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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

Honorable Jennifer B. McCoy, Circuit Court Judge

TRAVIS A. LEE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000047

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR court err in finding petitioner's guilty plea was voluntarily, intelligently, and knowingly tendered where the record showed prior to pleading guilty petitioner rejected the same negotiated plea offer two times and petitioner and defense counsel both testified at the evidentiary hearing that counsel did not have adequate time to prepare for trial, petitioner was under enormous pressure to plead guilty, and petitioner lacked sufficient time to make such an important decision?

STATEMENT

Procedural history

On May 21, 2015, petitioner was indicted by a Jasper County grand jury for attempted murder, kidnapping, and conspiracy. App. 133-38. On May 13, 2016, petitioner pled guilty, as indicted with a negotiated sentence range of fifteen to twenty years, before the Honorable Michael Nettles. App. 1. Donald Colongeli represented petitioner, and Sean Thornton, assistant solicitor, represented the state. App. 1. Judge Nettles sentenced petitioner to concurrent terms of eighteen years' imprisonment for attempted murder, eighteen years' imprisonment for kidnapping, and five years' imprisonment for conspiracy.

Thereafter, petitioner filed an application for PCR on March 27, 2017. App. 23-32. An evidentiary hearing was held before the Honorable Jennifer McCoy. App. 41. James Falk represented petitioner, and Sara Gunton, assistant attorney general, represented the state. App. 41.

On October 23, 2019, Judge McCoy signed an order denying petitioner's application for PCR. App. 121-21. Judge McCoy found petitioner's guilty plea was voluntary, intelligent, and knowing. The judge found petitioner presented no evidence at the evidentiary hearing that his guilty plea was not voluntary and found, based on the plea hearing, petitioner was fully informed of his constitutional rights, understood the charges against him, was aware of his potential sentence exposure, and was satisfied with counsel. Judge McCoy also found it was clear from the testimony presented that petitioner accepted the negotiated plea offer, with advice of counsel, to mitigate his sentencing exposure. App. 130-31.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding petitioner's guilty plea was voluntarily, intelligently, and knowingly tendered where the record showed petitioner rejected the same negotiated plea offer two times previously and petitioner and defense counsel both testified at the evidentiary hearing that counsel did not have adequate time to prepare for trial, petitioner was under enormous pressure to plead guilty, and petitioner did not have sufficient time to make such an important decision.

Relevant facts

At petitioner's guilty plea hearing, the state alleged that in 2015, petitioner and co-defendant, Jonathan Lilly, through a series of text messages, lured Mr. Grant[1] to a location by pretending to be a woman Grant was trying to meet. The state claimed that when Grant arrived, petitioner and the co-defendant brutally beat him, including stabbing him several times and lighting him on fire. They tied Grant's hands behind his back and loaded him into a truck and drove away. Grant was able to roll out of the truck bed and escape. App. 4, l. 20-6, l. 17.

The state's best evidence indicating petitioner's involvement in the incident was a phone call made from Grant's phone to a woman the state claimed was petitioner's girlfriend. App. 6, l. 24-7, l. 10. Additionally, Grant identified petitioner from a lineup as being there during the attack. Lilly was wearing a GPS ankle monitor, which put him at the scene of the incident. App. 5, ll. 17-21; 6, ll. 5-10.

At the evidentiary hearing, petitioner testified and presented testimony from his prior defense counsel in this case, Robert Hughes, as well as defense counsel, Donald Colongeli, whom he later retained. Throughout the evidentiary hearing, petitioner continuously maintained

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[1] Mr. Grant's full name is never stated in the record.

that he wanted to go to trial and never wanted to plead guilty. App. 47, l. 11; 52, ll. 19-21; 53, ll. 14-16; 65, ll. 10-25; 71, ll. 10-11; 75, l. 7; 115, ll. 6-17. When petitioner was arrested, he was appointed Robert Hughes as counsel. During the time Hughes represented petitioner, the state extended a negotiated guilty plea offer for petitioner to plead guilty, as indicted, for a sentence ranging from fifteen to twenty years. Petitioner rejected that offer on two separate occasions. App. 49, ll. 16-21. Hughes made a motion to sever the trial so that petitioner would be tried separately from his co-defendant, which was denied. In early May, petitioner and his family decided to hire private counsel to represent him at his May 16, 2016, trial. App. 51, l. 8-52, l. 11.

