

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Dillon County
J. Michael Baxley, Circuit Court Judge

S.C. Supreme Court

SHAHEEN CABBAGESTALK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212579

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in concluding Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered where Petitioner presented evidence that his plea counsel advised him incorrectly concerning the sentence he would receive?

STATEMENT

A Dillon County grand jury indicted Petitioner for armed robbery (2007 – GS – 17 – 364) and assault and battery with intent to kill (2007 – GS – 17 – 363) on March 1, 2007. App. 625 – 626; App. 23, lines 9 – 10. The state, represented by Kernard Redmond and Lee Hayes, called the case to trial on August 27, 2007 before the Honorable Howard P. King and a jury. Glenn Manning represented Petitioner. App. 19. During the middle of the trial, Petitioner announced that he wanted to change his plea from not guilty to guilty. App. 108, lines 10 – App. 109, line 11. As part of the plea agreement, Petitioner admitted his guilt to the armed robbery charge, the prosecutor dismissed the assault and battery with intent to kill charge, and the prosecutor did not oppose imposition of a sentence “on the lower end of the ten to thirty spectrum.” App. 110, lines 13 – 21; App. 117, lines 14 – 24. Thereafter, Judge King engaged in the guilty plea colloquy with Petitioner. App. 111, line 8 – App. 122, line 12.

During the plea colloquy, Manning informed the court that Petitioner had “never been indicted.” Manning explained that the person indicted was “James Cabbagestalk,” but Petitioner’s name was “Shaheen¹ Cabbagestalk.” Manning explained that he was not challenging the sufficiency of the indictment but was pointing out the discrepancy so that the court may amend the indictment. App. 122, line 17 – App. 123, line 6. When Judge King announced his intention to amend the indictment to reflect “James Cabbagestalk a/k/a Shaheen Cabbagestalk,” Petitioner expressed his objection. App. 125, line 19 – App. 127, line 17. Over Petitioner’s objection, Judge

¹ Petitioner’s first name was spelled “Shaheem” in the transcript and this incorrect spelling continued through the direct appeal process. For ease of reference, Petitioner refers to Petitioner as Shaheen, his given name, throughout this petition.

King amended the indictment. App. 130, line 20 – App. 132, line 11.² Manning asked the court to sentence Petitioner to the minimum. App. 130, lines 1 – 11. Judge King determined a sentence at the low end of the range was not appropriate for Petitioner because (1) Petitioner had failed to provide the police with the names of those who also participated in the crimes and (2) Petitioner had shown no remorse. As a result, Judge King sentenced Petitioner to eighteen years' imprisonment. App. 132, line 13 – App. 133, line 7.

Petitioner filed a timely notice of appeal, which was perfected by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Kathrine Hudgins represented Petitioner in his appeal. The issue presented on direct appeal was whether the judge erred in amending the indictment by changing the name from James Cabbagestalk to Shaheen Cabbagestalk. App. 471 – 481. The Court of Appeals dismissed Petitioner's appeal on November 19, 2009. App. 139; State v. James Cabbagestalk a/k/a Shaheen R. Cabbagestalk, 2009 – UP – 528 (S.C. Ct. App. filed Nov. 19, 2009).

On March 9, 2010, Petitioner filed an application for post-conviction relief (PCR). App. 141 – 169. The matter proceeded to an evidentiary hearing on May 15, 2012 before the Honorable J. Michael Baxley. J. Andrew Johnson Sr. represented the state, and Heather M. Canon represented Petitioner. App. 217. While waiting for the judge to issue a written order in the matter, Petitioner filed a motion to recuse Judge Baxley. App. 605 – 608. Judge Baxley denied Petitioner relief from his conviction and sentence and denied the recusal motion in an order filed on June 6, 2012. App. 612 – 624.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

² The only indictment physically amended by Judge King was the indictment for assault and battery with intent to kill, which was dismissed by the prosecution as part of the plea agreement. App. 625 – 626.

