STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Feb 27 2024

S.C. SUPREME COURT

Certiorari to Laurens County

Honorable Debra R. McCaslin, Circuit Court Judge

TARA ANN MAHAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001347

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea to felony driving under the influence resulting in death was rendered involuntary when, prior to the guilty plea, plea counsel advised Petitioner that the judge indicated a sentencing range of ten (10) to sixteen (16) years and when that judge recused himself from hearing the plea, counsel advised Petitioner that the new judge would probably not sentence above the sentencing range originally discussed but Petitioner received a twenty-two (22) year sentence from the new judge?

STATEMENT

In October of 2019, the Laurens County Grand Jury indicted Petitioner, Tara Ann Mahan, for felony driving under the influence [DUI] resulting in death and possession of methamphetamine, indictments #2019-GS-30-1402, 1404. (App. pp. 46-49). On October 17, 2019, Petitioner appeared before the Honorable Frank R. Addy, Jr. and pled guilty as charged. Tristan M. Shaffer represented Petitioner. O. Warren Mowry, Jr. prosecuted the case. Judge Addy sentenced Petitioner to twenty-two (22) years for felony DUI and three (3) years concurrent for the possession charge. (App. pp. 50-51). Petitioner did not file a notice of intent to appeal.

On March 18, 2020, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 52-60). The State filed a return on August 5, 2020. (App. pp. 61-67). An amended return was filed on November 18, 2020. (App. pp. 68-69). On November 30, 2022, an evidentiary hearing was held before the Honorable R. Scott Sprouse. Ashely A. McMahan represented Petitioner at the PCR hearing. T. Cruise Mitchell represented the State. In a written order signed June 23, 2023, Judge Sprouse denied relief and dismissed the application. (App. pp. 97-111). A timely notice of intent to appeal was filed on August 25, 2023. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea to felony driving under the influence resulting in death was rendered involuntary when, prior to the guilty plea, plea counsel advised Petitioner that the judge indicated a sentencing range of ten (10) to sixteen (16) years and when that judge recused himself from hearing the plea, counsel advised Petitioner that the new judge would probably not sentence above the sentencing range originally discussed but Petitioner received a twenty-two (22) year sentence from the new judge.

Petitioner appeared before the Honorable Frank R. Addy, Jr. and pled guilty to felony DUI resulting in death and possession of methamphetamine. The plea was entered without negotiations or recommendations from the State. (App. pp. 50-51). During the plea Judge Addy asked Petitioner, "Do you understand that whatever sentence you receive is entirely up to me? I could give you anything between 1 to 25 years, do you understand that, ma'am?" (App. p. 7, lines 1-3). Petitioner answered, "Yes, I do." (App. p. 7, lines 4). Judge Addy sentenced Petitioner to twenty-two (22) years in prison.

In the *pro se* PCR application Petitioner alleged ineffective assistance of counsel because, "Defense Atty. Mr. Shaffer failed to put on record to Judge Addie that a plea agreement was entered with Judge Hawker for 10-15 yrs. cap." (App. p. 57). During the PCR hearing Petitioner testified that plea counsel told her that the judge had indicated a sentencing range of eleven (11) to fourteen (14) years. (App. p. 76, lines 11-18). Plea counsel testified that he conferenced the case with Judge Hocker who indicated a sentencing range of ten (10) to sixteen (16) or seventeen (17) years. (App. p. 84, lines 5-18). Judge Hocker, however, recused himself and did not hear the plea because he knew one of the victims. (App. p. 84, lines 18-22). Instead, Petitioner pled guilty in front of Judge Addy.

During the PCR hearing plea counsel testified:

> I, I probably did tell her that Addy probably wouldn't go much above what Hocker would have done because as a general rule, and I've never done a felony

> DUI, at that time, I had never done any felony DUI or driving type offense in front of Addy, I was wrong, obviously. I made a bad choice there, I didn't know, but, you know, but I honestly, I think Judge Keesley, my understanding is he wouldn't have been all that great at that either. So I chose Judge Addy thinking that was the better of the two, had I known what Judge Addy was going to give her, I absolutely would have said to go to trial on it even though they had a really strong case against her."

(App. p. 85, lines 4-15). Plea counsel testified that while he advised Petitioner that she could receive a sentence of up to twenty-five (25) years he also testified, "I, I also, I did tell her I didn't think Addy would have been much higher than Hocker." (App. p. 86, lines 3-6). The record fails to reflect whether Judge Addy was made aware of the previous conference and sentencing indication made by Judge Hocker. The record fails to reflect if plea counsel requested a conference with Judge Addy.

In the order of dismissal the PCR judge wrote, "While Mr. Shaffer did testify that he probably told the Applicant that Judge Addy probably wouldn't go much higher than Judge Hocker, there was no formal plea agreement and Counsel did not erroneously advise Applicant of the consequences of her plea, this Court finds Counsel was **NOT DEFICIENT**." (App. p. 108, emphasis in original). The PCR judge erred.

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 plea to felony DUI in the present case was rendered involuntary by plea counsel's erroneous advice that the sentencing judge would not impose a much higher sentence than the previous judge indicated before his recusal. The error was not cured during the guilty plea hearing. Although the sentencing judge told Petitioner that the sentence she received would be entirely up to him, the sentencing judge was apparently unaware of the sentencing indication made by the previous judge. As a result of counsel's erroneous advice, Petitioner was not aware that the sentencing judge was not bound to impose a sentence similar to the indication made by the previous judge. 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

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 27th day of February, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tara Ann Mahan 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 Debra R. McCaslin, which was held on November 30, 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 Tara Ann Mahan.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of February, 2024.

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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."

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This 27th day of February, 2024.