

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas, Non Jury

Diane S. Goodstein, Circuit Court Judge

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DEC 20 2011

S.C. Supreme Court

ORIGINAL

Case Number: 2009-CP-18-1636

Jonathan Coburn.....Petitioner

v.

The State of South Carolina.....Respondent

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

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Question Presented on Appeal

Does a criminal defendant's reliance upon erroneous advice from trial counsel regarding the eligibility for good time credits for a charge of murder entitle the defendant to post-conviction relief?

Statement of the Facts

According to the information presented at the guilty plea, Petitioner, a sixteen-year-old on November 5, 2006, was involved as a principal participant, along with Vincent Corda Payton, in a scheme to rob a drug dealer. App. p. 90, l. 22- p. 91, l. 12. This plan did not go smoothly as the first attempted meeting did not come to fruition. App. p. 93, l. 2-20. After further efforts, a second meeting was arranged between Petitioner, co-defendant, and Melvin Keith Bryant. App. p.93, l. 21-22.

Petitioner and his co-defendant met at the prearranged location. App. p. 95, l. 18-21. However, things did not proceed as planned. Instead of successfully robbing the victim, gunfire erupted resulting in the killing of Lisa Thompson and the wounding of Melvin Keith Bryant. App. p. 95, l. 24- p. 97, l. 7.

Following Petitioner's arrest, law enforcement procured several statements from Petitioner involving the incident. App. p. 148, l. 14-16. Petitioner indicated Mr. Bryant's furtive movements inside the car caused fear and suggested the use of deadly force towards Petitioner. App. 241. Mr. Bryant's reputation as a drug dealer and violent person also caused Petitioner fear. App. p. 149, l. 14- p. 151, l. 3.

Statement of the Case

When the Grand Jury convened, Petitioner was indicted for Murder and Assault and Battery with Intent to Kill (ABIK). App. p. 243 & 246. With the assistance of trial counsel, this matter was eventually set for trial in the Dorchester County Court of General Sessions during the July 14, 2008 term of court. However, Petitioner entered a plea before the call of the case. App. p. 85, l. 3-8.

The arrangement called for Petitioner to plead guilty to Murder and ABIK. The plea involved “no negotiations or recommendations” as to sentence. App. p. 245, p. 248 and p. 85, l. 16-17. However, Petitioner did proffer information to the trial court at the request of the prosecutor so the State could leverage this potential testimony against his co-defendant if that case did not resolve before trial. App. p. 85, l. 3-8.

Although the co-defendant pled guilty, mooting the State’s need for Petitioner’s testimony, Petitioner received the mandatory minimum sentence of 30 years on the charge of Murder. App. p. 245. He received the maximum sentence of 20 years on the charge of ABIK. App. p. 248. These sentences were ordered to be served concurrently.

However, following his commitment to the Department of Corrections, Petitioner learned that he was not eligible for good time credits for the Murder charge. Because this conflicted with the information he received from his trial counsel, Petitioner filed an action seeking post-conviction relief. App. p. 16. Following the retention of undersigned counsel, this application was amended. App. p. 23.

After a hearing and briefing of the issues, the PCR Court issued an Order denying Petitioner’s request for relief through adoption, in whole, of the proposed Order submitted by the

State. App. p. 2. Despite a timely filed Motion to Alter or Amend, the PCR Court denied any alteration or modification but instead affirmed the previously issued Order. App. p. 29 & 14. This Petition follows the timely filing of a Notice of Appeal.

Standard of Review

A PCR court's findings of fact and conclusions of law are afforded great deference on review. Gibson v State, 514 SE2d 320 (SC 1999). In fact, a trial court's order regarding an application for post-conviction relief is reviewed under an "any evidence" standard. Gibson, at 325. However, where "no probative evidence exists" to support the judge's findings or conclusions, the judgement should be reversed. Riddle v. Ozmint, 631 SE2d 70 at 75 (SC 2006).

Argument

The PCR Court erred in denying Petitioner relief because the record conclusively establishes that trial counsel provided incorrect advice regarding the eligibility of good time credits for one convicted of the crime of murder. Further, the record conclusively establishes that, but for this erroneous advice, the Petitioner would not have pled guilty to either charge for which he was convicted. This Petition should be granted, the judgement of the post-conviction court reversed, the convictions vacated, and a new trial ordered.

To begin, Petitioner was denied the effective assistance of counsel. A petitioner proves the denial of the effective assistance of counsel when he shows both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 US 668, (1984); Judge v. State, 471 SE2d 146 (SC 1996). In order to prove prejudice, a petitioner must show that but for counsel's errors, there is a reasonable probability the result at trial would have

been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

The US Supreme Court expressly applied the Strickland test to challenges based upon allegations of ineffective assistance of counsel (IAC) in a guilty plea setting in the case of Hill v. Lockhart, 474 US 52 (1985). There, the Court rephrased the test as (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases; and (2) whether there is a reasonable probability that, except for counsel's errors, the petitioner would not have pled guilty but would have instead insisted upon a trial.

