

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JAN 10 2014

Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

S.C. Supreme Court

DARREN A. SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000204

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ISSUES PRESENTED

1. Did the PCR court correctly grant review pursuant to White v. State, 263 S.C. 110. 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights?
2. Did the PCR court err in failing to find plea counsel ineffective for not timely objecting during the guilty plea to the state asking the court for an active sentence?

STATEMENT

In May 2010, the Charleston County Grand Jury indicted Darren Simmons on the charges of burglary second degree violent, unlawful possession of a pistol, and possession of the tools of a crime. On September 1, 2010, Simmons appeared before the Honorable Roger M. Young, Sr. and entered guilty pleas to the three charges. Simmons was represented by Mary Beth Mullaney, and the state was represented by Dale Savage. Simmons' two codefendants, Lamar Jones and Jessica Kelly pled guilty at the same time. Jones was represented by Ben Lewis and Kelly was represented by Jason King. Judge Young sentenced Simmons and Jones to fifteen years suspended to ten years incarceration and five years probation. Kelly was sentenced to five years active time and five years probation. App. 24, ll. 5 – 18.

Simmons' attorney filed a Motion to Reconsider the Sentence Or In the Alternative Withdraw the Guilty Plea on September 10, 2010. A hearing was held before Judge Young on November 9, 2010. The three co-defendants were again represented by the same attorneys as at the guilty plea. Judge Young denied the motions and ordered that the sentences remain the same. Supp. App.28, ll. 1 – 6. Simmons did not appeal the convictions or sentences or the Motion to Reconsider.

On August 24, 2011, Simmons filed an application for post-conviction relief (PCR). The state filed a return on October 10, 2011 an evidentiary hearing was held on January 11, 2012 before the Honorable R. Markley Dennis, Jr. Simmons was represented by Mark Archer, and the state was represented by Matthew J. Friedman. On February 27, 2012, Judge Dennis issued an order granting a belated appeal to Simmons pursuant to White v. State, *supra*, and denying all other allegations and dismissing them with prejudice. App. 128 – 137. Simmons' attorney filed a notice of appeal. This petition follows accompanied by an Anders brief pursuant to White v. State.

ARGUMENT

The PCR court correctly granted review pursuant to White v. State, 263 S.C. 110. 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights.

Darren Simmons pled guilty, along with two co-defendants, Lamar Jones and Jessica Kelly, to breaking into two tractor trailer containers owned by the Carolina Rod and Gun Store in Charleston on December 15, 2009. There was also a juvenile involved who pled in Family Court. App. 9, ll. 3 – 9. Although the sentencing sheet was clearly marked that this plea was without negotiations or recommendations, the solicitor, during the guilty plea, asked the judge for active incarceration time for Simmons. There was no objection by defense counsel. App. 141-144; App. 11, ll. 19 – 21.

After the guilty plea, Simmons' attorney filed a Motion to Reconsider the Sentence Or in The Alternative Withdraw the Guilty Plea. App. 111-118. Among the concerns raised in this motion was that the state violated the plea agreement to make no recommendations as shown on the sentencing sheet, and then the state asked the plea court for an active sentence. App. 115, ll. 15- App. 117, ll. 16.

A hearing was held on November 9, 2010 before Judge Roger Young to hear the motion. All three co-defendants argued either a Motion to Reconsider or Withdraw the Plea. Simmons argued only a Motion to Reconsider the sentence asking for the same sentence that Jessica Kelly received which was five years active time and five years probation. Supp. App.10 – App. 11, ll. 17. The judge denied all of the motion finding that all of the sentences were appropriate. App. 28, ll. 1 – 6.

At his PCR hearing, Simmons' attorney testified that one of the reasons that she filed the Motion for Reconsideration was because the state violated the plea agreement when he asked for

active time because the sentencing sheet said with no recommendation. It was her understanding prior to the plea that the state agreed to make no recommendation. App. 63, ll. 1 – App. 65, ll. 2.

The PCR judge allowed Simmons to amend his PCR application at the hearing to include the ground that plea counsel was ineffective for not advising Simmons that he could appeal the denial of his Motion to Reconsider because the state and the “system” were not consistent with the plea agreement. The PCR judge said the plea court could have set the plea aside because it was not consistent with the plea agreement. App. 102, ll. 1 – App. 104, ll. 25.

The PCR judge then granted Simmons a belated appeal of his guilty plea and the denial of the Motion to Reconsider. The PCR judge held that the reviewing court needed to decide whether or not there was a plea agreement. App. 105, ll. 3 – App. 106, ll. 25.

