RECEIVED
Apr 13 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

ANTHONY MORRISON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001088

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

INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by the fact that plea counsel failed to discover that the officer who tested the marijuana was not properly certified?

STATEMENT

In April of 2017, the Horry County Grand Jury indicted Petitioner, Anthony T. Morrison, for trafficking cocaine, 28-100 grams, first offense and possession with intent to distribute marijuana first offense, indictments #2017-GS-26-02047, 02051. (App. pp. 12-13; 15-16). On June 22, 2019, Petitioner appeared before the Honorable Lee. S. Alford and pled guilty. Ralph Wilson, Jr. represented Petitioner at the plea. David Caraker represented the State. Pursuant to negotiations with the State, Judge Alford sentenced Petitioner to ten (10) years for the cocaine charge and five (5) years concurrent for the marijuana charge. (App. pp. 14, 17). Petitioner did not appeal the sentence or conviction.

On November 12, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 18-25). On September 14, 2020, the State filed a return and partial motion to dismiss. (App. pp. 26-37). On June 2, 2022, an evidentiary hearing was held before the Honorable H. Steven DeBerry, IV. James K. Falk represented Petitioner at the PCR hearing. Chelsey F. Marto represented the State. In a written order filed August 1, 2022, Judge DeBerry denied relief and dismissed the application. A timely notice of intent to appeal was filed on August 10, 2022. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by the fact that plea counsel failed to discover that the officer who tested the marijuana was not properly certified.

Petitioner pled guilty to trafficking cocaine first offense and possession with intent to distribute marijuana first offense. In the application for post-conviction relief Petitioner alleged that "Myrtle Beach Police Dept. confessed to not having proper re-certification." (App. p. 20). During the PCR hearing Petitioner testified that the police officer who tested the marijuana was not certified. (App. p. 42, line 7 – p. 43, lines 1-15). Petitioner testified that he "would have denied the first plea knowing he wasn't certified." (App. p. 43, lines 1-2). Plea counsel testified at the PCR hearing, "Vaguely I remember getting just something saying that the officer was recertified. I don't recall him being uncertified at the time. If that was the case I don't recall that, but it wouldn't have changed my opinion of the case. The marijuana was not the most important drug that he had on him." (App. p. 58, lines 11-15).

In the order of dismissal the PCR judge wrote, "Counsel credibly testified that he remembered discussion about an officer being recertified but did not recall him not being recertified. Counsel also credibly testified that this would not have changed his strategy and that this officer only dealt with the marijuana charge. Thus, this Court finds that Counsel seemingly investigated this issue and was not deficient. Additionally, because this issue did not impact the recommendation as to the plea, no prejudice is found. Accordingly, relief is denied on this ground." (App. p. 79). The PCR judge erred.

According to the testimony of Petitioner at the PCR hearing, plea counsel did not learn of the certification problem until a year after the guilty plea. (App. p. 42, lines 7-11; p. 43, lines 13-17). The PCR judge erred in finding that plea counsel was not deficient because he "seemingly"

investigated the certification issue. Plea counsel was deficient in failing to discover the certification problem prior to the guilty plea. As to prejudice, Petitioner testified that he "would have denied the first plea knowing he wasn't certified." (App. p. 43, lines 1-2).

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 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:

> 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."

Plea counsel's failure to discover the certification problem prior to the guilty plea rendered the guilty plea involuntary. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Petitioner testified that he "would have denied the first plea knowing he wasn't certified." (App. p. 43, lines 1-2). The PCR judge erred in refusing to grant relief.

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 13th day of April, 2023.

RECEIVED
Apr 13 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

ANTHONY MORRISON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Morrison 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 H. Steven DeBerry IV, which was held on June 2, 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 Anthony Morrison.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2023.

RECEIVED

Apr 13 2023

S.C. SUPREME COURT

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."

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

This 13th day of April, 2023.