

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2019-000446

JARRET GRADDICK,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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RESPONDENT'S ISSUES PRESENTED

Did the post-conviction relief court properly dismiss Petitioner's application where Petitioner was advised of the consequences of accepting the plea offer or going to trial and the plea was freely and voluntarily made?

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. *Smalls*, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

Petitioner was indicted on two kidnapping charges two armed robbery charges by a Charleston County grand jury on April 9, 2012. App. 163 — 170. Petitioner maintained his innocence throughout the process. App. 20 11. 11 - 13. On July 7, 2014, he pleaded guilty before the Honorable Roger M. Young, Sr. App. 1. Jennifer Shealy appeared on behalf of the state, and Andrew Grimes represented Petitioner. At the time of the plea, Petitioner was already incarcerated. App. 2 11. 5 - 14. At the outset of the plea, Petitioner moved to have plea counsel relieved. 1 App. 2 11. 5 - 17. In response, the plea judge characterized the plea offered by the state as "quite significant" and explained the three-strike concept. App. 2 1. 24 - App. 3 1. 21. Continuing to try and convince Petitioner to take the plea, the court calculated how long Petitioner had to serve and suggested that if he accepted it, he would have "a possibility of getting out and going to the movies and getting married and having a family." App. 4 1. 17 - App. 7 1. 5.

After a break and subsequent discussion with plea counsel, Petitioner pleaded guilty under Alford. The terms of the plea as outlined by the state were that Petitioner would receive a sentence of twenty years to be served concurrent to one another and his previous sentence. App. 11 11. 12-23. Before imposing a sentence, the plea court assured Petitioner it was a "good offer" for him to accept. App. 21 11. 15 - 20. The plea court then sentenced Petitioner to twenty years' concurrent. Id.

Petitioner filed an application for post-conviction relief on February 2, 2017. App. 24 57. It contained allegations of ineffective of counsel as well as "coerced guilty plea." App. 26. The state made its Return on or about July 6, 2017. App. 58 - 65.

An evidentiary hearing was held on December 3, 2018 before the Honorable G. Thomas Cooper, Jr. App. 66. James Falk represented Petitioner, and Kelly Oppenheimer appeared on

behalf of the state. Petitioner, his two co-defendants: Preston Swinton and Kenneth Murray, and the solicitor testified at the hearing.

The PCR court took the matter under advisement and requested proposed orders. App. 139 1. 25 - App. 140 1. 8. An Order of Dismissal was filed on March 13, 2019. App. 145 - 162.

RELEVANT FACTS

During the evidentiary hearing, Petitioner testified on his own behalf. Petitioner testified when he was brought to court on July 7, 2014, he did not know for what he was coming to court. He further testified at the time, he was serving a twenty-year sentence for another armed robbery. He testified he was advised that armed robbery was a strike offense. He elaborated on July 7th, he told the plea court he did not want to plead guilty and wanted to relieve Counsel. He further elaborated he wanted to relieve Counsel because Counsel was "not representing him as well." Petitioner explained Counsel only met with him three or four times, and Counsel had also represented him on his prior armed robbery charges. Petitioner also testified he did not want to plead guilty because he did not commit these crimes, and he told the plea court he did not want to plead. He testified, however, the plea court told him he would end up in a pine box, would be behind prison walls forever, and would die in prison if Petitioner were convicted at trial because he was eligible for a sentence of life without the possibility of parole (LWOP). He further testified the plea court also told him a plea would be a no brainer. Petitioner testified he wanted to exercise his right to proceed to trial, but the plea court and Counsel coerced him and forced him into pleading guilty. He testified he, Counsel, and Assistant Solicitor Shealy discussed an Alford plea. He elaborated he gave in to the pressures of pleading guilty. He further elaborated his understanding of an Alford plea was although he did not commit these crimes, he was

pleading to get "it" over with. He explained he was avoiding receiving a life sentence for something he did not do.

Petitioner further testified at the plea, the plea court spent a good deal of time advising him of the consequences of pleading guilty versus going to trial. He testified the plea court informed him even if he were acquitted on these charges, he would still have to serve twenty years in prison; but if he were convicted he would receive an LWOP sentence, which meant he would spend every single day of the rest of his life in prison. He further testified if he pled guilty, he would only be facing twenty years. He elaborated he thought the plea court was calling him stupid if he did not plead guilty. Petitioner testified, after having his memory refreshed, the plea court telling him it was not its job to convince Petitioner to plead guilty but it was its job to make sure Petitioner understood his options. He also testified the plea court informed him if he wanted to proceed to trial, to stop the proceedings. He further testified he informed the plea court he did not want Counsel to cross-examine any witnesses, did not want Counsel to suppress evidence, did not want Counsel to call witnesses on his behalf, and did not want Counsel to tell Petitioner's side of the story. He testified he informed the plea court it was his decision to plead guilty and also informed the plea court no one had forced him into pleading guilty or promised him anything in exchange for the plea. He elaborated he lied when he told the plea court no one had forced him.

