STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

LEVELL GRANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001408

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily made where Petitioner wanted to go to trial, but counsel advised him to plead guilty without challenging the factual basis for one of the armed robbery charges?

STATEMENT

The Charleston County grand jury indicted Petitioner for armed robbery and first-degree assault and battery during the August 2015 term of court. App. 189-90; 197-98. Petitioner was indicted for another armed robbery and possession of a weapon during the commission of a violent crime during the April 2016 term of the Charleston County grand jury. App. 169-70; App. 181-82. These indictments arose from two separate incidents.

The first incident occurred on February 19, 2015. That evening Cody Hood called Nick Washington to purchase Xanax. App. 54, ll. 12-15; App. 68, ll. 4-7. Washington did not have any Xanax but told Hood he would ask around. Shortly after that conversation Hood received a call from an unknown individual saying Washington had told him Hood was looking for Xanax. App. 54, ll. 15-18; App. 68, ll. 4-11. Police later tracked down the registered owner of the cellphone that called Hood which led them to Levell Grant, Petitioner. App. 55, ll. 14-17.

Hood agreed to meet Petitioner at Planter's Trace Apartments to purchase Xanax. App. 54, ll. 11-21; App. 68, ll. 10-15. During the meeting Hood alleged Petitioner placed him in a choke hold and pressed an item into his back. App. 55, ll. 2-10; App. 69, ll. 6-16. A second unidentified individual was allegedly waiting in the bushes for the drug buy to occur and passed the unknown object to Petitioner. App. 55, ll. 2-9. App. 69, ll. 2-4. Hood did not see what the object was. App. 69, ll. 10-13. Hood eventually lost consciousness. When he woke, he discovered his cellphone and money had been taken. App. 55, ll. 12-14. After his arrest, Petitioner made a statement indicating he and Hood had met to perform a drug transaction, that there was a physical altercation between them and that he took marijuana from Hood. Petitioner denied ever having a gun. App. 55, ll. 18-22.

The second incident occurred on September 12, 2012. App. 55, ll. 23-24. That evening a man entered a storage unit that was being used as an illegal gambling parlor armed with a rifle. The man took money from the business as well as personal property from one of the employees. The incident was captured on surveillance cameras and police were able to develop Petitioner as the suspect on the video armed with a gun. App. 56, ll. 1-13.

On May 11, 2016, Petitioner appeared before the Honorable Deadra Jefferson to enter a guilty plea[1] to all charges for a negotiated sentence range of twenty to twenty-five years imprisonment with all sentences to run concurrently. App. 1, App. 45-46. The State was represented by David Osborne, Petitioner was represented by Benjamin Lewis. App. 2. The court accepted Petitioner's guilty plea and deferred sentencing until May 17, 2016. App. 59, ll. 9-22. Petitioner was sentenced to an aggregate term of twenty-three years imprisonment. App. 84, ll. 9-21.

During the sentencing hearing Counsel Lewis informed the court that Cody Hood, the victim from the first armed robbery, had provided a video-recorded statement saying he wanted to drop the charges against Petitioner. App. 75, ll. 9-19. Judge Jefferson asked if Solicitor Osborne was aware that Hood had wanted to drop the charges to which he replied he did not know as he had never seen the video nor been provided with a transcript of the statement. App. 79, ll. 11-18. Counsel Lewis replied that he had verbally made Solicitor Osborne aware of the statement but had not provided him with a copy of it "for strategic reasons." App. 81, ll. 1-3. It

1 The State initially opposed Petitioner entering a guilty plea to both sets of charges as it had planned to try him on the Hood armed robbery first and if it secured a guilty verdict would then serve Petitioner with LWOP notice on the gambling parlor charge. The State argued that allowing him to plead to all of the charges at once was "circumventing" the LWOP statute, despite the fact that Petitioner did not have any prior strike offenses and was not subject to LWOP at the time of his guilty plea. Judge Jefferson took the matter under advisement after hearing argument and encouraged the parties to reach an agreement. After a short recess Petitioner came back before Judge Jefferson and entered the negotiated plea. App. 4-40.

was revealed during the PCR hearing that not only had Hood wanted to drop the charges, but Hood had told Counsel Lewis that he did not believe Petitioner was armed during the robbery. App. 117-118.

Petitioner did not appeal his convictions or sentences. On April 6, 2017, Petitioner filed a *pro se* application for post-conviction relief. App. 86-93. The State filed a return and motion for a more definite statement dated October 18, 2017. App. 94-101. PCR Counsel James Falk filed an amended PCR application dated May 17, 2019. App. 102-103. A hearing was convened before the Honorable Michael G. Nettles on July 25, 2019. Petitioner was represented by James Falk. The State was represented by Benjamin Limbaugh. App. 104.

Counsel Lewis testified that Hood had stated he had not believed Petitioner was armed during the incident and he did not wish to press charges. Counsel Lewis had this statement video-recorded but did not provide it to the state because he did not want the solicitor "to be able to basically prep himself to rebut my claims if it ended up being a trial." App. 117, ll. 8-App. 118, l. 12. Counsel Lewis stated that Hood changed his statement as trial approached, alleging that Petitioner was armed during the robbery, but felt there was still some "good stuff" to work with at trial. App. 130, ll. 19-24. Counsel Lewis also testified that although he did not like the negotiated plea range, he advised Petitioner to plead guilty to avoid two separate adjudications of the charges which would expose Petitioner to LWOP. App. 124-125.

