STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Sep 29 2020

S.C. SUPREME COURT

Certiorari to Spartanburg County

Thomas A. Russo, Circuit Court Judge

DENNIS RAY ALEXANDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000141

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel provided effective representation where plea counsel did not advise Petitioner he was entitled to an immunity hearing pursuant to the Protection of Persons and Property Act, since, absent this critical knowledge, Petitioner's pleas of guilty were not knowingly, voluntarily, and intelligently tendered?

STATEMENT

A Spartanburg County Grand Jury indicted Petitioner for attempted murder, possession of a weapon during the commission of a violent crime, and distribution of cocaine base. App. 132 – 135. On October 2, 2017, Petitioner appeared before the Honorable J. Mark Hayes, II, and pleaded guilty as indicted pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). App. 1; App. 3, ll. 9-22. Petitioner was represented by Andrew Johnson. The State was represented by Jennifer Jordan and Spenser Smith. App. 1.

At approximately six-o'-clock in the morning on March 14, 2016, Petitioner, who was at home with his two-year-old son, was in his bedroom when he was awakened by a loud noise and then "rumbling down the hallway." App. 9, l. 7 – 10, l. 6; App. 20, ll. 10-12. Petitioner fired a single gunshot into the hallway, which struck Officer Dawkins in the arm. App. 9, l. 21 10, l. 1. Officer Dawkins and other officers were present in Petitioner's home that morning after breaking down his door so they could serve a search warrant for drugs. App. 8, l. 23 – 9, l. 11. No drugs were found. App. 19, ll. 15-16. Officer Dawkins suffered pain and muscle spasms from the injury. App. 16, ll. 19-24.

At the plea hearing, the solicitor claimed that Dawkins "knocked and announced" the fact that there were police at the door before officers breached the door. App. 9, ll. 11-15. When the plea judge asked Petitioner if he agreed with the facts recited by the State, Petitioner said, "I never heard them announce police or none of that right there." App. 11, ll. 16-17.

Petitioner was asleep when officers breached his door. App. 20, ll. 8-10. Plea counsel said that this case did not involve a "no-knock" warrant and noted that Petitioner had consistently maintained that he "never heard anything along the lines of police or search warrant or anything like that." App. 20, ll. 10-13. According to plea counsel, a witness in the home

initially gave a statement that he did not hear the officers announce their presence until after the door was broken down, but after further interrogation, that witness said, "[H]e wasn't sure." App. 20, ll. 14-24. At least one officer neglected to initially report that a knock and announce was done, although he, too, changed his story after being questioned further by other officers. App. 20, l. 25 – 21, l. 5.

The State recommended a cap of twenty years, and recommended that the sentences be run concurrent with each other and with a ten year federal sentence Petitioner received "for a weapons violation directly related to this case." App. 3, l. 20 – 4, l. 2. The plea court sentenced Petitioner to serve concurrent terms of imprisonment of twenty years for attempted murder, five years for possession of a weapon during the commission of a violent crime, and five hundred and sixty-six days for distribution of cocaine base. App. 25, ll. 1-13; App. 136 – 138.

After Petitioner's plea and sentencing, he timely filed an application for post-conviction relief (PCR) and the State made its return. App. 27 – 37; App. 38 – 46. Petitioner then filed an amended PCR application. App. 47 – 49. On March 4, 2019, a hearing was held on the matter before the Honorable Thomas A. Russo. Susannah Ross represented Petitioner and Johnny James, Jr. represented the State. App. 51.

Petitioner testified that he did not have any lengthy conversations about self-defense with plea counsel, and he explained that counsel never spoke with him about the possibility of a pre-trial immunity hearing. App. 65, l. 22 – 66, l. 2. Critically, this testimony was not disputed by plea counsel. Plea counsel testified that he had no "specific recollection" of ever discussing an immunity hearing with Petitioner. App. 78, ll. 19-23.

Counsel said he had information regarding the Protection of Persons and Property Act (the Act) printed out in his file, so he assumed that he had spoken about the matter with

Petitioner. App. 78, l. 23 – 79, l. 2. Plea counsel was again asked whether he discussed the Act with Petitioner and he said, “I do not have a specific recollection of that.” App. 79, ll. 22-24. Plea counsel also said he thought an immunity hearing would have been “a difficult thing to win” because the complainant was a police officer, and the Act did not offer immunity to one who used deadly force against a police officer when the officer has identified himself, and plea counsel expected the police officers to testify that they did knock and announce. App. 79, l. 3 – 84, l. 18.