He testified Counsel showed him the discovery in this case, and there was neither fingerprint nor DNA evidence. He further testified he wanted an investigation into his case. He testified he was not near the Piggly Wiggly on the night of this robbery, and he was not identified by anyone in the store. He also testified he expected Preston Swinton and Kenneth Murray to testify at trial on this armed robbery and expected they would testify to the truth. He

He also elaborated Swinton and Murray would testify he was not involved in this crime. He also explained both Swinton and Murray were charged in connection with these crimes.

Following Petitioner's testimony, Preston Swinton testified. Swinton testified he is currently housed at Kirkland Correctional Institution and is serving sentences for armed robbery, strong arm robbery, possession with intent to distribute, and weapons charges. He explained his armed robbery conviction is in connection with the armed robbery of the Piggly Wiggly, and he pled guilty to that armed robbery and received a fourteen-year sentence. He further explained his plea was not contingent on anything, and he was not supposed to testify at Petitioner's trial.

He testified he was involved in the armed robbery of the Piggly Wiggly, but Petitioner was not. He elaborated Petitioner was not there, was not driving the car, and did not have a gun. He further testified he gave a statement to law enforcement, but Investigator Hembree wrote the statement and coerced his answers. He testified, however, he signed the statement. Swinton also testified in this statement, he said Petitioner had an uzi during this robbery. He elaborated He further elaborated Investigator Hembree coerced him into pinpointing Petitioner. Investigator Hembree did not hit him, but rather continuously brought up Petitioner's name during the interview.

Swinton recalled meeting with Assistant Solicitor Shealy about this robbery, but did not recall specifics. He denied telling Assistant Solicitor Shealy he had known Petitioner since he was a teenager, and testified he had not known Petitioner since he was a teenager because he was living in Georgia at the time. Swinton denied telling Assistant Solicitor Shealy Petitioner had an uzi during the robbery and denied telling her about the plan to rob the Piggly Wiggly. He further denied telling Assistant Solicitor Shealy about an armed robbery for which no one was charged.

Swinton also denied having any communication with Petitioner or Petitioner's mother since being in prison.

Following Swinton's testimony, Petitioner presented the testimony of Kenneth Murray. Murray testified he is currently housed in Lieber Correctional Institution, and is serving a twenty-eight year sentence for armed robbery. He explained the armed robbery for which he was sentenced to twenty-eight years does not involve the armed robbery of the Piggly Wiggly. He further explained he did not plead guilty to the Piggly Wiggly armed robbery, but he was charged in connection to that armed robbery and those charges were dismissed without prejudice. He testified he was accused of being involved in the armed robbery of the Piggly Wiggly, but he, Swinton, and Petitioner were not there. Murray also testified he is Petitioner's cousin, and he has communicated with Petitioner since being in prison. He further testified Petitioner's mother has also visited him in prison.

Murray testified he was approached by law enforcement and taken into custody, but they did not have a warrant for him. He testified he was held at the police station for ten to eleven hours, and law enforcement forced names on him. He elaborated he was denied food and water during this interview and was also denied bathroom breaks. He further elaborated Investigator Hembree woke him up by kicking his chair. Murray testified he gave a statement⁴ about the Pizza Hut and Piggly Wiggly robberies in order to get away from Investigator Hembree. He testified Investigator Hembree wrote the statement, but Murray signed the statement as being true. He further testified he implicated Petitioner in this statement, but the statement was coerced. He elaborated he had no information about Petitioner being at the Piggly Wiggly or having a gun. Murray also testified prior to his trial on the Pizza Hut armed robbery, a Jackson v.

Denno6 hearing was held regarding his statement, and the judge found his statement was voluntarily given and admissible.

Petitioner then rested his case, and Respondent presented the testimony of Assistant Solicitor Shealy. She testified she has been practicing law since 1986 and has been employed at the Ninth Circuit Solicitor's Office for approximately twelve years. She testified she prosecutes murder, armed robbery, and rape cases.

She further testified Petitioner and his co-defendants committed a string of armed robberies in the Mount Pleasant area along the Isle of Palms connector. Assistant Solicitor Shealy further testified Petitioner was charged with the armed robbery of the Cricket store, the Piggly Wiggly, and the Golden Bull, which was nolle prossed. She explained none of the charges of any of these co-defendants were nolle prossed because these co-defendants were not involved in the crimes. She further explained she used her discretion in dismissing Murray's charge of armed robbery in connection with the Piggly Wiggly because she did not want to use up the court's time. She testified the armed robbery of the Piggly Wiggly occurred late at night, and she had a videotape of this robbery. She explained the two bag boys at the store were seen high-fiving each other at the end of their shift, when Petitioner, Murray, and Swinton entered the store wearing masks and carrying menacing weapons. She testified the robbers were all of varying heights and wearing masks, but there was nothing special about their clothing. She further testified no one at the Piggly Wiggly could specifically identify Petitioner.