The PCR judge held in his order that he found plea counsel’s testimony to be credible, and that Simmons failed to meet his burden of proof that plea counsel was ineffective. App. 133. The PCR judge found that Simmons was entitled to a review of his direct appeal issues because Simmons did not freely and voluntarily waive his right to appeal the Motion for Reconsideration. The PCR Order provided that Simmons’ allegation that the state breached the plea agreement by asking the plea court for active time after agreeing not to make any recommendation. The Order provided that Simmons was entitled to a review since his counsel did not attempt to withdraw the plea. App. 135.

The PCR judge found that Simons did not knowingly and voluntarily waive his right to a direct appeal and granted Simmons the right to a belated appeal according to White v. State, 263 S.C. 110, 108, S.E.2d 35 (1974). App. 295; App. 296.

On review, a PCR judge’s findings will be upheld if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Trial counsel

must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The order of the PCR court granting the belated appeal should be affirmed.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not timely objecting during the guilty plea to the state asking the court for an active sentence.

Darren Simmons pled guilty, along with two co-defendants, Lamar Jones and Jessica Kelly, to breaking into two tractor trailer containers owned by the Carolina Rod and Gun Store in Charleston on December 15, 2009. There was also a juvenile involved who pled in Family Court. App: 9, ll. 3 – 9. Although the sentencing sheet was clearly marked that this plea was without negotiations or recommendations, the solicitor, during the guilty plea, asked the judge for active incarceration time for Simmons. There was no objection by defense counsel. App. 141-144; App. 11, ll. 19 – 21.

After the guilty plea, Simmons' attorney filed a Motion to Reconsider the Sentence Or in The Alternative Withdraw the Guilty Plea. App. 111-118. Among the concerns raised in this motion was that the state violated the plea agreement to make no recommendations as shown on the sentencing sheet, and then the state asked the plea court for an active sentence. App. 115, ll. 15- App. 117, ll. 16.

At the PCR hearing, plea counsel testified that she filed a Motion to Reconsider the Sentence of In the Alternative To Withdraw the Guilty Plea. One of the reasons was because it was her understanding that the state agreed to make no recommendation as to sentencing, and then the state asked the plea court for active time. App. 63, ll. 21 – App. 65, ll. 2. The solicitor had told her that he would dismiss an additional charge , and they could go forward on the plea without recommendation and let the judge decide. App. 68, ll. 1 – 21.

The PCR judge stated during the hearing that he was granting a belated appeal because “if the sentence had violated, as a matter of law, the agreement, then so be it. But that’s up to the reviewing court in Columbia, not for me.” App. 105, ll. 1 – 15.

The PCR judge then stated that he believed Simmons had a right to have the appellate court review as to whether or not there was a plea agreement. App. 105, ll. 24 – App. 106, ll. 25.

In his order, the PCR judge wrote:

Based upon Applicant's assertion that counsel did not attempt to withdraw the plea if there was a plea agreement, this Court concludes the Applicant is entitled to a review of his guilty plea and motion for reconsideration pursuant to White v. State.

App. 135.

A contemporaneous objection is typically required to preserve issues for appellate review. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005).

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, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that 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. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

Counsel was ineffective for not objecting when the state asked the plea court for an active sentence when the state had told her they would make no recommendation as to sentencing. The state violated the plea agreement which was clearly indicated on the sentencing sheet. Although counsel filed a Motion For Reconsideration of the Sentence, that was too late to object. In State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999), the Court of Appeals wrote that it was improper to argue new matter in a motion for reconsideration. The Court cited Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) that an issue may not be raised for the first time in post-trial motion.

In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), the Supreme Court held that the defendant's plea counsel was ineffective and counsel's conduct fell below "prevailing professional norms" in counsel failing to withdraw the guilty plea after the state reneged on the plea agreement.

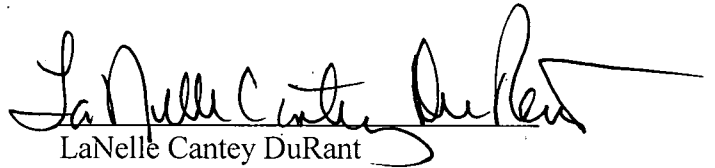
Simmons' plea counsel fell below the "prevailing professional norms" when she failed to timely object to the state making a recommendation for an active sentence. ¹

¹ In the event this Court finds that the Motion for Reconsideration was a timely objection, appellate counsel is filing an accompanying merits brief on the White v. State review of Simmons' direct appeal issues.

CONCLUSION

The order of the PCR court granting a belated appeal pursuant to White v. State should be affirmed. Certiorari should be granted on Issue Two in order for Simmons' convictions and sentences to be reversed, and his case remanded for resentencing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of January, 2014.

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CERTIFICATE OF SERVICE

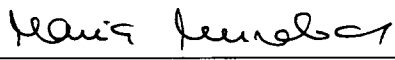
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Darren Simmons, # this 10th day of January, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of January, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 0223.