THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

R. Scott Sprouse, Presiding Judge

Case No. 2021-000416

Seth Fleury,

Petitioner,

vs.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether trial counsel was constitutionally ineffective when he recommended Petitioner enter an open plea where the assistant solicitor, law enforcement, and the victim were demanding a high sentence and where trial counsel advised Petitioner that he would get either house arrest or a one to two year prison sentence, where the circumstances did not support such an assertion.

STATEMENT OF THE CASE

Petitioner Seth Fleury was indicted for assault and battery of a high and aggravated nature (ABHAN) in Greenville County. On October 18, 2018, represented by Charles Ashton Bondurant (plea counsel), Fleury pleaded guilty as indicted before the Honorable Robin B. Stilwell. Assistant Solicitor Elizabeth Morrow Gary prosecuted the case. Judge Stilwell sentenced Fleury to 12 years in prison, Trial counsel filed a motion to reconsider the sentence, which was denied. Fleury did not appeal his conviction or sentence.

On June 25, 2019, Fleury filed an application for post-conviction relief in the Greenville County Court of Common Pleas. He alleged, *inter alia*, that plea counsel was constitutionally ineffective for advising him that if he pleaded guilty, the worst possible outcome would be two- or three-years' imprisonment. App. 55. He was represented by Tommy Thomas and Assistant Attorney General Taylor Z. Smith represented the State. The Honorable R. Scott Sprouse convened an evidentiary hearing (via WebEx) on March 5, 2021. On April 8, 2021, he signed an order dismissing the post-conviction relief application.

ARGUMENT

Petitioner's trial counsel was constitutionally ineffective when he recommended petitioner enter an open plea in light of the fact that the assistant solicitor, law enforcement, and the victim were demanding a high sentence and where trial counsel erroneously and unreasonably advised petitioner that he would get either house arrest or a short prison sentence, which was not plausible given the circumstances.

Petitioner Seth Fleury was charged with assault and battery of a high and aggravated nature (ABHAN) against his former girlfriend, Kayla Hayes. He was 22 years old and she was 18. On October 21, 2017, they met in parking lot and he gave her flowers and a card. App. 8-9. Eventually they argued. He leaned into kiss her, and she pulled her head away. When she did this, Fleury bit down on her bottom lip and tore it off. App. 9. She underwent multiple plastic surgeries and was left with permanent scarring.

Trial counsel advised Petitioner that he should plead guilty, stating that he had talked with other lawyers who agreed he would not get more than three years in prison, or house arrest. Fleury, who had planned to join the Navy, had no prior record.

The solicitor had originally offered a 15-year sentence, which Fleury rejected on the advice of counsel. His counsel agreed to an open plea without recommendations. App. 26.

What trial counsel failed to recognize is the judge would not give Fleury a short prison sentence or house arrest in light of many factors that existed. First of all, the assistant solicitor made it clear from the beginning that she would pursue the maximum penalty in this case. The victim lost most of her bottom lip and the photos reflected the horrible disfigurement that resulted. App. 10. Hayes had documented her injuries on

social media and had amassed a devoted following. The injuries also inflamed the law enforcement personnel who responded to the scene.

When the plea proceeded, the Assistant Solicitor told the court that there were previous, unreported incidents of violence. App. 8, lines 7-8. She also stated that Fleury had made jail calls that reflected a lack of remorse about the crime. App. 10. In describing the severity of the injury, the solicitor stated that she would have had the plastic surgeon testify that the bite was like that of a pit bull, and that as a result, Hayes' mouth size and range of motion is severely impaired. App. 10-11. He also would have testified that the force to cause such an injury would have to have been intentional. App. 11, lines 13-18.). She asked the court to impose a 15-year sentence. App. 27, lines 4-5.

Investigator Morecraft with the Simpsonville Police Department stated that he had been in law enforcement for 25 years and he had never seen "such a senseless, ruthless attack on a female in [his] career." App. 13, lines 19-20. Hayes' mother told the court that she had to have her food cut up for her in order to eat. She was forced to withdraw from college, losing all of her scholarships. She described the suffering her daughter had endured and asked the judge to punish Fleury to the "fullest allowable by law." App. 16, lines 21-23.

