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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

AARON W. COLLIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001738

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was the guilty plea rendered involuntary by counsel's failure to advise Petitioner that he was pleading guilty to a no parole offense?

STATEMENT

In February of 2010, the Greenville County Grand Jury indicted Collier for failure to stop for a blue light, driving under suspension, reckless driving and possession with intent to distribute methamphetamine, indictments #2009[1]-GS-23-1719, 2703, 2704, 6290. On November 9, 2010, Collier proceeded to jury trial before the Honorable Robin B. Stilwell on all charges except the possession with intent to distribute methamphetamine. Carlyle Steele represented Collier at trial. Lisa Bentley prosecuted the case. The jury found Collier guilty. Judge Stilwell sentenced Collier to five years for failure to stop for a blue light, six months concurrent for driving under suspension and thirty days concurrent for reckless driving. After the jury found Collier guilty on the driving offenses, he pled guilty to possession with intent to distribute methamphetamine, second offense. Judge Stilwell sentenced Collier to a concurrent sentence of fifteen years provided upon the service of eight years the balance is suspended with five years probation for the methamphetamine charge. Judge Stilwell also sentenced Collier to a concurrent eight year sentence for a probation revocation on the charge of possession with intent to distribute methamphetamine, indictment #2005-GS-23-5140. Collier did not appeal the sentences, convictions, or probation revocation.

On November 4, 2011, Collier filed a application for post conviction relief. The State filed a return on March 15, 2012. On April 17, 2013, an evidentiary hearing was held before the Honorable G. Edward Welmaker. Richard H. Warder represented Collier at the PCR hearing. Karen C. Ratigan was present on behalf of the State. In a written order signed May 3, 2013, Judge Welmaker denied relief and dismissed the application. A timely notice of intent to appeal was served on August 2, 2013. This petition for writ of certiorari follows.

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[1] It is unclear why the indictment numbers reflects 2009 when the Grand Jury true billed the indictments in 2010.

ARGUMENT

The guilty plea was rendered involuntary by counsel's failure to advise Petitioner that he was pleading guilty to a no parole offense.

During the PCR hearing Collier testified that he was never advised that the charge to which he pled guilty, possession with intent to distribute methamphetamine second offense, was a no parole offense. (App. pp. 243-245). Collier testified that if he had known the offense was a no parole offense or eighty-five percent offense, he would not have pled guilty. (App. p. 245, lines 14-21). During the PCR hearing when asked if anybody explained that the plea would be treated like a violent offense Collier testified, "No, sir. I actually leaned over to Carlisle Steele and asked him if it was non-violent and he said, yes, it is non-violent. And on the court records, even on my sentencing sheet, it says non-violent. But SCDC does not classify the same as the courtroom." (App. p. 244, lines 7-11). While possession with intent to distribute methamphetamine second offense, S.C. Code §44-53-375(B)(3), is classified non-violent, as reflected on the sentencing sheet (App. p. 212), the offense carries a sentence of five to thirty years and is a class A felony. S.C .Code §24-13-100 provides, "For purposes of definition under South Carolina law, a "no parole offense" means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more." Possession with intent to distribute methamphetamine second offense is a no parole offense.

When asked if he explained that possession with intent to distribute methamphetamine second offense was a no parole offense, plea counsel testified, "I can't say for sure. But if I were guessing, and I don't, I don't think I did. I think I probably – everything was moving so fast. He was anxious to plea, I don't think we talked about that. I would say we did not." (App. p. 238, lines 5-9). During the guilty the plea the judge discussed the maximum and minimum penalty and the

fact that possession with intent to distribute methamphetamine second offense is not considered a statutorily defined "serious" offense. (App. p. 190, lines 13-25). The plea judge, however, did not advise that possession with intent to distribute methamphetamine second offense is a no parole offense.

In the order of dismissal the PCR judge wrote:

> This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly advise him about parole eligibility. Even assuming arguendo that plea counsel did not advise the Applicant the PWID charge was not parole eligible (and he could serve 85% of that sentence), counsel was not obligated to convey this information. Parole elgibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Randall v. State, 356 S.C. 639, 641, 591 S.E.2d 608, 609 (2004). Further, given plea counsel's testimony about the Applicant being "emphatic" and "enthusiastic" to proceed and dispose of all outstanding matters, this Court does not find the Applicant's testimony that he would not have pled guilty to this charge if he had known it was parole ineligible.

(App. pp. 256-257). The PCR judge erred.

