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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Edgar W. Dickson, Circuit Court Judge
Honorable Grace Gilchrist Knie, Circuit Court Judge

ERNEST FLOYD JACKSON II,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001931

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by counsel's failure to explain that Petitioner could, pursuant to S.C. Code §17-25-50, challenge the State's ability to seek a sentence of life without parole if Petitioner was convicted at trial?

STATEMENT

In May of 2017, the York County Grand Jury indicted Petitioner, Ernest Floyd Jackson, II, for trafficking crack cocaine over ten grams, indictment #2017-GS-46-01958. (App. pp. 263-264). On April 11, 2018, Petitioner appeared before the Honorable Edgar W. Dickson and pled guilty to the charge as a second offense. (App. p. 5, lines 1-6). Mindy Hervey Lipinski represented Petitioner at the plea. Thomas Matthew Hogge prosecuted the case. Pursuant to negotiations with the State, Judge Dickson sentenced Petitioner to seventeen (17) years to be served concurrently to a ten-year sentence Petitioner was serving on indictment #2017-GS-46-01962, for trafficking crack cocaine over ten grams. (App. p. 265). Petitioner did not appeal the sentence or conviction.

On February 21, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 16-22). On April 29, 2019, the State filed a return and motion for a more definite statement. (App. pp. 23-32). On June 30, 2021, Petitioner filed an amended PCR application. (App. pp. 33-34). On June 30, 2021, an evidentiary hearing was held before the Honorable R. Lawton McIntosh. Thurmond Brooker represented Petitioner at the PCR hearing. Michael Neubauer and Lindsey McCallister represented the State. In a written order signed September 22, 2021, Judge Lawton denied relief and dismissed the application. (App. pp. 192-219). Counsel for Petitioner failed to file the notice of intent to appeal.

On June 16, 2022, Petitioner filed a second PCR application. (App. pp. 220-224). The State filed a return on September 7, 2022. (App. pp. 229-238). On December 5, 2023, an evidentiary hearing was held before the Honorable Grace Gilchrist Knie. Michael Lifsey represented Petitioner. Zachary Jones represented the State. In a written order signed December 6, 2023, Judge Knie granted a belated appeal pursuant to Austin v. State. (App. pp. 260-262). A

timely notice of intent to appeal was served on December 16, 2023. This petition for writ of certiorari pursuant to Austin and a separately filed petition for writ of certiorari follow.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by counsel's failure to explain that Petitioner could, pursuant to S.C. Code §17-25-50, challenge the State's ability to seek a sentence of life without parole if Petitioner was convicted at trial.

During a month period between May 3, 2016, and June 2, 2016, officers with the York County Multijurisdictional Drug Enforcement Unit used the same confidential informant to make three controlled buys from Petitioner outside of a residence on Chestnut Street. (App. pp. 184-187). Petitioner was not arrested until after the third controlled buy. (App. p. 187). Petitioner was indicted for trafficking and a proximity charge for a controlled buy on May 3, 2016, indictments #2017-GS-46-01958, 01957, distribution and a proximity charge for a controlled buy on May 20, 2016, indictments #2016-GS-46-02575, 02576, and a trafficking and a proximity charge as well as a conspiracy connected with the June 2, 2016, controlled buy, indictments #2017-GS-46-01962, 01964, 01963. (App. p. 194; pp. 184-187).

In November of 2017, Petitioner was tried in his absence for the June 2, 2016, controlled buy and convicted of trafficking crack cocaine over ten grams, indictment #2017-GS-46-01962. The judge sentenced Petitioner to ten (10) years in prison. On April 11, 2018, Petitioner pled guilty to trafficking crack cocaine second offense, connected with the May 3, 2016, controlled buy, indictment #2017-GS-46-01958. Pursuant to negotiations with the State, the judge sentenced Petitioner to seventeen (17) years to be served concurrently to a ten-year sentence Petitioner was serving. (App. p. 5, lines 1-9).

During the guilty plea defense counsel told the judge, "I also went over with him the strike law; part of being not only as a result of this plea, but if he did not accept this offer because he has a prior strike from a prox in the past, if he went to trial on any of his current charges after the trial in his absence, Mr. Hogge [assistant solicitor] had sent me correspondence indicating that the State

would seek life without parole on this charge itself." (App. p. 7, lines 13-19). Plea counsel told the judge that the strike consequences had been an "integral part of our discussions as it pertains to this plea, . . ." (App. p. 7, lines 21-22).

In the amended PCR application Petitioner wrote, "Appellant believes that his guilty pleas was [sic] not knowingly and intelligently give because trail [sic] counsel erroneously informed Applicant that a conviction under indictment 2017-gs-46-1958 constituted a third serious or most serious conviction, and that the State would seek life imprisonment if he was convicted at trial." (App. p. 33).

During the PCR hearing PCR counsel questioned plea counsel, "Did you discuss double jeopardy, the offense of double jeopardy?" (App. p. 102, lines 14-15). Plea counsel answered, "I believe so yes, because he felt that it was grossly unfair that they were trying him again and that they weren't satisfied. In my opinion I didn't think that this would prevent them from doing it because I have seen them stack them like that. So I have seen it done before and I certainly knew the State was motivated." (App. p. 102, lines 16-21). When questioned about whether she asked Petitioner if he wanted to proceed with a double jeopardy defense, plea counsel answered:

> Not a double jeopardy defense, no, but we had several discussions of do you want to go to trial. The C.I. had a host of issues. He was a registered sex offender. He had been on the run for a while. I think even after he testified and they had let him out on bond he picked up more drug charges. So we certainly had the conversation that, you know, the jury had issues with him in the first trial. This's certainly a chance they would have issues with him again. But the overwhelming concern was that if we didn't prevail and it was a third strike that he was looking at life without parole and unfortunately I think that was something that weighed heavily on his mind." (App. p. 102, line 25 – p. 103 lines 1-12).

