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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Jennifer B. McCoy, Circuit Court Judge

KAYLA MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001249

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was the guilty plea to murder, entered without negotiations or recommendations, rendered involuntary by counsel's failure to obtain and provide Petitioner with the results of forensic analysis of weapons believed to have been used in the crime?

STATEMENT

In May of 2018, the Aiken County Grand Jury indicted Petitioner, Kayla Nicole Moore, for murder, indictment #2018-GS-02-01067. (App. pp. 62-63). On July 26, 2018, Petitioner appeared before the Honorable Doyet A. Early, III, and entered a guilty plea, without negotiations or recommendations, to murder. C. David Hayes represented Petitioner at the plea. Samuel B. Grimes prosecuted the case. Petitioner was eighteen (18) years old at the time of her arrest and nineteen (19) at the time of the plea. Based on her age and the seriousness of the crime, Judge Early requested a presentence report. (App. p. 19, lines 7-21).

On December 13, 2018, Petitioner again appeared before Judge Early for sentencing. C. David Hayes represented Petitioner at the sentencing hearing. Samuel B. Grimes represented the State. Judge Early reviewed the prepared presentence report and noted that, "It actually didn't shed a whole lot of light on anything." (App. p. 27, lines 8-9). After hearing from the defense and the State, Judge Early sentenced Petitioner to life in prison. (App. p. 59, line 16 – p. 60, lines 1-3; p. 64). A timely notice of intent to appeal was filed but dismissed for failure to provide an explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR.

On May 28, 2019, Petitioner filed a *pro se* application for post-conviction relief [PCR]. (App. pp. 65-71). On August 29, 2019, the State filed a return and motion for more definite statement. (App. pp. 72-81. On September 24, 2020, Petitioner, represented by counsel, filed an amended application. (App. pp. 82-83). On June 3, 2021, an evidentiary hearing was held before the Honorable Jennifer B. McCoy. Nancy Fennell represented Petitioner at the hearing. Megan Jamison represented the State. In a written order filed on September 27, 2021, Judge McCoy denied relief and dismissed the application. (App. pp. 147-163). A timely notice of intent to appeal was served on October 29, 2021. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea to murder, entered without negotiations or recommendations, was rendered involuntary by counsel's failure to obtain and provide Petitioner with the results of forensic analysis of weapons believed to have been used in the crime.

Petitioner and her co-defendant, Jayson Miles, were charged in connection with the death of David Mackey, an acquaintance of Petitioner's mother who was allowing Petitioner to live in a mobile home on his property. (App. p. 18, lines 16-25). Petitioner entered a guilty plea to murder, without negotiations or recommendations. (App. p. 64). At the time of the plea Petitioner was nineteen (19) years old. (App. p. 7, lines 12-14). She received a life sentence. (App. p. 64).

During the May 2018, guilty plea hearing the prosecutor told the judge that the deceased had wounds to his head and chest as well as a stab wound in the neck. (App. p. 16, lines 22-24). Petitioner and Miles were arrested in Georgia using the deceased's car. (App. pp. 13-14). Miles implicated himself and Petitioner but claimed it was Petitioner's idea. (App. pp. 15-16). Miles admitted initially striking the deceased. (App. p. 16, line 1). According to Miles they both had hammers. (App. p. 16, lines 2-3). Miles admitted striking the deceased with an air soft gun. (App. p. 16, lines 1-15). After their arrest police found only one hammer, an air soft gun and a knife in the deceased's car used by Miles and Petitioner. All of the items appeared to have blood on them. (App. p. 17 lines 5-8). Petitioner told the police that the knife was hers but made no statement about using the knife. (App. p. 17, lines 8-11).

Petitioner maintained that the co-defendant, Miles, killed Mackey by himself and set the mobile home on fire because Petitioner told Miles that she heard an allegation of inappropriate behavior by Mackey from years ago. (App. p. 33, lines 1-6). During the guilty plea defense counsel told the judge that Miles threw Petitioner's belongings in the yard, told her to load the car and they

left together. (App. p. 33, lines 6-18). Miles was a friend of Petitioner's from high school and she did not want to betray him. (App. p. 33, lines 10-18).

During the December 2018, sentencing hearing the prosecutor told the judge that after Petitioner entered the guilty plea to murder but before the sentencing hearing, the State received DNA results from the hammer found in the car. (App. p. 37, lines 17-25). The DNA on the hammer matched the profile of the deceased. There is no reference to forensic evidence linking Petitioner to the hammer, the knife or the airsoft gun.

