STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

R.Knox McMahon, Circuit Court Judge

Appellate Case No.2012-213338

Sylvester Boone -- Petitioner,

-Vs-

State of South Carolina -- Petitioner,

PETITIONER'S PRO-SE JOHNSON PETITION

FOR WRIT OF CERTIORARI

Sylvester Boone
SCDC# 341082
BRCI
4460 Broad River Rd.
Columbia, SC. 29210

STATEMENT OF THE CASE

Petitioner entered a plea of guilty to kidnapping, armed robbery, and two counts of assault and battery with intent to kill during the May 2010 term of Richland County General Sessions Court, before the Honorable George C. James.

Judge James sentenced Petitioner to two twenty year terms on the kidnapping and armed robbery offense (sentences concurrent), and two seven-year sentences on the assault and battery with intent to kill offenses, concurrent to each other, but consecutive to the two twenty year terms, App.1-81. Petitioner was represented by April Sampson during the guilty plea. A timely appeal was filed, but the appeal was never perfected.

On April 15, 2011, Petitioner filed a pro-se application for post conviction relief (2011-CP-400-2556), App.83-91. On January 31, 2012, Respondent filed a Return requesting an evidentiary hearing, App.92-97.

An evidentiary hearing was convened August 13, 2012, at the Richland County Courthouse before the Honorable R.Knox McMahon, Circuit Court Judge. Petitioner was present at the hearing and was represented by Eleanor Duffy Cleary. On October 18, 2012, Judge McMahon issued an order of dismissal denying relief and dismissing the application, App.163-173.

A timely notice of appeal was filed. Petitioner [is] represented by Wanda H. Carter of the South Carolina Office of Indigent Defense. Carter filed a no merit Johnson Petition for Writ of Certiorari on June 28, 2013.

Petitioner's Pro-Se Johnson Petition is as follows:

ISSUE (A)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT AND ENFORCE THE ORAL TEN YEAR PLEA DEAL, EVEN THOUGH THE SOLICITOR TOOK THE DEAL OFF THE TABLE FIVE MINUTES BEFORE THE PLEA?

ISSUE (B)

WAS COUNSEL INEFFECTIVE IN PROVIDING PETITIONER WITH ERRONEOUS SENTENCING ADVICE, THUS RENDERING PETITIONER'S PLEA INVOLUNTARY?

To save the Court's time, Petitioner will address these issues together since the facts of one encompass the other.

FACTS

During the PCR hearing, Petitioner's mother Sandra Boone testified in his behalf and the following colloguy was recorded:

> Q). Okay. Did you understand that he could get from 10 to 100 years?
>
> A). No. To my understanding, by him signing and going to the plea, he would get 10 years.
>
> Q). Who told you that?
>
> A). That's what the lawyer said.
>
> Q). Ms. Sampson?
>
> A). That -- with the prosecutors, yeah. It was for 10 years.
> [App.112, 11.7-14].

During cross-examination of Sandra Boone, the following colloguy was recorded:

> Q). So it was your understanding he was going to get 10 years, but you still stood up and asked the Court not to give him the maximum sentence and have mercy on him?
>
> A). Well, that was because right like five

> minutes before the judge came in, the prosecutors pulled the deal off the table so I knew then that they wasn't going to give him -- the plea was taken away. That's why I asked for that at that moment.
> [App.123, ll.24-25-p.124, ll.1-5].

As was seen in the above, Petitioner's mother adamantly testified that according to Petitioner's counsel and conversation with counsel and the prosecutors Petitioner would enter a plea of guilty and receive the sentence of ten (10) years. But for reasons unknown in the record, five minutes before the judge came in the prosecution allegedly pulled "the deal" off the table.

Petitioner took the stand and PCR Counsel questioned Petitioner: "Okay the judge advised you that it was zero to -- or 10 to 100 years was the sentence that you were facing and you entered your plea without recommendations or negotiations; correct"? To which Petitioner responded: "I really ain't know what was going on". App.139, ll.23-25, -p.140, l.2.

PCR Counsel further stated that, "If the transcript reflects that the judge advised you that -- or made mention that you were entering without negotiations or recommendations, you wouldn't agree with that, would you?", App.140, ll.5-8. Petitioner responded, "yeah, I mean I wouldn't disagree with that, but I'm not a man who knew too much about big law words or anything like that. So it could fly right by my head and I wouldn't know", App.140, ll.9-11.

PCR Counsel asked Petitioner, "So you just didn't understand when he was explaining it to you?. I'm sorry. You said you didn't understand when the Court was advising you of these things?", App.140, ll.12-16.

Petitioner responded: "About me getting -- I remember Ms. Sampson telling me something about they would run concurrent and **I wouldn't really be getting that much**", App.140, 11.17-19.

During cross-examination of Petitioner the following colloguy was recorded:

> Q). And you still told the judge that you were satisfied with Ms. Sampson's representation of you and there was -- that she -- you thought that she had done everything she could do to help you out right?
>
> A). I mean, sir, it means if I was telling you, well I believe I'll be able to get you this 10 right here, so anything you say, I'm going to lie agree with it because I believed I was being all, you know, getting a lower sentence, App.141, 1.25-p.142, 11.1-7.