Plea counsel admitted that he did not advise Collier that possession with intent to distribute methamphetamine second offense is a no parole offense. (App. p. 238, lines 5-9). In the context of the guilty plea in this case, where Collier specifically asked plea counsel if the offense was non-violent, counsel's failure to advise is the equivalent of providing erroneous advise in regard to parole eligibility. In Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) the South Carolina Supreme Court wrote, " . . . [P]arole eligibility has been held to be a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). However, if the defendant's attorney undertakes to advise the defendant about parole eligibility and gives erroneous advice, then the plea may be collaterally attacked. See Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). Likewise, if the judge misinforms the defendant about parole eligibility, then the defendant is entitled to a new trial. See Brown v. State, 306 S.C. 381, 412 S.E.2d 399

(1991)." Plea counsel's failure to advise that possession with intent to distribute methamphetamine second offense is a no parole offense is the equivalent of providing erroneous parole information when Petitioner specifically asked and was advised that the offense was non-violent. Plea counsel's deficient performance rendered the guilty plea involuntary.

Additionally, the collateral consequence analysis, as discussed in Randall v. State, is questionable in light of the United States Supreme Court's decision in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). Padilla was decided on March 31, 2010. Collier pled guilty to possession with intent to distribute methamphetamine second offense on November 9, 2010. In Padilla the United States Supreme Court wrote, "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland, 466 U.S., at 689, 104 S.Ct. 2052." 599 U.S. at 365, 130 S.Ct. at 1481. The Court did not decide if the distinction between direct and collateral consequences was an appropriate distinction because deportation, the penalty at issue in Padilla, is unique and severe.

Given that the United States Supreme Court has never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under Strickland, this Court should not make that distinction, especially in regard to non-violent offenses that become no parole offenses pursuant to S.C. Code §24-13-100. Collier reasonably believed that he was entering a guilty plea to a parole eligible offense because of the non-violent characterization of the offense. Plea counsel advised Collier that the offense was non-violent and the sentencing sheet reflects that the offense is non-violent. The plea judge discussed that the fact that the offense was not a statutorily defined "serious" offense. Under

these circumstances plea counsel was ineffective in failing to advise Collier that possession with intent to distribute methamphetamine second offense is a no parole offense

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). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) ("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.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970))). "The second, or 'prejudice,' requirement ... focuses on whether counsel's

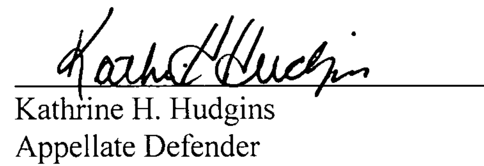
constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59, 106 S.Ct. 366.

Collier's guilty plea to possession with intent to distribute methamphetamine was not a voluntary and intelligent choice because counsel failed to advise that the offense was a no parole offense. Collier was prejudiced by counsel's deficient performance. When asked if he would have pled guilty if he had known he had to serve eighty- five percent of his sentence Collier testified, "No, sir. I'm not guilty of the charge. There's even a young lady who is guilty of the charge named Niser Foldus (phonics), who had claimed that it was her methamphetamine and I just happened to be there. I just didn't want to come back to court and thought I could get it taken care of." (App. p. 245, lines 16-21). While plea counsel testified that Collier was enthusiastic and emphatic about pleading guilty, those feelings were based on Collier's erroneous belief that he would be parole eligible. But for counsel's deficient performance, Collier would not have pled guilty but instead would have enthusiastically and emphatically insisted on going to trial. The guilty plea was rendered involuntary by counsel's failure to advise Collier that he was pleading guilty to a no parole offense. The conviction for possession with intent to distribute methamphetamine second offense should be reversed.

CONCLUSION

Based on the above arguments, the conviction and sentence of possession with intent to distribute methamphetamine should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of April, 2014.

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AARON W. COLLIER,

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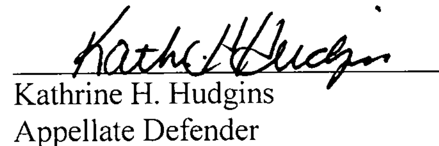
CERTIFICATE OF SERVICE

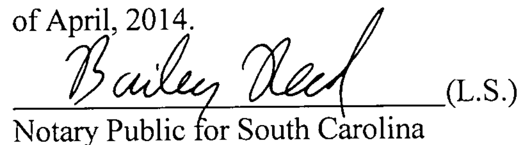
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire this 25th day of April, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of April, 2014.


(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.