

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County  
Roger L. Couch, Circuit Court Judge  
\_\_\_\_\_

**ORIGINAL**  
**RECEIVED**

NOV 13 2015

**S.C. Supreme Court**

ADDIE THILAVANH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000993

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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, because of plea counsel's failure to advise, Petitioner had no knowledge that his charges could be dismissed as law enforcement had failed to comply with S.C. Code Ann. § 56-5-2953 by not videotaping Petitioner's field sobriety tests and not producing an affidavit justifying their failure to satisfy statutory video recording requirements?

## STATEMENT

At around 7:45 pm on September 19, 2010, Petitioner's vehicle struck Cory Cole as he was walking on the side of Cedars Spring Drive in Spartanburg County. App. 9, ll. 3 - 11, ll. 9. Cole was killed. Petitioner stopped his vehicle as did a car that was traveling ahead of Petitioner and whose occupants saw the collision. *Id.*

By the time that South Carolina Highway Patrol Trooper Josh Siebel arrived on the scene of the accident, first responders had already determined that Cole was deceased. *Id.* Siebel led Petitioner through field sobriety tests. *Id.* Petitioner admitted that he had consumed a number of beers at a nearby Laotian temple. *Id.* Petitioner was arrested and transported to a local hospital for blood tests that revealed he had a BAC level of .23. App. 10, ll. 5-13.

### **Indictment**

On November 24, 2010, the Spartanburg County Grand Jury indicted Petitioner for felony DUI resulting in death and reckless homicide. App. 140.

### **Guilty Plea and Sentence**

On August 10, 2011, Petitioner appeared before the Honorable J. Mark Hayes and pled guilty. Richard Whelchel represented Petitioner and Solicitor Barry J. Barnette represented the State. There was no recommendation as to sentencing, however, as part of the guilty plea, the reckless homicide charge was dismissed. App. 4, ll. 6-18.

Judge Hayes accepted Petitioner's guilty plea and sentenced him to twenty years imprisonment. App. 20, ll. 8-24.

### **PCR Application**

On November 12, 2012, Petitioner filed an application for post-conviction relief alleging that he had involuntarily and unknowingly pled guilty because counsel had failed to inform him of

the statutory requirements of S.C. Code Ann. § 56-5-2953, mandating that police have a video record of a defendant's conduct at the incident cite unless certain specifically delineated exceptions are met. App. 22 - 35. The State filed a Return on March 3, 2014.

### **PCR Hearing**

On September 19, 2014, an evidentiary hearing before the Honorable Roger L. Couch. App. 43 - 106. Christopher D. Brough represented Petitioner and Assistant Attorney General J. Clayton Mitchell represented the State. Petitioner, Trooper Siebel, and plea counsel all testified at the hearing.

### Petitioner's Testimony

Petitioner testified that he was not aware of the videotaping requirements when he pled guilty. App. 48, ll. 6-21. Petitioner explained that the State never provided any video recording his conduct at the incident site or at the hospital where the blood test was administered. *Id.* Furthermore, Petitioner stated that the defense was never provided with an affidavit from the arresting officer explaining the failure to record his field sobriety tests. *Id.*

Petitioner testified that he did not want to plead guilty. App. 51, ll. 3-23. Petitioner said that if he had known that the failure to produce a video of his conduct at the incident site, or to produce an affidavit by the arresting officer explaining why the failure to record was excusable, could have resulted in the case being dismissed, he would not have pled guilty and would have insisted on going to trial. *Id.*

### Trooper Siebel's Testimony

Siebel recalled that by the time he arrived at the accident scene, emergency medical responders and firefighters were already there. App. 61, ll. 15-24. Siebel recollected that he administered the field sobriety tests on Petitioner, "as good as I could." App. 63, ll. 3-19. Siebel

stated that there was a "slight language barrier" and that ultimately a "solicitor certified" translator arrived to assist. App. 63, ll. 20 - 64, ll. 15.

Siebel conducted three field sobriety tests on Petitioner: "the horizontal gaze nystagmus test, the walk and turn test . . . and [the] one legged stand test." App. 64, ll. 11-15. Siebel admitted that the tests could have been conducted in front of his patrol car which was equipped with a video camera. App. 65, ll. 1-25.