Petitioner testified that he told Counsel Lewis to turn over the video statement of Hood to the State, but that Counsel Lewis did not want to do that. App. 145, ll. 7-19. While Counsel Lewis provided Petitioner with his discovery, Petitioner testified that they did not discuss the discovery in detail. App. 146, ll. 9-12. Notably, Petitioner testified that he wanted to go to trial but did not want to go to trial with Counsel Lewis representing him. App. 148, ll. 6-20.

Petitioner testified that even though he faced a potentially higher sentence he would prefer to go to trial with a different lawyer on his charges. App. 149, l. 8-App. 150, l. 4. Petitioner stated he tried to talk with Counsel Lewis about getting a different lawyer and even wrote to the disciplinary board about Counsel Lewis. Petitioner did not think he had filed a motion to substitute counsel. App. 150, ll. 2-10.

The order of dismissal was filed on October 7, 2020. App. 156-168. The order made mention of the PCR Judge's ability to scrutinize the credibility of the witnesses at the hearing but did not contain any credibility findings. App. 161-168. The order stated that Petitioner had failed to provide any evidence of his claims against Counsel Lewis. App. 164-168.

ARGUMENT

The PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily made where Petitioner wanted to go to trial, but counsel advised him to plead guilty without challenging the factual basis for one of the armed robbery charges.

It is well established that counsel has a duty to undertake reasonable investigations. Strickland v. Washington, 466 U.S. 668, 691 (1984). Therefore, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all 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). Inherent in the duty to investigate is a duty to use the discovered mitigating evidence to assist the defendant. In Petitioner's case, plea counsel interviewed the victim of the first armed robbery, Cody Hood. Hood, in a video recorded statement, said that he did not believe Petitioner was armed during the robbery. Considering that Hood had previously stated he never saw a weapon, his belief that Petitioner was unarmed further weakened the State's case against Petitioner. Counsel had a duty to use this information to challenge the factual basis of the plea and his failure to do so was ineffective assistance of counsel.

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's

constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. at 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pled guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Other jurisdictions have addressed counsel's failure to challenge the factual basis for a guilty plea. In State v. Allen, 708 N.W.2d 361, 368-69 (Iowa 2006), the Iowa Supreme Court concluded that defense counsel was ineffective for failing to challenge defendant's guilty plea to the charge of introducing a controlled substance into a detention facility where the correctional facility in question was not in fact a "detention facility" as that term was defined by law. The court found that a failure of this gravity by defense counsel resulted in prejudice per se. Id. See also Gaylord v. United States, 829 F.3d 500 (7th Cir. 2016) (counsel's failure to challenge the application of the "death results" enhancement, which was not supported by the forensic pathology reports, was ineffective assistance; the law required but-for causation which was not evident in Gaylord's case); Sauser v. State, 928 N.W.2d 816, 818–20 (Iowa 2019) ("The facts culled from the hearing and the plea colloquy do not reveal the amount of time the victim was held at gunpoint, and the reasons offered by the State that transformed the case into a kidnapping was merely speculative."); Mellott v. State, 2019 WY 23, 435 P.3d 376, 385–89 (Wyo. 2019) ("Trial counsel … recommended that Ms. Mellott plead guilty to charges with no factual basis to support them under the plain meaning of the statutes").

Pursuant to S.C. Code Ann. § 16–11–330(A), the State may prove an armed robbery by proving a robbery occurred and either "(1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while

using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon." State v. Muldrow, 348 S.C. 264, 267–68, 559 S.E.2d 847, 849 (2002).

In Petitioner's case, the victim never saw a weapon. The State alleged that Petitioner had a gun, but that was purely conjecture as there was no actual evidence a gun was used. At most, Hood could testify that "something" was placed into his back. However, Hood admitted that he did not believe Petitioner had been armed. Petitioner's statement to police was that there had been a physical altercation and that he took drugs from Hood however he denied that there was a gun. Therefore, the crucial element of being armed with a deadly weapon during the robbery was not present in the case. Counsel Lewis had a duty to challenge the factual basis for the plea to the Hood armed robbery. His failure to do so was unreasonable under prevailing professional norms.

Petitioner was prejudiced because he pled to an offense that was not supported by the evidence. Additionally, he pled to a violent and most serious offense when the State only had the evidence to convict him of a common-law strong-armed robbery. Petitioner repeatedly stated that he wanted to go to trial, he merely did not want to go to trial with Counsel Lewis representing him. This was due to Counsel Lewis's deficient performance, as seen by his failure to challenge the factual basis of the plea to the Hood armed robbery. Petitioner has shown both the requisite deficient performance and prejudice to establish ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.

s/Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of May, 2021.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies true copies of the Petition for Writ of Certiorari and Appendix in the above-referenced case have been served upon Benjamin Limbaugh, Esquire, at the at the primary e-mail address listed in the Attorney Information System (AIS); and on Levell Leonard Grant, #357137, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of May, 2021.

s/Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER