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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

HOLLIS BROCK, JR.

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2020-000460

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT

The PCR court properly granted Respondent's application for relief because the record supports the lower court's findings that plea counsel misadvised Respondent about the maximum possible sentence he could receive as a result of his plea and the plea judge did not unambiguously inform Respondent of the maximum possible sentence he was facing, thereby rendering Respondent's guilty plea involuntary. 7

CONCLUSION 13

QUESTION PRESENTED

Petitioner's Question Presented

Did the post-conviction relief court err in finding that Brock established plea counsel was constitutionally ineffective, thereby rendering his guilty plea involuntary, where the lower court's findings are premised on errors of law and fact and the record conclusively establishes Brock knowingly, voluntarily, and intelligently entered a guilty plea with the advice of competent counsel who properly advised him of the sentencing range prior to his guilty plea?

Respondent's Counterstatement of Question Presented

Did the PCR court properly grant Respondent's application for relief where the record supports the lower court's findings that plea counsel misadvised Respondent about the maximum possible sentence he could receive as a result of his plea and the plea judge did not unambiguously inform Respondent of the maximum possible sentence he was facing, thereby rendering Respondent's guilty plea involuntary?

STATEMENT OF THE CASE

Respondent was indicted in February 2017 by the Spartanburg County grand jury for two counts of felony DUI resulting in death, two counts of leaving the scene of an accident resulting in death, and one count each of felony DUI resulting in great bodily injury and leaving the scene of an accident resulting in great bodily injury. App. 40 – 48. Respondent was represented by Albert Smith and the state was represented by Barry Barnette. App. 1.

On August 24, 2017, Respondent appeared before the Honorable J. Mark Hayes and indicated that he was *not* going to plead guilty. App. 3, l. 5 – 5, l. 8. Plea counsel informed the judge that he would be moving to be relieved as counsel if Respondent did not plead guilty. App. 4, ll. 2 – 16. The judge then gave Respondent additional time to speak with his counsel. App. 6, l. 21 – 7, l. 10. After a recess, Respondent returned with his plea counsel and pled guilty to each of the felony DUI charges. The remaining charges against Respondent were dismissed. App. 1 – 38.

During Respondent's plea colloquy, the judge asked Respondent if he understood that "on *both* of [the felony DUI resulting in death] offenses, that the possible sentence [the judge] could impose [was] between one to twenty-five years[.]" App. 17, ll. 6 – 9 (emphasis added). Respondent indicated that he understood.

The judge accepted Respondent's guilty plea and sentenced him to consecutive twenty-five-year sentences for the felony DUI resulting in death charges and a concurrent fifteen-year sentence for the felony DUI resulting in great bodily injury charge for a total of fifty years imprisonment. App. 38, ll. 7 – 22. Respondent did not appeal his guilty plea.

Respondent filed his PCR application on June 28, 2018. App. 111 – 118. Respondent filed an amendment to his application on July 16, 2018. App. 119 – 121. The state filed its

return on April 16, 2019. App. 122 – 128. An evidentiary hearing was held on October 9, 2019 before the Honorable G. Thomas Cooper. Respondent was represented by Susannah Ross and the state was represented by Jacob Isenberg. App. 134. Testifying at the hearing were Respondent, his plea counsel, Respondent's sister Tina O'Sullivan and his friend Tonya Pander. App. 135.

At Respondent's PCR hearing, Respondent testified that plea counsel informed him he was facing a maximum of twenty-five years imprisonment if he pled guilty but that if Respondent went to trial, "they'll throw the book at [him]." App. 146, ll. 7 – 24. Respondent maintained that on the day of the plea, counsel told him it appeared more likely that he would be sentenced to eighteen years. Respondent also recalled that counsel threatened to quit if Respondent did not plead guilty. App. 147, l. 3 – 148, l. 1.

Prior to Respondent pleading guilty, he spoke with his sister and two of his friends in the holding cell. App. 148, ll. 2 – 5. Respondent maintained that they told him they spoke with plea counsel and counsel told them that Respondent would get no more than twenty-five years if he pled guilty but that he would get more if he went to trial. App. 148, ll. 6 – 13. Furthermore, Respondent recalled speaking with counsel prior to his plea and that counsel told Respondent that he had met with the judge and the judge told him he was not going to give Respondent consecutive sentences. App. 148, l. 14 – 149, l. 1.

