

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Union County

Honorable R. Scott Sprouse, Circuit Court Judge

WILLIAM S. VANDERFORD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000998

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in finding plea counsel provided effective representation where counsel failed to file a motion to clarify Petitioner's sentence after the court orally sentenced Petitioner to concurrent terms of one year imprisonment on domestic violence first degree, kidnapping, and possession of methamphetamine third offense, but the sentencing sheets reflected negotiated concurrent terms of ten-years imprisonment on the charges?

STATEMENT OF THE CASE

At approximately 3:30 in the morning on August 21, 2017, A.S. (victim), was in bed when Petitioner began accusing her of infidelity and striking her about her head. She alleged that Petitioner slammed her head into the wall, pulled her from the bed, and pushed her around the home while repeatedly striking her with his hands. She also stated that Petitioner struck her with a lead pipe about her legs and head while threatening to kill her. A.S. attempted to flee the home but stated that Petitioner stopped her and pulled her back into the house by her hair. Petitioner deadbolted A.S. in the residence and took her cellphone. A.S. was able to push out an air conditioning unit to escape and went to a family member's residence to get help. App. 14, l. 1-App. 15, l. 13.

A.S. had various injuries that were consistent with her allegations. Law enforcement searched the residence where the incident occurred and observed an air condition unit displaced from a window and blood inside the residence. Petitioner was arrested the same day when he arrived at the Union County Courthouse for roll call. Officers searched Petitioner's vehicle upon his arrest. In the vehicle they located A.S.'s cellphone along with various narcotics and drug paraphernalia. Two courthouse personnel purportedly overheard Petitioner saying he needed to call his father to let his girlfriend out. App. 15, l. 14-App. 16, l. 9.

During the July 2018 term of the Union County grand jury, Petitioner was indicted for one count of kidnapping, one count of domestic violence first degree, one count of possession of methamphetamine, one count of possession of a schedule III controlled substance, and one count of possession of a schedule IV controlled substance. App. 34-43. On February 1, 2019, Petitioner appeared before the Honorable William McKinnon to enter guilty pleas to the charges

with sentencing deferred until February 11, 2019. The State was represented by Meghan Gilmer. Petitioner was represented by Erik Delaney. App. 1.

At the plea hearing, Solicitor Gilmer informed Judge McKinnon that Petitioner was pleading to the kidnapping charge under North Carolina v. Alford¹ and as indicted to the remaining charges. The parties had negotiated active ten-year sentences on the kidnapping, domestic violence, and possession of methamphetamine charges, all to run concurrently. Additionally, the parties had negotiated time served sentences on the two possession of controlled substance charges. App. 3, l. 5-App. 4, l. 10; App. 6, l. 2-App. 7, l. 13. Petitioner confirmed that Solicitor Gilmer had correctly stated the terms of the negotiated plea agreement. App. 7, ll. 14-19. Petitioner informed Judge McKinnon that he wanted to enter guilty pleas to the negotiated sentences with the sentences being formally imposed on February 11. App. 9, ll. 2-14. Both Counsel Delaney and Petitioner confirmed that Petitioner was pleading guilty voluntarily and of his own free will. App. 13, ll. 5-24. Judge McKinnon accepted Petitioner's guilty pleas and deferred sentencing. App. 18, l. 17-App. 19, l. 17.

The parties reconvened on February 11, 2019, before the Honorable Benjamin H. Culbertson for the imposition of the negotiated sentences. App. 21. Solicitor Gilmer reviewed the charges, the negotiated sentences of "ten years active prison to run concurrently between the charges," and the negotiated time served sentences to the two possession of controlled substance charges. App. 23, l. 1-App. 24, l. 16. Judge Culbertson confirmed the negotiated sentences with Solicitor Gilmer and Counsel Delaney prior to formal sentencing. App. 24, l. 17-App. 26, l. 6. In announcing the sentence, Judge Culbertson stated that "the sole purpose of the hearing hear [sic] today is for the sentencing. There is a negotiated sentence which I will I [sic] accept."

