

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

MILDRED MONTGOMERY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-000526

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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INDEX

INDEX i

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT

Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel, who met with Petitioner on a mere two occasions, once at her bond hearing and then not again until the day of her plea, failed to adequately communicate with and advise Petitioner of her constitutional rights, the elements of the charged offenses, the state’s evidence against her, and the maximum penalties she faced, and where the colloquy between Petitioner and the plea judge failed to cure these deficiencies when the judge failed to (1) individually advise Petitioner of the constitutional rights she was waiving by pleading guilty and ensure she understood those rights, and (2) inform Petitioner of the nature and crucial elements of the offense to which she was pleading guilty, the maximum penalty she faced, or the consequences of her guilty plea.7

CONCLUSION.....13

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel, who met with Petitioner on a mere two occasions, once at her bond hearing and then not again until the day of her plea, failed to adequately communicate with and advise Petitioner of her constitutional rights, the elements of the charged offenses, the state's evidence against her, and the maximum penalties she faced, and where the colloquy between Petitioner and the plea judge failed to cure these deficiencies since the judge failed to (1) individually advise Petitioner of the constitutional rights she was waiving by pleading guilty and ensure she understood those rights, and (2) inform Petitioner of the nature and crucial elements of the offense to which she was pleading guilty, the maximum penalty she faced, or the consequences of her guilty plea?

STATEMENT OF THE CASE

On July 17, 2016, a fistfight broke out on the dance floor of the Down Beat Club. Petitioner was allegedly involved in the altercation along with several of her friends. The state claimed Petitioner shot Jenny Smith, whose friends were also involved in the fight, when Smith attempted to intervene. App. 6, ll. 11-24. The bullet struck Smith in the chest, but she ultimately survived. App. 7, ll. 4-7.

A Florence County grand jury indicted Petitioner on January 5, 2017 for attempted murder and possession of a weapon during the commission of a violent crime. App. 69-70. On April 10, 2017, Petitioner pled guilty to the lesser included offense of assault and battery of a high and aggravated nature (ABHAN) before the Honorable William H. Seals, Jr. App. 1. Deputy Solicitor John Jepertinger and Assistant Solicitor Lloyd Flores represented the state. App. 1. John Etheridge and Kevin Etheridge represented Petitioner. App. 1. Petitioner was sentenced to eighteen years. App. 8, ll. 14-16.

On the day Petitioner pled guilty, the judge generally advised the courtroom of the constitutional rights one waives by pleading guilty. He stated:

Everybody in the courtroom that's signed up to plead guilty or thinking about pleading guilty, I want to go over certain rights that you have and I want you to understand these rights. The first thing I want to go over is that you don't have to plead guilty. Nobody can make you plead guilty. If you would rather have a jury trial instead, all you have to do is ask me and I'll make sure you get one. I want you to understand if you have a jury trial and you have nothing to prove, the burden of proof is on the State of South Carolina to prove you guilty beyond a reasonable doubt.

Furthermore, if you had a trial and you have a jury made up of 12 people, they would have to take all 12 members of the jury to unanimously agree to convict you before the Court could sentence you. Also if you had a trial, your lawyer would have the right to cross-examine and confront all of the State's witnesses. Furthermore, if you like to testify, you can. If you come over here and be sworn in, take the witness stand and tell your side of the story any way you and your lawyer see fit. However, it's important to understand that you don't have to

because you have the constitutional right to remain silent. If you choose to exercise that right, I want you to understand that I would tell the jury they cannot use that against you in any way. I would tell the jury the fact that you did not testify is to have absolutely no prejudice against you in your case. I would even tell the jury they can't talk about that fact in they jury room.

Furthermore, if you had a trial or if you plead guilty in front of me [and] you [are] not happy with something that takes place, you can appeal it, but you got to do so within ten days. You come before me and plead guilty or anything else and you have any questions about these rights no matter how minor, don't hesitate to ask me and I'll make sure they're cleared up for you.

App. 3, l. 1 – 4, l. 10.

