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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

George C. James, Jr., Circuit Court Judge

NICHOLAS PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001154

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel by failing to explain the required mental state of "knowledge" for kidnapping when petitioner decided to reject the State's plea offer?

STATEMENT

On March 15, 2006, a Georgetown County grand jury indicted petitioner for kidnapping and first-degree burglary. App. 1165 – 68. On January 29, 2007, petitioner was tried before the Honorable John C. Hayes, III, and a jury. App. 1. Matthew Modica and Dori Biagianti represented the State. App. 1. Reuben Goude represented petitioner. App. 1. Petitioner was acquitted of burglary. App. 741, ll. 14 – 22. He was convicted of kidnapping. App. 741, ll. 14 – 22. Judge Hayes sentenced petitioner to twenty-five years' imprisonment. App. 747, ll. 4 – 10. Petitioner's appeal was dismissed after the filing of a brief pursuant to Anders v. California, 386 U.S. 73 (1963). App. 1133.

On February 1, 2010, petitioner filed a PCR application. App. 749. Petitioner's attorney filed two amendments to his PCR application. App. 759 – 61. On August 24, 2011, a hearing was held before the Honorable Stephen H. John. App. 762. Tricia Blanchette represented petitioner. App. 762. Christina Catoe represented the State. App. 762. At the end of this hearing, petitioner received a continuance because trial counsel previously told petitioner's PCR attorney that his file had been destroyed in a fire. App. 863, ll. 14 – 20. Trial counsel then appeared with the unburned file at the hearing. App. 863, ll. 14 – 20. Judge John continued the case and abandoned jurisdiction. App. 866, ll. 12 – 19.

On January 23, 2012, a new hearing was held before the Honorable George C. James, Jr. App. 874. On March 25, 2013, Judge James denied petitioner's application. App. 1133. On April 17, 2013, petitioner filed a motion pursuant to Rule 59(e), SCRCP. App. 1160. On May 7, 2013, petitioner's motion was denied. App. 1163. This petition follows.

ARGUMENT

Trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel by failing to explain the required mental state of "knowledge" for kidnapping when petitioner decided to reject the State's plea offer.

Relevant Facts

This case arises from tumultuous relationship between petitioner and Belinda Mitchum ("Mitchum"). They dated for fifteen months. App. 69, l. 19 – 70, l. 3. The couple had previously lived together and Mitchum's belongings were at petitioner's grandmother's house. App. 389, ll. 15 – 24. At 5:17 AM on a Sunday morning, Mitchum called petitioner. App. 386, ll. 13 – 21. Mitchum asked petitioner to come see her that morning and to bring her belongings. App. 389, ll. 15 – 24. They were also going to "talk." App. 391, ll. 12 – 18. Petitioner and his grandmother went to see Mitchum at approximately 6:15 AM. App. 395, l. 20 – 396, l. 1. Mitchum told petitioner she would leave the front door unlocked. App. 401, ll. 7 – 10.

Petitioner knocked on the front door and when no one answered, he entered. App. 401, ll. 14 – 16. Mitchum was sleeping on the couch. App. 401, ll. 22 – 23. Petitioner attempted to wake her, but was unsuccessful. App. 403, ll. 14 – 23. Petitioner saw "half a joint in the ashtray, coke residue on the table and beer cans all in the kitchen." App. 405, ll. 4 – 7.

Petitioner became upset. App. 407, l. 6. He admitted duct taping Mitchum's feet. App. 407, ll. 5 – 8. Trial counsel asked, "And what was the purpose of putting duct tape on the person's feet?" App. 407, ll. 9 – 10. Petitioner responded, "I couldn't tell you. I just, I lost my mind. I didn't know what I was doing at the time." App. 407, ll. 11 – 12. Trial counsel added, "Well, I agree with that statement." App. 407, l. 13. This remark drew an objection and a caution from the trial judge. App. 407, ll. 15 – 18.

