

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

ANTONIO YOUNG,

RECEIVED
FEB 26 2020
SC SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000810

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where plea counsel failed to advise Petitioner that his guilty plea could result in involuntary commitment for an indeterminate period under the Sexually Violent Predator Act, where Petitioner was transferred to the county jail in accordance with the SVP Act on the date he was scheduled to be released from prison after serving his sentence, and where Petitioner was subjected to trial and possible commitment as a result of his guilty plea?

STATEMENT

Petitioner was indicted by a Charleston County grand jury in June 2016 for criminal sexual conduct in the first degree. App. 68 – 69. He appeared before the Honorable Markley Dennis on April 21, 2017 for a negotiated Alford plea.¹ Petitioner was represented by Patty Kennedy; Tyler Whitaker appeared on behalf of the state. App. 1. Counsel had negotiated a three-year sentence on the lesser included offense of assault and battery of a high and aggravated nature.² App. 3 l. 23 – App. 4 l. 1. The only repercussions of the plea that were discussed were a two-year community supervision program. App. 5 ll. 13 – 22. Notably, there was no discussion of any potential involuntary commitment through the SVP program.

At the time of the plea, Petitioner had spent over seven hundred days in jail. App. 5 ll. 23 – 25. Plea counsel noted that he was already on the sex offender registry. App. 9 ll. 1 – 4. Petitioner pleaded guilty under Alford. App. 9 ll. 5 – 11. Following the plea, the plea judge asked defense counsel whether Petitioner had been advised of his rights as well as the consequences of his plea; she answered in the affirmative. App. 9 l. 25 – App. 10 l. 2.

The facts as alleged by the state were as follows: On or about April 1, 2014, Petitioner allegedly sexually assaulted a woman in her home. App. 11 l. 9 – App. 12 l. 25. The assistant solicitor described the woman as fragile due to an unrelated traumatic brain injury. Id. Further, she lived out of state and did not wish to testify. Id.

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 Led.2d 162 (1970).

² This plea predated State v. Hernandez, which held that ABHAN is not a lesser included offense of CSC. 428 S.C. 257, 834 S.E.2d 462 (2019).

The assistant solicitor noted Petitioner's record. App. 12 ll. 13 – 20. Within the past ten years, according to the state, Petitioner had a sexual registry violation from 2006 and three drug offenses. Id.

At the time of the plea, Petitioner had already been incarcerated for over two years. App. 15 l. 22 – App. 16 l. 9. He was forty-five years old, a lifelong resident of Charleston, and had four children and seven grandchildren. App. 17 ll. 11 – 19. His plea counsel remarked that Petitioner was “at a point in his life that ... he's ready to the extent that the system will allow him to ... come out and still have enough time in his life to be with his children, be with his grandchildren.” Id. According to plea counsel, Petitioner's family was anxious to have him home. Counsel suggested that this plea provided Petitioner “an opportunity to come out [of prison] in a fairly short period of time and resume his life.” App. 17 ll. 20 – 25.

The plea judge asked some additional questions before sentencing Petitioner, including whether Petitioner's record could have been used against him if he testified. App. 18 ll. 4 – 10. Quite importantly, none of the individuals present at the plea—plea counsel, the assistant solicitor, the plea judge, or Petitioner himself—ever noted that this conviction could be used to prompt a petition for probable cause determination under S.C. Code Ann. § 44-48-70.

The plea judge sentenced Petitioner to three years' incarceration with credit for time served. App. 20 ll. 2 – 9. As a result of the credit, he was only required to serve 160 days in prison. Id. However, the day he was scheduled to be released from the South Carolina Department of Corrections, he was instead transferred to the county jail. App. 52 ll. 3 – 20. Even after the completion of the entirety of his sentence, he was not allowed to go home.

Soon thereafter, on April 5, 2018, Petitioner filed an application for post-conviction relief. App. 22 – 29. He alleged that plea counsel failed to advise him of the possibility of being

involuntarily committed through the Sexually Violent Predator Act. App. 40 l. 20 – App. 41 l. 6. The state filed its Return and Motion for a More Definite Statement on or about June 7, 2018. App. 30 – 37. An evidentiary hearing was held on March 20, 2019 before the Honorable Jennifer McCoy. App. 38. James Falk represented Petitioner; Benjamin Hunter appeared on behalf of the state. Plea counsel and Petitioner testified at the hearing. The PCR judge took the matter under advisement. App. 59 ll. 5 – 8.

