

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable William C. McMaster, III, Circuit Court Judge

JADEN I. GARY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-001000

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether the PCR court erred by refusing to find trial counsel ineffective for failing to object to the solicitor's improper arguments concerning petitioner's sentence and where petitioner was prejudiced by trial counsel's failure to argue he was punished with a higher sentence for exercising his right to a trial?

II.

Whether the PCR court erred by refusing to find trial counsel ineffective for failing to move to for reconsideration of petitioner's sentence?

STATEMENT

In September of 2019, the Spartanburg County grand jury indicted petitioner for one count of burglary, first degree, one count of possession of a weapon during commission of a violent crime, and one count of grand larceny. App. 456-463. On August 10, 2021, petitioner proceeded to a jury trial before the Honorable J. Mark Hayes, II. App. 1. However, Judge Hayes declared a mistrial due to a “juror situation.” App. 172, ll. 13-19. Thereafter, petitioner’s case was called to trial on August 31, 2021, before the Honorable R. Keith Kelly and a jury. App. 175. Spenser Smith represented the state, and E. Joshua Schultz represented petitioner. App. 175. The jury ultimately found petitioner guilty as indicted. App. 428, ll. 12-25. Judge Kelly imposed a total sentence of twenty (20) years’ imprisonment, comprised of twenty (20) years as to burglary, first degree, five (5) years as to the weapons charge, and three (3) years as to the grand larceny charge, set to run concurrently. App. 454, ll. 1-10. Petitioner filed a timely notice of appeal; after briefing, the South Carolina Court of Appeals affirmed his convictions. App. 589-591.

On August 13, 2024, petitioner filed an application for post-conviction relief (PCR). App. 464-471. On October 10, 2024, the state filed a return and motion for a more definite statement. App. 472-481. On February 20, 2025, on behalf of petitioner, Susannah C. Ross, filed an amended PCR application, alleging, as relevant, that trial counsel was ineffective for failing to object to the solicitor’s closing arguments regarding petitioner’s sentence, for failing to argue that the sentence punished petitioner for exercising his right to a jury trial, and for failing to move to reconsider petitioner’s sentence. App. 526-528. On June 16, 2025, an evidentiary hearing was held before the Honorable William C. McMaster, III. App. 483. Susannah C. Ross represented petitioner, and MacKinnon Westraad represented the state. App. 483. On March

10, 2026, Judge McMaster signed an order denying PCR and dismissing petitioner's application with prejudice. App. 529-554. On March 19, 2026, petitioner moved to alter or amend the judgment because the order omitted a portion of the burglary statute and misstated a section of the statute. App. 555-558. On April 6, 2026, Judge McMaster entered an order granting in part and denying in part petitioner's motion to alter or amend the judgment. App. 559-560. Specifically, Judge McMaster granted the motion to amend the order of dismissal to include the complete burglary statute. App. 559. However, Judge McMaster denied the motion as to the remaining arguments. App. 559. On April 7, 2026, Judge McMaster signed an amended order denying PCR and dismissing petitioner's application with prejudice. App. 562-588.

This petition follows.

ARGUMENTS

I.

The PCR court erred by refusing to find trial counsel ineffective for failing to object to the solicitor's improper arguments concerning petitioner's sentence and where petitioner was prejudiced by trial counsel's failure to argue he was punished with a higher sentence for exercising his right to a trial.

Relevant facts

Trial

Jason Williams testified that on July 22, 2019, his phone displayed a notification from his security camera about motion and sound inside his home. App. 282, l. 12 – 284, l. 11. He called 9-1-1 and met with law enforcement once they arrived. App. 284, ll. 12-13. He testified that he watched individuals enter through his kitchen and search through each room with a handgun drawn. App. 284, ll. 14-19. He testified that his weapons were taken. App. 284, l. 19. Specifically, he testified that multiple long rifles, cases, ammunition, a plate carrier with plates, and pouches were taken during the robbery, totaling a value of over \$2,000. App. 295, ll. 7-17. His items were not recovered. App. 295, ll. 18-20.

