

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Sep 24 2021

S.C. SUPREME COURT

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Certiorari to Sumter County

Honorable R. Kirk Griffin, Circuit Court Judge
—————

BRANDON MCFADDEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000482
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

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ISSUE PRESENTED

Did the post-conviction relief court err in finding that Petitioner's guilty plea was voluntary where plea counsel did not give Petitioner a copy of his discovery until the day of the plea and told Petitioner that if he did not plead guilty that day, the plea offer would be revoked and he would be subjected to a jury trial where he would face a mandatory life without parole sentence and Petitioner only pled guilty because he had not had adequate time to review his discovery and prepare for trial?

STATEMENT

Petitioner was indicted by the Sumter County Grand Jury for armed robbery, possession of a weapon during the commission of a violent crime, unlawful carrying of a pistol, and possession of a firearm by a person convicted of a violent felony. App. 74. Petitioner was initially represented by Timothy Murphy and was later represented by Katarzyna Timmons. App. 57, ll. 3 – 11; app. 61, ll. 1 – 4. The state was represented by John Meadors. App. 1.

On November 12, 2019, Petitioner appeared before the Honorable R. Ferrell Cothran, Jr., and pled guilty to armed robbery for a negotiated twenty-year sentence. App. 1. The remaining three charges were dismissed. App. 3, ll. 1 – 8. At Petitioner's plea, the state alleged that Petitioner had robbed a convenience store while armed with a pistol and confessed to law enforcement that he committed the robbery because he needed money. App. 6, l. 21 – 7, l. 20. Petitioner told the judge that he was guilty. App. 9, ll. 15 – 17. The plea judge accepted Petitioner's guilty plea and imposed the negotiated twenty-year sentence. App. 10, l. 5 – 11, l. 2.

Petitioner filed a notice of appeal which the Court of Appeals dismissed for failure to comply with Rule 203(d)(1)(B)(iv), SCACR. State v. McFadden, Case No. 2019-001938 (S.C. Ct. App. Filed April 15, 2020).

Petitioner filed an application for post-conviction relief on July 13, 2020 and the state filed its Return and motion for a more definite statement on January 21, 2021. App. 13 – 25. Petitioner filed an amended application through counsel on February 25, 2021. App. 27. A virtual evidentiary hearing was held on March 10, 2021 before the Honorable R. Kirk Griffin. Timothy Griffin represented Petitioner and Michael Neubauer represented the state. App. 28. Petitioner, Timothy Murphy, and Katarzyna Timmons all testified. App. 29.

Petitioner testified that he never received a copy of his discovery until the day of his guilty plea and that he never had a chance to fully go over his discovery with either of his attorneys. App. 38, l. 23 – 37, l. 15. Petitioner also testified that on the day of his plea, his lawyer informed him that if he did not plead guilty that day, the plea offer would be revoked, and he would have to proceed to trial the following month. Petitioner feared having to proceed to trial because he had not had adequate time to review his discovery with his attorney and felt coerced into pleading guilty. App. 43, l. 18 – 44, l. 6; app. 50, ll. 4 – 12.

Timothy Murphy was Petitioner's first appointed lawyer. App. 56, l. 7 – 57, l. 11. Murphy received the discovery approximately two months after being appointed to represent Petitioner. App. 57, ll. 12 – 21. However, Murphy maintained that he could not get in contact with Petitioner after Petitioner bonded out of jail and failed to appear for a court date in November of 2017. A bench warrant was issued for Petitioner's arrest. App. 59, l. 13 – 60, l. 24. Murphy admitted that he never spoke with Petitioner about his discovery. App. 61, ll. 13 – 18.

Katarzyna Timmons was appointed to represent Petitioner after he was arrested on the bench warrant. App. 63, ll. 7 – 17. Timmons stated that she did not remember whether she gave Petitioner a copy of his discovery, but she claimed that she discussed the discovery with Petitioner. App. 64, l. 12 – 65, l. 2. Timmons also admitted that she told Petitioner on the day of his plea that if he did not plead guilty that day, the offer would be withdrawn, and he would have to proceed to trial facing life without the possibility of parole.¹ App. 67, ll. 10 – 21; app. 70, ll. 13 – 20.

¹ Petitioner had a prior conviction for armed robbery that made him eligible for a mandatory life sentence.

The PCR judge ruled that Petitioner failed to show that he was coerced into pleading guilty and that there was no evidence, outside of Petitioner's own testimony, that showed he would have rejected the plea offer and insisted on a jury trial. App. 86. Petitioner's application was denied. App. 88.

This petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief court erred in finding that Petitioner's guilty plea was voluntary because plea counsel did not give Petitioner a copy of his discovery until the day of his plea and told Petitioner that if he did not plead guilty that day, the plea offer would be revoked and he would be subjected to a jury trial where he would face a mandatory life without parole sentence and Petitioner only pled guilty because he had not had adequate time to review his discovery and prepare for trial.

In order to prove ineffective assistance of counsel, Petitioner 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. Petitioner 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.

Criminal defendants have a right to effective assistance of counsel during the plea negotiating process. Missouri v. Frye, 566 U.S. 134, 144 (2012). 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). “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.” Id. at 56 (internal quotations omitted).

“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.

Petitioner's guilty plea was involuntary because it was effectively coerced and therefore, not voluntary. Specifically, Petitioner was faced with a choice of pleading guilty without having had an opportunity to review any of his discovery or proceed to trial and face a mandatory life without parole sentence. Petitioner's plea cannot be said to have been voluntarily made under these coercive circumstances.

In Kolle v. State, 386 S.C. 578, 584, 690 S.E.2d 73, 76 (2010), the defendant pled guilty to trafficking cocaine and was sentenced to seven-years imprisonment after his lawyer's motion to suppress the drugs was unsuccessful. The defendant sought PCR on the grounds that his plea counsel was ineffective in failing to procure certain discovery and failing to thoroughly advocate for the suppression of the drugs. Id. at 585, 690 S.E.2d at 76. This Court affirmed the PCR judge's decision to grant the defendant relief because his plea counsel was ineffective. Id. at 590, 690 S.E.2d at 79. This Court found that counsel's failure to obtain certain discovery materials prevented him from effectively cross-examining the officers at the suppression hearing on several discrepancies which would have affected the outcome of the suppression motion. Id. at 591, 690 S.E.2d at 80.

In Hyman v. State, 397 S.C. 35, 41, 723 S.E.2d 375, 378 (2012), the defendant alleged that he was coerced into pleading guilty without having seen the video evidence of the drug transaction he was allegedly involved in. The defendant testified at his PCR hearing that he informed his plea counsel multiple times that he needed to see the video evidence before he could decide on whether to plead guilty. Id. at 40, 723 S.E.2d at 377. Plea counsel disputed this and testified that the defendant asked *her* to view the video evidence and that upon her viewing the video, she could clearly see the defendant involved in a drug transaction. Id.

The defendant told his attorney that it was impossible for him to be on the video because he never wore hats and his plea counsel had told him that the person on the video who the state claimed was the defendant was wearing a hat. Id. at 40-41, 723 S.E.2d at 377. Plea counsel then obtained still shots from the video and took them to the defendant and the defendant acknowledged that the person in the still shots was him. However, the defendant still wanted to see the video itself because the still shots did not show him engaged in a drug transaction. Id. at 41, 723 S.E.2d at 377-78.

This Court ultimately held that the defendant's guilty plea was not involuntarily made because of his never having viewed the videotape prior to his guilty plea. Id. at 42, 723 S.E.2d at 378. Instead, this Court found that the disclosure of the videotape to plea counsel was sufficient. Further, the defendant did not show that the video was favorable to him. Id. at 46-47, 723 S.E.2d at 381. Finally, this Court noted that the defendant failed to show prejudice because he testified that he would have pled guilty sooner had he seen the video; he would not have insisted on going to trial. Id. at 48-49, 723 S.E.2d at 381-82.

Petitioner's case is distinguishable from Hyman in several respects. First, Petitioner did receive his discovery from plea counsel, but it was not until the day of his guilty plea. Secondly, Petitioner was essentially threatened that if he did not plead guilty that day, the plea offer would be revoked, and he would be forced into a trial facing life imprisonment without having had adequate time to review his discovery to make an informed decision. Petitioner could not voluntarily plead guilty without having seen his discovery materials. Counsel was ineffective in failing to provide Petitioner with his discovery in advance of the plea date so that Petitioner could make a voluntary decision free from coercion.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

s/Adam Sinclair Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of September, 2021.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon Jamal McFadden states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Kirk Griffin, which was held on March 10, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Brandon Jamal McFadden.

Respectfully Submitted,

s/Adam Sinclair Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of September, 2021.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/Adam Sinclair Ruffin

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Appellate Defender

South Carolina Commission on Indigent
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ATTORNEY FOR PETITIONER

This 24th day of September, 2021.