She further explained Petitioner and his co-defendants fled the scene, and Dante Smalls drove the getaway vehicle. Assistant Solicitor Shealy also testified Petitioner was identified fleeing the area, and speeding into the yard of Petitioner's home. She explained the witness who identified the car fleeing the area gave Petitioner's and Murray's name to law enforcement and

alerted law enforcement to look for them. She further explained the Piggly Wiggly is close to Petitioner's home, approximately three or four miles. She also testified both Petitioner and Murray are known as troublemakers in the area, and the neighbor alerted law enforcement to She testified the tip indicated Petitioner was hiding off their odd behavior that night. Crosstown; and when law enforcement responded, both Petitioner and Swinton were found hiding under a house.

She testified she interviewed both Swinton and Smalls in connection with this armed robbery. She testified when she interviewed Swinton, he indicated he was present at the Piggly Wiggly robbery, and he had always been jealous of Petitioner because he always had guns and money. She further testified Swinton informed her Petitioner was involved in the Piggly Wiggly robbery and had an uzi during the robbery. She testified Swinton also implicated Smalls and Murray in this armed robbery. She explained her interview with Swinton was persuasive, and it echoed her interview with Smalls. She further explained Smalls told her he was the driver, and his car was hidden during this robbery. Assistant Solicitor Shealy testified Smalls told her he saw the uzi and implicated Petitioner, Swinton, and Murray in this armed robbery. She further testified both Swinton and Murray gave statements to law enforcement implicating themselves and Petitioner.

Assistant Solicitor Shealy also testified at trial, she would have primarily presented eyewitness testimony. She explained she would have had Swinton, Smalls, and Petitioner's neighbor testify. She further testified Petitioner 's neighbor would identify Petitioner's clothing and car, seen fleeing the area of the crime scene. She testified there was no DNA evidence in connection with the Piggly Wiggly robbery, but there was DNA evidence in connection with the Cricket robbery, with which Petitioner also denied being involved. She also testified the gun was

never recovered. Assistant Solicitor Shealy testified, however, she believed the evidence against Petitioner was strong.

She testified Petitioner was brought to court on July 7, 2014, because he had rejected the plea offer she had made, and she wanted the rejection of the offer on the record. She explained because this was an LWOP-situation and she had filed LWOP-notice, she wanted everything vetted out in the courtroom. She further explained it was her understanding Petitioner was going to reject the offer and attempt to relieve Counsel. She testified during that hearing, Petitioner asked to speak with her. She further testified when she spoke with Petitioner during the hearing, he attempted to charm her into offering a sentence of less than twenty years. She testified Petitioner's decision to plead guilty was smart, as he was avoiding a potential life sentence. Assistant Solicitor Shealy testified neither she nor Counsel forced Petitioner into pleading guilty. She explained Counsel was a zealous trial advocate, who would not talk his clients into pleading guilty. She further explained Counsel had represented Petitioner in his trial on another armed She robbery charge, during which they presented Petitioner's mother as an alibi witness. She testified Petitioner's mother is an enabler and zealously attempts to protect Petitioner. She explained Murray is easily manipulated by Petitioner and Petitioner's mother.

Assistant Solicitor Shealy also testified she pursued this armed robbery charge with respect to Petitioner because he was only sentenced to twenty years imprisonment for the Cricket armed robbery, whereas Murray received a twenty-eight year sentence on the Pizza Hut armed robbery. She explained she had Petitioner's name as a suspect in many more armed robberies than Murray's. She further testified she took Swinton's cooperation, willingness to take responsibility, and willingness to testify against Petitioner into consideration when offering Swinton a fourteen-year plea deal for the armed robbery of the Piggly Wiggly.

ARGUMENT

The post-conviction relief court properly dismissed Petitioner's application where Petitioner was advised of the consequences of accepting the plea offer or going to trial and the plea was freely and voluntarily made

Petitioner contends he was coerced into pleading guilty under Alford by plea counsel and the plea judge, where the plea judge opined that Petitioner would die in prison unless he pleaded guilty, and where his resulting plea was neither freely nor voluntarily made. However, the post-conviction relief court properly dismissed Petitioner's application where he was advised of the consequences of accepting the plea offer and his waiver of constitutional rights, as well as indicating to the plea judge that he was not being forced to accept the plea.

