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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
R. Markley Dennis, Jr., Circuit Court Judge

RANDY JENNINGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213573

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where plea counsel pressured Petitioner into pleading guilty by telling Petitioner if he went to trial, he would receive life in prison?

STATEMENT

Indictments

On July 28, 2009, Petitioner Randy Erin Jennings was indicted by the Greenville County Grand Jury for (1) first degree burglary; (2) grand larceny, third property offense; and (3) two counts of forgery. App. 93-98.

Plea Hearing

On March 3, 2010, Petitioner appeared before the Honorable Robin B. Stillwell where Petitioner pled guilty to first degree burglary, grand larceny, and the two counts of forgery. App. 1-28. Petitioner was represented by Timothy Sullivan, and the State was represented by Mark Moyer. App. 1.

At the plea hearing, Petitioner expressed his reluctance to plead guilty. When the court asked Petitioner whether he had had enough time to discuss this matter with his counsel, Petitioner replied, "No, sir. Not that I feel - - I feel that I haven't really. That was the grounds for me wanting another attorney and I didn't feel that I had got to discuss everything with him properly but you decided against it, so - -." App. 8, ll. 9-16.

Petitioner informed the court that he felt dissatisfied with his attorney's services and wanted another attorney. App. 8, ll. 17-25.

Petitioner also indicated to the court that he thought he had missed a plea offer which would have required him to serve less time. App. 9, ll. 1-8.

The plea judge, after hearing Petitioner's reservations about his attorney, made a finding on the record that his attorney's "representation of [Petitioner] in this matter has been competent and sufficient." App. 11, ll. 8-17.

Petitioner subsequently asked the court: "There's no way I can get a plea out of this like a plea that I had before, a chance that I made a mistake of taking this road that I did and

coming this far along? There's no way to go back to a plea?" App. 13, ll. 7-10. The court advised Petitioner that whether the State would reinstate an earlier, rejected plea offer would be the State's decision. App. 13, ll. 11-25.

The solicitor concurred that he would not put the earlier plea offer back on the table no matter how much time Petitioner's counsel spent trying to persuade the solicitor. App. 14, ll. 1 – 15, l. 24.

Following the State's presentation of the facts, Petitioner pled guilty to the offenses of first degree burglary, grand larceny, and the two counts of forgery, and the court accepted Petitioner's plea, finding that there was a substantial factual basis for the plea and that the plea had been entered into freely and voluntarily with the advice of counsel with whom Petitioner was satisfied. App. 16, l. 12 – 19, l. 12.

The plea judge sentenced Petitioner to (1) sixteen years for first degree burglary; (2) ten years for grand larceny; and (3) five years for each count of forgery. App. 25, l. 20 – 18. The sentences were to run concurrently for a total of sixteen years. App. 26, ll. 4 – 18.

Petitioner did not file a direct appeal.

PCR Application and Evidentiary Hearing

On February 21, 2011, Petitioner filed his application requesting post-conviction relief ("PCR"). App. 29 – 45. The State filed its return on May 26, 2011. App. 46 -51.

Petitioner filed an amendment to his PCR application on October 4, 2012, asserting thirty-one deficiencies of his plea counsel, including plea counsel's failure to reasonably investigate Petitioner's case, plea counsel's failure to keep Petitioner informed, and plea counsel's failure to properly explain to and advise Petitioner of pertinent matters. App. 52-56.

An evidentiary hearing was held before the Honorable R. Markley Dennis, Jr. on October 30, 2012. App. 57-80. Petitioner was represented by Rodney Richey, and the State was represented by Karen C. Ratigan. App. 57. Petitioner and his plea counsel, Timothy Sullivan, testified at the hearing. App. 64-76.

Petitioner testified that he only met with his plea counsel twice before the plea. App. 68, ll. 3-8. Petitioner further indicated he was aware of a previous plea offer by the State but felt like it was for too much time. App. 66, ll. 9-16. Petitioner believed his plea counsel did not adequately represent him because he could not obtain Petitioner a more favorable plea offer. App. 67, ll. 14-17.

Petitioner informed the PCR court that he was "concerned about the issue of Mr. Sullivan coercing me and telling me that I was going to get a life sentence" and for that reason, Petitioner decided to plead guilty. App. 63, ll. 3-5. Petitioner asserted that his plea counsel "took [Petitioner] to the holding cell and . . . told [him] that [he] would more than like, if this were to come to trial, that the jury put in the box it was a very very high chance that [Petitioner] would get a life sentence and that [Petitioner] needed to plead out while [he] still had a chance." App. 65, l. 22 – 66, l. 1.

