as originally scheduled, was because his attorneys were both in court all day Wednesday on unrelated matters. *Id.*

The Supreme Court ruled that the appointment of counsel three days before his death penalty trial was not a denial of the right to counsel. *Id.* at 451 - 453. The *Avery* Court placed significant weight in the fact that Avery had been appointed counsel in compliance with state law, that Avery had not provided his attorneys with the names any witnesses during their one pre-trial meeting, that his attorneys had appealed the trial court’s denial of their motion for a continuance and that the trial was in a small rural county where “information concerning witnesses and events is more widespread and more generally known than in large cities.” *Id.*

The PCR court further held that Petitioner failed to show that defense counsel was ineffective for failing to share discovery with him. App. 231. The court determined that Petitioner was “fully aware of the evidence against him when he made the decision to enter his plea.” App. 232.

In conflict with Swilley’s admission at the evidentiary hearing that he had retrospectively changed his mind about the strength of the State’s case; the order of dismissal summarily noted that Swilley had “considered all possible outcomes to the proceedings.” App. 229. The PCR court also found that Copeland and Swilley were credible witnesses. *Id.*

Post-Hearing Motions

On January 7, 2015, Petitioner filed a *pro se* Rule 59(e), SCRCP, motion to alter or amend the order of dismissal. App. 244 - 253. The State filed a Return on February 6, 2015. App. 254 - 259. Petitioner filed a timely *pro se* Reply to the State’s Return. App. 260 - 273.

On June 26, 2015, the PCR court issued a written order of denying Petitioner’s Rule 59(e) Motion, ruling that Petitioner’s motion “merely restated the same grounds and arguments considered and denied” in the Court’s order of dismissal. App. 274 - 275.

ARGUMENT

Petitioner's Sixth Amendment right to the effective assistance of counsel was violated and Petitioner suffered a constructive denial of his right to counsel where defense counsel failed to subject the State's case to adversarial scrutiny and independent investigation; thus coercing Petitioner into an involuntary guilty plea.

Introduction

Counsel Swilley's performance was constitutionally deficient because he abandoned his role as defense counsel when he advised Petitioner to plead guilty without having subjected the State's case to adversarial testing and without having conducted any independent investigation during the two weeks that he represented Petitioner. *See United States v. Cronin*, 466 U.S. 648, 656 (1984) (if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights which makes adversary process itself presumptively unreliable); *see also Nance v. Ozmint*, 367 S.C. 547, 557-58, 626 S.E.2d 878, 883 (2006) (holding that "counsel abandoned his role as defense counsel" and "failed to act as an adversary to the prosecution.").

Thus, the PCR court erred in holding that trial counsel provided effective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 56-58 (1985) (adopted the two-part standard in *Strickland v. Washington*, 466 U.S. 668 (1984)², and applied the *Strickland* standard to guilty plea challenges based on ineffective assistance of counsel).

² In *Strickland*, the defendant pled guilty (against counsel's advice) and waived his right to a death penalty advisory jury, opting instead to be sentenced by the trial judge (again against counsel's advice). 466 U.S. 668 at 672-673.

Discussion

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) (provides that a defendant’s decision to plead guilty must be knowingly and voluntarily made); *see also State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (provides that the record must reflect that the defendant freely and intelligently waived his constitutional trial rights and had a full understanding of the consequences of the plea).

Furthermore, the South Carolina Supreme Court has held that 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). However, “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) (voluntariness of a guilty plea not determined by examination of inquiry made by the sentencing judge alone, but determined from both the record made at the time of the guilty plea, and from the record of the PCR hearing).

In Petitioner’s case, regardless of whether counsel Swilley believed it was in Petitioner’s best interest to plead guilty, plea counsel “abandoned his role as defense counsel” by his admitted failure to subject the State’s case to meaningful adversarial testing. *Nance*, 367 S.C. at 557, 626 S.E.2d at 883; *see Herring v. New York*, 422 U.S. 853, 862 (1975)(provides that “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides

of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free”).

Swilley candidly admitted that his “independent” investigation consisted solely of speaking with the lead investigator at a social function. App. 218, ll. 9-23. Moreover, counsel conceded that, at the time that he represented Petitioner, he had no experience in defending computer crimes and did not know what the computer information turned over to him in discovery meant. App. 214, ll. 5-16. Further, counsel Swilley could not recall if he reviewed the videotape of Petitioner’s alleged chatroom conversations with the undercover officer. App. 205, ll. 14-19.