ARGUMENT

The PCR court erred in finding Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered where Petitioner presented evidence that his plea counsel advised him incorrectly concerning the sentence he would receive.

Relevant facts

Petitioner's jury trial began on August 27, 2007. App. 19. The alleged victim and responding officer testified. App. 68, line 4 – App. 92, line 18; App. 100, line 15 – App. 108, line 5. Thereafter, Petitioner's counsel, Manning, informed the court that Petitioner had decided to enter a guilty plea. App. 108, line 14 – App. 109, line 11. The prosecutor placed on the record that Petitioner was entering a guilty plea to the charge of armed robbery and the accompanying charge of assault and battery with intent to kill would be dismissed as a result. Additionally, the prosecutor explained he did not oppose a sentence “on the lower end of the ten to thirty spectrum,” but such was “a recommendation and in the court's discretion.” App. 110, lines 13 – 21. After the judge discussed Petitioner's waiver of rights, the prosecutor, at the judge's insistence, placed the plea negotiations on the record. The prosecutor reiterated that the state did not oppose a “lower-end sentence” and that he had “ma[d]e it clear that the court has the final say in any sentence.” App. 117, lines 16 – 20. Petitioner indicated that he understood the plea negotiations and recommendations made by the prosecutor and that there had been no additional promises made in order for him to plead guilty. App. 118, lines 1 – 13. Additionally, the judge queried Petitioner concerning the sentencing range for armed robbery – between ten and thirty years. During this questioning, the judge explained that he could not sentence Petitioner to less than ten years. App. 114, lines 4-11. Despite Manning's request for the minimum sentence, the judge sentenced Petitioner to eighteen years' imprisonment. App. 130, lines 1 – 11; App. 133, lines 6 – 7.

During the PCR hearing, Petitioner testified that he was advised by Manning to plead guilty to armed robbery and he would receive no more than ten years. App. 224, line 22 – App. 225, line 5. Petitioner went along with Manning’s advice to plead guilty because Manning said Petitioner was not even supposed to be in the courtroom because the court did not have subject matter jurisdiction over him due to the erroneous names appearing in the indictment. App. 231, lines 3 – 12. Manning further informed Petitioner him that he would receive no more than ten years if he entered a guilty plea. App. 231, lines 13 – 16. During the PCR, Petitioner referenced a plea agreement that indicated all of his sentences would run concurrently for a negotiated ten-year sentence. App. 231, line 17 – 22; App. 285.³ Petitioner testified that had he known he could receive anything more than ten years’ imprisonment he would not have entered a guilty plea. App. 232, lines 2 – 8. Petitioner believed he would receive a sentence on the “lower end of the spectrum,” which he believed to be between ten and fourteen years. App. 238, lines 13 – 22. Manning failed to advise Petitioner that his sentence was ultimately up to the judge. App. 244, lines 13 – 15. In fact, Manning advised that if he received any prison term it would not be over ten years. App. 244, lines 16 – 21. On cross-examination, Petitioner testified that Manning informed him of two different things regarding his guilty plea. He was told that the sentences would run concurrently and that he would receive ten years. Based upon those representations, Petitioner agreed to plead guilty. App. 245, line 18 – 23.

Manning denied telling Petitioner that he would receive no more than ten years. Additionally, Manning denied ever giving Petitioner a range of sentencing possibilities. App. 268, line 5 – 9; App. 268, lines 20-22. Manning recalled what he believed was an offer of eight years