Investigator Trevor Sue testified that he watched the surveillance video from Jason Williams's residence and identified petitioner. App. 330, ll. 3-15. Investigator Shue identified petitioner as the first individual walking through the living room with a firearm. App. 330, ll. 16-19. On cross-examination, Shue testified that, while he previously had a brief encounter with petitioner, petitioner had not been charged with a crime and did not have any involvement with the Department of Juvenile Justice or the Department of Social Services. App. 331, l. 21 – 332, l. 13. Investigator Brad Newton testified that he conducted an interview with petitioner at the

police station. App. 345, ll. 5-10. Petitioner was shown the surveillance video, and petitioner pointed out who he was in the line and identified himself as the individual with the pistol. Tr. 353, ll. 5-18. Petitioner provided a written statement. App. 353, ll. 19-21. Ultimately, the jury found appellant guilty as indicted. App. 428, ll. 12-25

Sentencing

Trial counsel presented mitigation in support of his request for a minimal sentence. *See generally* App. 428-449. The state informed the court that Jason Williams wanted “Your Honor and [petitioner] to know that he believes he’s lucky that he wasn’t home cause he thinks [petitioner] might be getting a life sentence but in a, in a different way and possibly all three of the young men that were involved.” App. 449, l. 22 – 450, l. 1. The state informed the court that Williams requested a maximum sentence “because [petitioner] had a chance to do the right thing and to plead, and instead he chose to keep doing the wrong thing.” App. 450, ll. 2-4. The state argued that “[n]o sincere efforts” were made to get the stolen guns back. App. 450, ll. 5-13. The state explained that the offer in this case was 15 years, which was the minimum. App. 451, ll. 2-4. The state argued that petitioner was the “ringleader.” App. 451, ll. 10-18.

The state argued that it did not “think that the minimum sentence is appropriate because he did not admit responsibility.” App. 451, ll. 20-22. The state continued that petitioner made “the State and Mr. Williams go through basically the last trial, we were one witness away from finishing, two different trials on a case where he confessed and is caught on video. So, he’s not accepted responsibility. He could not just admit what he had done and take punishment.” App. 451, l. 22 – 452, l. 3. The state reiterated that petitioner led them to having two different trials. App. 453, ll. 3-6. Trial counsel made no objection to the state’s sentencing arguments.

The trial court stated that petitioner was lucky because, had Williams been there, “he would of killed you and your two friends that day.” App. 453, ll. 11-19. The trial court stated that the shotgun petitioner took was “loaded to stop people like you and the citizens of this county and this state are tired of people like you breaking into their houses.” App. 453, ll. 20-23. The trial court explained that petitioner did not make a mistake, but rather he made a bad judgment. App. 453, ll. 20-25. The trial court thus imposed a total sentence of 20 years’ imprisonment. App. 454, ll. 1-6.

Evidentiary hearing

During his post-conviction relief evidentiary hearing, petitioner testified that his trial counsel did not object to the solicitor’s statements that he was not remorseful and was the ringleader. App. 495, ll. 1-5. He testified that he was the youngest of his co-defendants and that he was not the ringleader. App. 496, ll. 6-9. On cross-examination, petitioner agreed that he received a sentence within the range for the crime he was convicted of. App. 496, l. 23 – 497, l. 2. He testified that he believed he was punished for exercising his right to a jury trial, based on the solicitor’s arguments and statements during his sentencing hearing. App. 497, ll. 3-6. He testified that the solicitor argued that he “wasted their time by making them go through two trials.” App. 497, ll. 6-9.

Trial counsel then testified that Juge Kelly did not make any comments that indicated that petitioner was punished for taking his case to trial. App. 500, ll. 2-9. He further testified that he did not believe that he would have succeeded on an argument that petitioner was punished for his right to take his case to trial. App. 500, ll. 10-13. On cross-examination, trial counsel agreed that the Court of Appeals found the issue that petitioner’s sentence violated *Davis v. State*, 336 S.C. 329, 520 S.E.2d 801 (1999), was unpreserved because he did not object to the

solicitor's comments. App. 513, l. 22 – 514, l. 2. On redirect examination, trial counsel testified that he could not say whether the issue would have been successful on direct appeal had he objected to the solicitor's comments. App. 517, ll. 11-21. He testified that he did not believe that the record indicated that the trial judge decided petitioner's sentence based on the lack of responsibility or petitioner's decision to proceed to a trial. App. 518, ll. 3-7.