In her *pro se* PCR application Petitioner stated that the guilty plea was not knowing because of missing discovery forensics. (App. p. 67). In the amended application filed by PCR counsel Petitioner alleges ineffective assistance of counsel for failure to provide discovery. (App. p. 83). During the PCR hearing when asked about discussions with plea counsel, Petitioner testified, "Yes, ma'am, I asked him where are the forensics lab testing to say that my fingerprints are on any of the weapons and he bypassed that whole question and ignored it." (App. p. 105, lines 7-9). Petitioner testified that DNA testing was not brought up at the guilty plea hearing. (App. p. 105, lines 12-14). PCR counsel asked Petitioner, "So, if you had been aware previously that there, that there were - - was no DNA testing done, and no fingerprint of your connecting you to the alleged crime, how would that have affected your decision on whether to enter into a guilty plea?" (App. p. 105, lines 19-23). Petitioner answered, "It would of never happened. Never. Never." App. p. 105, line 24). While neither Petitioner's fingerprints nor the co-defendant's fingerprints were found on the hammer, air soft gun or knife, as Petitioner correctly noted at the PCR hearing, "The fact that my handprints aren't on anything. Miles stated that he used the hammer and that I used one. But only one hammer had blood on it and Jason is the only one who said he used one." (App. p. 101, lines 4-7).

Plea counsel admitted that he received the DNA analysis after the guilty plea. (App. p. 124, lines 1-3; p. 125, lines 1-12). When asked if he explained to Petitioner prior to her straight up guilty plea to murder that the DNA testing was not complete, plea counsel testified, "I don't recall. I do know we had explicit discussion about what it would show and that, in my opinion on it, is that it would not help or hurt us." (App. p. 125, lines 13-17). Plea counsel explained:

> And her story is that they were at the house. She had told Mr. Miles about a story of the victim of being supposedly a rapist back years past with a softball team. And once that was said, that Mr. Miles got up and said that 's all he needed to know, went into the trailer, and came out and was throwing her stuff out. The gas can was there. They picked the gas can up or he picked the gas can up. She loaded the car and he set the trailer on fire and they left to Atlanta.

(App. p. 125, line 19 – p. 126, lines 1-2). When asked again on cross-examination if he told Petitioner that DNA results were forthcoming, plea counsel answered that he believed that would have been in the discussions about pleading guilty and waiving defenses. (App. p. 135, lines 13-25). When asked if he advised Petitioner to wait until he received all of the evidence before moving forward, plea counsel answered that he did not believe the evidence would be beneficial. (App. p. 136, lines 4-10).

At the end of the PCR hearing PCR counsel argued:

> I believe the testimony, you know, presented by Miss Moore indicates that, you know, based on, her belief, and the situation at the time that she entered into the guilty plea, by virtue of the fact that not all the discovery was available at that time, that that, in and, in and of itself, indicates that not all defenses were investigated or discussed and, and well thought out with her because of that missing information. And I think her testimony to the effect that, that she had that information available to her at that time would have impacted her decision on whether to enter into a guilty plea."

(App. p. 142, line 20 – p. 143, lines 1-6). The PCR judge noted that the issue involving the outstanding discovery was "one of the strongest ones I've heard thus far." (App. p. 144, lines 18-19; 8-17).

In the order of dismissal the PCR judge addressed an allegation of ineffective assistance of counsel for failure to provide Applicant with full discovery and wrote:

> This Court finds Applicant cannot meet her burden of proof as to this allegation. This Court finds counsel and Applicant both testified that they discussed that additional analysis from SLED had not been completed, but despite this, Applicant wished to plead guilty to resolve her case as quickly as possible. The transcript from the sentencing proceeding supports counsel's testimony that the DNA report had not been complete at the time of the plea but was at the time of sentencing and was not exculpatory. (Dec. 13, 2018 Tr. 15-16). This Court finds counsel properly reviewed all available discovery with Applicant prior to her plea, discussed that SLED analysis was still forthcoming, and that following the review and discussion, Applicant made a decision to enter a knowing, voluntary, and intelligent guilty plea. This Court finds this allegation must be denied and dismissed with prejudice.

(App. pp. 160-161). The PCR judge erred. While the forensic report on the hammer was not exculpatory, it was not inculpatory and could have been used to impeach Miles' testimony at trial.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

"The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving "(1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." McKnight v. State, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

Plea counsel was ineffective in failing to obtain and provide Petitioner with the results of forensic analysis of weapons believed to have been used in the crime. Plea counsel's deficient performance affected the plea process and prejudiced Petitioner's case, rendering the guilty plea involuntary. The guilty plea in the present case does not represent a voluntary and intelligent choice among the alternative courses of action open to the defendant because of counsel's failure to review the forensic evidence prior to the guilty plea. There is a reasonable probability that, but for counsel's deficient performance, Petitioner would not have pled guilty and would have insisted on going to trial. The judge erred in refusing to grant relief.

CONCLUSION

Based on the above argument this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

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This 19th day of May, 2022.