¹ 400 U.S. 25 (1970)

App. 31, l. 23-App. 32, l. 2. Judge Culbertson then sentenced Petitioner to one year in the department of corrections for the kidnapping, domestic violence first degree, and possession of methamphetamine charges. Judge Culbertson sentenced Petitioner to time served on the two possession of controlled substance charges and ran all the sentences concurrent to each other. App. 32, ll. 3-15. The sentencing sheets reflected the negotiated sentence of ten years imprisonment on the kidnapping, domestic violence first degree, and possession of methamphetamine charges. App. 44-46.

A direct appeal was filed but was dismissed for failure to provide a sufficient explanation as required by Rule 203(d)(1)(b)(iv). The remittitur was issued on June 4, 2019. On June 24, 2019, Petitioner filed an application for post-conviction relief alleging Counsel Delaney was ineffective for failing to file a motion to reconsider because the sentence sheets for the kidnapping, domestic violence, and methamphetamine charges did not reflect the one-year sentence announced by the court. App. 49-57. The State made its return and motion to dismiss on September 11, 2019. App. 59-67.

A hearing on the State's motion to dismiss was convened via WebEx before the Honorable Grace Knie on December 7, 2021. The State was represented by Yasmeen Klein. Petitioner was represented by Rodney Richey. App. 68; App. 71, ll. 3-4. The State argued that Petitioner's application should be dismissed for failure to state a genuine issue of material fact. The State contended that the transcripts were dispositive that the pleas were for negotiated ten-year sentences and the sentencing judge merely misspoke when he sentenced Petitioner to one year. App. 75, l. 12-App. 76, l. 18. The State also argued that Petitioner had not raised a cognizable claim for relief under the PCR Act.² App. 77, ll. 3-20; App. 79, l. 21-App. 81, l. 12.

² See S.C. Code Ann. § 17-27-20

Counsel Richey argued that the sentencing transcript reflected Petitioner was sentenced to one year and that Counsel Delaney did not move to correct or clarify the sentence. Relying on Boan v. State, 388 S.C. 272(2010), he argued that Counsel Delaney could be found ineffective for failing to clarify the sentence and that due process required that the oral pronouncement of the one-year sentence would control over the written ten-year sentence. He contended that Petitioner had raised a material issue of genuine fact and a cognizable claim under the PCR Act. App. 78, l. 5-App. 79, l. 19; App. 82, l. 21-App. 83, l. 22; App. 86, ll. 12-18.

Judge Knie issued a written order on January 4, 2022, denying the State's motion to summarily dismiss Petitioner's PCR application. App. 93-95. An evidentiary hearing was convened before the Honorable R. Scott Sprouse on April 11, 2022. Petitioner was represented by Rodney Richey. The State was represented by Michael Neubauer. App. 96. At the start of the hearing, PCR Counsel Richey orally amended Petitioner's application to include ineffective assistance of counsel for failure to ensure Petitioner was indicted with ninety days, failure to ensure the victim was present during the guilty plea, and failure to ensure Petitioner received the proper time served credit from the department of corrections. App. 99, ll. 12-23.

Petitioner testified that after Judge Culbertson sentenced him to one year on the kidnapping, domestic violence, and methamphetamine charges, he asked Counsel Delaney about correcting the sentencing sheets to reflect the oral sentence. He believed Counsel Delaney should have taken some action to correct the sentencing sheets and that he was entitled to the one year sentence the court handed down, not the ten-year sentence that he was serving based on the sentencing sheets. App. 104, l. 14-App. 105, l. 20. Petitioner maintained his sentencing sheets needed to be corrected to reflect the one year sentence the judge announced during sentencing. App. 108, ll. 5-12.

