STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Clifton Newman, Circuit Court Judge

APPELLATE CASE NO. 2019-001044

PETITION FOR WRIT OF CERTIORARI

JAMES R. SNELL, JR.

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ISSUES PRESENTED

I. Did the PCR court err in finding that Petitioner John W. Madden failed to meet his burden to establish ineffective assistance of counsel prior to and leading up to his guilty plea?

II. Did the PCR court err in finding that Petitioner John W. Madden's guilty plea was entered into knowingly and voluntarily?

STATEMENT

Petitioner was indicted for Attempted Murder in July 2012 in Richland County General Session. Petitioner was represented by Stanley Myers. Petitioner pled guilty on October 24, 2014 to Attempted Murder, as indicted. Counsel represented petitioner during the plea. The Honorable Clifton Newman sentenced Petitioner to fourteen (14) years' imprisonment. Petitioner did not appeal his sentence or plea.

The incident in question took place on December 15, 2011, where the victim, Megan Madden, was shot in the back of the head with a Glock 22. A phone call was placed by the victim, to her daughter Ms. Holbrook where the victim stated that "Mr. Madden was pointing a pistol to her head" and then heard a gunshot. Petitioner Madden had been married to the victim for approximately two (2) years at the time of the incident, although they had dated for seven (7) years prior. During the plea colloquy, the State contended that this was a case of escalation of violence in a criminal domestic violence realm. (R. p. 262, lines 8-10). The State testified to the judge that a part of the theory of their case was that Petitioner Madden became addicted to pain killers and abused those pills with alcohol at the time of the incident (R. p. 262-263, lines 25, lines 1-5). The victim had left their marital home to go have dinner with her daughter, leaving Petitioner Madden alone at home. (R. p. 263, lines 8-11). When the victim made it back from dinner she climbed into bed and went to sleep before the State testified that she was awoken by a gun to her head *Id.* at lines 14-18. The gun was then placed into her mouth before a struggle where a round was discharged into the back of her head, penetrating the scalp, but not the victim's skull (R. p. 263-264, 18-25, lines 1-6). Police were not able to interview Petitioner Madden on the night of the incident because he was too intoxicated at the time (R. p. 265, lines 4-6).

During the plea, Petitioner's counsel informed the court that this was not a situation where Petitioner had a history of abuse and violence, but instead Petitioner had served his country and because of a situation of no fault of his own was involved in a horrific plane crash that fractured multiple vertebrae among other injuries (R. p. 279, lines 5-10; 17-24). Petitioner's counsel testified that due to the pain he suffered in the crash he was prescribed pain killers which did not numb his pain and in turn he combined them with alcohol to self-medicate. (R. p. 280, lines 10-14). While in Alvin S. Glenn, Petitioner's counsel had Doctor Donna Schwartz evaluate Petitioner and determined that he had Post-traumatic Stress Disorder, an addition to opiates, and was being treated for low testosterone (R. p. 285, lines (1-6 ; 14-15). Lastly, Petitioner's counsel stated that they could have attempted to come up with a sort of defense, but Petitioner Madden was voluntarily intoxicated at the time and voluntary intoxication is not a defense (R. p 294, lines 4-7).

During the Motion to Reconsider hearing, testimony was given that Petitioner's counsel for the criminal matter did not investigate an involuntary intoxication defense. (page 241, lines 15-25). Petitioner Madden was advised that voluntary intoxication could not be a legal defense, but the theory of involuntary intoxication was not adequately investigated.

ARGUMENT

I. The PCR court erred in finding that Petitioner John W. Madden failed to meet his burden to establish ineffective assistance of counsel prior to and leading up to his guilty plea.