The victim very articulately told the court in stunning detail about the physical and emotional pain she suffered, and the adverse impact that it has had on her life. App. 17-25.

Fleury addressed the court and stated that he never intended on "doing anything like that" and expressed remorse. App. 27, lines 15-16. Fleury's mother, grandfather, sister, and a friend addressed the court and explained that Fleury was not at all violent and was a very caring person. Plea counsel submitted letters from another ten references, as well as a letter from the counselor Fleury began seeing after the incident. App. 35. Counsel explained to the court that Fleury had joined the Navy prior to the incident and that the victim asked meet with him. He brought flowers and cards with a hope that they would reunite. App. 37. His actions were clearly not premeditated. Plea counsel then told the court that Fleury said, "I did want to bite her. I did want to hurt her. I wanted to leave a mark for her boyfriend but I wanted to split her lip. I wanted to bust it, leave a bad mark." App. 39, lines 8-11). When she jerked back, he jerked as well and ended up biting her harder than he intended.

The judge sentenced Fleury to 12 years in prison, of which he will have to serve eighty-five percent.

Fleury testified at the PCR hearing that plea counsel advised him to take an open plea because the "prosecutor wasn't coming down and it just didn't look good." App. 85 lines 15-17. Trial counsel advised him that he had talked to many judges and lawyer friends who believed that he would get "home incarceration, and at the worst, maybe two to three years in prison." App. 85, lines 17-20. Fleury had no experience with the criminal justice system, and he trusted his lawyer. App. 86. He did not understand that he was exposed to a twenty-year sentence or that he would have to serve eighty-five percent. Fleury averred he was instructed by trial counsel to answer all of the

judge's questions in the affirmative and that everything would be okay. App. 29. He testified that he would have gone to trial (with a different lawyer) if he had known that he would get more than a three-year sentence. App. 98.

Fleury also testified that he did not intend for the injury to happen and that he could not explain trial counsel's damaging comments at the plea hearing. App. 97.

Fleury's mother testified at the PCR hearing that trial counsel emailed her, stating that he would not get jail time. App. 114. The email dated September 12, 2018, which was introduced at the PCR hearing, stated: "I thought (and still think) that he likely would get very little if any prison time. This has been my experience for 10+ years." App. 191.

The State called plea counsel as a witness. He testified that he had been a prosecutor for seven years and had been a criminal defense attorney for four years, at the time of the plea. App. 124. He believed the state's offer of fifteen years was excessive based on his experience as a prosecutor, but the solicitor would not back down. App. 135. He asked other criminal defense lawyers and prosecutors what sentence he should expect.[1] They all stated he would get two years at the most. App. 136. He admitted he shared this opinion with Fleury and his family and told them he thought he would get one or two years. App. 138, 160. Plea counsel knew that the solicitor planned to ask for 15 years in prison. App. 139. He also told Fleury that if he went to trial and was found

[1] Plea counsel never indicated which criminal defense lawyers and prosecutors he discussed this case with, or who else would have believed that home incarceration was a reasonable sentence under the circumstances of this case. Counsel also did not inform the court regarding the particular facts he relayed to these other attorneys which certainly would have had a bearing on how they perceived these events.

guilty he would not get more than fifteen years, and possibly would get less. App. 140.

Trial counsel testified that he always explains that the judge is not bound by either side's recommendation or request. App. 140.

There were twenty-five people in the courtroom on behalf of Ms. Hayes and they wore T-shirts in support of her. App. 147. Law enforcement was clamoring for a high sentence and plea counsel admitted that if he had known that the investigator had made a comment on her Facebook page that this was one of the worst crimes he had ever seen, he would have been prepared for him to say that in court. App. 167.

Distraught by the lengthy sentence, plea counsel filed a motion for reconsideration outlining sentencing for the same crime where defendants with prior records had gotten much less prison time. App. 146-47. In addition, after the plea hearing, plea counsel looked at Hayes' Facebook account to see what other people said about his sentence. App. 148. He read the newspaper coverage from all over the world, including Australia, England, and the Middle East. App. 149.