The PCR court's ruling

In the order of dismissal, the PCR court addressed petitioner's allegation that trial counsel rendered infective assistance for failing to object to the solicitor's statements at sentencing that he should receive a harsher sentence because he did not accept responsibility by admitting wrongdoing and accepting punishment. App. 569. The PCR court determined that petitioner failed to overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment because trial counsel credibly testified that he did not think he would succeed on that argument. App. 572. The PCR court stated there was no indication in the record that Judge Kelly sentenced petitioner to punish him for taking the case to trial. App. 572. The PCR court determined that Judge Kelly's comments made clear that petitioner's sentence was based on the severity of the crime. App. 572. The PCR court concluded that the trial court did not embrace the solicitor's comments or request. App. 572. The PCR court continued that petitioner could not show prejudice because Judge Kelly did not take the solicitor's request or comments into account, therefore, it would not have impacted his sentence for trial counsel to object. App. 573. The PCR court thus denied relief as to this allegation. App. 573.

Discussion

The PCR court erred by refusing to find trial counsel ineffective where trial counsel's failure to object to the solicitor's improper arguments concerning petitioner's sentence constituted deficient performance and where petitioner was prejudiced by trial counsel's deficient performance.

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). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and that the deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687. Under the second prong, petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (citing *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016)).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . ." U.S. Const. amend. VI. Under the South Carolina Constitution, "The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury . . ." S.C. Const. art. I. § 14. "When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of

discretion.” *Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016) (citing *Davis*, 336 S.C. at 329, 520 S.E.2d at 801); *see also State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995) (our Supreme Court holding that a trial judge abuses his discretion at sentencing when he considers the fact that the defendant exercised his right to a jury trial). Moreover, in *Davis*, our Supreme Court determined that counsel was ineffective for failing to object when the trial judge indicated the reason that he sentenced Davis more harshly than two similarly-situated offenders who pled guilty was because those offenders admitted their guilt. *See Davis*, 336 S.C. at 330-333, 520 S.E.2d at 801-803.

In petitioner’s case, trial counsel was ineffective for failing to object to the solicitor’s arguments during sentencing advocating for a harsher punishment for petitioner because he exercised his right to a trial. The state repeatedly argued to the trial court that petitioner “had the chance to do the right thing and plead,” that a minimum sentence was not “appropriate because he did not admit responsibility,” emphasized that he made the state go through “two separate trials,” and asserted that petitioner “could not just admit what he had done and take punishment.” App. 450, ll. 2-4; 451, l. 20 – 453, l. 6. All of these arguments from the solicitor bore on petitioner’s constitutional right to a trial, *see* U.S. Const. amend. VI; S.C. Const. art. I. § 14, and explicitly asked the trial court to consider petitioner’s decision to exercise his trial rights rather than enter a guilty plea as a factor when it crafted petitioner’s sentence. Trial counsel’s failure to object to these improper arguments was therefore deficient where the trial court’s consideration of fact that a defendant exercised his right to a jury trial constitutes an abuse of discretion. *Castro*, 417 S.C. at 83, 789 S.E.2d at 47; *Davis*, 336 S.C. at 330-333, 520 S.E.2d at 801-803; *Hazel*, 317 S.C. 368, 453 S.E.2d 879. Likewise, trial counsel was deficient for failing to preserve this issue for direct appeal. *Stone v. State*, 419 S.C. 370, 389-390, 789 S.E.2d 562, 571-

572 (2017) (citing *Foye v. State*, 335 S.C. 586, 518 S.E.2d 265 (1999) (holding trial counsel was deficient in failing to preserve an issue for appeal)). Accordingly, the PCR court erred by refusing to find that trial counsel rendered deficient performance. App. 572.