There was conflicting testimony at the various PCR hearings as to whether Petitioner's counsel investigated an Ambien defense. Petitioner wrote numerous letters to his counsel consistently denying any recollection of the events of the incident to his attorney. Mr. Myers testified that he had also used the Ambien defense himself in the past, albeit with clients who were facing far less serious charges than Petitioner who was charged with Attempted Murder. However, Mr. Myers could not produce any notes or letters during the PCR hearing to substantiate that he did explore the Ambien defense with Applicant. The only advice given to Petitioner was the standard of voluntary intoxication in South Carolina, where Petitioner was informed that it is not a defense to specific intent to commit the alleged offense. Because plea counsel failed to advise Petitioner that despite the law on voluntary intoxication, that Petitioner could still proceed under a theory of involuntary intoxication due to the serious side effects which Ambien use alone has demonstrated, Petitioner has met the standard for granting post-conviction relief.

Plea counsel's duty was to represent his client while exploring all possible defense especially concerning the side effects that can occur from Ambien alone (without a combination of any other substance). The Order of Dismissal mentions that Petitioner informed his plea counsel that Petitioner had been drinking on the night of the incident (Order p. 7). Even if this were true, this did not absolve plea counsel of his obligation to defend his client. Based on his experience, plea counsel should have known that Ambien use in and of itself can

cause *serious injuries or death* (FDA Boxed Warning). Among the examples of serious injuries that have been caused from unintended side effects of Ambien and related medications include gunshot wounds *Id.* There is a multitude of literature on the subject, and numerous case examples where persons who had been taking Ambien engaged in inexplicable events, subconsciously, which they did not recall afterwards. A Mecklenburg County, North Carolina jury acquitted a man in 2016 who was accused of assaulting his wife and firing shots towards the police (State of North Carolina v. Charlie Saine). The defense in that case argued that their client who was taking Ambien as prescribed, was not conscious at the time of his actions. The State argued that the defendant made a conscious choice to mix Ambien with Alcohol and that there was no Ambien exception in the state of North Carolina. Had this strategy been communicated to the Petitioner in the instant case, it is clear from Petitioner's testimony on the record that he would have rejected a guilty plea and would have exercised his right to a jury trial.

It is clear from the record that plea counsel was familiar with the Ambien defense and therefore, was also familiar with the potential and very serious side effects from taking Ambien. Plea counsel's failure to advise his client regarding a dangerous side effect from Ambien that could have resulted in the attempted murder incident, without ingesting any additional intoxicating substance, must fail under a reasonableness analysis.

For guilty pleas, a petitioner for post-conviction relief must show a reasonable probability that, but for counsel 's alleged errors, he would not have pled guilty and would insist on going to trial. Hill v. Lockhart, 474 U.S. 52 (185); Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009); Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). Even applying a heavy measure of deference to plea counsel's advice regarding the law on voluntary intoxication under a

reasonableness standard, plea counsel unreasonably failed to advise Petitioner that a theory under involuntary intoxication could still be pursued based on all the well-known side effects which Ambien use had caused. As such, Petitioner's guilty plea following the advice of his attorney was not entered into knowingly and voluntarily because Petitioner did not know he could proceed under a viable theory of involuntary intoxication.

In Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) the Supreme Court reversed the PCR court's denial of relief to the petitioner, finding that an attorney who failed to interview a witness prior to calling that witness on behalf of the defense at trial provided ineffective assistance. Trial counsel's failure to investigate whether the witness' testimony would have supported the theory of defense in that case amounted to ineffective assistance of counsel, which the court further determined was prejudicial to the client. Ingle at 348 S.C. 471. Here, while Petitioner pled guilty prior to trial, Petitioner was deprived of the fundamental opportunity to explore his primary theory of defense. The court finds that plea counsel's failure to advise Petitioner regarding the theory of involuntary intoxication in this case amounts to ineffective assistance of counsel.

