

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Honorable Steven H. John, Circuit Court Judge

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60 SUPREME COURT

ANDRE A. ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002202

PETITION FOR WRIT OF CERTIORARI

John H. Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where plea counsel failed to adequately advise Petitioner of the elements of murder, the definition of malice, and his possible defenses?

STATEMENT

Relevant Facts

Petitioner was arrested for the murder of his cousin, Myron McCray. App. 7, l. 21 - 11, l. 25. McCray and Petitioner were not only cousins but good friends. *Id.* In the early morning hours of September 9, 2012, the two men were drinking at a small rural nightclub, informally known as the “Boom Boom Room”, in Williamsburg County located outside of Kingstree. *Id.*

The next morning, the Boom Boom Room’s owner found McCray’s body facedown behind the club. There were “severe cuts and gashes” on his head. App. 8, ll. 5-10. His body appeared to have been dragged an unknown distance. *Id.* at ll. 13-16.

Petitioner was the last person seen with McCray. App. 8, l. 17 - 9, l. 4. He was interviewed by law enforcement and eventually confessed that during a fight he killed McCray. App. 9, ll. 19-24. Appellant told law enforcement the fight began when McCray, who had a key to the Boom Boom Room, refused to get Petitioner a beer after closing time. *Id.*

The two men argued. McCray shoved Petitioner and the cousins “started tussling.” App. 10, ll. 6-19. Petitioner explained that, at some point during the fight, McCray fell down and Petitioner struck McCray’s head against a concrete slab several times. App. 10, l. 20 - 11, l. 5. Realizing that he had just unintentionally killed his good friend and cousin, Petitioner panicked and moved McCray’s body behind the nightclub; then disposed of his clothes. App. 9, ll. 5-24.

Guilty Plea

Less than eight months after the incident, Petitioner pled guilty to murder on March 5, 2013 before the Honorable Clifton Newman. Assistant Solicitor Kimberly Barr represented the State. Doward Harvin represented Petitioner.

During the colloquy, Petitioner stated that he did not have any defenses to the murder charge. App. 4, ll. 11-16. Judge Newman then asked Petitioner, “what makes you guilty of murder?” App. 5, l. 8 - 6, l. 11. Petitioner responded that he killed his cousin. When asked by Judge Newman why he killed his cousin, Petitioner stated “It wasn’t intentional. It started off with an argument and a fight. It went too far.” *Id.*

Judge Newman then explained that murder “is the intentional killing of another person with malice” and that if Petitioner claimed it was an accident, he could have a legal defense to the charge. *Id.* The court did not define malice. Petitioner indicated that he still wished to plead guilty. *Id.* Judge Newman accepted that there was a factual basis for the guilty plea and sentenced Petitioner to thirty years imprisonment. App. 18, l. 20 - 20, l. 2.

PCR Application and Evidentiary Hearing

Petitioner filed a PCR application on January 15, 2014 alleging that plea counsel was ineffective for failing to inform him of possible defenses and lesser included offenses, such as voluntary manslaughter. App. 22 - 28. The State filed a Return on September 24, 2014. App. 29 - 34. Petitioner submitted an amended PCR application on October 7, 2014. App. 36 - 37.

An evidentiary hearing was held before the Honorable Steven H. John on July 14, 2015. Charles Brooks, III, represented Petitioner. Assistant Attorney General Daniel Gourley represented the State. Petitioner and plea counsel both testified at the hearing.

Testimony of Petitioner

Petitioner testified that he accidentally killed his cousin and that his quick guilty plea was made unintelligently while he was under severe emotional stress. App. 47, ll. 1-12. Petitioner

stated that he did not understand the definition of malice at the time of the guilty plea. App. 44, l. 7 - 45, l. 7.

Specifically, Petitioner did not understand that the unlawful killing of another without malice would constitute voluntary manslaughter. *Id.* He explained that had he known that a jury could have found him guilty of manslaughter instead of murder, he would not have pled guilty, but would have insisted on standing trial. *Id.*

Petitioner recalled that plea counsel did not advise him about the malice element of murder and did not attempt to slow down the case so that Petitioner would have the opportunity to calm down and rationally consider his options. App. 46, ll. 4 - 48, l. 14.