A 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.* at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Voluntariness of a guilty plea is not merely determined by an examination of a specific inquiry by the plea court alone but rather is determined by the record of both the guilty plea proceeding and the post-conviction relief hearing. *Id.* However, the overarching concept remains "a guilty plea should only be accepted where the record evidences an affirmative showing that it was intelligent and voluntary." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (internal quotation omitted); *Parke v. Raley*, 506 U.S. 20, 29 (1992). This is because "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

"[While most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Alford*, 400 U.S. at 37. Indeed, "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* The Supreme Court in *Alford* noted:

That [the defendant] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.

Id. at 30. In essence, an *Alford* plea is a guilty plea, which carries the same penalties and punishments. *State v. Herndon*, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013). Furthermore, the entry of an *Alford* plea "has the same preclusive effect as a standard guilty plea." *Zurcher v. Bilton*, 379 S.C. 132, 137, 666 S.E.2d 224, 227 (2008). Indeed, in South Carolina, "there is no significant distinction between a standard guilty plea and an *Alford* plea." *Herndon*, 403 S.C. at 93, 742 S.E.2d at 380.

Key to the analysis in reviewing a plea for voluntariness is looking to "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Raley*, 506 U.S. at 29 (quoting *Alford*, 400 U.S. at 31). In order to find a guilty plea was knowingly and voluntarily entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin*, 395 U.S. at 244.

Petitioner's contention that he was coerced into accepting the plea by the plea judge is unfounded and directly refuted by the record. The plea court reviewed with Petitioner all of his

constitutional rights that he would be waiving and Petitioner acknowledged that he understood and wished to waive those rights. Petitioner informed the plea court that he did not wish to present any evidence on his behalf or call any witness. Furthermore, Petitioner answered affirmatively that no one had promised him anything or forced him to plead guilty and that it was his decision to accept the plea.

Further, the plea court's comments to Petitioner were not coercive in nature and were for the purpose of thoroughly explaining the consequences of either accepting or rejecting the plea offer. The plea court thoroughly explained to Petitioner the significance of strike offenses, LWOP, and what a concurrent sentence would mean for his case. Significantly the plea court stated the following: "I'm not trying to convince you. It's not my job to convince you, but it is my job to make sure that you understand what the deal is, and I have explained what the deal is to you." The plea court again reiterated to Petitioner that he was the only person who could make the decision as to whether to accept the plea or proceed to trial. The plea court then explained to Petitioner the possibility for entering an Alford plea and allowed Petitioner to recess to speak with his attorney about pursuing that option. The plea court, in doing so, properly followed the procedures outlined in *Harden v. State of South Carolina*, 276 S.C. 249, 277 S.E.2d 692 (1981) in offering a potential solution to the parties in an effort to avoid proceeding to trial. The commentary of the plea court in this case simply illustrated to Petitioner the potential consequences of proceeding to trial and being found guilty, he would in fact spend the rest of his natural life in prison. The plea court accurately informing Petitioner of the potential consequences of his decision is in no way coercive and in fact would grant Petitioner the opportunity for a more knowing and informed decision.

Finally, Petitioner attempts to incorporate an ineffective assistance of counsel claim in his argument that was not raised in the lower court and thus cannot be raised for the first time on appeal. Petitioner argues in his conclusion that his charges could have been dismissed but for a lack of investigation and counsel did not advise Petitioner accordingly, however, neither of these issues are stated in Petitioner's issue statement and thus are not before this court. Petitioner's issue is whether the plea court's comments were coercive and thus made his plea not freely, voluntarily, or intelligently made. Petitioner has failed to meet his burden in showing he was coerced into accepting the plea and Petitioner's own statements to the plea court on the record directly refute this claim. The post-conviction relief court properly denied Petitioner's application where Petitioner was advised of the consequences of accepting or rejecting the plea offer and Petitioner stated on the record that he had not been forced into accepting the plea. This Court should therefore deny Certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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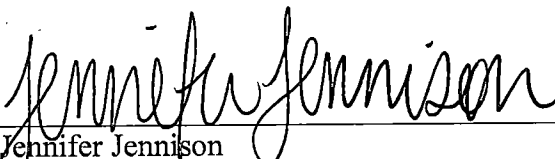
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the of the Return to Petition for Writ of Certiorari has been served upon the applicant by placing two copies in Interagency Mail addressed to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This the 26th day of February, 2020.



Jennifer Jennison
Administrative Coordinator for Respondent



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MAR 04 2020

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

March 4, 2020

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Jarret Graddick v. State of South Carolina
Appellate Case No.: 2016-000446

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jaj
Enclosures

cc: Taylor D. Gilliam, Esquire
Victim Advocacy Division