On January 13, 2020, the PCR court issued an order of dismissal in which addressed, *inter alia*, Petitioner’s allegation that counsel provided ineffective assistance in failing to move for immunity or otherwise advise Petitioner regarding the Act. App. 120; App. 124. The order of dismissal noted that per S.C. Code Ann. § 16-11-440(B)(4), the presumption of reasonable fear contained in S.C. Code Ann. § 16-11-440(A) does not apply if the person against whom deadly force is used is a police officer carrying out his duties after identifying himself. App. 124.

The order of dismissal incorrectly stated that plea counsel testified he discussed immunity with Petitioner. As seen, plea counsel testified he did not remember whether he discussed immunity with Petitioner and Petitioner said they did not discuss it. Nevertheless, the order of dismissal stated,

> Counsel fully explained the strengths and weaknesses of Applicant’s case, both in the context of the State’s burden at trial and Applicant’s burden in proceeding to an immunity hearing. Counsel and Applicant weighed the value of proceeding to an immunity hearing against the fact that they would lose the plea offer by doing so, and determined they did not wish to risk the favorable plea offer on a slim chance of prevailing.

App. 126.

The order continued,

> The Court finds that given the facts before it, Applicant has failed to show that had he proceeded to an immunity hearing, he would have prevailed. To the contrary, based on the record before this Court, the Court finds there is no credible evidence to refute law enforcement's anticipated testimony that they knocked on the door, announced their presence, and identified themselves as police before storming the house. For all of these reasons, the Court finds Applicant has failed to meet his burden of showing any deficiency on the part of Counsel, or any prejudice from the deficiency alleged, and his request for relief by way of this allegation is DENIED.

App. 126.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding plea counsel provided effective representation where counsel did not advise Petitioner he was entitled to an immunity hearing under the Protection of Persons and Property Act, since, absent this critical knowledge, Petitioner's pleas of guilty were not knowingly, voluntarily, and intelligently tendered.

Petitioner's pleas were not voluntarily, knowingly, and intelligently entered because he lacked an understanding of the law in relation to the facts of his case based on plea counsel's deficient performance, since plea counsel failed to advise Petitioner that he could seek immunity from prosecution under Protection of Persons and Property Act (the Act).

"When applicable, the Act provides immunity from prosecution." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 265-66 (2013). "Immunity under the Act is . . . a bar to prosecution and, upon motion of either party, must be decided prior to trial." *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011).

S.C. Code Ann. § 16-11-440(A) provides that,

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person: (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

However, S.C. Code Ann. § 16-11-440(B) provides in relevant part that,

> The presumption provided in subsection (A) does not apply if the person: . . . (4) against whom the deadly force is used is a law enforcement officer who enters or attempts to enter a dwelling, residence, or occupied vehicle in the performance of his official

> duties, and he identifies himself in accordance with applicable law or the person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

Similarly, S.C. Code Ann. § 16-11-450(A) provides that,

> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

Petitioner had a statutory right to a pretrial immunity hearing and counsel was deficient for failing to advise Petitioner of that right, since the Act was potentially applicable to the facts of the case and could have provided complete immunity. As seen, counsel was aware of the

potential applicability of the Act. He should have so advised Petitioner such that Petitioner was aware that he possessed this right and that pleading guilty would waive the right. *Strickland*, 466 U.S. at 687.

The PCR court's finding in its order of dismissal that counsel "fully explained" immunity to Petitioner and its finding that counsel and Petitioner "weighed the value of proceeding to an immunity hearing against the fact that they would lose the plea offer by doing so . . ." is simply without factual support in the record. App. 126. As seen, counsel twice testified that he did not recall whether he discussed immunity with Petitioner. Petitioner testified that he did not discuss this concept with counsel. App. 78, l. 19 – 79, l. 24; App. 65, l. 22 – 66, l. 2. This finding was error, and counsel was deficient for failing to discuss immunity with Petitioner.

The record of a guilty plea must be sufficient to show the defendant "has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). *See McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts"). Here, counsel's failure to advise Petitioner that he could seek immunity under the Act left Petitioner without an understanding of the law in relation to the facts of his case, and thus his pleas were involuntary. *McCarthy*, 394 U.S. at 466.

As to prejudice, the PCR court's finding that Petitioner failed to establish prejudice was based on an error of law. To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance

affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

Here, however, the PCR court found Petitioner did not establish prejudice because he did not show he would have prevailed at an immunity hearing. App. 126. This was error. As seen, the correct prejudice standard in the context of a guilty plea is whether or not the applicant would have proceeded to trial but for counsel's deficient representation. *Frierson v. State*, 423 S.C. at 262, 815 S.E.2d at 436.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of September, 2020.

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Counsel for Dennis Ray Alexander states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Thomas A. Russo, which was held on March 4, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Dennis Ray Alexander.

Respectfully Submitted,

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of September, 2020.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson 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."

s/ *Joanna K. Delany*
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This 29th day of September, 2020.