Testimony of Plea Counsel

Plea counsel testified that he was appointed to represent Petitioner and that the case was “one of the fast murder pleas we have [had] in our county.” App. 57, ll. 12-14. He recalled that the State had refused to allow Petitioner to plead to manslaughter. App. 56, l. 6 - 57, l. 14. Counsel also recalled that Petitioner waived his preliminary hearing and indictment. *Id.*

However, counsel then contradicted himself, stating that he met with Petitioner at his preliminary hearing and one other occasion prior to the guilty plea. App. 59, ll. 21-25. Counsel claimed that he went over the difference between manslaughter and murder with Petitioner in “fairly good detail.” App. 60, ll. 20-24.

Ruling from the Bench and Order of Dismissal

Ruling from the bench at the end of the hearing, the PCR court denied Petitioner’s application. App. 63, l. 2 - 64, l. 22. The court ruled that Petitioner had entered into the guilty

plea knowingly and that Judge Newman had informed Petitioner that by pleading guilty to murder he was admitting to having intentionally killed his cousin. *Id.*

On August 4, 2015, the PCR court issued a written order of dismissal. App. 67 - 76. Reiterating its earlier ruling, the court held that Petitioner had failed to prove that plea counsel did not advise him as to the elements of murder and the definition of malice. App. 73 - 74.

The court found plea counsel's testimony regarding his preparation of the case to be credible. The court also noted that Petitioner admitted his guilt to the court and "was fully informed of the nature and consequences of his plea by his attorney and was advised further by the plea court." App. 74.

This petition follows.

ARGUMENT

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where plea counsel failed to adequately advise Petitioner of the elements of murder, the definition of malice and possible defenses.

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).

In this case, Petitioner testified at the evidentiary hearing that plea counsel never discussed the elements of murder with him and never explained the definition of malice. App. 44, l. 7 45, l. 17. Similarly, plea counsel did not advise Petitioner that, under the facts of his case, he could argue that the killing was the unintentional result of a fight and, thus, voluntary manslaughter. *Id.*

The plea colloquy supports Petitioner's testimony. Petitioner told Judge Newman that he had no defenses to the murder charge. App. 5, l. 4 - 6, l. 14. When Judge Newman asked Petitioner why he killed his cousin, Petitioner stated that "[i]t wasn't intentional." *Id.* This answer clearly surprised Judge Newman, who then briefly explained that murder was the "intentional killing of another person with malice." *Id.* Notably, the court did not give a definition of malice. *Id.*

Furthermore, Petitioner testified that had he been advised that he had a possible defense or could have been convicted of manslaughter, he would not have pled guilty. App. 44, l. 7 - 47, l. 12; *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."). Petitioner also testified that the only reason he pled guilty was because of plea counsel's advice and the emotional distress he was under. App. 47, ll. 1-13.

Although Petitioner pled guilty, an "unsound result" occurred in this case. The record does not reflect that Petitioner freely and intelligently waived his constitutional trial rights as plea counsel failed to inform him of the elements of murder, including the definition of malice, and of possible defenses. *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 stood trial had plea counsel advised him of his possible defenses.

App. 86-93; See *Boykin*, 395 U.S. 238; see also *Hill*, 474 U.S. at 57-59.

CONCLUSION

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

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of July, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Williamsburg County
Honorable Steven H. John, Circuit Court Judge

ANDRE A. ROBINSON,

PETITIONER,

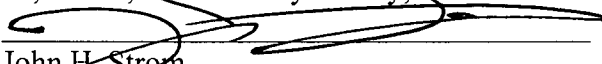
V.

STATE OF SOUTH CAROLINA,

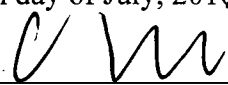
RESPONDENT

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 Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy Petition for Writ of Certiorari and a copy of the Appendix have been served on Andre A. Robinson, 319391 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC, 29472, this 18th day of July, 2016.


John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of July, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 5/12/2025 .