ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

RECEIVED
JUN 24 2013
S.C. Supreme Court

ERIC BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000001

JOHNSON PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The PCR court erred in concluding Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered where Petitioner presented evidence that his plea counsel advised him incorrectly concerning the sentence he would receive.

STATEMENT

A Dorchester County grand jury indicted Petitioner for murder on January 13, 2003. App. 202 – 203. On November 2, 2004, Petitioner entered a guilty plea to the lesser-included offense of manslaughter before the Honorable Steven John. Jennifer Porter represented the state, and Marva Hardee Thomas represented Petitioner. App. 1. Judge John sentenced Petitioner to twenty-five years' imprisonment. App. 19, lines 4-11; App. 204. Petitioner did not file a notice of appeal following his guilty plea.

On October 11, 2005, Petitioner filed an application for post-conviction relief (PCR). App. 22 – 53. A hearing convened on March 3, 2010 before the Honorable Diane Goodstein. Donald Budman represented Petitioner, and Mary Williams represented the state. App. 63. The record was left open, and Petitioner supplemented the record with documents secured from an investigative file. App. 159 – 183. By order filed March 23, 2012, Judge Goodstein denied Petitioner relief from his conviction. App. 184 – 194. Petitioner moved to alter or amend the judgment on April 4, 2012. App. 195 – 197. By order filed December 3, 2012, Judge Goodstein denied Petitioner's motion. App. 201.

Petitioner filed a timely notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in concluding Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered where Petitioner presented evidence that his plea counsel advised him incorrectly concerning the sentence he would receive.

Relevant facts

When Petitioner entered his guilty plea to the lesser included offense of voluntary manslaughter, the judge and the prosecutor noted the guilty plea was without further negotiations or recommendations. App. 2, lines 11 – 15. During the colloquy, Petitioner stated that he understood this as well. App. 3, lines 18 – 23. Judge John informed Petitioner that the potential sentence "could be up to [thirty] years." App. 3, lines 6 – 9. Petitioner indicated to the judge that he was pleading guilty freely, voluntarily, and of his own free will and accord. App. 6, lines 6 – 13. He further indicated that he had not been promised anything or threatened in any way. App. 6, lines 17 – 20. Judge John inquired as to prior plea negotiations between the parties. According to the prosecutor a prior offer consisted of Petitioner pleading guilty in exchange for a sentence of twenty-five years, which was to run consecutive to his youthful offender sentence. However, at the time of his guilty plea, Petitioner had already satisfied the requirements of his youthful offender sentence. App. 17, lines 8 – 20. Ultimately, Judge John sentenced Petitioner to twenty-five years' imprisonment. App. 19, lines 4 – 11.

At the PCR hearing, Petitioner testified that prior to his guilty plea, he was preparing to go to trial. In fact, the parties had selected at least two juries. App. 90, lines 20 – 22; App. 91, lines 5 – 14. Prior to selection of the third jury, plea counsel informed Petitioner that he would serve approximately seventeen years if he entered a guilty plea. App. 91, line 17 – 23. Petitioner agreed and expected that he would serve seventeen years. App. 91, line 25 – app. 92, line 1. According to

Petitioner, plea counsel informed him that he would receive a life sentence at the conclusion of the trial if he refused to enter the guilty plea to the reduced charge. App. 92, lines 9 – 14. Petitioner further testified that he would not have pled guilty, except for plea counsel's advice that he would receive a seventeen year sentence. App. 93, lines 12 – 16. When discussing the guilty plea with Petitioner, plea counsel used a yellow notepad and a calculator to determine that Petitioner would receive a sentence of seventeen years. App. 96, lines 20 – App. 97, line 4.

On cross-examination, Petitioner maintained that he was supposed to receive a sentence of seventeen years. App. 102, lines 23 – 25. Despite repeated questioning by the State, Petitioner steadfastly maintained his position that plea counsel informed him his sentence would be seventeen years. App. 106, line 23 – App. 107, line 4.

Plea counsel also testified at the PCR hearing. Plea counsel did not remember discussing with Petitioner that he would serve a sentence of seventeen years' imprisonment if he entered a guilty plea. App. 129, lines 21 – App. 130, line 6. Plea counsel recalled that Petitioner decided to plead guilty during the jury selection process. App. 131, lines 2 – 13. Plea counsel testified that she had no discussions with Petitioner regarding the amount of time he would likely receive from the judge. Specifically, she testified she did not "understand where the [seventeen] came from." App. 131, lines 14 – 17. Plea counsel recalled asking the court for leniency during the guilty plea proceeding. She reasoned that she would not ask for leniency if Petitioner were to receive a specific amount of time. App. 131, line 18 – App. 132, line 7. Put simply and most directly, plea counsel testified she did not remember talking to Petitioner about seventeen years at all. App. 132, lines 11 – 17.

Regarding this issue, the PCR court found Petitioner was advised of the potential sentence of up to thirty years for voluntary manslaughter during the plea colloquy and that the matter was

before the plea judge without negotiations or recommendations as to the sentence. App. 192. Ultimately, the PCR judge found Petitioner was clearly informed by the plea court of the potential sentence and the absence of any negotiations. Additionally, the court found "that while [Petitioner] was undoubtedly hopeful for the least possible sentence, the plea court's colloquy corrected any misgivings he may have had about the potential sentence." App. 193.

Discussion

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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also 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.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Due process of law requires that before a guilty plea can be entered voluntarily and Intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d

264, 265 (1982) overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)(citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435.

Petitioner testified that plea counsel informed him that he would receive a sentence of seventeen years and Petitioner agreed to the terms. Nevertheless, at the guilty plea proceeding, the judge sentenced Petitioner to twenty-five years' imprisonment, which was significantly more time than what Petitioner expected and to what he believed he had agreed. Therefore, Petitioner's guilty plea was involuntary as a result of plea counsel's promise of a lesser sentence to induce Petitioner to plead guilty.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of June, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

ERIC BROWN,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-000001

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric Brown 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 records and transcript of Petitioner's post-conviction relief hearing which was held on March 3, 2010. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Eric Brown.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of June, 2013

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Eric Brown, #272336, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 24th day of June, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of June, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.