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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable William A. McKinnon, Circuit Court Judge

ROBERT HOLLIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001139

JOHNSON PETITION FOR WRIT OF CERTIORARI

Sarah E. Shipe
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ISSUE PRESENTED

Whether the PCR court erred finding defense counsel was not deficient where counsel admittedly failed to move to reconsider petitioner's twenty-five-year sentence and the court erred finding petitioner was not prejudiced where petitioner's equally culpable co-defendant received a significantly shorter sentence?

STATEMENT

On March 21, 2019, a Cherokee County grand jury indicted petitioner for murder, attempted murder, and two counts of possession of a weapon during the commission of a violent crime. App. 99-102. On May 11, 2021, petitioner appeared before the Honorable Grace G. Knie and pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to voluntary manslaughter, assualt and battery of a high and aggravated nature, and one count of possession of a weapon during the commission of a violent crime. App. 1; 4-6. Petitioner was represented by Steven Epps and the state was represented by deputy solicitor, Derrick Bulsa. App. 1. Judge Knie accepted the *Alford* plea and sentenced petitioner in accordance with his negotiated terms with the state, concurrent terms of twenty-five years' imprisonment for voluntary manslaughter, twenty years' imprisonment for assault and battery of a high and aggravated nature, and five years' imprisonment for possession of a weapon during the commission of a violent crime. App. 20, ll. 23-24; 27, l. 21-28, l. 11.

Thereafter, petitioner filed an application for PCR. App. 33-46. An evidentiary hearing was held on June 7, 2022, before the Honorable William A. McKinnon. App. 60-84. Rodney Richey represented petitioner and Chelsey Marto, assistant attorney general, represented the state. App. 60.

On July 11, 2022, Judge McKinnon signed an order denying PCR. App. 85-96. The court found defense counsel was not deficient for failing to move to reconsider petitioner's sentence because he was sentenced "differently" than his co-defendant. Th court stated that there was no prejudice from counsel's failure to move to reconsider petitioner's sentence because it found the motion would not have been successful in this case. App. 95.

This petition follows.

ARGUMENT

The PCR court erred finding defense counsel was not deficient where counsel admittedly failed to move to reconsider petitioner's twenty-five-year sentence and the court erred finding petitioner was not prejudiced where petitioner's equally culpable co-defendant received a significantly shorter sentence.

Relevant facts

At petitioner's guilty plea hearing the state alleged that he, along with two other men, Dewayne Lipscomb and Cavatice Ford forcibly entered the home of Janet Smith. Smith had a visitor Christopher Poole and during the incident both Smith and Poole were shot. Poole was injured and Smith died. App. 18-20. A bullet found in Smith's body at autopsy was determined to most likely be from a nine-millimeter pistol. App. 19, ll. 16-18. When Lipscomb was arrested law enforcement found him in possession of a nine-millimeter pistol. App. 19, ll. 23-24. Petitioner admitted that he had nine-millimeter pistol during his interview but firmly denied having shot it during this incident. App. 19, ll. 5-8. During their recitation of the facts the solicitor acknowledged that, because they were unable to identify which of the three men was the shooter, they would have presented the case to a jury under the "hand of one is the hand of all" theory. App. 19, ll. 18-22. The solicitor stated to the court that petitioner cooperated with the prosecution but he "changed his story about who had what gun" during the incident. App. 20, ll. 10-19.

Defense counsel reiterated to the court that petitioner was cooperative but added that petitioner appeared "visibly intoxicated," during his interview with police which likely contributed to his being unclear regarding some details. App. 21-22. The only difference in petitioner's statements was regarding what type of guns his co-defendants had that day, "at one

point he says a [nine] and the other time he says a [forty-five]." App. 23, ll. 9-12. However, defense counsel contended petitioner's statements remained "very similar." App. 22, ll. 14-22.

At his evidentiary hearing petitioner testified that he was told by defense counsel that he and his two co-defendants would receive the same sentence. App. 66. However, Ford was sentenced to eighteen years, seven years less than petitioner's twenty-five-year sentence. App. 66. Petitioner contended that defense counsel failed to make a motion to reconsider his sentence. App. 72.

Defense counsel admitted he told petitioner that he would be sentenced "similarly" to his co-defendants and that he was "surprised" that Ford was sentenced to eighteen years as opposed to twenty-five years. App. 78, l. 23-79, l. 3; 82, ll. 21-25. In response to whether he should have filed a motion to reconsider petitioner's setnece he stated, "[y]eah[,] I often wonder about that." App. 79, ll. 9-12. Counsel followed that answer stating that he did not think he had grounds to ask the court to reconsider petitioner's sentence. App. 79, ll. 13-14.

Discussion

PCR court erred finding counsel was not deficient for failing to file a motion to reconsider petitioner's sentence where the record reflects his equally culpable, co-defendant, Ford, was sentenced to eighteen years' imprisonment. Petitioner was prejudiced by counsel's deficiency where if counsel had made a motion to reconsider his sentence the court likely would have sentenced him similarly and he would be serving a shorter sentence.

"A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty." *Johnson v. Catoe*, 336 S.C. 354, 358, 520 S.E.2d 617, 619 (1999). *See also Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997);

Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997).

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. *See, e.g., Evans v. Meyer*, 742 F.2d 371, 375 (C.A.7, 1984) ("It is inconceivable to us ... that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decision maker." 466 U.S. 668, 695 (1984).

Stalk v. State, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009) (quoting *Hill v. Lockhart*, 474 U.S. 52 (1985)).

For a guilty plea to be knowing and voluntary, plea must be entered with awareness of consequences of plea, i.e., proper advice by the court on mandatory sentencing. *Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999).

At petitioner's evidentiary hearing, counsel and petitioner testified that counsel told him his sentence would be the same as his co-defendant's sentences. Petitioner made the decision to plead guilty pursuant to *Alford* believing his co-defendants would be facing the same consequence. Thus, petitioner was unaware of the consequences of his *Alford* plea where his equally culpable, co-defendant received a significantly shorter sentence.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be granted to allow full briefing on the issue.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of January, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Bunyan Hollis states:

1. She is 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 before Judge William A. McKinnon, which was held on June 7, 2022, 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 Robert Bunyan Hollis.

Respectfully Submitted,

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of January, 2023.

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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."

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This 20th day of January, 2023.