

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable George M. McFaddin, Circuit Court Judge

RECEIVED

NOV 21 2018

EFRAIN MATOS RIVERA,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000758

PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 4

CONCLUSION 11

ISSUES PRESENTED

Whether the PCR court erred in denying Petitioner relief, where Petitioner's counsel of almost two years performed no investigation while Petitioner resided in Florida, where counsel did not discuss the case with Petitioner, and where counsel only inquired about money when the two spoke on the telephone?

Whether the PCR court erred in denying Petitioner relief, where Petitioner's guilty plea was not entered into freely, where Petitioner retained new counsel the day before his guilty plea, where a jury was selected the day of his guilty plea, and where Petitioner was denied effective assistance of counsel when the trial court denied the motion for a continuance?

STATEMENT

Petitioner was indicted for trafficking heroin, greater than twenty-eight grams, by a Sumter County grand jury on February 5, 2015. App. 102 – 103. He pleaded guilty to the reduced charge of trafficking between four and fourteen grams on August 11, 2016 before the Honorable Jeffrey Young. App. 1. Bronwyn McElveen appeared on behalf of the State, and Garryl Deas represented Petitioner.

The facts presented at the guilty plea by the solicitor were as follows: On October 13, 2014, law enforcement pulled over a white Hyundai Genesis with a Florida license plate for speeding on Interstate 95. App. 6 l. 14 – App. 9 l. 7. Petitioner was the driver. Id. The passenger was named Angel Pizarro. Law enforcement supposedly smelled marijuana inside the vehicle. According to the prosecution, Petitioner gave permission for law enforcement to search the car. One hundred and sixteen grams of Molly MDMA in rock form and a clear plastic bag containing marijuana were found during a pat down of Pizarro. Id. Petitioner was arrested for paraphernalia and constructive possession of the Molly. While at the detention center, law enforcement allegedly located approximately forty-seven grams of heroin hidden inside Petitioner. Id.

Judge Young accepted Petitioner's plea as entered into freely, voluntarily, knowingly, and intelligently. App. 14 ll. 1 – 10. Petitioner was sentenced to seven years under a negotiated plea. App. 17 ll. 15 – 18.

On November 15, 2016, Petitioner filed an application for post-conviction relief. It contained allegations that plea counsel as well as Petitioner's prior counsel, James T. Irvin, were ineffective for a litany of reasons. The State filed a Return and Partial Motion to Dismiss on October 17, 2017. App. 35 – 44.

At the outset of the November 16, 2017 evidentiary hearing, the Honorable George M. McFaddin granted the State's partial motion to dismiss the claims related to direct appeal issues. App. 48 ll. 12 – 21. Lance Boozer represented Petitioner, and Julie Coleman appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.¹

Judge McFaddin denied relief at the conclusion of the hearing and followed up with a written Order of Dismissal which was filed April 16, 2016. App. 85 l. 18 – App. 86 l. 14; App. 88 – 101. Judge McFaddin found that Petitioner received effective assistance of counsel and that he was not coerced into pleading guilty.

This petition follows.

¹ James T. Irvin passed away shortly before the evidentiary hearing. App. 70 ll. 15 – 17.

ARGUMENT

I. The PCR court erred in denying Petitioner relief, where Petitioner's counsel of almost two years performed no investigation while Petitioner resided in Florida, where counsel did not discuss the case with Petitioner, and where counsel only inquired about money when the two spoke on the telephone.

Relevant facts

Plea counsel was retained by Petitioner the day before his plea. App. 4 ll. 6 – 21. At the time of the entry of the plea, counsel and Petitioner had already selected a jury for trial even though prior counsel Irvin had not advised Petitioner of the upcoming trial date. Id.; App. 81 ll. 9 – 13; App. 84 ll. 7 – 14. Counsel's motion for a continuance was denied. App. 78 l. 18 – App. 79 l. 8. Additionally, counsel filed a motion to suppress the drug evidence found at the jail based upon the unlawful arrest; the suppression motion was denied. App. 74 l. 17 – App. 75 l. 11. Facing a maximum sentence of forty years, Petitioner had no decision but to plead guilty. App. 15 l. 8 – App. 17 l. 12.

Petitioner was not advised of a possible trial date until the very last minute. App. 54 ll. 6 – 17. After receiving a call from Irvin, Petitioner drove from Florida to South Carolina. Id. According to Petitioner, he was told to be in court at 10:30 in the morning on August 8. App. 54 l. 18 – App. 55 l. 13. Although Petitioner was present, Irvin was not. Id. Petitioner arrived at 2:30 in the afternoon after everyone else had left the courtroom. Id. Petitioner was offered a seven year sentence, which he rejected after learning that his co-defendant only received a fine. App. 55 ll. 11 – 23. Following the rejected offer, Petitioner was advised of a trial date which was slated to take place later that week. App. 55 l. 22 – App. 56 l. 24. It was at that point that Petitioner began searching for substitute counsel. Id.

Plea counsel, Garryl Deas, described Petitioner's unenviable position as a "precarious situation" and noted that Petitioner's prior attorney had never discussed his case with Petitioner. App. 75 l. 12 – App. 77 l. 7; App. 81 ll. 14 – 25. Counsel admitted that he "would have loved" to have had more time to prepare, discuss the case with Petitioner, further investigate, and "get a little more abreast of the specifics and the details of his case," but he was not afforded that opportunity following the motion for a continuance being denied. App. 78 l. 18 – App. 79 l. 8.