PCR court’s summary determination that counsel Swilley “reviewed the file,” including discovery materials, and “considered all possible outcomes to the proceedings,” is without support in the record. App. 233. Defense counsel could not satisfy his duties to conduct an independent investigation and to prepare Petitioner’s case where counsel admitted that he did not understand the discovery materials, did not understand what implications they had for the State’s case against Petitioner, and did not hire an expert to help him understand the material. App. 214, ll. 5-16.

Likewise, an informal conversation about Petitioner’s case with the lead investigator at a social function - during which the investigator “verified” the veracity of his own report - cannot satisfy defense counsel’s obligation to subject the State’s case to meaningful adversarial scrutiny. App. 218, ll. 9-23; *see Cronin*, 466 U.S. at 656-657 (“if the [criminal trial] process loses its character as a confrontation between adversaries, the constitutional guarantee is violated”). “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.” *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (CA7), cert. denied sub nom. *Sielaff v. Williams*, 423 U.S. 876 (1975).

Accordingly, although Petitioner pled guilty, an “unsound result” occurred in this case because the record does not reflect that Petitioner freely and intelligently waived his constitutional trial rights when he based his decision to plead guilty on plea counsel’s deficient advice. *See Brady*, 397 U.S. at 758; *see also Boykin*, 395 U.S. 238; *accord Hazel*, 275 S.C. 392, 271 S.E.2d 602; *Berry*, 381 S.C. at 635, 675 S.E.2d at 427.

Prejudiced is Presumed by Plea Counsel’s Deficient Performance

The United States Supreme Court has held that, in a PCR proceeding, “prejudice is presumed” when defense counsel “entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Cronic*, 466 U.S. 648 at 659; *see Nance*, 367 S.C. at 548-52, 626 S.E.2d at 878-80 (holding that “per-se prejudice occurs if there has been a constructive denial of counsel,” which arises when defense counsel’s deficient performance constitutes “a classic example of a complete breakdown in the adversarial process.”); *see also Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an applicant “must ordinarily show actual prejudice, he may be relieved of that burden if counsel’s ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary.”).

The adversarial process protected by the Sixth Amendment requires that the accused have “counsel acting in the role of an advocate.” *Anders v. California*, 386 U.S. 738, 743 (1967). In *Cronic*, the Supreme Court identified five factors relevant to the evaluation of a lawyer’s effectiveness: (1) the length of the attorney’s representation; (2) the experience of defense counsel; (3) the gravity of the charge, (4) the complexity of the case, and (5) the accessibility of witnesses. 466 U.S. at 663-665.

First, counsel Swilley’s representation lasted less than two weeks and he only began representing Petitioner after an eight to nine month period during which Petitioner was without

an attorney. App. 211, ll. 5-9. . Second, at the time of Petitioner's guilty plea, Swilley had been practicing law for a little more than a year and Petitioner's case was his first computer crimes case. App. 203 - 204; App. 214 - 216. Crucially, counsel Swilley admitted that he did not understand the computer related information that he received in discovery and that he made no effort to secure the assistance of an expert so as to understand the strength of the evidence against Petitioner. App. 214, ll. 1-22.

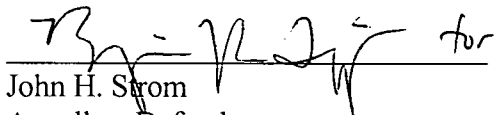
Third, with respect to the seriousness of his charges, Petitioner was facing a potential sentence of up to thirty years imprisonment; a fact that both counsel Swilley and counsel Copeland regularly emphasized to him when discussing whether to stand trial or plead guilty. App. 207, ll. 11-22. Regardless, of the length of potential incarceration, Petitioner is now subject to lifetime registration on the sex offender list a result of his guilty plea. App. 9.

Petitioner suffered a "constructive denial" of his right to counsel. *Cronic*, 466 U.S. at 654 (" [i]f no actual 'assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated") (*emphasis in original*). Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when there was a reasonable probability that, had he been provided constitutionally adequate counsel, he would have not pled guilty and would have insisted on going to trial. *See Boykin*, 395 U.S. 238; *see also Hill*, 474 U.S. at 57-59. *see also Holden*, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15.

CONCLUSION

Based on the foregoing reason, Petitioner Timothy Farris respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

 for

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County
Thomas A. Russo, Circuit Court Judge

TIMOTHY FARRIS,

PETITIONER,

V.

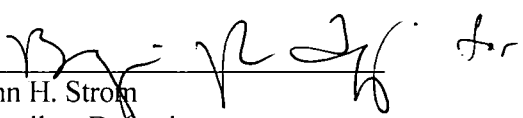
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000230

CERTIFICATE OF SERVICE

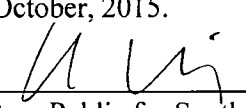
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire this 28th day of October, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of October, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.