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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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S.C. Supreme Court

WALTER BRANNON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001396

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to object to petitioner's sentence and/or move for a resentencing hearing in the case after the trial judge sentenced petitioner based on the formulation of misinformation about his prior record and character because this surely impacted the severity of the sentences handed down in the case.

STATEMENT

Petitioner Walter Jonathan Brannan pled guilty to trafficking in cocaine, trafficking in crack cocaine, possession of a weapon during the commission of a violent crime and possession with intent to distribute marijuana during the October 2009 term of the Greenville County General Sessions Court before Judge Edward W. Miller. Robert M. Arial represented petitioner at the plea proceeding, and Assistant Solicitor Barbara Tiffin appeared on behalf of the state. App. 1-18.

Petitioner was sentenced during the December 2010 term of the Greenville County General Sessions Court before Judge Miller. Robert M. Arial represented petitioner at the sentencing proceeding, and Assistant Solicitors Ryan Holloway and Joyce Monts appeared on behalf of the state. Petitioner was sentenced to imprisonment for an aggregate term of twelve years. App. 20-36.

On December 5, 2011, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 38-43. The respondent filed a return dated March 22, 2012, requesting that a hearing be held in the case. App. 45-48. Petitioner filed an amended PCR application on December 2, 2012. App. 50-54.

A PCR hearing was convened on April 18, 2013, at the Greenville County Courthouse before Judge G. Edward Welmaker. App. 55-87. Petitioner was present at the hearing and represented by Richard H. Warden, and Assistant Attorney General Karen Ratigan appeared on behalf of the state. On May 20, 2013, Judge Welmaker issued an Order of Dismissal denying Petitioner's allegations of ineffective assistance of counsel in the case. App. 89-98.

Petitioner appealed Judge Welmaker's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to petitioner's sentence and/or move for a resentencing hearing in the case after the trial judge sentenced petitioner based on the formulation of misinformation about his prior record and character because this impacted the severity of the sentences handed down in the case.

During the plea proceeding, the solicitor apprised the trial judge of the facts of the case. A highway patrolman stopped petitioner for speeding in his vehicle on I-85 in Greenville County on January 24, 2009, and noticed during the stop that petitioner was extremely nervous and that there was a strong odor of air freshener about the vehicle. Thereafter, the K-9 dogs that were called to the scene signaled an alert to the presence of drugs in the vehicle. The ensuing search yielded the presence of cocaine, crack cocaine, marijuana, and a pistol. App. 14, l. 11-p. 15, l. 11, App. 24, l. 11-p. 25, l. 1.

During the PCR hearing, petitioner testified that trial counsel erred in failing to object to the trial judge's tirade when he ranted on and on at the plea proceeding about petitioner having transported drugs in the past because the gist or inference was that petitioner was a habitual drug trafficker who frequently transported drugs up and down our highways. App. 60, l. 2-p. 61, l. 1. In other words, the trial judge assumed that petitioner had a prior drug record, which was not true. The reality was that petitioner had no prior drug convictions. Petitioner had one prior firearm conviction and nothing else. App. 60, l. 17-p. 61, l. 1; App. 15, l. 1-2. Petitioner testified in effect that trial counsel's failure to object to the judge's assumption regarding false information about him prejudiced his case at the sentencing phase. App. 61, l. 5-25.

The trial judge's remarks in question follow:

The Court: Mr. Brannan, here's my concern, you don't ride up and down the highway with 233, I think that's right, 233 grams of cocaine, 25 and a half grams of crack, 216 grams of marijuana unless you've done it before. Nobody is going to trust you with that kind of money, that kind of drugs unless they know who you are. So—and you have gotten a substantial reduction already from the mandatory 25 year sentence. I'm going to give you 12 on the trafficking cocaine, 10 on the crack and five on the marijuana. Good luck. App. 35, lines 8-17.

Trial counsel testified that he did not know why he failed to object to the judge's comments about petitioner's nonexistent criminal drug record because this was objectionable matter, but added that an objection would have placed greater emphasis on the matter of drugs. App. 84, l. 24-p. 86, l. 24.

The PCR judge ruled that petitioner failed to demonstrate that plea counsel erred in not objecting to the trial judge's comments in question or that he was prejudiced by the same because any objection in this regard would not have benefitted him (petitioner). App. 95.

Clearly, the trial judge was laboring under the mistaken impression that petitioner was a repeat drug offender and this probably precluded the issuance of a lenient in the case. As a rule, a sentence cannot be predicated on false information. State v. Franklin, 267 S.C. 240, 226 S.E. 2nd 896 (1976) citing to Townsend v. Burke, 334 U.S. 736 (1948). In Franklin the court held:

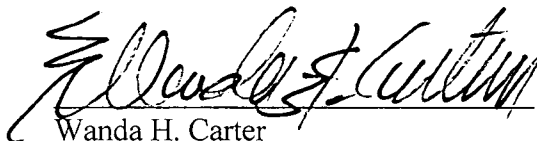
If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and give serious consideration to any information material to punishment. If a defendant's record, as publicly disclosed, is incorrectly reported, the defendant should have an opportunity to explain any discrepancy and inform the court concerning the alleged errors.

In the case at bar, trial counsel erred in failing to object to the judge's presupposition that petitioner was a drug dealer who engaged in perpetual drug dealings in the past because this was false information. Quite naturally, it is plausible that the trial judge factored this misinformation into consideration when he handed down petitioner's sentence, which was probably harsher than what he would have been given but for the falsehoods that were assumed. Counsel's error in failing to object to the error regarding petitioner's prior record constituted deficient performance during his guilty plea proceeding in violation of the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985). Petitioner was prejudiced by counsel's ineffectiveness in this regard because but for counsel's omission, petitioner's sentence might have been reconsidered and recalculated in the case.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant full briefing on the issue raised in this petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wanda H. Carter", written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

WALTER BRANNON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001396

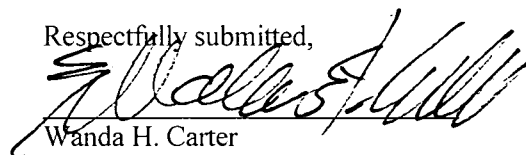
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Walter Brannan states:

1. She is Deputy Chief 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 April 18, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), 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 Walter Brannan.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of March, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

WALTER BRANNON,

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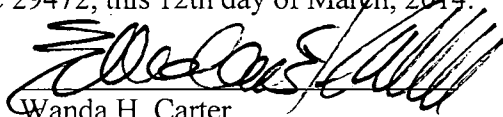
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Walter Brannan, #343944, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of March, 2014.



Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of March, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.