PCR counsel the introduced the affidavit completed by Siebel in Petitioner's case. App. 66, ll. 14-20. In the affidavit Siebel had checked the pre-written answer that there was no video of the breath site because of "exigent circumstances." App. 107. Below that, Siebel wrote that the failure to comply with § 56-5-2953 was excusable because Petitioner "was transported to Spartanburg Medical Center for a blood test, ergo there is not a video of the breath site." *Id.* The affidavit does not state why Siebel did not record the field sobriety tests. Siebel could not specifically recall if his camera was functioning during Petitioner's tests. *Id.*

On cross-examination, the State had Siebel emphasize that his memory of Petitioner's case was "a little fuzzy" and that he did not recall many specifics. App. 72, ll. 7-25. In an effort to expand what constituted "exigent circumstances" the State also stressed that, in addition to investigating the accident, Siebel and other troopers also had to conduct traffic control. App. 74, ll. 14-21.

Despite having a "fuzzy memory," Siebel recalled that Petitioner failed the unrecorded field sobriety tests. App. 75, ll. 5-20. The State led Siebel through his affidavit highlighting again that Siebel claimed at the time that "exigent circumstances existed or other valid reasons based on the totality of the circumstances and these are outlined below." App. 77, ll. 1- 78, ll. 7. The only

circumstances outlined below were those pertaining to the failure to videotape a breathalyzer test. App. 112.

On a brief re-direct examination, Siebel conceded that Petitioner was mobile and able to walk around. App. 80, ll. 9-18. Siebel also admitted that troopers were supposed to video field sobriety tests, but that there was no video in Petitioner's case. Siebel could not remember why. *Id.* at ll. 19-22.

When asked whether he recalled if anything prevented him from recording the sobriety tests, Siebel became evasive, answering the question with a series of hypothetical impediments to filming:

Well, there again, I take issue with that. If -- I could of put my patrol vehicle anywhere to secure the scene. That could of been on a side street to keep traffic from coming down there. My exact placement on the vehicle, that's a -- there's no telling.

[W]ell, I could of been blocking a road and my video camera could of been pointed towards someone's house.

[I]f I pointed directly towards someone's fence, I can't exactly put him in front of someone's fence. . . . It's gonna be obscured.

App. 81, ll. 16 - 82, ll. 8. **Siebel then acknowledged that his car's camera could be turned and that he frequently turns his camera around after making DUI arrests in order to film suspects.** App. 82, ll. 9 - 17 (*emphasis added*). Siebel also acknowledged that he could have moved Petitioner around in order to be able to film him. *Id.*

#### Testimony of Plea Counsel, Richard Whelchel

When presented with the cover-sheet detailing the State disclosures in Petitioner's case, plea counsel acknowledged that the State did not provide any videotapes. App. 87, ll. 2-16; App. 111. Counsel agreed that the State had provided Siebel's affidavit addressing the failure to record a breathalyzer test. *Id.* at ll. 17-20.

Counsel freely conceded that the affidavit did not address the failure to produce a video of Petitioner's sobriety tests. App. 88, ll. 19 - 89, ll. 9. He did not recall ever receiving an affidavit relating to the incident site video. *Id.* Counsel averred that he discussed the lack of video evidence with Petitioner and that he could file a motion to Petitioner's charges based on the lack of video evidence. App. 90, ll. 2-6. When pressed to evaluate the chance of the motion being granted, plea counsel demurred, "I think that would be an issue for the judge." App. 89, ll. 19-20.

On cross-examination, counsel agreed with the State that he never "entertain[ed] the thought of taking [Petitioner's case] to trial. App. 92, ll. 10-12. Contradicting his earlier testimony, counsel then hypothesized that a motion to dismiss the charges would not have been successful because police will usually testify that their reaction to an accident constitutes an exigent circumstance. App. 95, ll. 2-13. Counsel also claimed that Petitioner did not want to stand trial. App. 93, ll. 7-24.