An Order of Dismissal was issued on May 2, 2019. App. 61 – 67. The PCR judge found that plea counsel’s performance was “in accordance with ‘professional norms’ and that Applicant has failed to establish any deficiency of counsel.” App. 66. The Order of Dismissal contained a slightly confusing sentence: “Counsel testified that she doubts that she did not review it with him, but did not have an independent recollection of doing so.” App. 66. Citing Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005), the PCR court found Petitioner failed to meet his burden. App. 66 – 67.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where plea counsel failed to advise Petitioner that his guilty plea could result in involuntary commitment for an indeterminate period under the Sexually Violent Predator Act, where Petitioner was transferred to the county jail in accordance with the SVP Act on the date he was scheduled to be released from prison after serving his sentence, and where Petitioner was subjected to trial and possible commitment as a result of his guilty plea.

Relevant facts

Contrary to the language from the Order of Dismissal, plea counsel testified that she did not recall advising Petitioner of the possibility of being involuntarily committed to the South Carolina Department of Mental Health through S.C. Code Ann. § 44-48-10 et al. Neither her recollection nor her notes suggested that the two had ever discussed anything of the like:

Q: Okay. What were your discussions about his possible exposure to ... being in an action for a sexually violent predator civil contempt trial?

A: I can't honestly say we had those discussions. I have my notes, what we said on the phone, and it's unlikely that would have happened, however, I don't have any independent recollection of it. The other issue in my mind is that it may have been that I didn't do it because of the charge he was pleading to.

App. 42 l. 21 – App. 43 l. 4.

She candidly remarked that she did not recall having a conversation with him about the possibility. App. 44 ll. 2 – 3. When asked whether she was aware of the indeterminate period of time an individual who is committed under the SVP Act is in the program, plea counsel gravely described the involuntary commitment as **“a different kind of life without parole.”** App. 45 ll. 16 – 20 (emphasis added). Plea counsel testified that although she had been practicing for

almost thirty-three years at the time of the evidentiary hearing, it would not have been part of her normal practice to determine whether there had been any prior sexually violent predator proceedings as part of her representation of a client. App. 47 ll. 20 – 23. On cross-examination, plea counsel replied in the negative when asked whether she believed Petitioner would have had any knowledge of the SVP Act or any resulting proceedings, thus rendering him unprepared and uninformed. App. 46 ll. 8 – 14.

Petitioner provided a timeline of his incarceration following the Alford plea. He was transported to the South Carolina Department of Corrections and served seven months following his plea. App. 48 ll. 16 – 24. He was then taken to the Charleston County Detention Center in October 2017. App. 48 l. 25 – App. 49 l. 2. He went straight from the state prison to the county jail. App. 52 ll. 6 – 20. He went to trial on the sexually violent predator commitment trial in October 2018. App. 49 ll. 3 – 12. The result of that trial was a hung jury, which meant he was scheduled for another trial the month after his PCR evidentiary hearing.³ Id.

Petitioner echoed plea counsel’s recollections and unambiguously stated that the two never had a conversation about him being subjected to any SVP proceedings after his plea. App. 49 ll. 13 – 21; App. 50 ll. 5 – 8. Similarly, Petitioner noted that he was not transported for any prior SVP actions and had “no prior experience with this whole civil commitment proceeding.” App. 50 ll. 9 – 20; App. 52 ll. 21 – 23. Petitioner understandably asserted that if he had been aware of the possibility of being committed for an indeterminate period under the SVP Act, he would have gone to trial. App. 51 ll. 15 – 22; App. 52 l. 24 – App. 53 l. 15. He openly admitted that he was unaware how long he would be in custody should he be committed at the trial

³ Petitioner was tried in Charleston County a second time and ordered to be committed. Petitioner would ask this Court to take judicial notice of the underlying civil action matter State v. Antonio Young, 2017-CP-10-03932 and the corresponding direct appeal pending at the South Carolina Court of Appeals, In the Matter of Antonio D. Young Appellate Case No. 2019-000823.

scheduled to take place the month following the evidentiary hearing. App. 53 ll. 12 – 15; App. 54 ll. 13 – 15.

Counsel for Petitioner at the evidentiary hearing opined that:

[T]his is a type of collateral consequence, although it's not that specifically named in Padilla v. Kentucky, but this is the type of collateral consequence that somebody needs to know about before they plead guilty to a charge that could expose them to a sexually violent predator civil commitment proceeding.

App. 54 l. 24 – App. 55 l. 6. After hearing from counsel for both parties at the conclusion of the evidentiary hearing, the PCR judge described the situation as “interesting” and requested written orders.

