

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County

S.C. SUPREME COURT

Honorable G.D. Morgan, Jr., Circuit Court Judge

STEVEN R. LEWIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000539

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to move to reconsider the sentence when Petitioner had no prior criminal record and trial counsel testified that he believed this was an appeal issue?

STATEMENT

In August of 2015, the Spartanburg County Grand Jury indicted Petitioner, Steven Lewis, for kidnapping, murder, and attempted murder, indictments #2015-GS-42-3788, 3789, 3790. (App. pp. 412-417). In February of 2017, Petitioner was additionally indicted for burglary first degree and armed robbery, indictments #2017-GS-42-523, 524. (App. pp. 418-421). On May 22, 2017, Petitioner proceeded to jury trial before the Honorable J. Derham Cole. Matthew William Shealy represented Petitioner at trial. Derrick Bruce Balsa and Nicholas Jordan Sharpe prosecuted the case. The jury found Petitioner guilty as indicted. Judge Cole sentenced Petitioner to concurrent life sentences for murder and burglary first degree, thirty (30) years concurrent for armed robbery and thirty (30) years consecutive for attempted murder. (App. pp. 422-426). A timely notice of intent to appeal was filed followed by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On May 1, 2019, the South Carolina Court of Appeals dismissed the appeal. State v. Lewis, Op. No. 2019-UP-155 (S.C.Ct.App. filed May 1, 2019).

On June 4, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 427-444). The State filed a return and partial motion to dismiss on September 10, 2019. (App. pp. 445-479). On April 21, 2022, an evidentiary hearing was held before the Honorable G. D. Morgan, Jr. Susannah Ross represented Petitioner at the PCR hearing. Chelsea Marto represented the State. In a written order signed March 16, 2023, and filed April 3, 2023, Judge Morgan denied relief and dismissed the application. A timely notice of intent to appeal was filed on April 3, 2023. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to move to reconsider the sentence when Petitioner had no prior criminal record and trial counsel testified that he believed this was an appeal issue.

At sentencing the prosecutor told the judge that Petitioner had no prior criminal history. (App. p. 408, lines 20 -21). Trial counsel additionally advised the judge that Petitioner had no prior criminal record and asked for leniency. (App. p. 409, lines 7-12). The trial judge, however, sentenced Petitioner to two concurrent life sentences, a concurrent thirty (30) year sentence, and a **consecutive** thirty (30) year sentence. Trial counsel did not file a motion to allow the judge to reconsider the sentences imposed.

During the PCR hearing the State asked trial counsel if he saw any reason to reconsider the sentence. (App. p. 530, lines 18-19). Trial counsel answered:

No. I mean, we – we were gonna – the way that I generally handle that is – that’s an appeal issue. If we had filed a motion to reconsider it would have stalled his appeal out. Judge Cole’s ordinary sentence in these cases are – is life. That – that’s just what he ordinarily does. We argued all of the other information. We argued the – the lack of criminal history, so I don’t know that I had anything new for him to consider, and I think that’s kind of a threshold matter in a motion to reconsider is generally when I have something new to present.

(App. p. 530, line 20 – p. 531, lines 1-5). When asked if he thought any motion to reconsider would have been denied he answered, “Yeah. I think so.” (App. p. 531, line 9).

In the order of dismissal the PCR judge wrote, “Applicant claims Counsel was ineffective for failure to move to reconsider the conviction and sentence. Counsel credibly testified that he did not think a motion would be successful and thought any issues that could be raised in a post-trial motion should be raised on appeal instead. This is a reasonable decision and Counsel is not found deficient as a result. Additionally, because there was no showing that the motion would have been successful, no prejudice is found. Accordingly, relief is denied on this ground.”

(App. p. 572). The PCR judge erred. Trial counsel waived any appellate issue with regard to challenging the sentence imposed by failing to file a motion to reconsider the sentence imposed.

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.


Trial counsel was ineffective for failing to file a motion to reconsider sentence when Petitioner had no prior criminal record. In State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

The sentencing judge was the only person who had the authority to reconsider and reduce the life plus thirty year sentence. By failing to raise the issue below, trial counsel waived the issue for appellate review. New information is not required to file a motion to reconsider sentence. There is a reasonable probability that, but for counsel's failure to file a motion to reconsider sentence, the result of the proceedings would have been different.

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 2nd day of November, 2023.

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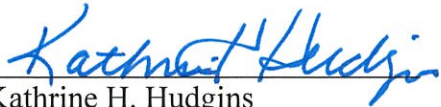
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven R. Lewis 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 G.D. Morgan, Jr., which was held on April 21, 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 Steven R. Lewis.

Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of November, 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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