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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable G.D. Morgan, Jr., Circuit Court Judge

REGINA OWINGS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000459

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding Petitioner voluntarily, knowingly, and intelligently pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), when Petitioner only entered a plea based on plea counsel's promise that she would be sentenced to five to eight years imprisonment, and where Petitioner was prejudiced because she was sentenced to fourteen years and there is a reasonable probability she would have proceeded to trial if she would have known she could be sentenced to more than eight years?

STATEMENT OF THE CASE

In 2016, Petitioner lived in Travelers Rest with her husband, William Lee Carpenter, Jr. and Carpenter's two grandchildren, Minor 1 and Minor 2. The children's parents, Carpenter's son and his wife, lived on the third floor of the residence. Tr. 76, l. 15 – 78, l. 15. Carpenter financially supported Petitioner as well as his son, William Lee Carpenter, III, and his son's wife, Delina. App. 80, ll. 4-10; App. 124, ll. 4-8. Petitioner, who only has a seventh grade education, has suffered from drug addiction since she was a teenager and depended on Carpenter to financially support her addiction. App. 79, ll. 6-11. Delina was also addicted to drugs and often used with Petitioner. Carpenter ultimately "cut her [Delina] off" and refused to continue "furnishing her drug habit." App. 171, ll. 5-11.

During the summer of 2016, Minor 2 disclosed that in 2014 and 2015 when she was eight years old Petitioner held her down while Carpenter vaginally penetrated her, digitally on one occasion and with his penis on another occasion. App. 130, ll. 16-25; App. 134, l. 22; App. 136, ll. 13-22. While Minor 1 initially denied being sexually abused, that fall, he disclosed that when he was ten years old Carpenter anally penetrated him while Petitioner was present. App. 132, l. 22 – 134, l. 3. Both children claimed feces were put on their backs during the sexual assaults and that they were forced to drink urine. App. 133, l. 21 – 134, l. 5.

The assistant solicitor who prosecuted the case maintained that there were a lot of very graphic photographs found on Carpenter's phone that showed consenting adults, including Petitioner and Carpenter, engaged in sex acts involving urine and feces. App. 129, ll. 1-7. Carpenter later admitted under oath that he engaged in such acts with Petitioner. App. 134, ll. 9-24. He said he liked to drink Petitioner's urine as it was "an act of subjugation." App. 87, ll.

16-17; App. 134, ll. 13-23. Petitioner also admitted to engaging in such acts with Carpenter, her husband, but denied ever involving children. App. 189, ll. 10-15.

Petitioner has always maintained her innocence as well as Carpenter's and denied any sexual abuse occurred. App. 173, ll. 11-16. She believed Delina, Minor 1 and Minor 2's mother, "coached the kids" because she wanted Carpenter's money and was upset Carpenter refused to continue supporting her drug habit. App. 170, l. 15 – 171, l. 11; See App. 124, ll. 4-11. Delina was aware Petitioner and Carpenter practiced coprophilia and was able to "coach" the children in that respect. App. 171, ll. 14-18. Because Petitioner "was adamant that she didn't know anything [and] nothing happened," she wanted to go to trial and could not cooperate with the state against Carpenter. App. 173, ll. 22-23; App. 176, ll. 2-3. However, after Carpenter was tried, convicted, and sentenced to thirty years imprisonment in September 2018, Petitioner "was scared to death to take it to trial." App. 167, ll. 6-8; App. 176, ll. 2-6.

Petitioner ultimately waived presentment to the grand jury and, on January 29, 2019, pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to second degree criminal sexual conduct with a minor before the Honorable Letitia Verdin. App. 1; App. 4, ll. 7-23; App. 9, l. 22 – 10, l. 4. This charge concerned alleged conduct involving Minor 2. In exchange for her plea pursuant to Alford, the state recommended a sentencing "cap" of fifteen years imprisonment. App. 11, ll. 20-23. The state also dismissed charges related to Minor 1. App. 148, l. 20 – 149, l. 5. Petitioner was sentenced to fourteen years imprisonment. App. 17, ll. 23-25. She did not appeal her conviction or sentence.

On May 10, 2019, Petitioner filed an application for post-conviction relief. App. 20-26. The state filed a return to this application dated December 13, 2019. App. 27-36. With the assistance of counsel, Petitioner filed an amended application on July 2, 2020, and a second

amended application on August 24, 2020. App. 37-43. The state filed an amended return on October 29, 2020. App. 44-59. Petitioner filed a reply in opposition to the state's amended return on December 23, 2020. App. 60-65. An evidentiary hearing was convened on November 9, 2021 before the Honorable G.D. Morgan, Jr. App. 66. Assistant Attorney General Taylor Smith represented the state, and William Yarborough represented Petitioner. App. 66.

Petitioner testified at the evidentiary hearing that she only pled pursuant to Alford because plea counsel told her if she "took it to trial, [she] was going to get 30 years." App. 167, ll. 2-7. Counsel explained to her that pleading pursuant to Alford was "pleading not guilty but letting the judge decide to do what she wanted to do with you." App. 167, ll. 8-10. Counsel further told her that despite the "15 year cap" she "was looking at five to eight years" imprisonment if she pled. App. 167, ll. 11-14; App. 178, ll. 6-15; App. 184, ll. 1-6. Petitioner believed she could "deal with" a five to eight year sentence since she had already served over eighteen months in the county jail and knew she would receive credit for time served. App. 184, ll. 1-8.

