RECEIVED
Jan 26 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

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

LEVY LARKIN BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001636

JOHNSON PETITION FOR WRIT OF CERTIORARI

GARY H. JOHNSON
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

Whether the PCR court erred in finding counsel was effective when she failed to correct petitioner's belief that pleading guilty and taking full responsibility for the charges would exonerate petitioner's co-defendant facing the same charges since that was central to petitioner's decision to plead guilty?

STATEMENT

Petitioner was indicated on multiple drug offenses by a Beaufort County grand jury. App. 110 – 121. Petitioner appeared before the Honorable Carmen Mullen and plead guilty on July 29, 2021. App. 1. Petitioner was represented by Melissa Duque (hereinafter counsel) and Jared Shedd appeared on behalf of the state. App. 1. A few months before this plea, petitioner was tried before Judge Mullen and a jury and, following a guilty verdict, sentenced to sixteen years in prison for armed robbery. App. 3, l. 3 – 4, l. 12. At this earlier trial, petitioner was also represented by Counsel. App. 76, ll. 19 – 24.

Counsel timely appealed the armed robbery conviction, and that appeal is currently pending before this Court on a petition for certiorari following an unpublished opinion by the South Carolina Court of Appeals affirming the conviction. *See* State v. Brown, Opinion No. 2023-UP-365 (S.C. Ct. App. Filed November 15, 2023). Counsel spent no time with petitioner concerning the drug charges before his plea on July 29, 2021, as the meetings with petitioner focused on the armed robbery jury trial. App. 62, ll. 1 - 17. Counsel did not discuss trial strategy, defenses, or potential motions with petitioner, such as the legality of the search leading to the charges. App. 73, l. 14 – 74, l. 1.

During his plea, petitioner told the court he wanted his plea to benefit a co-defendant facing the same charges since the co-defendant was not involved in the drug activity. App. 6, l. 20 – 7, l. 14. Rather than correct petitioner's mistaken belief that his plea would absolve his co-defendant, Counsel allowed the plea to continue. App. 6, ll. 6 - 19. Following his plea, Judge Mullen sentenced petitioner to five years on the charge of possession with intent to distribute marijuana, first offense; fifteen years on the distribution of cocaine, first offense; ten years on trafficking cocaine between ten, but less than 22 grams, first offense; sixteen years for trafficking

of methamphetamine, or cocaine based, 28 grams or more, but less than 100 grams, first offense; five years on the charge of possession of a weapon during the commission of a violent crime; and five ears on the pointing and presenting a firearm charge, all to run concurrent to each other, and concurrent to the earlier armed robbery sentence petitioner was then currently serving. App. 110 – 121.

Petitioner's evidentiary hearing was before the Honorable G.D. Morgan, Jr. on November 16, 2022. App. 53. Petitioner was represented by Michael Lifsey with Lauren T. Mims appearing on behalf of the state. App. 53. Both petitioner and his trial counsel presented testimony. The PCR court denied petitioner's application by order dated of dismissal dated October 2, 2023. App. 97.

This Petition for Certiorari follows.

ARGUMENT

The PCR court erred in finding counsel was effective where she failed to correct petitioner's incorrect belief that pleading guilty and taking full responsibility for the charges would exonerate petitioner's co-defendant facing the same charges.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). "Thus, when challenging a guilty plea, a PCR applicant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the applicant would not have pled guilty." Ervin v. State of South Carolina, 438 S.C. 559, 565, 885 S.E.2d 387, 390 (2023) (internal citations omitted). In a guilty plea setting, "the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial." Frierson v. State, 423 S.C. 257, 263, 815 S.E.2d 433, 436 (2018). "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

How the issue was addressed during petitioner's guilty plea.

Petitioner testified during his guilty plea that he was taking responsibility to absolve his co-defendant: "I want it on the record that with them drug charges, I had co-defendants that got charged, too, and they had nothing to do with it. They weren't aware of what I had going on. I take credit for all the drug charges." App. p. 6, l. 22 – 7, l. 1.

