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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Robert E. Hood, Circuit Court Judge

SCOTT R. WELCH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000326

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the post-conviction relief judge err by finding Petitioner voluntarily, knowingly, and intelligently pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) when, during the plea proceeding, Petitioner's counsel failed to timely correct the prosecutor's misstatement of law that the sentence imposed for possession of a weapon during the commission of a violent crime had to be served consecutively to the sentence imposed for the underlying felony since, if counsel had properly informed the judge that the sentences could be served concurrently, there is a reasonable probability the judge would have sentenced Petitioner to fifteen years as opposed to the aggregate eighteen year sentence Petitioner ultimately received?

STATEMENT OF THE CASE

A Horry County Grand Jury indicted Petitioner on May 28, 2015 for assault with intent to commit first degree criminal sexual conduct, kidnapping, pointing and presenting a firearm, and possession of a weapon during the commission of a violent crime. R. 107-110. On August 30, 2018, Petitioner pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to assault with intent to commit first degree criminal sexual conduct and possession of a weapon during the commission of a violent crime before the Honorable George McFaddin. App. 1. The remainder of Petitioner's charges were dismissed in exchange for his plea. App. 5, ll. 16-10. Assistant Solicitor Mary-Ellen Walter represented the state, and Jonathan Hiller represented Petitioner. App. 1.

At the conclusion of the plea proceeding, as Judge McFaddin was announcing Petitioner's sentence, the assistant solicitor interrupted and erroneously informed the judge that statutorily the sentence imposed for possession of a weapon during the commission of a violent crime must be served consecutively to the sentence imposed for the underlying violent crime. App. 19, ll. 8-13. Consequently, despite his original announcement that the sentences imposed would be served concurrently, Judge McFaddin sentenced Petitioner to fifteen years for assault with intent to commit first degree criminal sexual conduct and five years consecutive for the weapons offense for an aggregate sentence of twenty years. App. 19, ll. 22-24. Petitioner's counsel did not correct the solicitor's misstatement of law.

The following day, August 31, 2018, the parties appeared before Judge McFaddin on Petitioner's motion to reconsider his sentence. App. 22. Assistant Solicitor Mary-Ellen Walter represented the state, and Jonathan Hiller represented Petitioner. App. 22. At the beginning of the hearing, the assistant solicitor told the judge that she had "unintentionally misinformed" the

judge that the sentence imposed for possession of a weapon during the commission of a violent crime must be served consecutively to the sentence imposed for the underlying felony. App. 24, ll. 4-9. While the sentence imposed by the judge, fifteen years for assault with intent to commit first degree criminal sexual conduct and five years consecutive for the weapons offense, was not illegal, the solicitor stated she had no objection to the judge reconsidering the sentence imposed with the knowledge that the sentences do not need to be served consecutively. App. 24, l. 9 – 25, l. 14.

The judge asserted, "My initial sentence, as I recall in looking at the [sentence] sheets here, was . . . five and 15 concurrent. That's what I recall. Then I was told that it would need to run consecutively, right? Is that what happened yesterday?" App. 25, ll. 15-25. The solicitor responded that the judge had not announced what sentence he intended to impose when the issue of concurrent or consecutive arose during the prior proceeding. App. 25, l. 22 – 26, l. 17. The judge again asserted that it appeared he "had initially indicated concurrent, five, 15 concurrent, based on these markings on these sentencing sheets." App. 26, l. 24 – 27, l. 2. He subsequently announced, "*So that's what I will go back to then*." App. 26, l. 24 – 27, l. 2 (emphasis added). For whatever reason, the solicitor immediately requested to approach the bench with Petitioner's counsel. App. 27, ll. 4-7. After the bench conference, which was not on the record, the judge maintained the lawyers had "refreshed" his memory "and the sentence of the Court would therefore be five years regarding the weapon to run concurrent with the other sentence of 18 years." App. 27, ll. 8-12. Petitioner's counsel did not object to the eighteen year sentence ultimately imposed.

On October 23, 2018, Petitioner filed an application for post-conviction relief raising the claim argued in this petition. App. 30-41. The state filed a returned to this application dated

January 28, 2019. App. 42-53. An evidentiary hearing was convened on October 26, 2021 before the Honorable Robert E. Hood. App. 54. Assistant Attorney General William Ray represented the state, and James Falk represented Petitioner. App. 54.

Petitioner testified at the evidentiary hearing that it appeared the plea judge was going to change Petitioner's sentence from an aggregate of twenty years (fifteen years for assault and five years consecutive for the weapons offense) to an aggregate of fifteen years (fifteen years for assault and five years concurrent for the weapons offense) during the hearing on Petitioner's motion to reconsider. App. 63, ll. 11-18. However, before the sentencing decision was final, the assistant solicitor asked to approach the bench with Petitioner's counsel. "Somehow or another," at the conclusion of the bench conference, Petitioner "ended up with 18." App. 62, l. 23 – 63, l. 7. Petitioner believed the solicitor attempted to "coax" the judge into sentencing Petitioner to twenty years and "when everything was done" the judge ultimately sentenced him to eighteen years. App. 66, ll. 10-15.

Petitioner emphasized that he was not attempting to withdraw his plea during the PCR process. He merely wanted to be resentenced to fifteen years, which was the original sentence the plea judge intended. Petitioner asserted, "I don't want to withdraw it [the plea]. I don't want a trial. I don't want to plead guilty again. I'm guilty. I just - - I want to go back - - I feel like I was done wrong. I want to go back to the original sentence." App. 67, ll. 9-14.