Discussion

The PCR judge relied on Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005) for the notion that counsel has no duty to inform a client about the civil commitment process under the SVPA. App. 66. In Page, this Court analyzed the SVP statutory scheme and concluded that Page’s counsel “had no duty to inform him about the civil commitment process under the SVPA” in a situation where Page pleaded guilty to criminal sexual conduct and other charges subject to a negotiated agreement. Id. at 637, 615 S.E.2d at 742. The ultimate holding was that “any possible civil commitment of Petitioner would not follow directly from his guilty plea but rather from a separate civil proceeding as a collateral consequence.” Id.

The catalyst for SVP proceedings is a conviction of a sexually violent offense. S.C. Code Ann. § 44-48-40(A). Without the conviction, there are no proceedings. With a conviction, the below process **must** originate. Following the conviction, a multidisciplinary team appointed by the Director of the Department of Corrections receives written notice and records of the individual who received the conviction. S.C. Code Ann. § 44-48-50. “[T]he agency with jurisdiction **must** give written notice to the multidisciplinary team.” S.C. Code Ann. § 44-48-40.

(emphasis added). The multidisciplinary team, within thirty days, “**must** assess whether or not the person satisfies the definition of a sexually violent predator.” Id. (emphasis added). If that answer is yes, the team “**must** forward a report of the assessment to the prosecutor’s review committee.” Id. (emphasis added).

The prosecutor’s review committee is appointed by the South Carolina Attorney General. S.C. Code Ann. § 44-48-60. The committee “**must** determine whether or not probable cause exists to believe the person is a sexually violent predator.” Id. (emphasis added). While deliberating, “the committee must also consider the information provided by the circuit solicitor who prosecuted the person.” Id. (emphasis added).

“When the prosecutor’s review committee has determined that probable cause exists to support the allegations that the person is a sexually violent predator, the Attorney General **must** file a petition.” S.C. Code Ann. § 44-48-70. (emphasis added). The petition “must be filed within thirty days of the probable cause determination ... [and] must request that the court make a probable cause determination as to whether the person is a sexually violent predator.” Id. “The petition must allege that the person is a sexually violent predator and must state sufficient facts that would support a probable cause allegation.” Id.

After the petition is filed, “the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator.” S.C. Code Ann. § 44-48-80. Only after the court determines that probable cause exists is the individual taken into custody. Id. After being taken into custody, the individual must be provided with notice of the opportunity to appear in person at a hearing. If the probable cause determination is made, the court “must direct that upon completion of the criminal sentence, the person must be transferred to a local or regional detention facility pending conclusion of the proceedings.” Id.

Additionally, the court “must further direct that the person be transported to an appropriate facility of the South Carolina Department of Mental Health for an evaluation as to whether the person is a sexually violent predator.” Id.

Soon thereafter, the person is tried. S.C. Code Ann. § 44-48-90. If found to be a sexually violent predator, “**the person must be committed** to the custody of the Department of Mental Health for control, care, and treatment until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large and has been released pursuant to this chapter.” S.C. Code Ann. § 44-48-100. (emphasis added).

In Hamm v. State, 403 S.C. 461, 744 S.E.2d 503 (2013), Michael Hamm filed a petition for a writ of habeas corpus and a declaratory judgment regarding his civil commitment to the South Carolina Department of Mental Health’s Sexually Violent Predator (SVP) program pursuant to S.C. Code Ann. § 44-48-10. He contended that the plea judge and plea counsel in his case were ineffective for failing to inform him that he was subject to the SVP act as a direct consequence of pleading guilty. Hamm can be distinguished from the matter at hand in at least three ways.

Hamm asserted that in light of Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), his guilty plea was not knowingly, voluntarily, or intelligently made because he was not advised that his plea subjected him to the SVP Act. He made this argument in a habeas action, not a post-conviction relief forum. Petitioner, based on the short sentence he received coupled with the time he had already served, was able to file his application for post-conviction relief within the one year statute of limitations. This Court held in Hamm that the petitioner in that matter “failed to file a PCR application raising any issue related to Padilla within one year of that decision, issued March 31, 2010, as required by section 17-27-45 of the

South Carolina Code.” Hamm at 464, 744 S.E.2d 503, 504. Therefore, this Court held Hamm was “barred from habeas corpus relief on his Padilla-related grounds. Id. at 465, 744 S.E.2d at 504.

Nonetheless, this Court addressed whether Hamm would have been entitled to relief regardless. Citing to Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005) for the notion that commitment pursuant to the SVP act does not automatically flow from the conviction, rather a civil proceeding entailing testing, evaluation, a probable cause hearing, and a trial, this Court suggested that he would not have been entitled to relief had he exhausted all other remedies. Id. at 465, 744 S.E.2d 504-5. Further, this Court suggested that Padilla does not extend to a person’s civil commitment to the SVP Act.