On cross-examination, Petitioner testified that he discussed the negotiated plea with Counsel Delaney prior to entering his guilty plea. However, he believed that the judge still had discretion to sentence him anywhere from zero to thirty years and that the State was only recommending a ten-year sentence. App. 108, l. 25-App. 109, l. 11. Petitioner admitted he recalled the court explaining that Counsel Delaney and the State had worked out a negotiated plea for a ten-year active sentence but stated that the court never explicitly told him that he was sentencing him to a ten-active sentence. App. 109, l. 21-App. 110, l. 25. Petitioner stated that there was not an objection by the State to the one-year sentence and that it was Counsel Delaney's job to correct the discrepancy between the oral sentence and the sentencing sheets. App. 127, l. 20-App. 128, l. 2.

Counsel Delaney testified that the judge did sentence Petitioner to something different than the negotiated plea terms. He stated that he did not catch the sentencing mistake while in the courtroom. He confirmed Petitioner brought up the sentencing disparity after the plea and that they discussed it, but he could not recall if Petitioner requested that he file a motion to clarify or reconsider the sentence. He admitted that he had not taken any action after the guilty plea other than filing the direct appeal at Petitioner's request. App. 132, l. 10-App. 133, l. 21. Counsel Delaney stated he told Petitioner he did not get a one-year sentence, that the deal was negotiated for a ten-year sentence, and it could not be anything lower than that. App. 134, ll. 7-18. He maintained that even though sentencing was deferred, that Petitioner had pled guilty to the negotiated terms on February 1. App. 135, ll. 1-15.

On cross-examination, Counsel Delaney testified that he conveyed the negotiated plea terms to Petitioner in person and that he believed it was understood by Petitioner that the sentence would be a ten-year active prison term. He denied ever telling petitioner that the judge

could sentence him to anything other than ten years. App. 141, l. 12-App. 142, l. 12. Counsel Delaney confirmed that the only time a sentence of one year on the kidnapping, domestic violence, and methamphetamine charges was ever mentioned was when the court announced the sentence. App. 143, ll. 18-25. He testified that other than the misstatement by Judge Culbertson, there was no ambiguity or confusion as to the ultimate sentence that Petitioner would receive. Counsel Delaney did not file a motion to reconsider or clarify and stated he believed that any such motion would not have been successful as the plea was accepted as negotiated. App. 144, l. 17-App. 145, l. 20.

An order of dismissal was filed on July 11, 2022. App. 154-172. In the order, the PCR court found that it was clear from the record that Petitioner had bargained for a negotiated ten-year sentence and that Judge Culbertson had only misspoken when he pronounced that Petitioner be sentenced to one-year. The PCR court also ruled that Counsel Delaney did not have any professional obligation to file for reconsideration or clarification when the sentence imposed on Petitioner was not illegal, nor was there any allegation that the sentencing court had acted with partiality, prejudice, oppression, or corrupt motive in sentencing Petitioner. App. 166-168.

ARGUMENT

The PCR court erred in finding plea counsel provided effective representation where counsel failed to file a motion to clarify Petitioner's sentence after the court orally sentenced Petitioner to concurrent terms of one year imprisonment on domestic violence first degree, kidnapping, and possession of methamphetamine third offense, but the sentencing sheets reflected negotiated concurrent terms of ten-years imprisonment on the charges.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether 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,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must show that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Our Supreme Court has held that counsel can be found ineffective for failing to move to reconsider or clarify a sentence when the oral sentence announced by the court does not match the final written sentencing order. In Boan v. State, 388 S.C. 272, 695 S.E.2d 850, the Court addressed whether trial counsel was ineffective for failing to file a motion to clarify the sentence where there was a ten-year discrepancy between the oral pronouncement of the sentence and the written sentencing order. Id. at 275, 695 S.E.2d at 851.

Boan was convicted of criminal sexual conduct (CSC) with a minor first degree and two counts of lewd act upon a child. The trial judge orally sentenced Boan to serve concurrent sentences of twenty years for the first offense and fifteen years for the second offense, followed by a consecutive sentence of ten years for the third offense. However, the written sentencing order indicated that Boan was to serve a thirty-year sentence on the first offense instead of a twenty-year sentence. Counsel for Boan did not make any motions regarding the sentencing discrepancy. Boan filed an application for post-conviction relief alleging counsel was ineffective for not challenging the sentence. The PCR court dismissed the application finding no error in the sentencing because the written sentencing order controlled. Id. at 274-275, 695 S.E.2d at 851.