Petitioner retained Don Colongeli on May 2, 2016. On May 6, 2016, Colongeli visited petitioner to prepare for trial. App. 52, ll. 12-22. During the visit petitioner asked Colongeli to move for a continuance because his trial date, May 16, was quickly approaching. Colongeli told petitioner the judge would likely deny a motion for continuance. App. 53, 1-7. On May12, Colongeli visited petitioner again and told him his co-defendant was taking a plea agreement and would testify against him. Petitioner insisted he still wanted to go to trial. App. 57, ll. 7-14. That same day, Colongeli told petitioner he would have him transported to court the following day, May 13, to see whether his co-defendant was actually going to plead guilty. App. 58, ll. 2-6.

On May 13, 2016, petitioner was transported to court. When they spoke, petitioner said Colongeli had totally changed his stance on the case. Suddenly, Colongeli had totally lost confidence in his ability to try the case and began trying to persuade petitioner to take the negotiated guilty plea that petitioner had twice rejected. App. 58, ll. 7-14. Petitioner said Colongeli tried to convince him that taking this plea offer was the best idea because if he lost at trial petitioner would be facing a potential sentence of fifty-five years. App. 59, ll. 10-21.

Petitioner testified that he was an "emotional wreck," and felt a lot of pressure because he was not given much time to decide. App. 60, ll. 19-25. Ultimately petitioner felt he had no other viable choice: (1) he either had to go to trial in three days with an attorney who did not feel prepared and had no confidence or, (2) he had to plead guilty that day on the spot. App. 63, l. 21-64, l. 7; 79, ll. 12-19.

Robert Hughes testified that he probably agreed to sit second chair on petitioner's case because he knew "there was a limited amount of time" and "the private attorney wasn't fully up to speed." App. 83, l. 14-84, l. 2. Hughes said the state had very little evidence against petitioner and his recollection was that Grant had made a "tentative identification" of petitioner as having been there during the incident. App. 85, ll. 10-24. On cross-examination the assistant attorney general asked Hughes if he believed it was in petitioner's best interest to plead guilty. Hughes responded that it would have been in petitioner's best interest to testify against his co-defendant, who the state wanted "more than anything." However, petitioner never admitted any guilt to Hughes or ever indicated he was even a bystander at the incident, and petitioner, therefore, refused to cooperate with the state. App. 86, ll. 4-12.

Donald Colongeli agreed that he was retained by petitioner on May 2, only three weeks from petitioner's May 16, trial. According to petitioner's file, Colongeli said he sent his letter of representation along with a request for a continuance in his case to the solicitor on May 5. App. 91, l. 13-92, l. 5. Colongeli's recollection was that he was hired to obtain a better offer for petitioner from the state. App. 93, ll. 1-3. Colongeli testified that, other than petitioner's co-defendant's testimony against him, the state did not have much evidence against petitioner and there were a great deal of mitigating circumstances, but the seriousness of the case was what made him feel trial was a risky decision. App. 94, ll. 16-20; 95, l. 16-96, l. 6. Colongeli also

said he understood why petitioner testified that he seemed to lose confidence and petitioner was justified in feeling "shortchanged." App. 96, ll. 9-23. Colongeli agreed that petitioner was under a great deal of pressure and he was shocked, at the plea hearing, when petitioner told the judge he was satisfied with counsel because petitioner was very upset that day. App. 110, ll. 23-25; 111, ll. 3-17.

Discussion

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon 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, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). A defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59.

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea. *Dover v. State*, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980)). 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." *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993).

When determining issues relating to guilty pleas, the appellate court will consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR

hearing. *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984). Specifically, 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. *Id.* (emphasis added).

There is a reasonable probability but for counsel's advice petitioner would not have pled guilty and would have have gone to trial. *See Hill*, 474 U.S. at 59. Both Colongeli and Hughes testified the state had very little evidence of petitioner's guilt. Petitioner's own testimony, which both Hughes' and Colongeli's testimonies corroborated, demonstrated that he rejected the same plea offer he was later pressured to accept two separate times indicating that he had a strong desire to go to trial. Colongeli admitted petitioner was under a great deal of pressure and that he may not have had enough time to consider the plea offer. Also, petitioner testified numerous times at the evidentiary hearing that he never wanted to plead guilty. Petitioner hired Colongeli with the belief that Colongeli would secure a continuance and prepare for trial. Instead, Colongeli unsuccessfully attempted to secure a better plea deal and then pressured petitioner into accepting a deal petitioner had previously rejected when Colongeli knew he was not prepared for trial.

The PCR court incorrectly found that petitioner presented no testimony or evidence at the evidentiary hearing that his plea was not voluntarily made. Along with the testimony referenced above, it was undisputed that counsel Colongeli was hired only three weeks before petitioner's trial, and Colongeli's testimony indicated Colongeli did not feel comfortable trying petitioner's case with such limited time to prepare.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2020.