Petitioner was also prejudiced by trial counsel's deficient performance. Petitioner had no criminal history, was seventeen years old at the time of the offense, and had a substantial amount of family support; yet he received a much harsher sentence than his similarly-situated co-defendants. *See generally* App. 428-449; App. 523, ll. 1-5; App. 592-595. Although the PCR court determined that petitioner could not show prejudice because the trial court did not embrace the state's request, the state's unobjected arguments constituted the bulk of its reasoning to the court supporting its request to sentence petitioner above the minimum, and the trial court did just that by sentencing petitioner to twenty (20) years' imprisonment. App. 572; *see also* App. 454, ll. 1-6. Moreover, trial counsel's failure to object to the solicitor's sentencing arguments left the issue unpreserved for review on direct appeal. App. 5879-591; *see Foye*, 335 S.C. at 586, 518 S.E.2d at 265; *see also Rivers v. State*, 446 S.C. 1, 11-14, 916 S.E.2d 335, 341-342 (2025). Nor did trial counsel testify that the issue would have been unsuccessful on direct appeal, and the PCR court merely stated that an objection would not have impacted petitioner's sentence. App. 517, ll. 11-21; App. 573. Thus, the PCR court erred by finding that petitioner failed to demonstrate prejudice where there is a reasonable probability that, but for trial counsel's failure to object to the solicitor's continual urging to the trial court to consider the improper factor of petitioner's decision to proceed to trial, the result of the proceeding would have been different. *Thompson*, 423 S.C. at 245, 814 S.E.2d at 492; *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625; *Rutland*, 415 S.C. at 577, 785 S.E.2d at 353.

Therefore, the PCR court erred because trial counsel's failure to object to the solicitor's improper sentencing arguments constituted deficient performance which prejudiced petitioner. *Strickland*, 466 U.S. at 687-688; App. 572-573.

II.

The PCR court erred by refusing to find trial counsel ineffective for failing to move to for reconsideration of petitioner's sentence.

Relevant facts

Sentencing

As to mitigation, trial counsel informed the court that petitioner was seventeen years old at the time of the offense. App. 432, ll. 15-16. He requested leniency and pointed to the dozens of people seated in the gallery in support of petitioner. App. 432, ll. 20-22. Trial counsel argued that petitioner had grown up and had reestablished good relationships with several family members in the two years he was on home detention. App. 433, ll. 9-23. Trial counsel informed the court that petitioner had no record. App. 435, ll. 6-7. Trial counsel requested a minimal sentence because of petitioner's age, lack of criminal record, and family support. App. 436, ll. 13-19. Several family members provided allocutions to the trial court. Petitioner's mother, Moriah Williams, explained to the court that petitioner had received his GED and that she was proud of the person petitioner was becoming over the last few years. App. 437, ll. 19-25. She told the court that petitioner had a job and helped with the kids at home. App. 438, ll. 2-6. Petitioner addressed the court and apologized. App. 449, ll. 2-17.

As discussed above, the state argued that it did not "think that the minimum sentence is appropriate because he did not admit responsibility." App. 451, ll. 20-22. The trial court thus imposed a total sentence of twenty (20) years' imprisonment. App. 454, ll. 1-6.

Evidentiary hearing

Petitioner testified that he was sentenced to twenty (20) years' imprisonment while his co-defendants were sentenced to fifteen (15) years' imprisonment for burglary, second degree.

App. 495, ll. 6-9. He testified that his trial counsel did not move to reconsider his sentence. App. 495, ll. 10-11. Petitioner testified that he did not know the context of his co-defendants receiving reduced charges and that his co-defendants did not testify against him. App. 495, ll. 12-17. On cross-examination, petitioner agreed that video evidence showed him leading his co-defendants through the home and that he identified himself from the video in the interview with law enforcement. App. 497, ll. 17-23.