While the trial judge made this general announcement at some point before Petitioner pled guilty, he never individually advised Petitioner of the constitutional rights she was waiving by pleading guilty nor adequately ensured that she understood those rights. See App. 5, ll. 1-8. Moreover, the judge wholly failed to inform Petitioner of the nature and crucial elements of the offense to which she was pleading guilty, the maximum penalty she faced, or the consequences of her guilty plea. App. 5, 1 – 6, l. 7. Significantly, the judge never questioned plea counsel concerning whether he had advised Petitioner of such matters. App. 5, 1 – 6, l. 7. Furthermore, while the judge generally asked Petitioner if she was guilty, he never inquired into whether she agreed or substantially agreed with the facts as alleged by the solicitor. App. 6, l. 1 – 8, l. 16. The record of the plea proceeding spans a mere six pages. App. 3-8.

On September 22, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 10-16. The state filed a return to this application dated February 9, 2018. App. 17-22. An evidentiary hearing was convened on November 6, 2018 before the Honorable Craig Brown. App. 23. Assistant Attorney General Samuel Key represented the state, and Jonathan Waller represented Petitioner. App. 23.

Kevin Etheridge, who practices at the Gardner Law Firm with his father, John Etheridge, testified that Petitioner's family retained the firm to represent her. App. 43, l. 10 – 44, l. 9. Because his father has mobility limitations, Kevin handles a majority of the matters in the courtroom. App. 44, ll. 3-9. Kevin first met Petitioner at a bond hearing shortly after the firm was retained. App. 43, ll. 20-24. While he briefly spoke with Petitioner before the hearing, Kevin admitted they only discussed the matter of bond and what was going to happen that day. App. 48, ll. 14-20. He did not meet with Petitioner again until the day of her guilty plea. App. 44, l. 19 – 45, l. 2. Kevin admitted that his discussion with Petitioner on the day of her plea was "primarily focused on the offer." However, he claimed the two "briefly" talked about the discovery. He commented, "Of course, if we were gonna go to trial we would have a lot more conversations about that [the discovery]. But the day in question was a plea day and that was the main focus on that day was to see if she wanted to plea." App. 45, ll. 3-17.

When questioned whether he discussed with Petitioner "what the State would need to prove if the case had gone to trial," Kevin asserted the two "had some conversations about going forward, but again, mainly we just talked about the plea." App. 49, ll. 14-17. When asked whether he advised Petitioner of the elements of attempted murder and ABHAN, Kevin said the two "discussed the crime." When asked again whether they specifically discussed the elements of the offenses, Kevin said he "assumed" they did. App. 50, ll. 2-10. He maintained they "briefly" talked about the factual basis the state intended to offer during Petitioner's plea. App. 50, ll. 17-20.

As far as Petitioner's constitutional rights, Kevin testified that he "assumed" he "went through that whole standard refrain" that he usually goes through, but he could not recall specifically. App. 50, ll. 11-16.

John Etheridge, Kevin's father, admitted that he never met with Petitioner in person. App. 39, ll. 15-16. Instead, he claimed he spoke to her on the telephone two or three times while she was incarcerated. App. 39, ll. 10-11. However, he could not recall the content of their conversations or when they occurred. App. 39, ll. 12-14; App. 39, l. 22 – 40, l. 2.

Petitioner testified that after she was first arrested, she was denied bond. App. 28, ll. 4-6. Shortly thereafter, her family retained the Gardner Law Firm. While she initially thought John Etheridge would represent her, Kevin ended up handling her case. App. 28, ll. 7-17. Petitioner said she only spoke to John one time over the telephone while she was incarcerated. John merely told her that he was "trying to get [her] out" and "to keep [her] head up." App. 28, ll. 22-25. He refused to talk about the case over the phone and told Petitioner he would "be up there to see [her]." App. 28, ll. 18-21.

