

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

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JUL - 5 2013

S.C. Supreme Court

WENDELL G. DELARGE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELATE CASE NO 2012-213290

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 9

ISSUE PRESENTED

Was the guilty plea rendered involuntary by the fact that petitioner was not advised that the State would be asking for consecutive time and during the guilty plea the judge failed to explain that the maximum sentence that could be imposed was two consecutive thirty year sentences?

STATEMENT

In January of 2009, the Lexington County Grand Jury indicted Petitioner Delarge for criminal sexual conduct in the first degree and kidnapping, indictments #2009-GS-32-5187, 5188. On October 14, 2009, Delarge appeared before the Honorable Robin B. Stilwell and pled guilty as charged. Casey Cornwell represented Delarge. Shawn Graham prosecuted the case. Judge Stilwell sentenced Delarge to 25 years, consecutive, for each charge. A motion to reconsider sentence was filed and denied. A timely notice of intent to appeal was filed but, despite the filing of a motion to reconsider sentence, the South Carolina Court of Appeals dismissed the appeal.

On October 29, 2010, Delarge filed an application for post conviction relief. The State filed a return on January 19, 2011. On January 30, 2012 and February 2, 2012, an evidentiary hearing was held before the Honorable Eugene C. Griffith, Jr. Benjamin Stitely represented Delarge at the PCR hearing. Kaelon E. May was present for the State. In a written order filed October 22, 2012, Judge Griffith denied relief and dismissed the application. A timely notice of intent to appeal was filed on October 24, 2012. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea was rendered involuntary by the fact that petitioner was not advised that the State would be asking for consecutive time and during the guilty plea the judge failed to explain that the maximum sentence that could be imposed was two consecutive thirty year sentences.

Delarge pled guilty to criminal sexual conduct first degree and kidnapping. During the guilty plea the plea judge asked plea counsel, "And have you also discussed with him the maximum possible penalty and sentence that he can receive under the charge, sir?" (App. p. 4, lines 20-22). Plea counsel replied, "Yes, sir." (App. p. 4, line 23). The plea judge then asked plea counsel, "is it your understanding that he understands these rights and the maximum possible penalty and wished to proceed today, sir?" (App. p. 4, line 24 – p. 5, line 1). Plea counsel replied, "Yes, sir." (App. p. 5, line 2). Later, the plea judge advised Delarge that he could be sentenced for 30 years in prison for criminal sexual conduct first degree and that he could be sentenced to up to 30 years for kidnapping. (App. p. 6, line 18 – p. 7, lines 1-21). The judge never specifically discussed the fact that the two sentences could be imposed consecutively.

The plea sheets reflect that the guilty plea was entered without negotiations or recommendation. (App. pp. 46-47). At the end of the guilty plea the State asked for the maximum sentence of 60 years, 30 years consecutive for each charge. (App. p. 25, lines 13-21). Counsel for Delarge requested a sentence of 10-15 years. (App. p. 31, lines 11-12). The judge sentenced Delarge to 25 years consecutive for each charge.

During the PCR hearing Delarge testified, "It was my understanding that once I admitted my guilt, which I state now that I'm not, that he would take no position in the sentence that I would receive, sir. That was my understanding." (App. p. 153, line 25, - p. 154, lines 1-3). Delarge further testified, "I was greatly uncomfortable pleading because I really didn't want to, but being advised by Mr. Cornwell, I did so, only under his advisement. And when it was said that he - - he

recommended that I receive sentences ran consecutive and that I receive sixty years, I nudged Mr. Cornwell and stated basically, that - - you know what's up with this. That's kind of what my words were. And he said hold on, I got this, I'll take care of it kind of sort of." (App. p. 154, lines 13-20). Delarge's testimony reflects that he was not advised that the State would be seeking two thirty year consecutive sentences.

Delarge explained, "Yes, sir, Mr. Cornwell explained to me basically the open plea because he's charged with zero to thirty; and like I say, it was just prior to that that I received the written agreement, the second agreement in the kidnapping." (App. p. 155, lines 9-12). Delarge's testimony reflects that he did not understand that the Judge could impose consecutive sentences. Delarge testified that if he had known the solicitor was going to recommend the maximum consecutive sentence, he would have gone to trial. (App. p. 155, lines 13-18).

Plea counsel testified at the PCR hearing, "I basically said that the judge could sentence him however he wanted to. When there's no recommendation, you can get up to the max on each sentence." (App. p. 90, lines 19-21). Plea counsel did not testify that he specifically advised Delarge that the judge could impose consecutive sentences amounting to an aggregate sentence of 60 years. Plea counsel admitted that Delarge may have understood that a guilty plea entered without negotiations or recommendation meant that the State would not ask for a specific sentence. (App. p. 91, lines 1-15).

In the order of dismissal the PCR judge wrote, "The Applicant asked Mr. Cornwell to explain what 'without recommendations or negotiations' on the Applicant's sentencing sheet meant. Throughout the guilty plea hearing, the Applicant nudged Mr. Cornwell because the applicant was uncomfortable during the plea. Mr. Cornwell explained to the Applicant that the plea was an open plea with a sentence range of zero (0) to sixty (60) years." (App. p. 241). As discussed above, plea

counsel Cornwell admitted that Delarge may have misunderstood the meaning of “without recommendations or negotiations.” (App. p. 91, lines 1-15). The record does not support a finding that plea counsel advised Delarge he was facing a sentence of zero (0) to sixty (60) years. The State, citing State v. Rikard, 371 S.C. 295, 638 S.E.2d 72 (Ct. App. 2006) (cert. denied November 15, 2007) argued, “The guilty plea transcript reflects that Mr. Delarge indicated he understood the charges, the possible sentences and of the plea was straight up. Either party is free to request a favorable sentence.” (App. p. 231, lines 6-10). The plea judge at the guilty plea, however, did not specifically advise Delarge that he was facing a sentence of zero (0) to sixty (60) years. The guilty plea was rendered involuntary by the fact that Delarge was not advised that he could receive a sentence of zero (0) to sixty (60) years.

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). The Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). 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)).

As noted by the Court in Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999), “In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” Pittman at 624, citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991).


“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

The guilty plea was rendered involuntary because Delarge was not aware of the maximum 60 year sentence he faced. There is a reasonable probability that if Delarge had known he faced two consecutive thirty years sentences, he would not have pled guilty but would have insisted on going to trial. The case is distinguished from Rikard because Rikard was advised of the maximum penalty she faced. Delarge is entitled to a new trial.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2013.

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WENDELL G. DELARGE,

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CERTIFICATE OF SERVICE

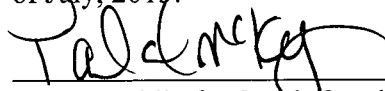
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Wendell G. DeLarge 12-608 McCormick Correctional Institution 386 Redemption Way McCormick, SC 29899 this 5th day of July, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of July, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 5, 2013.