³ The guilty plea offer sheet to which petitioner referred during his testimony listed the charges as armed robbery, assault and battery with intent to kill, and petit larceny. The offer by the prosecutor

from the prosecutor. He conveyed this offer to Petitioner and it was rejected. App. 268, lines 9-13; App. 271, lines 7-9. According to Manning, Petitioner indicated his desire to plead guilty after the alleged victim testified and Petitioner recognized him. App. 298, lines 14-20.⁴ Manning claimed that when Petitioner expressed a desire to enter a guilty plea, “[t]here was no discussion about the plea.” In fact, “[t]here was no discussion about any time frame, or any sentence range, or anything like that.” App. 271, line 18 – App. 272, line 6. On cross-examination, Manning testified that the only plea negotiation he recalled was the offer of eight years. App. 276, lines 7-15. Although Manning recognized that armed robbery, for which Appellant was charged, carried a ten-year minimum sentence, but he saw no strangeness in the prosecution’s offer of eight years. He explained that in his experience, “if both sides go in camera with the judge, and if they all agree to something,” then “miracles happen.” App. 277, lines 2-14.

At the conclusion of the hearing, Judge Baxley announced that he was denying Petitioner relief from his conviction and sentence. Concerning the involuntary, unknowing, and unintelligent nature of the guilty plea, Judge Baxley found no ineffective assistance. He found that Petitioner was “in a difficult situation ... a tough spot” and that Petitioner “did what [he] felt was best for [him].” App. 281, lines 20-24. Judge Baxley found that Petitioner was not prejudiced by the plea “that was in his best interest,” which he did “knowingly [and] voluntarily.” App. 282, lines 9-13.

The exhibits submitted during the hearing included the guilty plea offer from the prosecutor dated February 26, 2007, in which the prosecutor offered to allow Petitioner to plead guilty to

read as follows: “plea to AR, all other charges concurrent (10 yrs).” Additionally, the plea sheet indicated the offer was for a negotiated term of years, as opposed to a recommendation. App. 285.

⁴ At the PCR hearing, Manning maintained that Petitioner admitted his name was “James” to Judge King, but the transcript of the proceedings before Judge King indicate Petitioner maintained he was not named “James” and had never gone by that name. App. 269, lines 18-20; App. 277, lines 20-23.

armed robbery, “all other charges concurrent” for a negotiated ten-year sentence. App. 285. On April 16, 2007, the prosecutor had offered to allow Petitioner to “[p]lea to 10 years, accessory before fact or provide [co-defendants’] names for a straight plea to common law robbery.” App. 417.

In the order of dismissal, Judge Baxley concluded that Petitioner “found himself in a difficult situation and chose to plead guilty, admitting his guilt to change the direction of his case and perhaps in the hope to receive leniency.” The court was “not moved by any of [Petitioner’s] present complaints.” Judge Baxley acknowledged Petitioner’s testimony that Manning informed him he would get no more than ten years if he pled guilty; however, the judge found that Petitioner “failed to prove there was any plea agreement in this case whatsoever.” App. 617-618.

Discussion

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner 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. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

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, 243-244 (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, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). 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, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)(citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435.

Petitioner testified that plea counsel informed him that the judge would sentence him to no more than ten years. Based upon plea counsel's representations regarding sentencing, Petitioner agreed to the terms. Nevertheless, at the guilty plea proceeding, the judge sentenced Petitioner to eighteen years, which was eight years beyond what Petitioner expected and to what he believed he had agreed. Therefore, Petitioner's guilty plea was involuntary as a result of plea counsel's promise of a lesser sentence to induce Petitioner to plead guilty.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR court and grant Petitioner relief from his conviction and sentence based upon ineffective assistance of counsel.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DILLON COUNTY
J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE

SHAHEEN CABBAGESTALK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

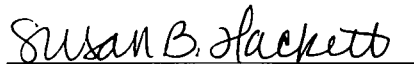
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shaheen Cabbagestalk states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 15, 2012. In her opinion, seeking certiorari from the order of dismissal is without merit.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Shaheen Cabbagestalk.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of February, 2014

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Shaheen Cabbagestalk, #295567, at Lee Correctional Institution, 990 Wisacky Hwy, Bishopville, SC 29010, this 11th day of February, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of February, 2014.

Sam Fisher (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.