The first time Petitioner met Kevin was at her bond hearing. She did not see him again until the day of her guilty plea. App. 29, ll. 13-22. Petitioner testified that she and Kevin never discussed the possibility of proceeding to trial except for Kevin's statement that "it would've been extra money." App. 30, ll. 7-9. Petitioner maintained Kevin never advised her of her constitutional rights, the potential defenses she may have to the charges, or the state's evidence against her. App. 30, l. 1 – 31, l. 14. She first saw the discovery after her guilty plea when her family obtained a copy from the firm and mailed it to her. App. 32, ll. 3-18. John confirmed that they gave Petitioner a complete copy of her file after she pled guilty. App. 41, ll. 11-17.

Petitioner asserted that she did not fully understand the case before she pled guilty because she "was illiterate when it came to the law." App. 33, ll. 5-11. Moreover, she was unaware of the evidence the state had against her. App. 33, ll. 5-11. She explained that she only pled guilty because Kevin told her if she proceeded to trial he "wouldn't be able to win." App.

30, l. 20 – 31, l. 1; App. 35, ll. 13-20. This “scared” Petitioner. App. 35, ll. 16-19. However, she was adamant she would have proceeded to trial but for counsel’s deficient performance. App. 36, ll. 2-5.

By order filed March 27, 2019, the PCR judge denied Petitioner relief. App. 59-67. The judge found that while Petitioner “may feel as though . . . plea counsel did not communicate enough with her,” plea counsel nonetheless “reasonably communicated” with Petitioner. App. 65. Moreover, the judge found Petitioner failed to show how she was prejudiced by counsel’s alleged lack of communication since “counsel met and conferred with [Petitioner] prior to [her] plea.” App. 65. The PCR judge also found Petitioner failed to show how plea counsel was deficient in advising her. The judge concluded “any such alleged deficiency was cured by the plea court’s colloquy.” App. 66.

Because Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made since plea counsel failed to adequately communicate with and advise Petitioner of her constitutional rights, the elements of the charged offenses, the state’s evidence against her, and the maximum penalties she faced, and the colloquy between Petitioner and the plea judge failed to cure these deficiencies, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel, who met with Petitioner on a mere two occasions, once at her bond hearing and then not again until the day of her plea, failed to adequately communicate with and advise Petitioner of her constitutional rights, the elements of the charged offenses, the state's evidence against her, and the maximum penalties she faced, and where the colloquy between Petitioner and the plea judge failed to cure these deficiencies when the judge failed to (1) individually advise Petitioner of the constitutional rights she was waiving by pleading guilty and ensure she understood those rights, and (2) inform Petitioner of the nature and crucial elements of the offense to which she was pleading guilty, the maximum penalty she faced, or the consequences of her guilty plea.

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made since plea counsel failed to adequately communicate with and advise Petitioner of her constitutional rights, the elements of the charged offenses, the state's evidence against her, and the maximum penalties she faced. Significantly, the colloquy between Petitioner and the plea judge failed to cure these deficiencies. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that she would not have pled guilty but would have proceeded to trial if counsel had properly communicated with her and adequately advised her.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided

representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "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 v. Lockhart, 474 U.S. 52, 58-59 (1985); See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000)); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

"Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). "The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers." Pittman, 337 S.C. at 599, 524 S.E.2d at 624 (citing Boykin, 395 U.S. 238). Additionally, "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.” Id. (citing Boykin, 395 U.S. 238).

“To ensure the defendant understands the consequences of his guilty plea, the trial judge usually questions the defendant about the facts surrounding the crime and punishment that could be imposed.” Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)). “Although the trial court is not required to direct the defendant’s attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of the guilty plea.” Id. (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976)). “Defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and ‘may be accomplished by colloquy between court and defendant, between court and defendant’s counsel, or both.’” Id. (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)).

“The longstanding test for determining the validity of a guilty 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) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

“[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing.” Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)) (alteration in original).

In Pittman, this Court held Pittman’s guilty plea was not voluntary, intelligent, and knowing where Pittman did not fully understand the nature of the constitutional rights being

waived and the consequences of his plea. Id. at 601, 524 S.E.2d at 625. It was undisputed that Pittman met with his attorney only twice for approximately twenty minutes each. Id. at 600, 524 S.E.2d at 625. The trial judge did not advise Pittman of the crucial elements of the charged offenses. Id. Moreover, while the judge informed Pittman of the maximum sentences which could be imposed, he failed to advise him that the armed robbery charge carried a mandatory minimum of ten years, seven without the possibility of parole. Id. (citing 22 C.J.S. Criminal Law § 404 (1989) (“prior to accepting a plea of guilty . . . the court is required to advise accused of the range of punishment attached to the offense charged such as . . . the minimum sentence.”)). Lastly, the trial judge never affirmatively asked Pittman for an admission of guilt. Id.