Mary-Ellen Walter, the assistant solicitor who prosecuted the case, testified that she requested to approach the bench during the hearing on Petitioner's motion to reconsider in order to discuss the judge's "original intentions" as to sentencing. She explained, " I believe I looked at the sentencing sheet, and it certainly appeared, at least to my eye, that originally 18 had been written in, and then it was crossed out and a 15 was written in. And Judge McFaddin even

mentioned in the transcript that the sentencing sheet looked a mess because there were so many things crossed out and scribbled out. So the bench conference may have been about what his [Judge McFaddin's] original intentions were, not that Mr. Hiller [defense counsel] or I would have been privy to that, but I was probably saying it looked to me like there was 18 on the sentencing sheet. That's the best of my recollection." App. 81, l. 18 – 82, l. 7.

Jonathan Hiller, Petitioner's plea counsel, testified that he could not recall what was discussed at the bench conference during the hearing on Petitioner's motion to reconsider. App. 87, ll. 5-18.

By order filed March 9, 2022, the PCR judge denied Petitioner relief. App. 96-106. He found Petitioner freely and voluntarily entered a plea without any negotiations or recommendations after rejecting all previous offers. App. 105. The judge determined that while Judge McFaddin may have sentenced Petitioner to a total of fifteen years but for the assistant solicitors errant statement of law, McFaddin was informed of the error the following day and resentenced Petitioner with a correct understanding the of law. App. 105. The judge emphasized that the assistant solicitor's misstatement did not render Petitioner's sentence unlawful as the two sentences may be served consecutively or concurrently. App. 105. Lastly, the judge maintained that even if he was inclined to find that plea counsel was ineffective, he does not have the authority to reduce Petitioner's sentence based on the circumstances of this case. App. 105.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated by plea counsel's deficient performance in failing to correct the solicitor's misstatement of law, and since Petitioner was prejudiced as he was sentenced to eighteen years instead of fifteen years as originally intended by the plea judge, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief judge erred by finding Petitioner voluntarily, knowingly, and intelligently pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) when, during the plea proceeding, Petitioner's counsel failed to timely correct the prosecutor's misstatement of law that the sentence imposed for possession of a weapon during the commission of a violent crime had to be served consecutively to the sentence imposed for the underlying felony since, if counsel had properly informed the judge that the sentences could be served concurrently, there is a reasonable probability the judge would have sentenced Petitioner to fifteen years as opposed to the aggregate eighteen year sentence Petitioner ultimately received.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove 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." Id. at 686; 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.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "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." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326

S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000)); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

"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) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). "The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. 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 (citing Boykin, 395 U.S. 238). 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. (citing Boykin, 395 U.S. 238).

"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) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

"[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the

time of the entry of the guilty plea and the record of the post-conviction hearing." Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)) (alteration in original).

In Pittman, this Court held Pittman's guilty plea was not voluntary, intelligent, and knowing where Pittman did not fully understand the nature of the constitutional rights being waived and the consequences of his plea. Id. at 601, 524 S.E.2d at 625. It was undisputed that Pittman met with his attorney only twice for approximately twenty minutes each. Id. at 600, 524 S.E.2d at 625. The trial judge did not advise Pittman of the crucial elements of the charged offenses. Id. Moreover, while the judge informed Pittman of the maximum sentences which could be imposed, he failed to advise him that the armed robbery charge carried a mandatory minimum of ten years, seven without the possibility of parole. Id. (citing 22 C.J.S. Criminal Law § 404 (1989) ("prior to accepting a plea of guilty . . . the court is required to advise accused of the range of punishment attached to the offense charged such as . . . the minimum sentence."). Lastly, the trial judge never affirmatively asked Pittman for an admission of guilt. Id.

In this case, it is undisputed that the assistant solicitor incorrectly told the plea judge that the sentence imposed for possession of a weapon during the commission of a violent crime must be served consecutively to the sentence imposed for the underlying felony. Petitioner's counsel failed to correct this misstatement of law during the proceeding. Consequently, the judge sentenced Petitioner to an aggregate of twenty years, fifteen years for assault with intent to commit first degree criminal sexual conduct and five years consecutive for the weapons offense.

Petitioner was prejudiced by counsel's deficient performance because, if counsel had timely informed the judge that the sentences could be served concurrently, there is a reasonable probability the judge would have sentenced Petitioner to an aggregate sentence of fifteen years as

opposed to the eighteen year sentence ultimately imposed. This assertion is supported by the record from the hearing on Petitioner's motion to reconsider. During that hearing, the judge repeatedly said that he originally intended to sentence Petitioner to fifteen years for assault and five years concurrent for the weapons offense. See App. 25, ll. 15-25 ("My initial sentence, as I recall in looking at the [sentence] sheets here, was . . . five and 15 concurrent. That's what I recall."); App. 26, l. 24 – 27, l. 2 ("It appears that I had initially indicated concurrent, five, 15 concurrent, based on these markings on these sentencing sheets."). Consequently, the PCR judge erred by finding Petitioner freely and voluntarily pled guilty and that counsel was not ineffective.

Respectfully, this Court should reverse Petitioner's sentence and remand for a new sentencing hearing.

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.

Respectfully submitted,

s/ Lara M. Caudy______________________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of August, 2022.

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Counsel for Scott R. Welch states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on October 26, 2021 before the Honorable Robert E. Hood, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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 her as counsel for Scott R. Welch.

Respectfully Submitted,

s/ Lara M. Caudy_____________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of August, 2022.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

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ATTORNEY FOR PETITIONER

This 30th day of August, 2022.