PCR counsel questioned Petitioner, "Did you all discuss the possibility that these two events, that the drug trafficking event that occurred on the -- May 3rd of 2016 and the drug trafficking event that occurred on June 2, 2016, did you all discuss the possibility or that there was

an argument to be made that those two events constituted one event as opposed to two separate events?" (App. p. 137, lines 9-15). Petitioner answered, "No." (App. p. 137, line 16).

In the order of dismissal the PCR judge wrote:

> Applicant argues his guilty plea was not freely and voluntarily entered because Counsel "erroneously informed Applicant that a conviction under indictment 2017-gs-46-1958 constituted a third serious or most serious conviction, and that the State would seek life imprisonment if he was convicted at trial," on the basis that the conviction would count only as a single strike if it arose from a single continuing conspiracy. As discussed above, this Court finds Applicant's conviction at issue here was a conviction for the substantive offense of trafficking, not conspiracy, and therefore, the Court also finds Counsel's advice regarding the number of strikes and Applicant's potential sentencing liability was not deficient.

The PCR judge erred. Plea counsel was deficient in failing to explain that, pursuant to S.C. Code §17-25-50, Petitioner could challenge the State's ability to seek a sentence of life without parole if Petitioner was convicted at trial. There is a reasonable probability that Petitioner would not have pled guilty and instead would have insisted on going to trial if he did not face a sentence of life without parole.

During the guilty plea counsel advised the judge that Petitioner had a prior conviction for a proximity charge which is considered a serious offense pursuant to S.C. Code §17-25-45. (App. p. 7, lines 13-19). Petitioner's conviction at trial for trafficking based on the June 2, 2016, controlled buy constituted a second serious offense pursuant to S.C. Code §17-25-45. A conviction at trial for trafficking based on the May 3, 2016, controlled buy would constitute a third serious offense pursuant to S.C. Code §17-25-45.

S.C. Code §17-25-45(B) provides that:

> Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for:
> (1) a serious offense;
> (2) a most serious offense;

(3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or
(4) any combination of the offenses listed in items (1), (2), and (3) above.

In advising Petitioner of the consequences of a conviction at trial for trafficking based on the May 3, 2016, controlled buy, plea counsel correctly advised Petitioner that he faced a potential sentence of life without parole. Plea counsel, however, failed to advise Petitioner that, pursuant to S.C. Code §17-25-50, Petitioner could challenge the State's ability to seek a sentence of life without parole. S.C. Code Ann. §17-25-50 provides, "In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses."

In Bryant v. State, 384 S.C. 525, 534–35, 683 S.E.2d 280, 285 (2009), the South Carolina Supreme Court wrote:

> In sum, we hold: (1) section 17–25–45 operates to trigger a life without parole sentence under the respective "two-strikes" and "three-strikes" provisions; (2) subsection (F) of section 17–25–45 sets forth a straightforward timing feature for identifying "a prior conviction;" and (3) section 17–25–50 is intended to serve as a legislatively sanctioned safeguard to ensure that a life without parole sentence is not imposed in cases where the multiple section 17–25–45 offenses are "so closely connected in point of time that they may be considered as one offense," which we construe to mean the offenses are inextricably connected and share an immediate temporal proximity. In essence, what may be charged as two, three or more strikes under section 17–25–45 must be deemed "one-strike" for sentencing purposes under section 17–25–50 and, as a result, preclude a life without parole sentence. We believe this approach most closely hews to legislative intent based on what is admittedly imprecise statutory language.

The conviction for trafficking based on the June 2, 2016, controlled buy was inextricably connected to the trafficking charge based on the May 3, 2016, controlled buy and the two should

be deemed "one-strike" for sentencing purposes precluding a sentence of life without parole. The Drug Enforcement Unit used the same confidential informant to make the controlled buys from outside the same residence on Chestnut Street.

As noted by the Court in Bryant:

> When a *genuine* ambiguity exists as a result of the proposed application of section 17–25–50 to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (recognizing the settled rule that penal statutes must be strictly construed in the defendant's favor); see also United States v. Shabani, 513 U.S. 10, 17, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994) (observing that the rule of lenity "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute"). Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) ("[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.' ").

384 S.C. at 533, 683 S.E.2d at 284. Petitioner maintains that in the present case there is no ambiguity as to the application of S.C. Code §17-25-50. If there is ambiguity, however, any doubt must be resolved in favor of Petitioner. Plea counsel was deficient in failing to explain S.C. Code §17-25-50.

The present case is distinguished from Bryant where the Court found that three separate armed robberies on different days, at different locations, involving different victims were not inextricably connected such that the robberies could be considered one offense pursuant to S.C. Code §17-25-50. Again, in the present case the Drug Enforcement Unit used the same confidential informant to make the controlled buys from outside the same residence.

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 trafficking in the present case was rendered involuntary by plea counsel's failure to advise Petitioner that, pursuant to S.C. Code §17-25-50, Petitioner could challenge the State's ability to seek a sentence of life without parole. The error was not cured during the guilty plea hearing. 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 arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

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Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of July 2024.