Trial counsel then asked, "Was there inkling in your brain of the purpose of putting duct tape on another person's feet?" App. 407, ll. 19 – 20. Petitioner replied again that he did not realize what he was doing. App. 407, ll. 21 – 22. Trial counsel asked, "How could you not realize what you are doing and when you are the one doing it?" App. 407, ll. 23 – 24. Petitioner testified that he "didn't know what was happening till later on probably about 30 or 45 minutes after that when I realized she had tape around her feet. That's why I took it off." App. 408, ll. 1 – 4.

Petitioner then admitted taking Mitchum from the trailer and putting her in the back seat of the truck. App. 408, l. 17 – 412, l. 1. Petitioner also admitted that he duct taped Mitchum's hands. App. 415, ll. 13 – 16. Petitioner's grandmother drove them back to Summerville. App. 415, l. 22 – 416, l. 1.

During his closing argument, trial counsel told the jury that the question for them to decide was whether petitioner intended to commit a crime. App. 704, ll. 7 – 17. Petitioner stated, "So, the question is whether he intended, whether he thought he was doing something wrong, whether he thought he was..." App. 704, ll. 8 – 10. The State interrupted with an objection. App. 704, l. 11. The trial judge sustained the objection and told the jury he would charge them regarding the mental state required for kidnapping. App. 704, ll. 12 – 15. Undeterred, trial counsel immediately argued, "The – whether he thought he was intending to kidnap somebody he told you what he intended." App. 704, ll. 16 – 17. Trial counsel argued that petitioner only took Mitchum because he was afraid she was drunk, passed out, and would be abused. App. 704, ll. 16 – 24. Trial counsel argued that petitioner "was intending to try to help" Mitchum. App. 705, ll. 4 – 6.

Prior to trial, the State offered petitioner a plea deal. App. 1030, ll. 2 – 8. The State offered to dismiss the burglary charge in exchange for a plea of guilty to kidnapping. App. 1030, ll. 2 – 8. The State offered a thirteen to sixteen-year negotiated sentence. App. 1030, ll. 1 – 8.

Petitioner testified that trial counsel failed to explain to him the mental state required to be convicted of kidnapping. App. 988, ll. 7 – 15. Petitioner testified that he would have considered his plea differently had he understood this law. App. 988, l. 16 – 989, l. 8. On cross-examination, the State asked petitioner if his "real complaint" was that "the judge gave you too much time." App. 1014, ll. 17 – 18. Petitioner responded:

> No, I feel that my lawyer didn't prepare me the right way. If he had prepared me then my outcome, I might have took the plea and we might could have argued more on the ten-year plea than take it to trial.

App. 1014, ll. 19 – 22.

Discussion

The PCR judge made a specific finding that trial counsel "did **not** explain to the Applicant the distinction between knowledge and intent with respect to the kidnapping offense." App. 1142 (emphasis added). Despite this finding that trial counsel failed to explain the applicable law, the PCR judge denied petitioner's application. Instead, the PCR judge used petitioner's testimony from trial to find that petitioner would not have accepted a plea even if he understood the law. App. 1143. This was error.

The mens rea required for kidnapping is "knowledge." State v. Jefferies, 316 S.C. 13, 18-19, 446 S.E.2d 427, 430-31 (1994). See also S.C. Code Ann. § 16-3-910. Citing a United States Supreme Court case, this Court explained the difference between "knowledge and "intent." Jefferies at 19, n. 7 - 8, 446 S.E.2d at 431, n. 7 – 8; citing United States v. Bailey, 444 U.S. 394 (1980). Intent, or acting "purposefully," was defined as follows: "A person who causes a particular result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct." Jefferies at 19, n. 7, 446 S.E.2d at 431, n. 7 (internal quotations omitted). "Knowledge" was defined: "A person is said to act knowingly if he is aware that that

result is practically certain to follow from his conduct, whatever his desire may be as to that result." Id. at 19, n. 8, 446 S.E.2d at 431, n. 8 (internal quotations omitted).

While this difference may be slight in most cases, it was manifestly important in petitioner's case. Even if the jury had believed petitioner's story that he never meant to do any harm to Mitchum, under the knowledge standard, they would still be required to convict him. It was clear from petitioner's testimony that he believed he could convince the jury that he never meant to kidnap Mitchum, but this was a legal impossibility given his admission that he duct taped her hands and feet and carried her away.