Judge Mullen asked if petitioner was going to make a proffer on the record, but the solicitor indicating his willingness to accept full responsibility was "news" to the solicitor. App. 7, ll. 6 – 14. Rather than interject and attempt to clarify petitioner's understanding of the impact of his plea, Counsel allowed the plea to mover forward.

How the issue was addressed during the PCR hearing.

At the PCR hearing, Counsel acknowledged knowing about petitioner's desire to exonerate his co-defendant before his plea hearing:

> And during one of those calls, I want to say it was the first one after we met with Judge Mullen, that he, he told me that he wanted to write a statement pretty much taking blame for all of the drug charges so that his codefendant wouldn't be essentially prosecuted for those charges. And I remember saying to him that I wasn't -- I am not -- I wasn't the attorney for that person and I personally didn't recommend for him to do that.

App. 82, l. 23 – 83, l. 5.

Petitioner would not have plead guilty but for Counsel's deficiency in not advising petitioner that his guilty plea and taking full responsibility would not assist his co-defendant. While petitioner was told he would not receive more time that he already faced in connection with the plea, his earlier conviction was under direct appeal. Entering this guilty plea for an identical sentence from his earlier conviction would have effectively rendered the appeal worthless. App. 67, ll. 1 – 5. Petitioner based his decision to plead guilty and effectively moot any benefits from his direct appeal due to his mistaken belief doing so would benefit his co-defendant:

> Q. So it was your decision to plead guilty to help the innocent person?
>
> A. If that was a part of the deal I was gonna plead to it. That wasn't the deal. That's not what I got. In so many words, if, if, if I wasn't gonna get this, I would have rather went to trial cause now I'm

> pleading things that I really have nothing to do with it. I'm just doing it for someone else because I already have time.

App. 70, l. 20 – 71, l. 2.

How the PCR court ruled.

The PCR court addressed the issue finding that trial counsel's testimony that the solicitor's office had a general policy of not changing its sentencing recommendation regardless of whether the accused pled guilty or went to trial made any leverage or negotiation with the solicitor's office pointless. App. 102 – 103. The PCR court found petitioner's belief taking responsibility would benefit his co-defendant did not create an issue of ineffective assistance of counsel or impact the voluntary nature of his guilty plea. App. 103.

How the PCR court erred.

Appellant's willingness to plead guilty to exonerate someone facing the same charges would have provided leverage to counsel in resolving the charges. An agreement with the solicitor regarding the impact of petitioner's guilty plea would have been enforceable. Under South Carolina law, "prosecutors are obligated to fulfill the promises they make to defendants when those promises serve as inducements to defendants to plead guilty." State v. Miller, 375 S.C. 370, 389, 652 S.E.2d 444, 454 (Ct. App. 2007).

Counsel's failure to proper communicate with petitioner, particularly the impact of his plea on the charges faced by his co-defendant, demonstrates ineffective assistance of counsel. *See* Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876–77 (2018) ("Generally, where defense counsel does not communicate such an offer to the defendant, counsel has rendered ineffective assistance.); Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (holding "counsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State.").

Despite knowing of petitioner's desire to enter statements taking full responsibility and his belief that would assist his co-defendant, Counsel made no effort to contact the solicitor and did not interrupt the plea while this failure could still be corrected. "I didn't even -- when Mr. Brown pled and got on the record and he asked Judge Mullen can I say something real quick, and he went on and pretty much took blame for all of the drug charges, I wasn't expecting that to happen." App. 83, ll. 6 – 9.

The PCR court's ruling that the "no negotiation" general policy of the solicitor's office cured any ineffective assistance of counsel claim was an error of law and not supported by the record. Regardless of the general policy of the solicitor's office, Counsel had an obligation to provide effective assistance to petitioner, including advising him on the lack of impact taking sole responsibility for the drugs would have on the same charges against his co-defendant since that was a critical aspect of petitioner's decision to plead guilty.

Counsel was in a situation similar to that addressed by our Supreme Court in Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). In Rolen, plea counsel recommended a guilty plea, but during the plea hearing, Rolen told the court that he was not guilty and should never had agreed to plead. Id., 384 S.C. at 411, 683 S.E.2d at 473. In reversing a denial of relief under a PCR application, our Supreme Court noted the record established that plea counsel was ineffective in not acting to withdrawal Rolen's plea in light of his pronouncement to the court of his innocence.

In Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009), plea counsel never discussed Berry's prior record as supporting a sentence enhancement. This failure to properly communicate with Berry undermined the voluntary nature of his plea.

> [Plea] decisions must be made knowingly and voluntarily with the advice of constitutionally competent counsel. Simply saying 'I

> never gave it a thought' falls short of the Sixth Amendment guarantee of effective assistance of counsel. As a result, we find counsel's failure to even consider whether a paraphernalia conviction qualifies for enhancement, and so inform Berry, fell below the standard of objective reasonableness. We therefore find plea counsel provided constitutionally deficient representation.

Id, 381 S.C. at 635–36, 675 S.E.2d at 427.

Here, petitioner was under the misperception that pleading guilty and taking full responsibility for the drugs would exonerate his co-defendant who was not involved with the drugs. App. p. 6, l. 22 – 7, l. 1. Counsel was aware of petitioner's desire to take full responsibility and his belief it would exonerate his co-defendant. App. 82, l. 23 – 83, l. 5.

The record establishes that petitioner's statements regarding sole responsibility for the drugs had not been discussed or disclosed to the solicitor by Counsel. When asked about it during the plea, the solicitor indicated petitioner's claim was "news" to him. App. 7, ll. 6 – 8.

Allowing petitioner to plead guilty under the mistaken belief that taking full responsibility for the drugs would benefit his co-defendant was ineffective assistance of counsel. *See* Rolen, 384 S.C. 409, 683 S.E.2d 471.

Petitioner would not have plead guilty but for Counsel's ineffective assistance. While petitioner was told he would not receive more time than he already had in connection with the plea, his earlier conviction was under direct appeal. Entering this guilty plea for an identical sentence from his earlier conviction would have effectively rendered his appeal worthless. App. 67, ll. 1 – 5. Petitioner based his decision to plead guilty and effectively moot any benefits from his direct appeal due to his mistaken belief doing so would benefit his co-defendant:

> Q. So it was your decision to plead guilty to help the innocent person?
>
> A. If that was a part of the deal I was gonna plead to it. That wasn't the deal. That's not what I got. In so many words, if, if, if I wasn't

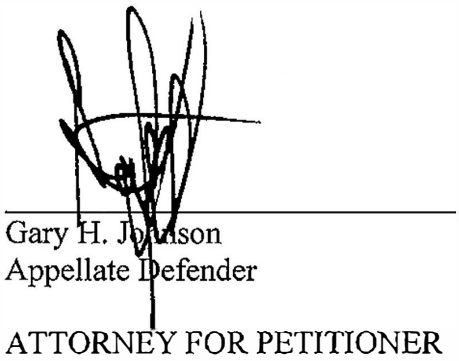
> gonna get this, I would have rather went to trial cause now I'm pleading things that I really have nothing to do with it. I'm just doing it for someone else because I already have time.

App. 70, l. 20 – 71, l. 2.

Counsel's conduct in not communicating with the solicitor about petitioner's desire to plead guilty to take full responsibility for the drug charges to exonerate his co-defendant and her failure to tell petitioner such a plea would not impact those charges "undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686 (1984). Moreover, there is a "reasonable probability that, but for counsel's errors, [petitioner] would not have pled guilty." Ervin, 438 S.C. at 565, 885 S.E.2d at 390 (2023) (internal citations omitted).

CONCLUSION

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



Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2024.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

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

LEVY LARKIN BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Levy Larkin Brown states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge G.D. Morgan, Jr., which was held on Nov. 16, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Levy Larkin Brown.

Respectfully Submitted,

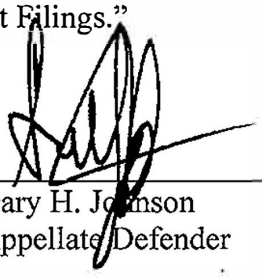
Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2024.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



Gary H. Johnson
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 26th day of January, 2024.