Trial counsel testified that he could have moved to reconsider petitioner's sentence based on his co-defendants' pleas. App. 500, ll. 22-24. He explained, however, that it would not have been successful. App. 501, ll. 1-3. He testified that petitioner was sentenced within the range for the burglary offense and that based on his experience practicing before Judge Kelly, the motion would not have been successful. App. 501, ll. 4-11. On cross-examination, trial counsel read from Applicant's Exhibits 1 and 2,¹ which were the South Carolina Department of Corrections (SCDC) inmate detail reports for petitioner's co-defendants. App. 510, ll. 1-7. He testified that one co-defendant's projected release date was October 7, 2027, while the other co-defendant had a projected release date of August 31, 2027. App. 510, ll. 8-16. He testified that both co-defendants received fifteen (15) year total sentences. App. 510, l. 17 – 511, l. 11. He noted that the SCDC report showed that both co-defendants' offenses for burglary, second degree were classified as violent. App. 511, ll. 14-16; App. 592-595. He testified that the difference between burglary second degree and first degree meant that the co-defendants would not have to serve eight-five (85) percent of their sentences prior to release and would be released much sooner than petitioner. App. 511, l. 17 – 512, l. 6. Finally, trial counsel agreed that he did not move to

¹ Applicant's Exhibits 1 and 2 from the PCR evidentiary hearing are on file with this Court.

reconsider petitioner's sentence after his co-defendants received sentences for burglary second-degree. App. 514, ll. 16-19.

The PCR court's ruling

In the order of dismissal, the PCR court addressed petitioner's allegation that trial counsel rendered ineffective assistance of counsel for failing to move to reconsider his sentence after his co-defendants received lower sentences. App. 574. The PCR court determined that trial counsel testified credibly that, based on his experience with Judge Kelly, he did not think a motion to reconsider would be successful. App. 575. The PCR court noted that petitioner was sentenced withing the required range. App. 576. The PCR court concluded that trial counsel was not deficient for recognizing the difference in petitioner's case, namely that he possessed a firearm and his co-defendants pleaded guilty. App. 576. The PCR court also found that petitioner was not prejudiced because he did not show it was likely that Judge Kelly would have reduced his sentence where his co-defendants received sentences for burglary, second degree, rather than burglary, first degree which petitioner was convicted of. App. 576. The PCR court thus denied relief as to this allegation. App. 576.

Discussion

Trial counsel was ineffective for failing to file a motion to reconsider the sentence once petitioner received a total imprisonment sentence of twenty years. App. 454, ll. 1-10. Particularly, petitioner testified that trial counsel did not move to reconsider his sentence, and trial counsel agreed that he could have moved to reconsider petitioner's sentence. App. 495, ll. 10-11; App. 500, ll. 22-24. Considering that petitioner received a significant sentence, combined with his youth at the time of the offense, his lack of criminal history, and the lesser sentences his co-defendants received, trial counsel should have filed a motion to reconsider the sentence and

was rendered deficient performance in failing to do so. See *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (explaining that “when counsel articulates a *valid* reason for employing a certain strategy, such conduct will generally not be deemed ineffective assistance of counsel.”); App. 514, ll. 16-19.

Trial counsel’s deficient performance also prejudiced petitioner. In *State v. Hicks*, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. *Wasman v. United States*, 468 U.S. 559, 563, 104 S. Ct. 3217, 82 L.Ed.2d 424 (1984).

The sentencing judge in the present case had the authority to reconsider and reduce the twenty-year sentence imposed. *Hicks*, 377 S.C. at 325, 659 S.E.2d at 500; see also *Smith*, 276 S.C. at 498, 280 S.E.2d at 202. There is a reasonable probability that if trial counsel had filed a motion to reconsider sentence, despite his testimony to the contrary that he did not believe the motion would have been successful, that the trial judge would have granted the motion. App. 501, ll. 1-11; *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Petitioner’s age, mitigating circumstances, extensive family support, his allocution expressing remorse, and his co-defendants’ lesser sentences may have served as a basis for reconsideration. See generally App. 432-449; 510, l. 1 – 511, l. 16. In addition, trial counsel’s mere testimony that he did not believe that a motion for reconsideration would be granted is an insufficient reason to refuse to file a motion to reconsider the sentence. Therefore, trial counsel was ineffective for failing to file a motion to reconsider

petitioner's sentence, and petitioner was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687-688; App. 575-576.

CONCLUSION

Based on the foregoing arguments, petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.


Molly M. Keegan
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of September, 2026.