

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

RECEIVED

MAY 21 2014

S.C. Supreme Court

LONZIE JOSEPH FOX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000368

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that he would be sentenced to three and a half years imprisonment if he pled guilty instead of proceeding to trial and where Petitioner was actually sentenced to fifteen years suspended upon the service of seven years imprisonment?

STATEMENT

A Richland County Grand Jury indicted Petitioner at the July 2010 term of General Sessions for first degree criminal sexual conduct, first degree burglary, kidnapping, and knowingly infecting another with a sexually transmitted disease, and at the January 2011 term for first degree assault with intent to commit criminal sexual conduct. App. 91-92; App. 99-102. Petitioner pled guilty to second degree burglary pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), and second degree assault with intent to commit criminal sexual conduct on July 14, 2011 before the Honorable L. Casey Manning. App. 1. All other charges were dismissed as part of the plea deal. App. 3, ll. 9-11. Assistant Solicitor Luck Campbell appeared on behalf of the state, and J. Rhodes Bailey represented Petitioner. App. 1. Petitioner was sentenced by Judge Manning to fifteen years imprisonment suspended upon the service of seven years imprisonment on each charge to be served concurrently. App. 31, ll. 14-21. Petitioner did not appeal.

On June 8, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 33-39. The state filed a return to this application dated June 25, 2012. App. 40-46. The matter proceeded to an evidentiary hearing on January 17, 2013 before the Honorable G. Thomas Cooper, Jr. App. 47. Assistant Attorney General Robert D. Corney represented the state, and Ely O. Grote represented Petitioner. App. 47. By order dated January 28, 2013, Judge Cooper denied Petitioner relief. App. 91-98.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that Petitioner would be sentenced to three and a half years imprisonment if he pled guilty instead of proceeding to trial and where Petitioner was actually sentenced to fifteen years suspended upon the service of seven years imprisonment.

Guilty Plea

At the start of Petitioner's guilty plea, Judge Manning asked plea counsel whether he had explained to Petitioner the nature of the charges, the possible punishment each charge carried, and his constitutional right to a jury trial. Plea counsel told the judge that he had done so and that, in his opinion, Petitioner understood the charges, the possible punishment, and his constitutional rights. App. 4, ll. 5-16.

Judge Manning then advised Petitioner that second degree assault with intent to commit criminal sexual conduct carries up to twenty years imprisonment and that second degree burglary carries up to fifteen years imprisonment. With this knowledge, Petitioner stated that he still wished to plead guilty. App. 8, ll. 7-14; App. 9, ll. 9-16. The judge also informed Petitioner that he could choose to "run the sentences on these two charges consecutively that is put one after the other or add one to the other and if I did so you're looking at thirty-five years in the penitentiary." Petitioner stated that he understood that his sentences could be run consecutively, but he still wished to plead guilty to both charges. App. 9, l. 21 – 10, l. 5. In addition to this initial advisement of the potential punishment Petitioner faced by pleading guilty to the two charges, Judge Manning advised Petitioner a second time of the sentences he faced by pleading guilty before accepting his plea. App. 12, ll. 14-23.

Judge Manning also asked Petitioner whether anyone had “promised [Petitioner] anything or held out any hope of reward in order to get [Petitioner] to plead guilty” to which Petitioner responded, “No, sir.” App. 15, l. 25 – 16, l. 3. Petitioner also informed the judge that he was pleading guilty freely and voluntarily. App. 16, ll. 15-17.

After a routine colloquy, Judge Manning accepted Petitioner’s guilty plea after finding that there was a substantial factual basis for the plea and that the plea was made freely, voluntarily, knowingly, and intelligently with the advice of counsel. App. 23, ll. 8-14.

During the sentencing proceeding, plea counsel told the judge that Petitioner “doesn’t want a trial. He does not want to put [the complainant] or her family through [a] trial. He wants to take responsibility for, for, his actions.” App. 28, ll. 10-14. After presenting mitigation evidence, plea counsel asked the judge to consider sentencing Petitioner to “two or three years something that’s, that’s reasonable.” App. 31, ll. 4-7.