Discussion

Petitioner and Irvin never discussed anything other than money. App. 54 ll. 3 – 5. The events giving rise to Petitioner's arrest took place on October 13, 2014; Petitioner relieved his attorney in August 2016. During that time, the two never discussed strategies, defenses, discovery, the charges, possible sentences, or anything else besides money. Irvin did not advise Petitioner of anything useful to his pending charge.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. "[T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v.

Washington, supra). In this regard, there is no evidence to support the PCR court's conclusions that Petitioner received effective assistance of counsel from James T. Irvin.²

The Order of Dismissal wrote off Petitioner's allegations that Irvin failed to investigate, file a Rule 5 or Brady motion as meritless. However, plea counsel noted nothing useful from the file which he received from Irvin. It is apparent that no investigation took place. Irvin did not request any footage from the detention center. He did not interview the law enforcement officials. He did not question Petitioner's co-defendant. He failed to request any footage from law enforcement's dashcam. Based upon the testimony at the evidentiary hearing, *no investigation* took place. Irvin failed to research any applicable defenses, discuss the case with Petitioner, or file any motions. Irvin failed to adequately and sufficiently discuss Petitioner's case with him; he failed to fully participate in the defense of this matter.

"The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Prejudice in Petitioner's matter manifested itself in the chaotic conclusion of his case. Petitioner relieved his ineffective counsel and sought new representation. However, following the denial of the continuance motion, he was forced to select a jury with underprepared plea counsel. Based on the lack of knowledge his new attorney had, Petitioner took the same plea deal which was made available through Irvin. As will be discussed more fully below, his guilty

² The Order of Dismissal lists his name as "James T. Ervin." App. 95.

plea not only represents the prejudice in his case, but it was also the product of duress and therefore was neither voluntarily or freely entered into.

II. The PCR court erred in denying Petitioner relief, where Petitioner's guilty plea was not entered into freely, where Petitioner retained new counsel the day before his guilty plea, where a jury was selected the day of his guilty plea, and where Petitioner was denied effective assistance of counsel when the trial court denied the motion for a continuance.

Plea counsel agreed that Petitioner was under duress at the time he entered into his plea. App. 82 ll. 1 – 6. PCR counsel summarized the “precarious situation” facing Petitioner in a question to plea counsel:

Well, how about ... based on your conversations with [Petitioner] and I think your conversations with Mr. Irvin that he had very little contact with his prior counsel and he had no chance to discuss the substance of the case, formulate any sort of defense, strategy, no motions had been filed and it appeared that according to Mr. Rivera that the only conversations were about money and then to throw himself into - - [Irvin's] no longer his lawyer and y'all have got a few days to prepare for a trial. Would you be comfortable saying that he's probably under some duress at that point based on those facts?

App. 82 l. 7 – App. 83 l. 5. In response, plea counsel acknowledged Petitioner's likely high stress levels and reiterated that Irvin seemingly had not prepared to try the case. *Id.* Plea counsel was under the impression that Irvin had not filed any discovery motions either. *Id.*

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). This Court has held that, “in addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and

any mandatory minimum penalty, and the nature of the constitutional rights being waived.” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A plea made in ignorance of its direct consequences is entered in ignorance and is invalid. Hazel, 275 S.C. 392, 271 S.E.2d 602.

When a defendant is represented by counsel during the plea process and enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Shirley v. State, 306 S.C. 241, 411 S.E.2d 215 (1991). A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill at 56-57, 106 S.Ct. at 369, 88 L.Ed.2d at 208-09.

“That the plea be voluntary is not only a requirement of due process, but a premise of the defendant's meaningful participation in the plea process.” United States v. Savinon-Acosta, 232 F.3d 265, 268 (1st Cir. 2000) (citing McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)).

The questions asked at the guilty plea asked by the circuit court judge, repeated in the Order of Dismissal, do not account for the duress Petitioner was facing. App. 11 ll. 11 – 17; App. 99. An attorney, whom Petitioner had paid thousands of dollars, failed to provide representation, much less competent representation. App. 66 ll. 5 – 24. Petitioner did not receive his discovery until the week his case was called for trial. His guilty plea was the result of

ineffective counsel, coupled with an impossible turnaround time for the beginning of his trial, and he pleaded guilty without ever receiving full, competent representation during the pendency of the trafficking charge. Facing the possibility of forty years, Petitioner unknowingly pled down to receive seven, without knowing the possible defenses available to him. Neither attorney who represented him performed an investigation; although the former had the time and the money, he seemingly chose not to do so. The latter was not provided the time to research the specifics of Petitioner's case. In the end, Petitioner pleaded guilty rather than go to trial with an attorney he had hired the day before following almost two years' worth of sending payments to Irvin and receiving nothing in return.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against his, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of November, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 21st day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

NOV 21 2018

Certiorari to Sumter County

Honorable George M. McFaddin, Circuit Court Judge S.C. SUPREME COURT

EFRAIN MATOS RIVERA,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Efrain Matos Rivera, #369339, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 21st day of November, 2018.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of November, 2018.

Notary Public for South Carolina (L.S)

My Commission Expires: May 12, 2027.