It was also equally clear from trial counsel's questioning and argument that he did not understand this subtle, yet immensely important difference. He continued to argue "intent" to the jury, despite having an objection to his argument sustained. App. 704, ll. 7 – 17. At the PCR hearing, trial counsel gave a rambling, defensive answer when questioned about his discussions with petitioner about the Jefferies standard. App. 1096, l. 10 – 1098, l. 7. Trial counsel opined that juries do not "get into the minute legal points that have been made here today or that sometimes are made in the instructions on the law. I think the jury was going to use their common sense . . . to decide whether they thought that we kidnapped the woman or we did not. . . ." App. 1096, ll. 16 – 24. He said, "From the jury's point of view in testifying I think it all means the same thing and the jury is the one that votes not guilty or guilty." App. 1097, ll. 6 – 9. He also indicated he guessed there was a chance the trial judge might have charged the wrong law—intent. App. 1097, ll. 18 – 23. Importantly, trial counsel never said he discussed the standard with petitioner. App. 1096, l. 10 – 1098, l. 7. Undoubtedly, this testimony was the basis for the PCR judge's finding that trial counsel never discussed the "knowledge" standard with petitioner.

This failure to fully advise petitioner regarding the law constituted ineffective assistance of counsel. "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted). "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 v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012).

This Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. This Court found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing). In this case, the reverse is true. Trial counsel's erroneous advice led petitioner to mistakenly reject a plea offer that was much more favorable than the sentence he received at trial.

The testimony used by the PCR judge to find that petitioner was not prejudiced came from the State's cross-examination of him at trial. The petitioner was responding to aggressive questioning from the solicitor:

> Q. All right, so we understand each other then you don't have a problem with lying to people when it suits you, correct?
>
> A. It wasn't that I –no, it wasn't that I was lying. That's what I had believed at that time.

Q. Okay, so, you're asking our jury to take what you're saying on faith, on belief of what you think might have happened; is that [what] you're telling us?

A. That's—no, sir, I'm telling you you cross examine me and my lawyer cross examine me and I just want them to get the truth out of all of that. That's all I want.

Q. Well, I think that's what we all . . . want.

A. That's the only reason I'm here to try it. That's why I didn't plea.

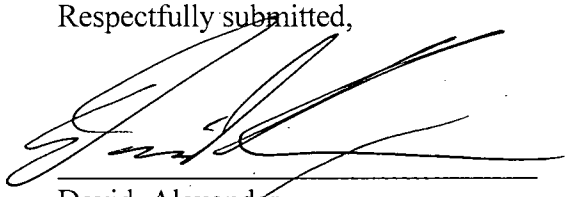
App. 462, ll. 4 – 17. Petitioner here was testifying before he understood the difference between the "knowledge" and "intent" standards. At the point in time of this testimony, petitioner lacked any understanding of the law regarding kidnapping. Therefore, this testimony cannot logically or fairly be used to show that petitioner would have rejected a plea offer.

This was the only basis used by the PCR court to support its conclusion that petitioner would not have accepted the State's plea offer had he understood the mental state required for kidnapping. Once this improper basis is removed, the only evidence in the record is petitioner's testimony that he would have accepted a plea offer and would not have taken the case to trial had he understood this difference. App. 988, l. 16 – 989, l. 8. App. 1014, ll. 19 – 22. Therefore, the PCR court erred and the case must be reversed.

CONCLUSION

For the above-stated reasons, this Court should grant the petition with the ultimate relief of reversing the judgment of the PCR court and remanding with instructions to reinstate the plea offer of guilty for kidnapping with a negotiated sentence of thirteen to sixteen years.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of December, 2013.

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NICHOLAS PARKER,

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire United States Postal Services at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. Nicholas Parker #320005 Broad River Correctional Institution 4460 Broad River Road Columbia, SC 29210 this 16th day of December, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of December, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.