This Court also noted that Padilla does not apply retroactively. Hamm at 465, 744 S.E.2d at 505 n.4. Petitioner in the matter *sub judice* is not attempting to do; Padilla came out almost seven years before his guilty plea. Additionally and interestingly, the Hamm decision lists no counsel of record for Hamm on appeal.

In Hamm, this Court suggested that “[c]ommitment pursuant to the SVP Act does not automatically flow from the conviction, rather a civil proceeding occurs where the defendant is evaluated before confinement is certain.” 403 S.C. at 465, 744 S.E.2d at 504. The above statutory outline indicates numerous mandatory steps. The conviction is what prompts the proceedings.

The Page opinion relied on five cases from outside South Carolina to support the holding, including Pearman v. State, 764 So.2d 739 (Fla. Dist. Ct. App. App. 2000). However, Pearman was distinguished by State v. Stapleton, 764 So.2d 866 (Fla. Dist. Ct. App. 2000) for two reasons that are also applicable to Petitioner’s case. Firstly, unlike the defendant in Pearman, Stapleton

complied with the filing deadlines, much like Petitioner filed a timely application for post-conviction relief. 764 So.2d at 888. Secondly, at the time Stapleton entered his plea, Florida's equivalent of the SVP Act was in place and in effect, unlike Pearman but much like Petitioner's.

In Padilla v. Kentucky, the Supreme Court addressed Padilla's postconviction allegations after he pleaded guilty to a drug charges and faced deportation as a result. 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). Padilla relied on his attorney's advise that he "did not have to worry about immigration status since he had been in the country so long." Id. He claimed his counsel failed to advise him of the immigration consequences and he relied on the erroneous advise in pleading guilty to the drug charges "that made his deportation virtually **mandatory**." Id. at 359, 130 S.Ct. at 1478 (emphasis added). Much like commitment under the SVP Act, removal proceedings are civil in nature. The Court in Padilla held that Strickland applies to Padilla's claim: "We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." Id. at 366, 130 S.Ct. at 1482.

Similar to plea counsel's testimony that in her thirty-three years of practice, it would never have been part of her routine to look and see if a client had previously been subject to sexually violent predator proceedings, the Court in Padilla explained the duties counsel may have while representing an individual whose case entails complicated potential ramifications:

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal courts or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advise is equally clear.

Id. at 369, 130 S.Ct. at 1483 (footnote omitted).

At the conclusion of the PCR evidentiary hearing in Petitioner's case, counsel for the state noted that if a defense attorney were not to offer advice to a client at all, there could be no deficiency. App. 58 l. 17 – App. 59 l. 4. Padilla addressed that position:

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even where answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of the plea agreement.' When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the Strickland analysis.'

Id. at 370-71, 130 S.Ct. at 1484. (internal citations and footnote omitted).

In order to receive relief for ineffective assistance of counsel, a defendant must make two showings. First, he must show that his counsel's performance was deficient, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair result. Id. Counsel's performance under the first prong of the Strickland test is judged under the standard of "reasonableness under prevailing professional norms." Id. at 688, 104 S.Ct. 2052. To establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, Petitioner must demonstrate that his attorney's errors had an effect on the judgment against him. Id. at 691, 104 S.Ct. 2052.

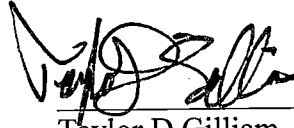
Petitioner took the plea deal because he was only going to be required to serve approximately five to seven months at the Department of Corrections. It was everyone's

understanding that he would be done with his sentence at that point. Given the choice of pleading guilty and being subjected to the SVP Act versus going to trial with a witness who did not wish to attend, Petitioner truthfully answered that he would have selected the latter. He was prejudiced by plea counsel's failure to advise him of the consequences of his plea.

Based on the holding in Padilla, and the realistic implications of having a conviction for a sexually violent offense in South Carolina, Petitioner would ask that this Court overturn State v. Page and hold that attorneys have the duty to advise clients of the potential SVP ramifications of pleas.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing on the issues raised herein.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of February, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

ANTONIO YOUNG,

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 Benjamin Limbaugh, 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 Antonio Young, #289735, at 4546 Broad River Road, , Columbia, SC 29210, this 26th day of February, 2020.



Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 26th day of February, 2020.

Marcy Allgood (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027.