The State presented the testimony of Plea Counsel April Simpson, App.148-p.151. During direct examination of Sampson, the State asked Sampson if she ever promised Petitioner any particular sentence. Counsel testified: "No. What I told him was we'd be asking for the the minimum because he had no real record and because he was young when this incident occurred. He was the youngest of the three offenders. That I would be asking for the minimum and I was thinking his range was 10 to 15 and that I did tell him that I thought his charges would run concurrently mainly because they all happened at the same time, App.148, 11.10-18.

Petitioner asserts he was denied the effective assistance of counsel when counsel gave Petitioner erroneous sentencing advice, and further counsel should have objected and moved the Court to enforce the oral plea agreement of 10 years.

Discussion

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-part standard for evaluating claims of ineffective assistance of counsel. The first part of the test requires that a defendant show that his counsel's performance was deficient such that it falls below the objective standard of reasonableness. The second part of the test requires that a defendant show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This second part of the Strickland test has also been referred to as the "prejudice" requirement. Although the U.S. Supreme Court's decision in Strickland dealt with ineffective assistance of counsel in a capitol sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard was extended so as to apply to ineffective assistance of counsel claims arising out of the plea process in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

In Hill, the United States Supreme Court held that in the context of determining the voluntariness of a guilty plea that is entered upon the advice of counsel, the first half of the Strickland test would require an inquiry into whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Simply put, the first inquiry is whether counsel's advice was deficient. According to Hill, the "prejudice" requirement of the Strickland test focuses on whether counsel's ineffective performance affected the outcome of the

plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability the, but for counsel's errors the results of the proceeding would have been different. In support of the first part of the Strickland and Hill test, Petitioner asserts that counsel was ineffective in giving him erroneous sentencing advice. The record supports this contention.

Petitioner's mother testified during the PCR hearing that she had discussions with Plea Counsel and it was her understanding that with the discussions with Counsel and the Prosecutors that Petitioner would enter a plea of guilty in exchange for a 10-year sentence. An examination of the records shows that Petitioner, by and through Counsel's advice he was only looking at 10 years [if] he pled guilty. This is easily seen as Plea Counsel advised Petitioner "I was thinking his range was between 10 and 15 years" (emphasis original). Plea Counsel's sentencing advice was obviously defective.

The "prejudice" incurred is easily seen as there was apparently a plea agreement of 10 years according to Sandra Boone's testimony, but for reasons unknown in the record the Prosecutors took the deal off the table "five (5)" minutes before the Judge entered the Courtroom. Here, Counsel should have objected and moved the Court to enforce the oral 10-year agreement as conveyed to Petitioner and his mother.

In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989)(counsel ineffective based on erroneous sentencing advice). In the instant matter clearly counsel misadvised Petitioner that

he would be looking at 10 to 15 years if he pled guilty. Instead he pled guilty and Judge James sentenced Petitioner to twenty-seven (27) years.

In Custodio v. State, 644 S.E.2d 36 (S.C.2007)(counsel found ineffective in burglary and grand larceny case for failing to have the defendant's plea agreement enforced based on detrimental reliance. Following his cooperation, the prosecutor chose not to honor the initial agreement, and the defendant pled guilty and was sentenced to forty-five years. Counsel's conduct was found deficient in failing to purse enforcement of the initial agreement).

The 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, Stalk v. State, 375 S.C. 289, 652 S.E.2d 402 (S.C.App.2007), citing Harris v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984); also see Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)(when determining issues relating to guilty pleas the Court will consider the [entire] record, including the transcript of the guilty plea and the evidence presented at the PCR hearing).

Petitioner is entitled to a new sentencing hearing to conform to the 10-years, based on ineffective assistance of counsel and his detrimental reliance on the 10-years.

CONCLUSION

WHEREFORE, based on the foregoing, the writ should be granted and remand for a new sentencing hearing conducted for the purposes of sentencing Petitioner to the ten (10) years based on ineffective assistance of counsel and Petitoner's detrimental reliance on the ten (10) years (minimum) sentence.

Respectfully Submitted,

/s/ Sylvester Boone

Sylvester Boone

Petitioner, pro-se

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appellate Case No.2012-23338

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the enclosed pro-se Johnson petition on the attorney for Respondent, Ms. Megan E. Harrigan, Assistant Attorney General, P.O. Box 11549, Columbia, SC. 29211, by placing the aforesaid copy in a properly addressed, first-class postage affixed envelope and placed in the U.S. Mail this 8 day of August 2013.

The undersigned further states the Original was placed in the U.S. Mail the same day stated herein and mailed to Mr. Daniel Shearouse, S.C. Supreme Court, Clerk, P.O. Box 11330, Columbia, SC. 29211.

Sworn to and Subscribe Before Me

this 8 day of August, 2013

Eugene Kelly Jr.

NOTARY PUBLIC

My Comm. Expires My Commission Expires April 4, 2016

Respectfully Submitted,

/s/ Sylvester Boone

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