Michael Morin, Petitioner's plea counsel, testified that he was retained to represent Petitioner by Carpenter, Petitioner's husband and codefendant. App. 75, ll. 4-25. Carpenter paid Morin's fee. App. 95, ll. 19-24. Morin corroborated Petitioner's testimony that Petitioner always maintained her innocence and intended to proceed to trial. App. 76, ll. 11-14; App. 91, ll. 22-24. However, after Carpenter was tried, convicted, and sentenced to thirty years, Petitioner called Morin and said she needed "to work out a plea." Morin said she was "almost hysterical." This was the first time Petitioner ever mentioned wanting to plead. App. 91, ll. 11-20. Up until that day, Morin "always figured we were going to trial." App. 91, ll. 22-24. He explained that he "brought up" an Alford plea because it would allow Petitioner to take advantage of the state's

favorable offer without admitting guilt. With such a plea, Petitioner would only have to acknowledge that if she proceeded to trial, she would likely be found guilty. App. 92, l. 14 – 93, l. 16. Morin believed an Alford plea was proper because Petitioner "had a drug problem" and "perhaps" because of that problem, she could not remember "exactly" what occurred. App. 92, l. 25 – 93, l. 5. Moreover, Morin testified that if Petitioner had gone to trial, the state intended to try her for first degree criminal sexual conduct with a minor, "just like Mr. Carpenter, under the hand of one, the hand of all." App. 92, ll. 18-20. Therefore, pleading to the lesser offense of second degree criminal sexual conduct with a minor with a sentencing "cap" of fifteen years was very favorable to Petitioner. App. 93, ll. 4-10.

Morin testified that he thought Petitioner's fourteen year sentence was "too high . . . [b]ut it was better than what would have happened" if she had gone to trial. App. 113, ll. 12-16. He was "trying to keep it under 10," but told Petitioner she could be sentenced "all the way" up to fifteen years. App. 118, l. 16 – 119, l. 2. Morin denied telling Petitioner she would only be sentenced to five to eight years. App. 193, ll. 6-19.

By order dated April 10, 2022, the PCR judge denied Petitioner relief. App. 197-234. The judge found "plea counsel adequately informed [Petitioner] of everything that she needed to know in order to enter her Alford plea voluntarily, knowingly, and intelligently" and that Petitioner provided "no credible evidence to believe otherwise." App. 209. The judge further found that "even if plea counsel had incorrectly advised [Petitioner] in matters such as the possible sentences [Petitioner] could face if she pleaded guilty, the consequences of entering an Alford plea, and the rights [Petitioner] would be waiving by pleading guilty, any error on plea counsel's part would have been cured by the plea court's colloquy." App. 209. The judge emphasized plea counsel's testimony that he advised Petitioner of the potential sentences she

faced. App. 202. He also emphasized Petitioner's testimony where she acknowledged that the plea judge had informed her during the plea "of the fifteen year cap." App. 203.

Moreover, the PCR judge found Petitioner failed to prove there was a reasonable likelihood she would have proceeded to trial instead of entering an Alford plea but for plea counsel's alleged deficiencies. App. 209-210. The judge emphasized Petitioner's testimony that she "wanted a trial at first but became scared when plea counsel told her that, if she went to trial, she could get thirty years in prison like her codefendant." App. 210.

Because Petitioner's Alford plea was not voluntarily, knowingly, and intelligently entered due to plea counsel's deficient performance, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief (PCR) judge erred by finding Petitioner voluntarily, knowingly, and intelligently pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), when Petitioner only entered a plea based on plea counsel's promise that she would be sentenced to five to eight years imprisonment, and where Petitioner was prejudiced because she was sentenced to fourteen years and there is a reasonable probability she would have proceeded to trial if she would have known she could be sentenced to more than eight years.

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, the judge 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.

In this case, Petitioner's plea was not knowing, intelligent, and voluntary because of plea counsel's promise that she would only be sentenced to five to eight years imprisonment. The state recommended a sentencing "cap" of fifteen years and Petitioner was ultimately sentenced to fourteen years imprisonment. Counsel's promise that Petitioner would only receive a five to eight year sentence despite this sentencing "cap" induced Petitioner to enter a plea where she would not have. Petitioner was unable to make an intelligent choice among the alternative courses of action open to her because of counsel's promise. No reasonably competent criminal defense lawyer would promise a client that she would be sentenced to less time than she was facing. Consequently, plea counsel's performance was deficient.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonably probability Petitioner would have proceeded to trial if she would have known she would be sentenced to more than eight years.

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

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. Petitioner ultimately requests this Court reverse her conviction and sentence and remand for a new trial.

Respectfully submitted,

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

ATTORNEY FOR PETITIONER

This 6th day of February, 2023.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Regina G. Owings 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 November 9, 2021 before the Honorable G.D. Morgan, Jr., 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 Regina G. Owings.

Respectfully Submitted,

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

ATTORNEY FOR PETITIONER

This 6th day of February, 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."

s/ Lara M. Caudy
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Appellate Defender

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This 6th day of February, 2023.