During summation arguments at the evidentiary hearing, the court asked whether Siebel could have provided an affidavit at a later date explaining his failure to video tape the incident site and field sobriety test. App. 101, ll. 1-23. PCR counsel answered that under the circuit's case management system, the State is required to disclose discovery prior to initial appearance. *Id.*

### **Order of Dismissal**

On April 22, 2015, the PCR court denied Petitioner's application by a written Order of Dismissal. App. 128 - 138. In denying Petitioner relief, the court ruled that "Siebel testified he believed exigent circumstances existed and excused his use of the video recording requirement." App. 133. The court ruled that Petitioner failed to prove counsel was ineffective for not moving to dismiss the charges as counsel's reasoning in not challenging the charges was strategically valid and objectively reasonable given on his assessment of the likelihood of success. App. 133-134. The

court then summarily concluded that any motion to dismiss was unlikely to succeed because of unspecified "numerous exigent circumstances." *Id.*

## ARGUMENT

**The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where, because of plea counsel's failure to advise, Petitioner had no knowledge that his charges could be dismissed as law enforcement had failed to comply with S.C. Code Ann. § 56-5-2953 by not videotaping Petitioner's field sobriety tests and not producing an affidavit justifying their failure to satisfy statutory video recording requirements**

Trooper Siebel's affidavit only addressed his failure to videotape a breathalyzer test. App. 112. As Petitioner was administered a blood test, the State obviously could not produce a video of a breathalyzer test that never took place. However, Siebel could not explain why he did not submit an affidavit explaining how his failure to videotape Petitioner's field sobriety tests should be excused under § 56-5-2953<sup>1</sup>. App. 65, ll. 10 - 69, ll. 9.

Petitioner testified that plea counsel never advised him of the video recording provisions of § 55-5-2953. App. 48, ll. 6-21. Petitioner further testified that, had he been advised that the charges against him could have been dismissed because of the State's failure to comply with the statute, he would not have pled guilty and would have insisted on going to trial. App. 51, ll. 3-23.

### **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

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<sup>1</sup> A person suspected of driving under the influence of drugs or alcohol "must have his conduct at the incident site and the breath test site video recorded." § 56-5-2953(a). The video recording must begin at the activation of the officer's blue lights, must include any field sobriety tests as well as the individual's arrest and Miranda advisement. *Id.*

Separately, the individual's "entire breath test procedure," must also be recorded by video. § 56-5-2953(a)(2). The video recording requirement is subject to an exception allowing the arresting officer to submit an affidavit certifying that a video of the incident is unavailable due a camera malfunction or that recording was "physically impossible" because the individual required medical attention or that other "exigent circumstances existed." § 55-6-2953(b).

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).

In this case, Petitioner testified at the evidentiary hearing that plea counsel never discussed the video recording provisions of § 55-5-2953 or that the State's failure to comply with those provisions could result in the dismissal of his charges. *See Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (provides that failure to investigate possible defenses constitutes ineffective assistance of counsel); *see also Praylow v. Martin*, 761 F.2d 179 (4<sup>th</sup> Cir. 1985) (provides that a defendant's stated interest in pleading guilty does not relieve counsel of his duty to investigate possible defenses).

The affidavit produced by the State in discovery dealt exclusively with the failure to record a breathalyzer test. App. 112. It did not address the failure to produce a video of the accident site or of Petitioner's field sobriety tests. Moreover, the affidavit's "exigent circumstances" justifying

noncompliance with the statute - that Petitioner was not administered a breathalyzer and instead taken for a blood test - was irrelevant. It did not justify the failure to video the field sobriety tests.

Petitioner testified that had he been advised of any possible defenses, he would not have pled guilty and would have gone to trial. App. 51, ll. 3-23; *see Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985) (provides, in pertinent part: To prove ineffective assistance of counsel from a guilty plea, the defendant must show: (1) “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases” and (2) that “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.”).

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 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. Therefore, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when he would have went to trial had plea counsel advised him of the video recording requirements. App. 128-138; *See Boykin*, 395 U.S. 238; *see also Hill*, 474 U.S. at 57-59.

CONCLUSION

Based on the foregoing reason, Addie Thilavanh's petition for writ of certiorari should be granted in order 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 13th day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

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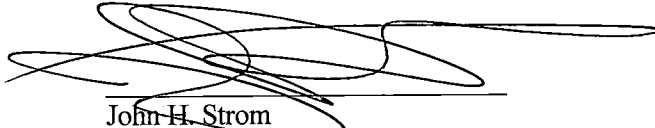
APPELLATE CASE NO. 2015-000993

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CERTIFICATE OF SERVICE

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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 Alicia Olive, Esquire this 13th day of November, 2015.



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John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day  
of November, 2015.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: May 12, 2025.