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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Clarendon County

J. Cordell Maddox, Jr., Circuit Court Judge

BILLY LISENBY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000886

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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INDEX

INDEX 1

ISSUES PRESENTED 2

STATEMENT 3

ARGUMENT 5

CONCLUSION 16

ISSUES PRESENTED

1.

Whether the PCR court erred by refusing to allow Petitioner to orally amend his application to include an additional claim of ineffective assistance of counsel when the amendment did not cause any prejudice to the state, particularly where the court allowed Petitioner to present extensive testimony in support of the claim during the evidentiary hearing, and the state was able to cross-examine Petitioner's witnesses on the claim?

2.

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel improperly advised Petitioner that assault on a correctional facility employee was a misdemeanor when in fact it was classified as a felony, and where Petitioner testified that if he would have known the proper classification of the offense he would not have pled guilty?

STATEMENT

A Clarendon County Grand Jury indicted Petitioner at the October 7, 2010 term of General Sessions for assault on a correctional facility employee. App. 136-137. Petitioner pled guilty on July 11, 2011 before the Honorable Howard P. King. App. 1. Assistant Solicitor Amy Land represented the state, and Scott Robinson represented Petitioner. App. 1. Judge King sentenced Petitioner to six months imprisonment. App. 10, ll. 18-20.

By order filed March 6, 2012, the Court of Appeals dismissed Petitioner's direct appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR . The remittitur was sent on March 22, 2012. App. 32.

On March 14, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 13-30. The state filed a return to this application dated July 2, 2012. App. 31-36. The matter proceeded to an evidentiary hearing on March 20, 2013 before the Honorable W. Jeffrey Young. App. 37. Assistant Attorney General Megan Harrigan Jameson represented the state, and Shaun C. Kent represented Petitioner. App. 37. By order dated April 11, 2013, Judge Young denied Petitioner relief. App. 59-67. PCR counsel Kent did not file a Notice of Appeal.

On October 25, 2014, Petitioner filed a second application for post-conviction relief seeking the right to a belated appeal of the denial of his original application. App. 68-99. The state filed a return to this application and motion to dismiss dated April 14, 2014. App. 100-106. The matter proceeded to an evidentiary hearing on December 18, 2014 before the Honorable J. Cordell Maddox, Jr. App. 107. Assistant Attorney General Daniel Gourley represented the state, and Steven W. Fowler represented Petitioner. App. 107. By order dated March 12, 2015, Judge Maddox granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 132-135.

This petition for writ of certiorari pursuant Austin v. State follows.

ARGUMENT

1.

The PCR court erred by refusing to allow Petitioner to orally amend his application to include an additional claim of ineffective assistance of counsel when the amendment did not cause any prejudice to the state, particularly where the court allowed Petitioner to present extensive testimony in support of the claim during the evidentiary hearing, and the state was able to cross-examine Petitioner's witnesses on the claim.

PCR Hearing

Petitioner testified during the evidentiary hearing that plea counsel told him assault on a correctional facility employee was classified as a misdemeanor and not as a felony. He said he thought the offense was a misdemeanor before and during his guilty plea and that he would be able to simply "pay a fine and go home." It was not until after his plea that Petitioner learned the offense was actually classified as a felony. App. 44, l. 15 – 45, l. 1. Petitioner further maintained that if plea counsel had properly advised him that the offense was a felony, he would not have pled guilty. App. 45, ll. 8-11.

After this evidence was presented, the assistant attorney general objected on grounds that this claim of ineffective assistance of counsel was not raised in Petitioner's PCR application. Presumably, the assistant attorney general's objection was not based on prejudice to the state, but on a lack of notice, which is the ground the state frequently raises when a PCR applicant attempts to orally amend his or her application during the evidentiary hearing. In response to the assistant attorney general's objection, the PCR court stated, "I understand. I'll note your objection. You may proceed." App. 45, ll. 15-18. After the state's objection, Petitioner continued to present evidence in support of his claim that counsel was ineffective for failing to properly advise him of the correct

classification of the offense. See App. 48, l. 19 – 49, l. 19. The state also cross-examined Petitioner on this claim. See App. 48, l. 19 – 49, l. 19.

In addition to Petitioner's testimony, plea counsel testified that he did not recall discussing with Petitioner the classification of assault on a correctional facility employee and did not remember telling Petitioner whether the offense was a misdemeanor or a felony. App. 52, l. 24 – 53, l. 4.

