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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Robert J. Bonds, Circuit Court Judge

ASHLEY PRIOR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000564

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was plea counsel ineffective in failing to adequately explain and provide copies of both the initial and the amended indictment for burglary first degree so that Petitioner could intelligently consider the State's plea offer for the mandatory minimum sentence?

STATEMENT

In March of 2018, the Aiken County Grand Jury indicted Petitioner, Ashley Tavelle Prior, for grand larceny and burglary first degree, indictments #2018-GS-02-0530-31. (App. pp. 27-30). The aggravator listed on the burglary first indictment was that the entry took place during nighttime hours. (App. p. 30). In August of 2018, the Aiken County Grand Jury indicted Petitioner for burglary first degree, indictment #2018-GS-02-1898. (App. pp. 25-26). The aggravator listed on this indictment is that the defendant has two or more convictions for burglary. The date, address, and homeowner are the same on both indictments. On August 20, 2018, Petitioner appeared before the Honorable William P. Keesley and pled guilty to grand larceny and burglary first, indictment #2018-GS-02-1898. Barry L. Thompson, II, represented Petitioner. Heather M. Deloach prosecuted the case. Judge Keesley sentenced Petitioner to twenty (20) years for burglary and five (5) years concurrent for larceny. The same day as the plea, August 20. 2018, the other burglary first degree indictment #2018-GS-02-0531 was nolle prossed. (App. p. 29).

On August 23, 2018, counsel for Petitioner filed a motion to reconsider and memorandum in support. (App. pp. 33-36). On February 13, 2019, Judge Keesley granted the motion to reconsider, backdated the sentence start date to May 9, 2015, and ordered that the sentences be served concurrently with other sentences for which Petitioner was serving time. (App. pp. 37-39). 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 August 8, 2019, Petitioner filed a *pro se* application for post-conviction relief [PCR]. (App. pp. 40-49). The State filed a return on December 13, 2019. (App. pp. 50-58). On January 24, 2022, counsel for Petitioner filed an amended PCR application. (App. pp. 59-61). On February 4, 2022, an evidentiary hearing was held via WebEx before the Honorable Robert J.

Bonds. Nancy C. Fennell represented Petitioner. Megan H. Jameson represented the State. In a written order signed on April 11, 2022, Judge Bonds denied relief and dismissed the application. A timely notice of intent to appeal was served on April 20, 2022. This petition for writ of certiorari follows.

ARGUMENT

Plea counsel was ineffective in failing to adequately explain and provide copies of both the initial and the amended indictment for burglary first degree so that Petitioner could intelligently consider the State's plea offer for the mandatory minimum sentence.

In March of 2018, Petitioner was initially indicted for burglary first degree, indictment #2018-GS-02-0531. (App. pp. 29-30). The indictment alleges, "That ASHLEY TAVELLE PRIOR did in Aiken County on or about February 28, 2015, wilfully and unlawfully enter the dwelling of Steve Haines located at xxxx Richardson Lake Road, without consent and with the intent to commit a crime therein and the defendant entered dwelling during the nighttime hours, all in violation of §16-11-311, Code of Laws of South Carolina (1976), as amended." (App. p. 30). During the PCR hearing Petitioner testified that he just recently found out about the nighttime burglary. (App. p. 100, lines 4-6). Petitioner testified that he thought the burglary was alleged to have taken place in the morning. (App. p. 100, lines 6-8).

Petitioner, however, did not plead to the March indictment. Instead, Petitioner pled to the August burglary first degree, indictment #2018-GS-02-1898. (App. pp. 25-26). This indictment alleges, "That ASHLEY TAVELLE PRIOR did in Aiken County on or about February 28, 2015, wilfully and unlawfully enter the dwelling of Steve Haines located at xxxx Richardson Lake Road, without consent and with the intent to commit a crime therein, and the defendant has a prior record of two or more convictions for burglary or housebreaking or a combination of both, all in violation of §16-11-311, Code of Laws of South Carolina (1976), as amended." §16-11-311, Code of Laws of South Carolina (1976), as amended." (App. p. 26). Prior to the guilty plea Petitioner was evaluated for competency and the trial judge held a Blair hearing. (App. pp. 3-7). In mitigation plea counsel advised the judge about Petitioner's extensive mental health problems. (App. p. 19, line 6 – p. 20, lines 1-14).

During the PCR hearing PCR counsel told the judge, "Well, Your Honor, I believe it's his testimony that he didn't receive that – that later amended indictment." (App. p. 77, lines 15-17). During the PCR hearing Petitioner testified that he did not know if the burglary first degree was based on nighttime or guns or priors. (App. p. 101, lines 17-22). Petitioner testified that, "I mean now – I hear now you – you told me that it was con – prior burglaries is why it's first degree. That's the first I'd heard of that when I talked to you. I ain't even got any papers on that or anything or my aunt hasn't either." (App. p. 102, lines 2-6).

Plea counsel testified that the August indictment was the one he saw in court. (App. p. 141, line 8 – p. 142, lines 1-2). As for the first indictment, plea counsel testified, "I will tell you that if there was an earlier indictment, it's – it's doubtful that I would have ever seen it." (App. p. 142, lines 5-7). Plea counsel testified that he discussed the elements of burglary first degree with Petitioner. (App. p. 127, line 21 – p. 128, lines 1-9). Plea counsel testified that he reviewed the discovery material with Petitioner. (App. p. 128, lines 9-22). It is unclear if the discovery material included the indictment that counsel testified he saw in court.

During the PCR hearing Petitioner testified, "And the solicitor – and the solicitor, you know, before this, before court and all, he offered me fifteen violent. No way I would have took that." (App. p. 89, lines 14-16). Plea counsel testified at the PCR hearing that the State offered a plea offer for the fifteen (15) year minimum sentence for burglary first and Petitioner did not accept the offer. (App. p. 133, lines 11-16). Instead, Petitioner pled guilty without the benefit of a plea offer and received a twenty (20) year sentence. (App. p. 31). Plea counsel was ineffective in failing to adequately explain and provide copies of both the initial and the amended indictment for burglary first degree so that Petitioner could intelligently consider the State's plea offer for the mandatory minimum sentence.

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)).

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."

In the present case plea counsel was ineffective in in failing to adequately explain and provide copies of both the initial and the amended indictment for burglary first degree. There is a reasonable probability that, but for counsel's error, Petitioner would have accepted the State's plea offer for the mandatory minimum sentence of fifteen (15) years. Instead, Petitioner pled straight up and received a twenty (20) year sentence.

CONCLUSION

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

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of February, 2023.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ashley Tavelle Prior 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 Robert J. Bonds, which was held on February 4, 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 Ashley Tavelle Prior.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th 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."

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This 9th day of February, 2023.