Further, South Carolina has repeatedly recognized that erroneous advice regarding sentencing and the service of a sentence will render the advice deficient. See, e.g. Alexander v. State, 402 SE2d 484 (SC 1991); Ray v. State, 401 SE2d 151 (SC 1991), & Hinson v. State, 377 SE2d 334 (SC 1989). Most of these cases involved admissions by counsel, on post-conviction review, that the information provided regarding these sentencing issues was erroneous. Finally, the appellate courts have repeatedly approved of a finding of prejudice when the lone and uncontradicted evidence contained in the record on this issue was petitioner's sworn testimony that the erroneous advice served to induce a plea when he otherwise would have proceeded to trial. Alexander, at 485-486 & Ray, at 153.

In Hinson v. State, the Supreme Court of South Carolina reversed the denial of post-conviction relief in the context of erroneous advice regarding a murder conviction. In Hinson, trial counsel provided incorrect advice that parole was available after service of ten (10) years because his conviction involved common-law murder in contrast to the twenty (20) year eligibility requirement which existed for murder at the time of Hinson's matter. Hinson's

testimony was corroborated by the testimony of trial counsel, who represented his co-defendant, regarding the deficiency prong, but no corroboration was noted regarding the prejudice prong.

Likewise, in Ray v. State, the South Carolina Supreme Court reversed a criminal conviction based upon the provision of improper sentencing advice. The State conceded erroneous advice was provided, but instead asserted the prejudice prong had not been satisfied by the petitioner's testimony. In reversing the lower court, the Supreme Court noted the petitioner's "...un-controverted testimony that he would not have pled guilty absent the erroneous advice..." Id., at 153.

Finally, in Alexander v. State, the Supreme Court again reviewed a post-conviction challenge to a guilty plea premised upon incorrect sentencing advice. The issue in Alexander concerned the prejudice prong as the court found the advice provided was obviously deficient. In granting relief through reversal of the circuit court, the Supreme Court noted the proof of prejudice was conclusively established because: "(i)n fact, the only evidence in the record on this point is petitioner's own testimony...." Id., at 485.

Deficient Performance -Improper Advice Regarding Good Time Credits for Murder

Petitioner contends his attorney provided him improper advice regarding the eligibility for good time credits for the charge of murder. Further, he contends that there is a reasonable probability that, but for this error, he would have chosen to proceed to trial instead of entering a plea of guilty to either of the two charges for which he was convicted. Both prongs were established in this case by a preponderance of the evidence.

In South Carolina, the charge of murder carries a penalty set by statute. See SC Code Section 16-3-20. Because Petitioner was only sixteen (16) years old at the time of the incident

for which he was charged, the State could not seek the death penalty. Roper v. Simmons, 543 U.S. 551 (2005). Thus, the eligible sentence range for a conviction of murder is imprisonment for life or a mandatory minimum term of thirty years. SC Code Section 16-3-20(A).

In South Carolina, statute provides that no parole opportunities are available for those whose crimes carry a potential penalty of twenty (20) years or more. SC Code Section 24-13-100. Even though this class of crimes are classified as “no parole” by statute, other sections of law provide for the eligibility of good time credits, essentially providing the possibility that a person could be released after the service of eighty-five (85) percent of his sentence. See e.g. SC Code Section 24-13-210. A sentence for murder; however, is different because any sentence for this charge must be served day for day. See SC Code Section 16-3-20 (“No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section.”).

In the case at bar, the PCR Court did not make a specific finding regarding the deficient performance prong of Petitioner’s claim of ineffective assistance of counsel. App. p. 8 (*“If Counsel, in spite of this, advised that Applicant could be eligible for parole after service of 85% of the sentence, this advice was clearly incorrect.”*)(Emphasis added).

However, it is clear and uncontradicted that Petitioner received improper advice regarding the availability of “good time credits” for the Murder charge. This incorrect advice constitutes deficient performance for purposes of this litigation. Petitioner’s trial counsel testified at the merits hearing that he provided incorrect advice to Petitioner Coburn regarding this concern.

App. p. 125, l 22-p. 126, l. 7.