Order of Dismissal

In the order of dismissal, the PCR court stated, "At the evidentiary hearing, [Petitioner] moved to orally amend his application to include allegations that counsel was ineffective for: failing to file a direct appeal on [Petitioner's] behalf and misinforming [Petitioner] that he was pleading to a misdemeanor rather than a felony. Respondent objected to [Petitioner's] motion to orally amend his application, **citing a lack of notice** provided to the State that [Petitioner] intended to allege these additional claims of ineffective assistance of counsel. This Court allowed [Petitioner] to proceed forward on his claim that counsel was ineffective for failing to file a direct appeal, but decline[d] to allow [Petitioner] to proceed on his claim on misadvise regarding his charge classification." App. 60 (emphasis added).

For whatever reason, the court failed to provide any reasoning as to why it refused to allow Petitioner to orally amend his application to include the additional claim that counsel was ineffective for failing to properly advise him on the correct classification of assault on a correctional facility employee. Significantly, the court made no findings that such an amendment would prejudice the state. Moreover, the court failed to indicate why it allowed Petitioner to orally amend his application to assert the additional claim regarding counsel's failure to file a direct appeal (which is wholly frivolous), but would not allow him to orally amend his application to include the claim

regarding counsel's incorrect advice on the offense's classification (which is meritorious). See App. 60.

Consequently, the PCR court did not address the merits of Petitioner's allegation that counsel was ineffective for failing to properly advise him of the correct classification of assault on a correctional facility employee.

Discussion

The PCR court erred by refusing to allow Petitioner to orally amend his application to include an additional claim of ineffective assistance of counsel when the amendment did not cause any prejudice to the state, particularly where the court allowed Petitioner to present extensive testimony in support of the claim during the evidentiary hearing and the state cross-examined Petitioner regarding the additional claim. During the hearing, Petitioner sought to orally amend his application to include the claim that plea counsel was ineffective for failing to properly advise him that assault on a correctional facility employee was classified as a felony and not a misdemeanor.

"The circuit court **is to freely grant leave to amend** when justice requires and there is no prejudice to any other party." Harvey v. Strickland, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002) (citing Rule 15, SCRCP and Foggie v. CSX Transp., Inc., 313 S.C. 98, 431 S.E.2d 587 (1993)) (emphasis added). "A motion to amend is addressed to the sound discretion of the trial judge, and **the party opposing the motion has the burden of establishing prejudice**." Id. (internal citation omitted) (emphasis added). "Amendments to conform to the proof **should be liberally allowed** when no prejudice to the opposing party will result. Id. (citing Soil & Material Eng'rs, Inc. v. Folly Assoc., 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987)) (emphasis added). "This decision is within the trial court's discretion." Id. (internal citation omitted).

In Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006), this Court reversed the PCR court's ruling that an issue was not preserved for review because Simpson did not specifically raise the claim in his PCR application. Noting that two separate witnesses were called to testify about the issue, this Court held Simpson should have been permitted to amend his PCR application to conform to the evidence presented. Moreover, this Court held the state was not prejudiced by the amendment and, therefore, addressed the merits of the issue. Id. at 599-600, 627 S.E.2d at 707-708.

Here, Petitioner testified plea counsel incorrectly advised him that assault on a correctional facility employee was classified as a misdemeanor and not as a felony. He said he thought the offense was a misdemeanor before and during his guilty plea and that he would be able to "pay a fine and go home." App. 44, l. 15 – 45, l. 1. Petitioner further maintained that if plea counsel had properly advised him that the offense was a felony, he would not have pled guilty, but instead would have insisted on proceeding to trial. App. 45, ll. 8-11.

It was only after this evidence was presented that the assistant attorney general objected on grounds that this claim was not raised in Petitioner's PCR application and thus there was a lack of notice to the state. In response, the PCR court stated, "I understand. I'll note your objection. You may proceed." App. 45, ll. 15-18. Petitioner then continued to present evidence in support of his claim that counsel was ineffective for failing to properly advise him of the correct classification of the offense and the state was able to cross-examine Petitioner on this additional allegation. See App. 48, l. 19 – 49, l. 19 and App. 48, l. 19 – 49, l. 19. In addition to Petitioner's testimony, plea counsel testified that he did not recall discussing with Petitioner the classification of assault on a correctional facility employee and did not remember telling Petitioner whether the offense was a misdemeanor or a felony. App. 52, l. 24 – 53, l. 4.

