STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Jan 16 2024

S.C. SUPREME COURT

Certiorari to Florence County

Honorable George M. McFaddin, Circuit Court Judge

LAROSS ANTONIO GRAHAM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001117

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

Was the guilty plea rendered involuntary by plea counsel's erroneous advice that Petitioner would receive a twenty-year sentence in exchange for his substantial cooperation with the State?

STATEMENT

In July of 2012, the Florence County Grand Jury indicted Petitioner, Laross Antonio Graham, for two counts of murder, conspiracy, and grand larceny, indictment #2012-GS-21-00898. (App. pp. 44-46). On May 8, 2013, Petitioner appeared before the Honorable Thomas A. Russo and pled guilty as charged. Verdell Barr represented Petitioner at the guilty plea. Solicitor E.L. Clements, III, represented the State. Sentencing was deferred based on Petitioner's cooperation with the investigation and pending trial of co-defendants. (App. p. 13, lines 20-23).

On October 9, 2013, Petitioner appeared before Judge Russo for sentencing. Verdell Barr again represented Petitioner. Solicitor Clements again represented the State. Judge Russo sentenced Petitioner to two thirty (30) year concurrent sentences for the murder charges, a five (5) years consecutive sentence for the conspiracy charge and a five (5) years consecutive sentence for grand larceny. (App. pp. 47-50). Plea counsel did not file a notice of intent to appeal.

On April 17, 2014, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 51-57). The State filed a return on June 25, 2014. (App. pp. 58-64). An amended PCR application was filed on July 26, 2017. (App. pp. 65-68). An evidentiary hearing was held on April 5, 2018, before the Honorable George McFaddin. Aimee Zmroczek represented Petitioner at the hearing. Lindsay McCallister represented the State. In a written order filed March 7, 2019, Judge McFadden denied relief and dismissed the application. (App. pp. 125-134). On April 11, 2019, Petitioner filed a motion to reconsider. (App. pp. 135-136). The State filed a return on August 4, 2022. (App. pp. 137-143). Judge McFadden denied the motion to reconsider on June 16, 2023. A timely notice of intent to appeal was served on July 8, 2023. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea was rendered involuntary by plea counsel's erroneous advice that Petitioner would receive a twenty-year sentence in exchange for his substantial cooperation with the State.

Petitioner worked for a drug dealer who had pending distribution charges based on purchases by confidential informants. (App. p. 11, lines 12-19). The drug dealer learned the identities of the confidential informants and ordered a hit by Petitioner. (App. p. 11, lines 20-21). Petitioner recruited another individual as the actual shooter. (App. p. 11, lines 21-24; p. 25, lines 15-18). Petitioner had no criminal history. (App. p. 31, lines 3-4).

In the amended application Petitioner alleged, "Ineffective assistance of counsel for failure to properly preserve negotiations on the record as counsel advised client he would receive a twenty (20) year sentence for his incredible cooperation;" (App. p. 66). During the PCR hearing Petitioner testified that his lawyer advised him to cooperate with the Solicitor's Office and law enforcement. (App. p. 80, lines 2-19). Petitioner testified that he believed that if he cooperated with the prosecution, he would receive a twenty (20) year sentence. (App. p. 81, lines 2-10). Petitioner testified that he plead guilty because his lawyer told him he would receive a twenty (20) year sentence. (App. p. 82, lines 3-19). Plea counsel did not testify at the PCR hearing because he passed away on November 15, 2013. (App. p. 74, lines 16-21).

During the sentencing hearing the prosecutor outlined for the judge Petitioner's cooperation including the fact that Petitioner passed a polygraph examination. (App. pp. 29-30). The prosecutor testified at the PCR hearing that he told Petitioner that if he cooperated, he would "take the death penalty off the table and he could plead straight up to the murder charges in front of the judge and then he'd be looking at a life sentence down to 30 years possibly, but that would be up to the judge." (App. p. 102, lines 2-7). Petitioner was not the instigator, was

not the shooter and had no prior criminal history. During the PCR hearing the prosecutor admitted that he did not serve a notice of intent to seek the death penalty for Petitioner. (App. p. 107, lines 12-17).

In the order of dismissal the PCR judge wrote:

> The Court finds Applicant had two opportunities, plus all the months in between, to inform the plea court of his belief he would receive a twenty-year sentence, and he never did so. Finally, this Court finds the plea colloquy is determinative as to Applicant's allegation. During the guilty plea, Applicant testified he understood the plea was without negotiation or recommendation from the State as to the sentence except that the sentences for each charge would be concurrent. See Tr. pp. 3-4; Sent. Tr. p. 14. The plea judge also explained the possible sentencing range for each charge, and Applicant indicated he understood and wished to plead guilty. See Tr. p. 3, 9-10. Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir.1976). This Court finds Applicant failed to present any such reason in this case.

(App. p. 133). The PCR judge erred. First, while the murder sentences were concurrent, the judge ordered that the conspiracy and grand larceny sentences run consecutively. Second, the brief mention of the penalty did not sufficiently explain that murder carries a mandatory minimum sentence of thirty (30) years. The plea judge stated, "Mr. Graham, count one and count two of the Indictment charges you with the offense of murder. Each of those carries penalty of thirty years up to life in prison. Do you understand that?" (App. p. 3, lines 2-6). Petitioner answered, "Yes, sir." (App. p. 3, line 7). The judge did not state that thirty years was the mandatory minimum.

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). "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 Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), the South Carolina Supreme Court wrote:

> Entering a guilty plea results in a waiver of several constitutional rights, therefore 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). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Id. Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). 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. Id.

In Dalton v. State, 376 S.C. 130, 138–39, 654 S.E.2d 870, 874 (Ct. App. 2007), the South Carolina Court of Appeals wrote:

> "[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

The guilty pleas to murder in the present case were rendered involuntary by plea counsel's erroneous advice that Petitioner would receive a twenty (20) year sentence in exchange for his substantial cooperation with the State. The error was not cured during the guilty plea hearing because the plea judge failed to explain that murder carried a mandatory minimum sentence of thirty (30) years. Petitioner was prejudiced by the error.

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."

There is a reasonable probability that, but for counsel's error, Petitioner would not have pled guilty and would have insisted on going to trial. The PCR judge erred in refusing to grant relief. Petitioner is entitled to post-conviction relief.

CONCLUSION

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 16th day of January, 2024.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
Jan 16 2024
S.C. SUPREME COURT

Certiorari to Florence County

Honorable George M. McFaddin, Circuit Court Judge

LAROSS ANTONIO GRAHAM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Laross Antonio Graham 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 George M. McFaddin, which was held on April 5, 2018, 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 Laross Antonio Graham.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2024.

RECEIVED

Jan 16 2024

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 16th day of January, 2024.