The PCR Court held that Fleury failed to prove that trial counsel was constitutionally ineffective for advising him that the worst possible outcome of a plea would be a sentence of two to three years, noting that the judge stated, in the plea colloquy, that Fleury could get up to 20 years in prison for ABHAN. App. 5, lines 10-13. App. 209.

This was error. Trial counsel's assertion that Fleury would only get three years in prison at the most was constitutionally ineffective, and Fleury was prejudiced by that unsound advice.

Under *Strickland v. Washington*, (1) proper standard for attorney performance is that of reasonably effective assistance; (2) defense counsel's strategy was reasonable and, thus, defendant was not denied effective assistance of counsel; and (3) even assuming challenged conduct of counsel was unreasonable, defendant suffered insufficient prejudice to warrant setting aside the result. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id., at 688, 104 S.Ct. 2052.

Under *Hill v. Lockhart*, 474 U.S. 52, 52, 106 S. Ct. 366, 367, 88 L. Ed. 2d 203 (1985), the *Strickland* analysis applies to guilty pleas, and in order to satisfy the second, or "prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

The 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." *North Carolina v. Alfor*d, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969); *Machibroda v. United States*, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473 (1962); *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

When determining issues relating to guilty pleas, the Court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000).

The entry of a "guilty plea implicates the protections of the Due Process Clause of the federal and state constitutions." *State v. Nesbitt*, 411 S.C. 194, 200, 768 S.E.2d 67, 70 (2015) (referencing that U.S. Const. amend. XIV and S.C. Const. art. I, § 3 (providing that states may not deprive a person of life, liberty, or property without due process of law).

A defendant must have a full understanding of the consequences of his plea and of the charges against him." *Roscoe v. State*, 345 S.C. 16, 20 n.6, 546 S.E.2d 417, 419 n.6 (2001). Erroneous advice may render a plea invalid where the record shows the defendant's plea was induced such that, but for the erroneous advice, the defendant would not have pled guilty but would have insisted on going to trial. *Alexander v. State,* 303 S.C. 539, 402 S.E.2d 484 (1991); *Ray v. State,* 303 S.C. 374, 401 S.E.2d 151 (1991); *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989).

In this case, plea counsel's assessment that Fleury would get no more than a couple of years in prison was objectively unreasonable. Plea counsel simply failed to view the circumstances objectively and if he had, he would have realized that Fleury would be sentenced to more than a few years.

Plea counsel had received the photos and medical records provided by the State. He knew that Ms. Hayes' injuries were horrifying and that the judge would see how the incident had dramatically affected her face, as well as her ability to eat. In addition,

plea counsel knew that the assistant solicitor felt very strongly that Fleury should get fifteen years.

Plea counsel has a duty to research the case to get a feel for the victim and the community's level of interest in a high sentence. If he had "googled" Ms. Hayes' name before the plea, he would have known that she had been posting photos, as well as her account of their relationship, which she characterized as abusive. App. 188. He also would have seen that the investigator believed the crime to be the worst he had seen in 25 years as a law enforcement officer. He also could have surmised that the courtroom would be full of her supporters (wearing T-shirts). Counsel's advice to his client, that he should plead guilty and receive a relatively minor sentence, was demonstrably unreasonable given the facts of the case and the sentiments of the victim, the solicitor, and law enforcement. Although defendants generally do not have a right to challenge their convictions based on the sentence they receive in a case, the advice given in this case by plea counsel was so staggeringly unreasonable that Fleury should be allowed to withdraw his guilty plea and take his case to trial.

Instead, he wrongly, and unreasonably, believed that because Fleury had no record, had a job, and his family believed he was a good person, that the judge would give him a couple of years in prison. This advice was patently wrong in light of the circumstances.

Fleury was prejudiced by this advice. He credibly testified that plea counsel had told him that if he took the case to trial, he would likely get less than 15 years. He testified that if he had known he was going to get only three years less than that, he

would have taken the case to trial. At trial, he would have had the opportunity to cross-examine the witnesses and his lawyer could have painted a more accurate picture of their relationship.

Therefore, Fleury is entitled to post-conviction relief.

CONCLUSION

This case raises an issue of significant importance to the bench and bar of this state. Petitioner is entitled to post-conviction relief.

Respectfully submitted,

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