Petitioner's testimony confirmed the receipt of this incorrect advice. App. p. 189, l. 16-25. Correspondence between trial counsel and Petitioner's parents, referenced in testimony by trial counsel, adds further confirmation of this deficiency. App. p. 167, l. 14- p. 170, l. 19. Finally, the State conceded the advice provided to Petitioner in this regard was incorrect. App. p. 223, l. 13-20, & p. 234, l. 2-9.¹

Prejudice -Absent the Incorrect Advice, Petitioner Would Not Have Pled Guilty

While the PCR Court found that Petitioner suffered no prejudice despite the erroneous advice, the evidence establishes that Petitioner would not have pled to either the charge of Murder or Assault and Battery with Intent to Kill had he been provided correct advice. The difference between the correct and incorrect advice constitutes a *possible* fifteen (15) percent difference in the time Petitioner Coburn would actually have to serve in prison. App. p. 135, l. 17-24. Considering that Petitioner Coburn's sentence effectively began when he was sixteen (16) years old, this four and a half (4 ½) year difference is significant.

Petitioner testified that he would not have pled to the Murder charge had he been provided correct advice. App. p. 191, l. 18- 24. Further, he indicated that he would not have pled to the Assault and Battery with Intent to Kill charge either because if he desired a trial, he would have done so on both charges. App. p. 191, l. 25- p. 192, l. 4. The sincerity of this testimony is confirmed by the correspondence between trial counsel and Petitioner's father after

¹The record also includes a sentence which appears to be a concession by the State that the prejudice prong was also not at issue. App. p. 223, l. 16- 19 (“[Petitioner] would not have pled but for his understanding regarding the 85 percent parole eligibility in this case given that he could also receive life.”). However, given the State's position in opposition to PCR relief, undersigned counsel assumes this is a typo in the transcript.

the discovery of the error where the father indicated he would have told his minor son to “roll the dice” if he knew the minimum sentence was not eligible for good time credits.² App. p. 167, l. 14- p. 170, l. 19.

Further, trial counsel testified that Petitioner Coburn was especially concerned about his eligibility for the good time credits. In fact, trial counsel testified that Petitioner’s concern in this regard seemed misplaced to him given the possibility of a life sentence, but that Petitioner was fixated, for whatever reason, on this issue. App. p. 186, l. 18- p. 187, l. 11. An explanation for this fixation was offered at the hearing.

Petitioner testified that he desired to plea, with the eligibility for good time credits, because it could provide him the chance to be with his father outside of prison since his father would only be seventy-seven (77) years old at that release date. On the other hand, a day for day thirty (30) year sentence would reduce that chance because his father would then be eighty -two (82) years old. His mother has battled breast cancer for many years and Petitioner did not hold much hope that he would be reunited with her following the service of any lengthy prison term. App. p. 190, l. 1- p. 191, l. 24.

The evidence establishes that prejudice ensued from Petitioner’s receipt of this improper advice regarding this sentencing issue. Importantly, while Petitioner unequivocally asserted during his testimony that his decision to forego his trial rights was affected by this deficiency, other significant and consistent evidence supports this averment. Finally, it is clear that the

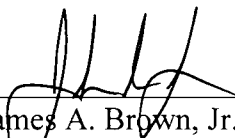
²Petitioner’s theory, had the case gone to trial, is no mystery as it is contained in his statement made to law enforcement and entered into the record as Petitioner’s 1 at the merits hearing. This theory is also confirmed by Petitioner’s PCR testimony and referenced in the second ground for which he sought post conviction relief. App. p. 154, l. 1-2; p. 200, l. 1-11; and p. 25.

decision to plead to the Murder charge altered Petitioner's decision as to the charge of Assault and Battery with Intent to Kill such that the ABIK plea was also detrimentally influenced by the same deficiency.³

Conclusion

Thus, no evidence exists in the record to affirm the denial of post-conviction relief. Instead, the record conclusively establishes that Petitioner received the ineffective assistance of counsel. Therefore, this Court should grant this Petition, reverse the Order of the PCR Court, vacate the convictions and sentences, and remand this matter for a new trial on both charges.

Respectfully Submitted by:



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³It strains credulity to believe that Petitioner Coburn would plead guilty to Assault and Battery with Intent to Kill but insist upon trial on the Murder charge when the State's theory was based upon transferred intent. App. p. 173, l. 11- p. 175, l. 2.

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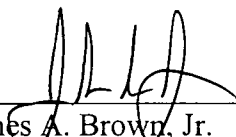
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PROOF OF SERVICE

Counsel for Jonathan Coburn hereby certifies that he has prepared and served a Petition for Writ of Certiorari and Appendix on this 16th day of December, 2011 upon the State, by depositing a copy, postage pre-paid, in the United States Mail, addressed to Attorney for Respondent, Robert D. Corney, Esquire, Office of the Attorney General, PO Box 11549 Columbia, SC 29211-11549, (803) 734-3970.



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