Respondent testified that he would not have pled guilty if he had known there was a chance that he could receive consecutive sentences. App. 149, ll. 2 – 6. Respondent also maintained that when the judge asked him if he understood he could get twenty-five years on "both" of the felony DUI resulting in death charges that the judge meant he could receive a *total* of twenty-five years. App. 150, ll. 10 – 23.

Respondent's sister, Tina O'Sullivan, also testified at the PCR hearing. She hired plea counsel to represent Respondent because she trusted him and had been represented by him before. App. 162, ll. 17 – 25. O'Sullivan recalled that on August 18, she met with plea counsel in his office and he told her that Respondent would be sentenced between eighteen and twenty-five years if he pled guilty. App. 164, ll. 6 – 14. O'Sullivan testified that on the day of Respondent's guilty plea, she "begged" him to pled guilty because counsel had told her that Respondent would be sentenced to no more than twenty-five years. App. 165, ll. 5 – 20. O'Sullivan maintained she would not have encouraged Respondent to plead guilty if she knew there was any chance of him receiving more than twenty-five years. App. 165, l. 21 – 167, l. 15.

Tonya Pander, a family friend of Respondent, was also present with O'Sullivan and Respondent prior to his plea. Pander testified that plea counsel told them on the day of the plea that Respondent had a "plea deal" for a twenty-five-year sentence and that if Respondent did not take the deal, counsel would resign. App. 178, ll. 6 – 23. Pander also recalled that plea counsel said if Respondent did not plead guilty, "they would throw the book at him." App. 178, ll. 24 – 25.

Plea counsel, Albert Smith, testified that the only plea offer that the solicitor ever made to Respondent was that he could plead guilty "straight up without any recommendation" but that he could pick which judge to plead in front of. App. 187, ll. 1 – 13. According to Smith, he believed that Judge Hayes "would be the one most receptive to a 25-year concurrent sentence." App. 188, ll. 2 – 4. Smith admitted that he met with Judge Hayes and the solicitor in chambers and that the meeting "gave [him] hope" that Judge Hayes would sentence Respondent to twenty-five years. App. 188, ll. 5 – 13. Smith further admitted that he communicated to Respondent and his family that he believed Judge Hayes would sentence Respondent to twenty-five years.

However, Smith claimed that he told Respondent that Respondent could receive more than twenty-five years which is why Respondent initially did not want to plead guilty. App. 188, ll. 14 – 24. Smith recalled that he was "forceful" in telling Respondent that if he did not "take the deal" that day, the state was going to try Respondent and that Smith would not represent Respondent at trial because he had not been paid enough for a trial. App. 192, l. 19 – 193, l. 6.

After Smith met with Judge Hayes and the solicitor, he admitted that he told Respondent and Respondent's family that he believed Respondent would be sentenced to twenty-five years. Smith recalled:

> I told them and . . . I guess maybe I didn't appreciate the impression that my words might have had on them with the 25 years. But I said to them and I say today, I believe that Judge Hayes will give [Respondent] the 25 years. I said that. I believe that. I was wrong.

App. 206, l. 21 – 207, l. 5.

In granting Respondent's application for post-conviction relief, the PCR judge found that the testimony at the PCR hearing "show[ed] that [Respondent's] decision to plead guilty was not fully informed as he did not have a clear understanding of the potential sentence he could, and did in fact receive." App. 270. The PCR judge further found that the conversations between Respondent, his family, and plea counsel centered around Respondent being sentenced to no more than twenty-five years. Furthermore, these conversations took place immediately after plea counsel had an in-chambers discussion with the plea judge and solicitor. App. 270.

The PCR judge also noted that Respondent's sister and friend who both testified at the hearing corroborated Respondent's testimony that plea counsel assured them of a maximum twenty-five year sentence. App. 270. Plea counsel also acknowledged that he had asked the family members to encourage Respondent to plead guilty on the day of his plea with the

understanding that the maximum sentence would be twenty-five years. App. 271. The PCR judge further found that the plea judge failed to unambiguously advise Respondent of the maximum sentence he was facing. The plea judge never mentioned consecutive sentences, nor did he mention the possibility of Respondent being sentenced to fifty or sixty-five years. App. 271.