Our Supreme Court reversed the PCR court finding that trial counsel was deficient for failing to make a motion for clarification or a motion to conform to the oral sentence. The Court found prejudice because an additional ten years was added to Boan's sentence. Id. at 276, 695 S.E.2d at 852. Having determined both deficient performance and prejudice, the Court next determined whether there was a reasonable probability that Boan would not have been sentenced to an additional ten years if his counsel had properly brought the discrepancy to the trial court's attention. Id. As a matter of first impression the Court determined that "a trial's fairness is compromised when a trial judge increases a defendant's sentence outside his presence.

Accordingly, in a situation as the one on appeal, due process requires the judge's oral pronouncement control over a conflicting written sentencing order." Id. at 277, 695 S.E.2d at 852.

The Court ultimately ruled that had counsel made the proper motion regarding the sentencing discrepancy, Boan would have received the twenty-year sentence. Therefore, Boan had shown a reasonable probability that the results of his sentence would have been different but for counsel's deficiency. Id. The Court determined that the appropriate relief to remedy the prejudice Boan had suffered was to remand the matter back to the circuit court for resentencing on the CSC charge. Id.

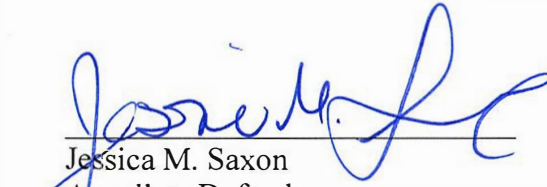
Petitioner is similarly situated to the defendant in Boan. Judge Culbertson orally pronounced sentences of one year for the kidnapping, domestic violence, and methamphetamine charges, but the written sentencing sheets reflected sentences of ten years. The discrepancy of nine years should have been addressed by Counsel Delaney in a motion to clarify or a motion to conform to the orally pronounced sentences. However, Counsel Delaney did not file any motions and in fact did not even hear Judge Culbertson announce the one-year sentences during the hearing. This was deficient performance.

Admittedly, Petitioner was instructed numerous times that he would be given concurrent ten-year sentences pursuant to the negotiated plea agreement. However, when his sentence was formally imposed Judge Culbertson only handed down one year concurrent on each of the three charges. Even though Petitioner entered negotiated guilty pleas, his sentence was technically increased outside of his presence in violation of Boan. He has shown prejudice because an additional nine years was added onto his sentence on the written sentencing sheets. Therefore,

Petitioner was entitled to PCR relief after he showed both deficient performance by Counsel Delaney and the resulting prejudice.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of May, 2023.

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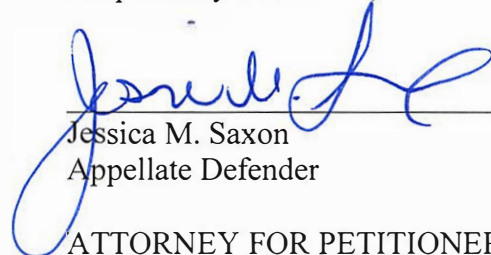
PETITION TO BE RELIEVED AS COUNSEL

Counsel for William S. Vanderford 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 R. Scott Sprouse, which was held on April 11, 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 William S. Vanderford.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of May, 2023.

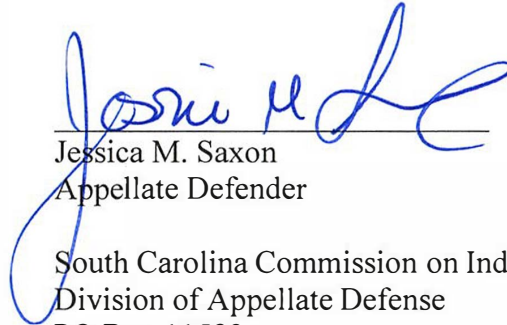
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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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ATTORNEY FOR PETITIONER

This 12th day of May, 2023.