

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Nov 23 2020**

**S.C. SUPREME COURT**

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Certiorari to Aiken County

Honorable J. Cordell Maddox, Circuit Court Judge

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GILBERT EDWARD DAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001247

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REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_  
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## ARGUMENTS IN REPLY

I. Plea counsel's belief that Griffin was not obligated to cooperate with plea counsel's pre-hearing questioning on what Griffin planned to tell the plea court was not dispositive regarding his failure to investigate because his belief that Griffin was not bound to cooperate was not a legitimate reason to not question Griffin on what he planned to tell the plea court.

Petitioner would not have pled guilty had he known Detective Griffin was going blame his wife's suicide on him at the plea hearing. App. 50, ll. 20 – 23. Plea counsel had a duty to investigate into what the state's witnesses were going to tell the plea court during Petitioner's guilty plea hearing as it inevitably has an impact on sentencing. ("The court acted within its discretion in its consideration of the entire record and its determination of [the defendant's] sentence." State v. Quinn, 430 S.C. 115, 126, 843 S.E.2d 355, 361 (2020) (citing State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 745 (2007))). As such plea counsel should have questioned Detective Griffin regarding what he was going to tell the plea court prior to the plea hearing.

Despite Detective Griffin not having an obligation to be forthcoming to plea counsel, it was still incumbent upon plea counsel to do his due diligence and investigate. An attorney must conduct a reasonable investigation into "all reasonably available mitigation evidence and reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

There was no reason to believe that Griffin would not have been forthcoming with plea counsel's investigation. Additionally, even if Griffin did not cooperate with plea counsel's pre-hearing questioning, Griffin's obstructiveness would have clued plea counsel into the fact that Detective Griffin was *not* going to be a helpful witness to Petitioner. After learning that Griffin would not be helpful, plea counsel would have been better able to determine whether advising

Petitioner to proceed with the guilty plea was proper strategy. Instead, plea counsel testified at the PCR hearing that he believed Detective Griffin was going to speak in favor of Petitioner at the guilty plea hearing and erroneously advised Petitioner that, which induced him to plead guilty involuntarily. App. 50, ll. 20 – 23; App. 76, l. 7 – 77, l. 13; App. 84, l. 24 – 85, l. 7.

Thus, plea counsel provided ineffective assistance of counsel for failing to investigate into what the state's witness planned to tell the plea court because his belief that the witness would not cooperate with his questions was not a valid justification for failing to investigate.

II. That plea counsel attempted to respond after Griffin spoke during the plea hearing but was stopped by the plea court was not a legitimate reason to fail to investigate into what Detective Griffin was planning to tell the plea court prior to the plea hearing.

Plea counsel's attempt to respond after Griffin's irrelevant and prejudicial comments was of no consequence regarding his duty to investigate prior to the guilty plea hearing. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). Plea counsel was required *prior to Appellant pleading guilty* to investigate into the witnesses that would speak at the plea hearing. One component of the duty to investigate is to contact witnesses and to determine whether their testimony would aid the defense. Id. Here, plea counsel's attempt to respond illustrated the severe effect that Griffin's comments had during the hearing and corroborated Petitioner's testimony that the comments had a "dramatic impact" on the plea judge's demeanor, but did not absolve plea counsel of his duty to investigate prior to the plea hearing. App. 16, l. 25 – 17, l. 1; App. 49, l. 25 – 50, l. 7.

Therefore, plea counsel's failure to investigate was not alleviated by his attempt to respond to Griffin's statements at the plea hearing.

III. The plea court has wide discretion in its sentencing determinations; however, the court did not have discretion to impose a sentence based in part on the impermissible consideration derived from Griffin’s statement that Petitioner’s wife killed herself because of him.

While the plea court had wide discretion in what it could consider for sentencing, considering irrelevant and unproven accusations was not proper. (“A sentence may be rendered substantively unreasonable if the district court relied on an improper consideration during sentencing.”) United States v. Hargrove, 625 F.3d 170, 184 (4<sup>th</sup> Cir. 2010) (citing United States v. Fowler, 948 F.3d 663, 668 (4<sup>th</sup> Cir. 2020)). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” Way v. State, 410 S.C. 377, 764 S.E.2d 701 (2014) (see also Bridges v. Wyandotte Worsted Co., 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961)). Here, Griffin’s allegation to the plea court that Petitioner was responsible for his wife’s suicide was unproven and without evidentiary support. App. 15, l. 14 – 16, l. 22.

As far as undersigned counsel is aware, the issue of the state injecting unfounded, unproven, and unfairly prejudicial accusations into a guilty plea hearing is a matter of first impression in South Carolina. However, other jurisdictions have addressed the issue. State v Lambert, 147 N.H. 295, 787 A.2d 175 (N.H. 2001) (Admitting improper evidence at sentencing requires remand for reconsideration of sentence unless it is clear that judge gave it no weight.); State v. Carrillo, 597 N.W.2d 497 (Iowa 1999) (“When a trial court considers an improper sentencing factor, we require a remand for resentencing ... . [This is because] there is no way of knowing what sentence would have been pronounced had the improper factor not been considered.”)

The test for determining whether a sentence was tainted by improper information is whether the information was impermissible as a matter of law and whether the improper information formed part of the sentencing basis in the judge's mind. Arthur W. Campbell, *Law of Sentencing* § 9.8 (2020). In this case, Griffin alleged, without proving, that Petitioner was responsible for his wife's suicide. App. 15, l. 14 – 16, l. 22. Petitioner was also never charged for the years of abuse that Griffin said Petitioner inflicted on his wife prior to her suicide. *Id.* Accordingly, Griffin's statements were an improper sentencing consideration as a matter of law.

The improper information from Griffin formed part of the sentencing basis in the judge's mind as evidenced when Petitioner testified at his PCR hearing that the plea judge's demeanor drastically changed directly after hearing Griffin's statements. App. 50, ll. 2 – 7. During the guilty plea hearing, plea counsel also recognized the impact of the comments on the plea court and tried to respond but the damage had been done and the court did not allow plea counsel to speak. App. 16, l. 25 – 17, l. 1. Thus, Petitioner was wrongfully prejudiced by Griffin's statements to the plea court and, because Petitioner would not have pled guilty if he knew what Griffin was going to say, his guilty plea was entered involuntarily. App. 50, ll. 20 – 23.

Accordingly, plea counsel provided ineffective assistance of counsel for failing to investigate, prior to the plea hearing, into what Griffin was going to say to the plea court.

**CONCLUSION**

For these additional foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

s/ Victor R. Seeger  
Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 23<sup>rd</sup> day of November, 2020.