Finally, the PCR judge found that plea counsel's statement to the plea judge that he would move to be relieved as counsel if Respondent did not plead guilty was "coercive and deprived [Respondent] of effective representation." App. 272. The judge noted that this move by plea counsel "fell below an objective standard of reasonableness because it was contrary to the client's best interests, evidenced a failure to prepare the case for trial, and it put undue pressure on [Respondent] to plead guilty or be without legal representation." App. 271.

After conducting a "thorough review of the record in its entirety and the testimony and argument presented at the evidentiary hearing," the PCR judge ruled that Respondent was entitled to a reversal of his conviction. The judge found that Respondent "established ineffective assistance of counsel in that [Respondent] was misadvised and not made to understand the maximum penalty he was facing by pleading guilty" and that Respondent "was unduly pressured to plead by his counsel's untimely motion to be relieved." The Court further concluded that "[c]ounsel's deficiency was not cured by the colloquy during the guilty plea." App. 272 – 273.

The PCR judge granted Respondent's application for relief. App. 265 – 273. The state appealed and filed its petition for writ of certiorari. This return follows.

ARGUMENT

The PCR court properly granted Respondent's application for relief because the record supports the lower court's findings that plea counsel misadvised Respondent about the maximum possible sentence he could receive as a result of his plea and the plea judge did not unambiguously inform Respondent of the maximum possible sentence he was facing, thereby rendering Respondent's guilty plea involuntary.

Petitioner contends that the PCR judge erred in granting Respondent relief because "the record conclusively established [Respondent] knowingly, voluntarily, and intelligently entered a guilty plea" and that "[t]he record clearly refutes any assertion [Respondent] was not aware he could receive consecutive sentences." Petition for writ of certiorari at 8. The PCR judge properly rejected this argument finding that Respondent established through his own testimony, along with two corroborating witnesses and his plea counsel, that he was not accurately informed of the maximum possible sentence he could receive. The PCR judge further found that Respondent was unduly pressured to plead guilty by plea counsel's assertion to the plea judge that he would move to be relieved if Respondent did not plead guilty. The PCR judge's findings are not controlled by an error of law and are supported by evidence in the record. See Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016) (Appellate courts "give great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them). This Court should deny certiorari.

In order to prove ineffective assistance of counsel, Respondent must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of

performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Respondent must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

The same two-part inquiry developed in Strickland also applies to claims of ineffective assistance of counsel which arise in the context of guilty pleas. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). "If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases." Tollett v. Henderson, 411 U.S. 258, 266 (1973) (internal quotations omitted). In order to show that plea counsel was ineffective, the defendant must show that he would not have pled guilty but for counsel's deficient performance. Griffin v. State, 361 S.C. 173, 176–77, 604 S.E.2d 394, 396 (2004). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

"Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). A defendant must be advised of the specific constitutional rights he is waiving prior to a plea judge

accepting his guilty plea. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969). "Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers." Pittman, 337 S.C. at 599, 524 S.E.2d at 624. Additionally, "a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Id.

Here, the record supports the PCR judge's finding that Respondent was not fully informed of the maximum possible sentence he could receive as a result of his guilty plea. Respondent, his sister, and friend all testified consistently at the PCR hearing that counsel told them Respondent would not be sentenced to more than twenty-five years if he pled guilty. Although plea counsel claimed at the PCR hearing that he told Respondent he could be sentenced up to sixty-five years, counsel acknowledged that after his meeting with the plea judge, he gave Respondent and his family the impression that Respondent would not be sentenced to more than twenty-five years if he pled guilty. App. 196, ll. 12 – 14; app. 206, l. 21 – 207, l. 5.