Petitioner only pled guilty because he was "scared to death" that he would get a life sentence if he did not plea. App. 70, l. 18 – 71, l. 6, 6-17. Petitioner said that his plea counsel told him the solicitor was "pushing for a life sentence and it was likely that [Petitioner] would get it." App. 71, ll. 4-6.

Plea counsel claimed that he never told Petitioner that he was going to receive a life sentence if he went to trial and only advised Petitioner that he was exposed to a life sentence since first degree burglary carried a range from fifteen years to life. App. 73, ll. 7-17.

At the conclusion of the testimony, the PCR judge recognized that in reviewing the plea hearing transcript "it's clear that Mr. Jennings was very reluctant to plead guilty. I don't fault Judge Stilwell, I think there was an abundance of evidence and the whole proceeding in its totality justified his taking and accepting the plea. I just probably would not have accepted it and you [Petitioner] would have gone to trial that day and faced what a jury would have said and faced a sentence that would have exposed him to that which he has said prior to and again on the witness stand what he didn't want to run the risk of." App. 76, l. 20 – 77, l. 5.

Notwithstanding the PCR judge's observation that he would have not accepted Petitioner's plea, the PCR judge found that Petitioner entered the plea voluntarily, knowingly, and intelligently. App. 77, ll. 6-13. The PCR judge accordingly denied Petitioner's PCR application. App. 79, ll. 7-8.

Order of Dismissal

On December 5, 2012, Judge Dennis issued his Order of Dismissal, concluding that Petitioner failed to prove that his plea counsel rendered ineffective assistance of counsel and also failed to prove that his guilty plea was not knowing and voluntary. App. 81-88.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty because plea counsel pressured Petitioner into pleading guilty by telling Petitioner if he went to trial, he would receive life in prison.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). Additionally, the South Carolina Supreme Court has held that the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). However, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). "A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." Richardson v. State, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993).

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court adopted the two-part standard in Strickland v. Washington, 466 U.S. 668 (1984), and applied the Strickland standard to guilty plea challenges based on ineffective assistance of counsel. To

prove ineffective assistance of counsel from a guilty plea, the defendant must show: (1) "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases" and (2) that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 57-59.

In the instant case, the PCR court erred in finding that plea counsel was not deficient. Plea counsel told Petitioner and had Petitioner believing that he if decided to go to trial with a jury, he would almost certainly be given a life sentence for the first degree burglary charge. App. 63, ll. 3-5; 65, l. 22 – 66, l.1; 70, l. 22 – 71, l. 17.

While the offense of first degree burglary does provide for a discretionary sentencing range of fifteen years to life imprisonment, there was no reason for plea counsel to have believed that Petitioner would have received a life sentence for first degree burglary where the burglary occurred during the day when no one was home, no person was injured during the burglary, and the only aggravating factor was that a rifle was stolen during the burglary. S.C. CODE ANN. § 16-11-311(B); App. 17, ll. 2-9.

Therefore, the first prong of the Strickland and Hill tests has been met where plea counsel improperly gave Petitioner the impression that he would receive a life sentence upon going to trial where the facts of the burglary did not support plea counsel's assertions. See Alexander v. State, 303 S.C. 539, 542-43, 402 S.E.2d 484, 485 (1991); Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 152 (1991).

In support of the "prejudice" requirement of the second prong of the Strickland and Hill tests, Petitioner's testimony establishes that had plea counsel not improperly given him the impression that he would have received a life sentence if he proceeded to

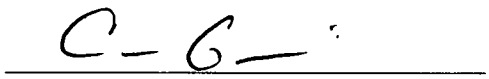
trial, that he would have not pled guilty and would have gone to trial. App. 63, ll. 3-5; 65, l. 20 – 66, l. 8; 67, ll. 18 – 21; 70, l. 14 – 71, l. 17. Thus, the second part of the test has been met. See Alexander, 303 S.C. at 543, 402 S.E.2d at 485-86; Ray, 303 S.C. at 376, 401 S.E.2d at 152-53.

Accordingly, because plea counsel's wrongfully advised Petitioner that he would receive a life sentence on the first degree burglary charge where the evidence did not support such a statement, plea counsel's advice improperly induced Petitioner's guilty plea and the case must be reversed and remanded for a new trial. See Alexander, 303 S.C. at 543, 402 S.E.2d at 486.

CONCLUSION

Based on the foregoing reasons, this court should grant the petition of Petitioner Randy E. Jennings with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
R. MARKLEY DENNIS, JR., CIRCUIT COURT JUDGE

RANDY JENNINGS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Randy Jennings 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 October 30, 2012. 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 Randy Jennings.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of July, 2013

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Certiorari to Greenville County
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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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Randy Jennings, #259845, at Perry Correctional Institution this 5th day of July, 2013.

Carmen V. Ganjehsani
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 24, 2022 .