In this case, it was undisputed that neither Kevin Etheridge nor Johnny Etheridge met with Petitioner while she was incarcerated in the local detention before her plea. Kevin Etheridge admitted he only met with Petitioner at her bond hearing and the day of her guilty plea. At the bond hearing, the two only discussed the matter of bond and what was going to happen that day. App. 48, ll. 14-20. Kevin further admitted that his discussion with Petitioner on the day of her plea was “primarily focused on the offer.” He claimed they “discussed the crime” and “briefly” talked about the factual basis the state would offer, but he could not recall whether he advised Petitioner of the elements of the charged offenses or her constitutional rights. He merely assumed he went through the “standard refrain” that he goes through with clients who are pleading guilty. App. 50, ll. 2-20.

John Etheridge admitted that he only spoke to Petitioner on a couple of occasions over the telephone. He could not recall the content of their conversations or when they occurred. App. 39, ll. 12-14; App. 39, l. 22 – 40, l. 2. There was absolutely no evidence that John advised Petitioner of her constitutional rights, the elements of the charged offenses, the state’s evidence

against her, or the potential penalty she faced. He confirmed Petitioner's testimony that the firm did not provide her with a copy of the discovery until after she pled guilty. App. 41, ll. 11-15.

Plea counsel's lack of communication and failure to properly and adequately advise Petitioner rendered her guilty plea invalid as it was not knowingly, intelligently, and voluntarily made. Counsel's deficient performance was not cured by the colloquy between Petitioner and the plea judge since the judge never individually advised Petitioner of the constitutional rights she was waiving by pleading guilty nor adequately ensured that she understood those rights. See App. 5, ll. 1-8. Moreover, the judge wholly failed to inform Petitioner of the nature and crucial elements of the offense to which she was pleading guilty, the maximum penalty she faced, or the consequences of her guilty plea. App. 5, 1 – 6, l. 7. Significantly, the judge also never questioned plea counsel concerning whether he had advised Petitioner of such matters. App. 5, 1 – 6, l. 7. Furthermore, while the judge generally asked Petitioner if she was guilty, he never inquired into whether she agreed or substantially agreed with the facts as alleged by the solicitor. App. 6, l. 1 – 8, l. 16.

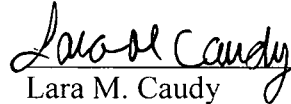
Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that she would not have pled guilty but would have proceeded to trial if counsel had properly communicated with her and adequately advised her. Petitioner asserted that she did not fully understand the case before she pled guilty because she "was illiterate when it came to the law." App. 33, ll. 5-11. Moreover, she was unaware of the evidence the state had against her. App. 33, ll. 5-11. She explained that she only pled guilty because plea counsel told her if she proceeded to trial he "wouldn't be able to win." App. 30, l. 20 – 31, l. 1; App. 35, ll. 13-20. This "scared" Petitioner. App. 35, ll. 16-19. However, she was adamant she would have proceeded to trial but for counsel's deficient performance. App. 36, ll. 2-5.

Respectfully, this Court should reverse Petitioner's conviction and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. Petitioner ultimately requests this Court reverse her conviction and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of October, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 04 2019

S.C. SUPREME COURT

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

MILDRED MONTGOMERY,

PETITIONER,

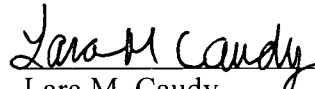
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

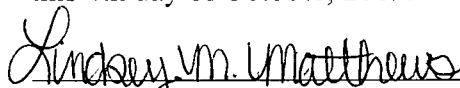
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served upon Mildred Montgomery, #372236, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 4th day of October, 2019.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of October, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.