In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), this Court found that the defendant established he was prejudiced by his plea counsel's incorrect advice regarding the possible sentence he was facing at trial. Specifically, the defendant testified at his PCR hearing that he would not have pled guilty but for his counsel's incorrect advice regarding the sentencing range at trial. Id. at 543, 402 S.E.2d at 485-486. This Court stated: "We find that because trial counsel's improper sentencing advice induced petitioner's guilty plea, this case must be reversed." Id. Plea counsel in Alexander, admitted at the PCR hearing that he told the defendant that "he faced fifty years without question, possibly one hundred if all four indictments stood,

which 'would have effectively been his life expectancy.'" Id. at 542, 402 S.E.2d at 485. This was incorrect however, because the defendant faced only seven to twenty-five years on one count and a mandatory twenty-five on another. As in Alexander, Respondent's plea counsel here gave him erroneous information regarding the sentence he was facing, and Respondent pled guilty as a result of that erroneous information.

Furthermore, the PCR judge correctly found that Respondent's plea colloquy with the plea judge was ambiguous as to the maximum possible sentence. See United States v. Akinsade, 686 F.3d 248, 254 (4th Cir. 2012) (invalidating defendant's guilty plea where plea counsel misadvised defendant that his guilty plea would not make him eligible for deportation and the plea judge's admonishment to defendant that the plea "could" result in deportation was "insufficient to correct counsel's affirmative misadvice" because this admonishment was equivocal). Here, when the plea judge discussed the sentencing range with Respondent, the plea judge indicated that the maximum possible sentence Respondent could receive for *"both"* felony DUI resulting in death charges was twenty-five years. Couching the sentencing range in terms of *"both"* offenses suggested to Respondent that twenty-five was the total aggregate sentence he could receive for those offenses. The plea judge never once mentioned that Respondent could be sentenced to fifty years or sixty-five years. Nor did the plea judge ever explain to Respondent that the sentences for each offense could be run consecutively to one another.

In Pittman v. State, 337 S.C. 597, 601, 524 S.E.2d 623, 625 (1999), this Court affirmed the PCR court's granting relief to the defendant after finding his guilty plea was involuntary. The Pittman Court found that the plea judge failed to advise the defendant of the elements of the charged offense and also failed to inform the defendant that the charge to which he was pleading carried a mandatory minimum prison sentence. Id. at 600, 524 S.E.2d at 625. This Court held

that the plea judge's failure to advise the defendant of the mandatory minimum sentence, along with the judge's failure to explain the elements of the offense or ask for an admission of guilt rendered the defendant's plea involuntary. Id. at 601, 524 S.E.2d at 625. See also Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991) (holding that defendant's plea was not knowingly and voluntarily made where plea judge misadvised the defendant that he would be eligible for parole after serving one third of his sentence when he was in fact ineligible for parole); State v. Hazel, 275 S.C. 392, 393-394, 271 S.E.2d 602, 603 (1980) (holding that defendant's plea was involuntary where the plea judge informed the defendant that she "could" receive a life sentence where the defendant was in fact facing a *mandatory* life sentence).

Lastly, the PCR judge's finding that Respondent was unduly pressured by plea counsel threatening to quit if Respondent did not plead guilty is supported by the record. Contrary to Petitioner's claim, the record does not show that Respondent "clearly understood" he could obtain new counsel prior to a trial if his current counsel were to be relieved. Petition for writ of certiorari at 18. Respondent was at no point advised of this by the plea judge and the fact that Respondent had previous lawyers does not establish that he knew he could be represented by a lawyer subsequently to plea counsel being relieved.

As was noted by the PCR judge, when plea counsel threatened to move to be relieved if Respondent did not plead guilty, the plea judge responded simply by asking Respondent whether he wanted to plead guilty or not. App. 4, ll. 2 – 23; app. 271 – 272. After Respondent continued to express his reluctance to plead, the judge asked Respondent if he wanted to speak with plea counsel about what to do. Therefore, the PCR judge correctly found that plea counsel's motion to be relieved if Respondent did not plead guilty placed undue pressure on Respondent to plead guilty.

Here, the PCR judge's conclusion is amply supported by evidence in the record establishing that Respondent's guilty plea was not intelligently, knowingly, and voluntarily made. The PCR judge correctly found that Respondent received ineffective assistance of counsel because his counsel misadvised Respondent as to the maximum sentence and the judge's explanation of the maximum possible sentence was ambiguous. The PCR judge's findings are not controlled by an error of law. This Court should deny certiorari.

CONCLUSION

Because the PCR judge properly determined that Respondent established he received constitutionally ineffective assistance of counsel, this Court should deny certiorari.

s/Adam Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of February, 2021.