The record from the evidentiary hearing contradicts the PCR court's ruling in the order of dismissal. The court noted at the beginning of its order that Petitioner had moved to orally amend his application to include the allegation that counsel was ineffective for "misinforming [Petitioner] that he was pleading to a misdemeanor rather than a felony" and that it had "decline[d] to allow [Petitioner] to proceed on his claim on misadvise regarding his charge classification." App. 60. However, this statement is incorrect. When the state objected to Petitioner presenting testimony on this additional allegation during the evidentiary hearing on grounds that he had not raised the claim in his application, the PCR permitted Petitioner to continue to present testimony on the issue, presumably overruling the state's objection. Thus, the PCR court should have addressed the merits of the issue in its order of dismissal.[1]

Moreover, the PCR court should have allowed Petitioner to orally amend his application and addressed the merits of Petitioner's additional claim of ineffective assistance of counsel because, as this Court has held, "[t]he circuit court is to freely grant leave to amend when . . . there is no prejudice to any other party." Harvey, 350 S.C. at 313, 566 S.E.2d at 535 (internal citations omitted); See Rule 15, SCRCP ("If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and **shall do so freely** when the presentation of the merits of the action will be subserved thereby and the

[1] Petitioner alleged in his second application for post-conviction relief that his PCR counsel, Shaun Kent, was ineffective for failing to file a motion to alter or amend pursuant to Rule 59(e), SCRCP, under Martinez v. Ryan, 132 S.Ct. 1309 (2012). App. 68-99. Counsel Kent's failure to file a Rule 59(e) motion prevented Petitioner from challenging the original PCR court's decision declining to allow him to orally amend his application to include the additional claim of ineffective assistance of counsel and the PCR court's failure to address the merits of this claim in its order of dismissal. At Petitioner's evidentiary hearing on December 18, 2014, Judge Maddox only permitted Petitioner to go forward on his Austin claim seeking a belated appeal. App. 111, ll. 3-5. Moreover, in the Order Granting an Appeal Pursuant to Austin v. State, Judge Maddox ruled that Petitioner's "contention that prior PCR counsel was ineffective for failing to file a 59(e) is non-justiciable." App. 134.

objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.") (emphasis added). Here, the state failed to meet its burden of proving it would be prejudiced by the amendment. In fact, the state failed to make **any** argument whatsoever as to why it would be prejudiced. Moreover, the state was not prejudiced by Petitioner's amendment given the fact that the assistant attorney general cross-examined both Petitioner and plea counsel on the issue. See App. 48, l. 19 – 49, l. 19.

Respectfully, this Court should reverse the ruling of the PCR court refusing to allow Petitioner to orally amend his application to conform to the evidence presented on the additional claim of ineffective assistance of counsel when the amendment caused no prejudice to the state. Moreover, this Court should further hold the PCR court erred by failing to rule on the merits of the issue and either address the merits of the issue on appeal or remand this case to allow the PCR court to make a ruling on the claim.

2.

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel improperly advised Petitioner that assault on a correctional facility employee was a misdemeanor when in fact it was classified as a felony, and where Petitioner testified that if he would have known the proper classification of the offense he would not have pled guilty.

Guilty Plea

At the beginning of Petitioner's guilty plea hearing, the court questioned plea counsel and the assistant solicitor about the offense of assault on a correctional facility employee given that the statute outlining the charge had recently been repealed and replaced by assault and battery in the second degree. App. 3, ll. 5-24. Plea counsel said he thought the charge carried "six months to five years." Counsel further asserted, when questioned by the court, that he had explained to Petitioner "the charge contained in the indictment," the possible punishment, and his constitutional rights. App. 3, ll. 5-20.

The court then advised Petitioner that assault on a correctional facility employee "carries six months to five years," but "has now been eliminated from our law and the charge is now one of assault and battery in the second degree . . . which carries only up to three years." When asked, Petitioner stated he understood. App. 5, ll. 10-24. The court also briefly advised Petitioner of his constitutional rights, including his right to a trial by jury, his right to remain silent, and his right to appeal. App. 6, l. 3 – 7, l. 20.

