STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

SHIQUAN TYON CWIKLINSKI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-002075

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to move for a motion to reconsider sentence?

STATEMENT

In July of 2013, the Richland County Grand Jury indicted Petitioner, Shiquan Tyon Cwiklinski, for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime, indictments #2013-GS-40-4043, 4044, 4045. (App. pp. 30-35). On October 15, 2015, Petitioner appeared before the Honorable Tanya A. Gee and pled guilty to two counts of the lesser included offense of assault and battery of a high and aggravated nature [ABHAN] and possession of a weapon during the commission of a violent crime. Anastasia Walker represented Petitioner at the plea. Dolly Garfield and Joseph Shenkar represented the State. Judge Gee sentenced petitioner to twenty (20) years concurrent for each count of ABHAN and five (5) years concurrent for the weapons charge. A timely notice of intent to appeal was filed but the appeal was ultimately dismissed on March 29, 2016, pursuant to Rule 203(d)(1)(B)(iv), SCACR.

On March 16, 2017, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 40-51). The State filed a return on September 15, 2017. (App. pp. 52-57). An evidentiary hearing was held on December 3, 2018, before the Honorable Jocelyn Newman. Dayne C. Phillips represented Petitioner at the PCR hearing. Lindsey A. McAllister represented the State. In a written order filed May 22, 2019, Judge Newman denied relief and dismissed the application. (App. pp. 150-167). A timely motion to alter or amend pursuant to Rule 59(e). SRCP was filed on May 28, 2019. (App. pp. 168-172). Judge Newman denied the motion to alter or amend in a written order filed December 13, 2019. A timely notice of intent to appeal was served on December 19, 2019. The petition for writ of certiorari was filed on August 25, 2020. The return was filed on January 8, 2021. Pursuant to Rule 243 (1), SCACR, the case was transferred from the South Carolina Supreme Court to the South Carolina Court of Appeals on

January 25, 2021. On October 24, 2022, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to move for a motion to reconsider sentence.

Petitioner entered guilty pleas, without negotiations or a recommendation from the State, to two counts of the lesser included offense of ABHAN. The judge sentenced Petitioner to twenty (20) years in prison, the maximum sentence without imposing consecutive sentences. (App. pp. 36-38). In the PCR application Petitioner alleged that plea counsel was ineffective in failing "to file a Motion for Reconsideration of the Sentence despite Applicant's timely and specific request." (App. p. 42).

During the PCR hearing Petitioner testified that he asked plea counsel to file a motion to reconsider the sentence right after the judge pronounced the twenty-year sentence. (App. p. 83, lines 5-20). Plea counsel testified that she did not recall Petitioner asking her to file a motion to reconsider sentence. (App. p. 100, lines 14-18). Instead, plea counsel testified that Petitioner's mother called and advised that Petitioner wanted to file an appeal. (App. p. 100, line 19 – p. 101, lines 1-7). When asked if plea counsel denied that Petitioner asked her to file a motion to reconsider sentence, plea counsel answered, "I do not deny it. I do not recall it." (App. p. 125, line 11). Plea counsel testified that she had no memory of a request to file a motion to reconsider sentence. (App. p. 125, lines 12-14). Plea counsel agreed that in her explanation to the Appellate Court pursuant to Rule 203(d)(1)(B)(iv), SCACR, she specifically noted that Petitioner was dissatisfied with his sentence and insisted on appealing. (App. p. 126, line 16 – p. 127, line 1).

In the order of dismissal the PCR judge wrote:

> Applicant alleges he requested Plea Counsel to file a Motion for Reconsideration of his sentence, and Plea Counsel failed to do so despite a timely and specific request. This Court finds this allegation is without merit. Specifically, this Court

finds credible Plea Counsel's testimony that she did not recall Applicant asking her to file a Motion for Reconsideration.

Instead, Plea Counsel stated Applicant's mother informed her Applicant was unhappy with his sentence and asked her to file an appeal, which Plea Counsel did. Additionally, this Court has reviewed the plea transcript and finds no basis for a successful Motion for Reconsideration. The transcript reflects the plea judge, after viewing the surveillance video, characterized Applicant's conduct as "surreal," "stupid," "scary," and "incredibly dangerous." The judge also indicated she "believe[d] in justice tempered with mercy," which in this case was the State's willingness to allow Applicant to plead to a lesser-included charge. Therefore, this Court finds a Motion for Reconsideration was not reasonably likely to have resulted in a reduced sentence, and therefore Applicant was not prejudice [sic] by Plea Counsel's failure to file the motion. Since Applicant has failed to meet his burden of proof as to both the deficiency and prejudice prongs, this Court finds Plea Counsel was not constitutionally ineffective, and this allegation is denied and dismissed on these grounds.

(App. pp. 165-166). The PCR judge erred.