In Ralph King Anderson Jr., South Carolina Requests to Charge – Criminal, § 6-4 (2012), the following is a jury charge on the law of involuntary intoxication:

> Involuntary intoxication may result from innocently consuming an intoxicant, through being tricked into it by another, or being forced to take it, or perhaps through unanticipated side effects of a prescription drug taken on orders of a physician. If [a jury] find[s] the defendant was given drugs or alcoholic beverages without his knowledge, and as a result, he lost his ability to exercise independent judgment and violation while committing the crimes alleged against him, then it

would be [the jury's duty] to find the defendant not guilty. State v. Shands, 424 S.C. 106, 125, 817 S.E.2d 524 (Ct. App. 2018).

Shands involved a direct appeal following a conviction at trial, but the case discussion of voluntary intoxication being pursued as a viable theory of defense is monumental for the purposes of this PCR action. The Court of Appeals declined to find that the lower court erred in refusing to charge the jury on the law of involuntary intoxication, while at the same time accepting the state's request to charge the jury on the law of voluntary intoxication *Id.* In that case, the defendant had voluntarily consumed moonshine but argued that the drink was "spiked" with some unknown substance and therefore, he was unaware how he would react to this unknown substance. *Id.* at 424 S.C. 126-127, 817 S.E.2d 534. The Court of Appeals determined that Shands "knowingly consumed an illegal, unregulated liquor and had no right to assume the moonshine would cause a predictable intoxicating effect." *Id.* at 424 S.C. 126, 817 S.E.2d 535. The distinction is a stark contrast to the issue in this case, where a valid theory of defense of involuntary intoxication could have been pursued by the Petitioner based on Ambien along, which can cause these unintended and dangerous side effects without the use of additional intoxicants such as alcohol. Further, the instructions for involuntary intoxication specifically provide for this theory or defense, specifically "unanticipated side effects of a prescription drug taken on orders of a physician."

It must be acknowledged that the medical literature on the subject is continually evolving. Further, the underlying mechanisms by which these insomnia medicines cause complex sleep behaviors that are not completely understood (quoting from the Boxed Warning issued by the U.S. FDA on April 30, 2019). While this warning was not available during the time of the PCR hearing, the court has taken judicial notice of the warning regarding these sedative-hypnotic

medications. Case examples of involuntary and dangerous sleep behaviors have existed long before this warning was issues, and plea counsel himself acknowledged he was aware of the Ambien defense as a viable legal theory. Because plea counsel failed to advise Petitioner that, while the law regarding voluntary intoxication precludes a defense to a specific intent crime, a theory under involuntary intoxication resulting from a lawful prescription for Ambien and the attending side effects could have been pursued at trial.

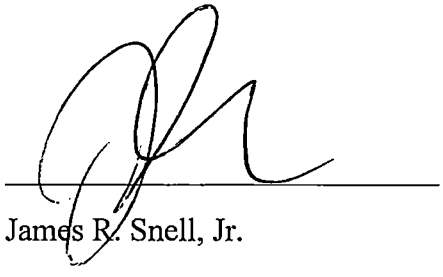
II. The PCR court erred in finding that Petitioner John W. Madden's guilty plea was entered into knowingly and voluntarily.

A defendant who pleads guilty simultaneously waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront his accusers. State v. Patterson, 278 S.C. 319, 332, 295 S.E.2d 264, 265 (S.C. 1982). For such a waiver to be valid under the due process clause, it must be an intentional relinquishment or abandonment of a known right or privilege. *Id.* Further, the record must clearly establish waiver. *Id.* See also Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Petitioner was improperly advised as to his legal rights by his plea counsel, and therefore, was prejudiced into his decision to plead guilty. Petitioner relied on the advice of counsel and believed he had no other legal theory of defense available to him, despite having testified he wrote multiple letters denying knowledge or recollection of the incident. As a result of plea counsel's failure to advise Petitioner regarding this critical stage in the defense, Petitioner's plea could not have been freely and voluntarily entered.

CONCLUSION

Based on the foregoing certiorari should be granted, Petitioner's conviction and sentence reverse, and the case remanded.



James R. Snell, Jr.
ATTORNEY FOR PETITIONER

This 11th day of November, 2019