The assistant solicitor then told the court the facts of the case. According to the solicitor, while incarcerated at Turbeville Correctional Institution, Petitioner "struck" a female correctional officer in the face. However, the solicitor explained that when interviewed by an investigator,

Petitioner said he struck the employee "because she physically threatened him first" and he felt provoked. App. 7, l. 22 – 8, l. 7.

Immediately after this brief recitation, the court found there was a substantial factual basis for the plea, and that Petitioner's decision to plead guilty was freely, voluntarily, and intelligently made. Consequently, the court accepted Petitioner's plea. App. 8, ll. 8-13. The court ultimately followed the state's recommendation and sentenced Petitioner to six months imprisonment. App. 10, ll. 18-20.

PCR Hearing

Petitioner testified at the PCR hearing that, based on counsel's advice, he thought assault on a correctional facility employee was a misdemeanor instead of a felony. He maintained that he did not know he "was pleading to a serious felony charge." App. 44, ll. 15-19. Petitioner said he "thought it was a misdemeanor and I could pay a fine and go home." App. 44, l. 25 – 45, l. 1. It was not until after Petitioner's guilty plea that he learned the offense was actually classified as a felony. Petitioner testified that if plea counsel would have made it clear the charge was a felony and not a misdemeanor, he would not have pled guilty, but instead would have insisted on proceeding to trial. App. 45, ll. 8-14.

Scott Robinson, who represented Petitioner during his guilty plea, testified that he did not recall any discussion with Petitioner about whether assault on a correctional facility employee was a misdemeanor or a felony. App. 52, l. 24 – 53, l. 4. However, he admitted Petitioner "didn't want to plead," and only agreed to plead guilty based on counsel's advice and the state's offer to recommend a sentence of six months imprisonment. App. 51, ll. 22-24; App. 55, ll. 19-22.

Order of Dismissal

The PCR court failed to address the merits of Petitioner's allegation that counsel was ineffective for failing to properly advise him that assault on a correctional facility employee was a felony because, despite failing to find that the state would suffer prejudice by the amendment, the court declined to allow Petitioner to orally amend his application to raise this additional claim. App. 60. Thus, the court also failed to make any credibility findings regarding Petitioner's testimony.

Discussion

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel improperly advised Petitioner that assault on a correctional facility employee was a misdemeanor when it was actually classified as a felony. Petitioner was prejudiced by counsel's deficient performance because if Petitioner would have known the proper classification of the offense, he would not have pled 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 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).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. 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 v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

Moreover, "[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)).

Petitioner's decision to plead guilty was not freely, voluntarily, and intelligently made because of counsel's deficient performance. Plea counsel was ineffective for incorrectly advising Petitioner that assault on a correctional facility employee was a misdemeanor. Petitioner testified, "I know I asked him [plea counsel] if it was a misdemeanor and he said yes." App. 48, l. 24 – 49, l. 2. Under S.C. Code Ann. § 16-3-630, assault on a correctional facility employee is a felony punishable by not less than six months imprisonment and not more than five years. A competent criminal defense attorney would have known and properly advised his client of the correct classification of the offense before advising the client to plead guilty. Moreover, counsel's error was not cured by the plea colloquy because the trial court failed to advise Petitioner of the correct classification of the offense during the hearing. The only information about the offense the trial court conveyed to Petitioner was the sentencing range. See App. 5, ll. 15-24.

Petitioner was prejudiced by counsel's deficient performance because if plea counsel would have properly advised Petitioner of the correct classification of assault on a correctional facility

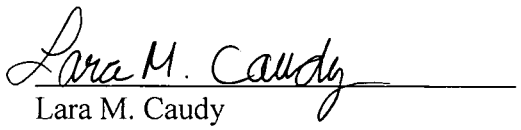
employee, he would not have pled guilty. Petitioner testified, "I thought the plea was to a misdemeanor like I said. I would not have pled otherwise." App. 49, ll. 18-19; See App. 45, ll. 8-14.

Based on the foregoing argument, this Court should hold that counsel was ineffective for failing to properly advise Petitioner on the correct classification of the offense he ultimately pled guilty to, and that Petitioner suffered prejudice by counsel's deficient performance.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari pursuant to Austin v. State and permit full briefing on the issues presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of December, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County
J. Cordell Maddox, Jr., Circuit Court Judge

BILLY LISENBY,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000886

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on Daniel Gourley, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of December, 2015.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of December, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.