Petitioner filed a timely motion to alter or amend pursuant to rule 59(e). (App. pp. 168-172). In the motion Petitioner stated:

(3) The Order Denying Post-Conviction Relief fails to properly address Applicant's claim that Trial Counsel provided ineffective assistance of counsel by failing to file a Motion for Reconsideration of Applicant's sentence.

a. Plea Counsel testified she had no memory of Applicant's request but did acknowledge that Applicant's mother told her Applicant was unhappy with his sentence and maintained Applicant's mother asked her to file an appeal.

b. Plea Counsel subsequently filed the Notice of Appeal and the required explanation pursuant to Rule 203(d)(1)(B), SCACR, indicating Applicant's dissatisfaction with the sentence (acknowledging that there are not issues are preserved for appellate review. Knowing no issues were preserved for appellate review, Plea Counsel should have known that the request was to file a Motion for Reconsideration.

c. Therefore, Plea Counsel's performance was deficient by not filing the appropriate Motion for Reconsideration based on Applicant's request, Applicant's significant sentence, the lack of any injuries by the victims, and the minimal mitigation evidence presented during the plea hearing.

(App. pp. 170-171).

In the order denying the motion to alter or amend the PCR judge wrote:

> Applicant next contends that the Order of Dismissal "fails to properly address Applicant's claim that Trial Counsel . . . fail[ed] to file a Motion for Reconsideration of Applicant's sentence." The Court disagrees and believes that the discussion in the Order of Dismissal satisfies S.C.Code ANN. §17-27-80 and Rule 52(a), SCRCP. In particular, it appears that Applicant and the Court have different interpretations [sic] Plea Counsel's position. All agree that Plea Counsel testified that she didn't recall being asked to file a motion for reconsideration. However, Applicant interprets that as meaning Plea Counsel has no memory of the conversation – that Applicant might have asked, but she doesn't remember. The Court, on the other hand, having heard the testimony and the context in which the matter was discussed, finds that Plea Counsel was indicating that Applicant made no such request. Therefore, this claim is denied.

(App. p. 176).

First, the PCR transcript reflects that plea counsel did not deny that Petitioner requested that she file a motion to reconsider sentence, she just did not recall it and had no memory of the request. (App. p. 125, lines 11-14). The PCR judge's interpretation of plea counsel's testimony as indicating that Petitioner did not request that she file a motion to reconsider sentence is not supported by the record. Second, although plea counsel did not recall being asked to file a motion to reconsider sentence, when Petitioner's mother informed plea counsel that Petitioner was unhappy with the sentence and wanted to appeal, plea counsel should have explained that a motion to reconsider sentence rather than an appeal was the proper way to challenge the sentence, as the sentence was within the statutory guidelines and not subject to challenge on direct appeal.[1] With the knowledge that Petitioner was not satisfied with the sentence, plea counsel should have filed the motion to reconsider sentence rather than the notice of intent to appeal. Plea counsel was ineffective in failing to file a motion to reconsider sentence.

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[1] This second part of the argument is not a "tacit admission" that Petitioner did not ask plea counsel to file a motion to reconsider sentence. Instead, the second part of the argument shows that plea counsel was on notice that Petitioner was not happy with the sentence, as additionally supported by the explanation that plea counsel submitted with the notice of intent to appeal.

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.

Plea counsel was ineffective in refusing to file a motion to reconsider sentence when she learned that Petitioner was not happy with the twenty-year sentence imposed, the maximum sentence possible without imposing consecutive sentences. In State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

> The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

The sentencing judge in the present case had the authority to reconsider and reduce the maximum twenty-year sentence imposed. Plea counsel was deficient in failing to file a motion to reconsider sentence when she was on notice that Petitioner was not happy with the sentence imposed. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that if plea counsel had filed a motion to reconsider sentence, the sentencing judge would have granted the motion. There is evidence in the record from which the plea judge, not the PCR judge, could have based a reduction in sentence. There were no injuries. Petitioner was originally indicted for two counts of attempted murder. In one of the indictments Petitioner is alleged to have attempted to kill Kendale Pollock. (App. pp. 30-31). Pollock, however, testified on behalf of Petitioner at the guilty plea and told the judge that he and Petitioner were friends and he would not think that Petitioner would try to hurt him. (App. p. 23, line 17 – p. 24, lines 1-2).

The State's decision to allow Petitioner to enter guilty pleas to the lesser included offense of ABHAN would not prevent the Judge from reconsidering the sentence imposed. There are many reasons why a prosecutor might decide to reduce charges in exchange for a guilty plea which include avoiding problems with the case or the expense of a trial, among other reasons. Under the specific facts of this case, the State may have had difficulty proving the specific intent to kill required for attempted murder. In April of 2015, before Petitioner's October 2015, pleas, the South Carolina Court of Appeals decided State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). In King the Court of Appeals wrote, "We find the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that

attempted murder is a general intent crime." State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The South Carolina Supreme Court affirmed, as modified, the finding by the Court of Appeals writing, "Considering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a "specific intent to kill" as an element." State v. King, 422 S.C. 47, 63–64, 810 S.E.2d 18, 26–27 (2017) (n. 5 omitted).

Plea counsel was deficient in failing to move for reconsideration of the sentence imposed. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that if plea counsel had moved to reconsider sentence, the sentencing judge would have imposed a sentence less than the maximum.

CONCLUSION

Based on the above argument, this Court should reverse the convictions and remand for a new trial. Alternatively, this Court should remand the case for a motion to reconsider sentence.

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This 22nd day of November, 2022.