While the solicitor did request a “substantial sentence,” she never asked the judge to sentence Petitioner to a specific term of years on the record. See App. 24, ll. 2-3.

PCR Hearing

During the PCR hearing, Petitioner testified, “I felt that I was promised. [Plea counsel] never come out and said he’d made - - that this is a promise, but he told me that him and Ms. Campbell [the solicitor] had met with Judge Manning on more than one occasion, and she was going to ask for seven years, he was going to ask for time served, and Mr. Manning was going to split it down the middle.” App. 60, ll. 18-25. Petitioner further testified that he believed he was promised a three and a half year sentence if he pled guilty and that he would not have pled guilty had it not been for that promise. App. 61, ll. 1-10.

When questioned by the assistant attorney general, Petitioner acknowledged that Judge Manning had advised him during his guilty plea that he was facing up to thirty-five years imprisonment. App. 62, ll. 5-8. Petitioner also admitted that even with this knowledge he still told the judge that he wanted to go forward with his plea. App. 62, ll. 17-22. Petitioner testified that he knew he was facing up to thirty-five years, but he was led to believe that he would only be sentenced to three and a half years imprisonment. App. 63, ll. 7-14.

Petitioner further explained that he was “told to go along with what, what the judge asked [him], so that [his] guilty plea would go through.” He agreed with his PCR counsel that “the things [he] stated on the record were because [he] wanted the guilty plea to go through based on the promises [he had] been made.” App. 63, l. 19 – 64, l. 1. Furthermore, Petitioner testified that he never told plea counsel or Judge Manning that he wanted a jury trial. App. 64, ll. 5-14.

Plea counsel, Rhodes Bailey, testified that he met with Petitioner frequently due to the seriousness of the charges pending against him. App. 68, ll. 11-14. Bailey explained that he reviewed with Petitioner the elements of the offenses, the potential sentences that each charge carried, and the discovery materials. App. 68, l. 15 – 70, l. 3; App. 72, ll. 5-10. He also discussed his efforts to obtain a favorable plea bargain for Petitioner. App. 68, l. 17 – 69, l. 14; App. 75, l. 8 – 76, l. 5.

Furthermore, Bailey testified:

I told him in my experience with judges and, and just knowing Judge Manning, I thought what would happen is I would ask for something, Ms. Campbell would ask for something, and that **he would probably split down the middle**. That’s what - - that was my, you know, guess, but I made clear, you know, that I, I, I certainly - - you know, Judge Manning didn’t promise anything and wouldn’t promise anything, and I wouldn’t ask him to promise anything.

Additionally, you know, I couldn’t guarantee him as to a particular sentence. I told him, though, I thought it was in his best

interest to go forward the way it was, and I told him I would ask for two to three years but that, you know - - not - - don't be surprised if [the judge] gave him, you know, more.

Tr. 77, l. 13 – 78, l. 1 (emphasis added).

Bailey also explained that he had given Petitioner all the advice and information necessary for Petitioner to make a knowing, intelligent, and voluntary decision whether to enter a guilty plea. He said that he went through the questions Judge Manning would ask Petitioner during his guilty plea to make sure Petitioner was fully advised of his rights and that Petitioner understood the questions before he was asked them, but that he did not tell Petitioner how he should answer the questions. App. 79, l. 21 – 80, l. 18.

Lastly, Bailey testified that “[he] think[s] it was clear [to Petitioner] . . . that there was no fixed number that he was . . . guaranteed or going to get.” App. 80, l. 19 – 81, l. 2.

Order of Dismissal

The PCR court noted that plea counsel “testified he made it abundantly clear to [Petitioner] there was no guaranteed sentence” that Petitioner should expect to receive if he pled guilty. The court found this testimony to be credible and further found any testimony Petitioner gave that contradicted this testimony not credible. App. 96. The court stated, “The record and credible testimony presented firmly convince this Court [Petitioner’s] plea was entered freely, voluntarily, and intelligently with full knowledge of the risks and potential sentences that realistically could be imposed.” App. 96.

The PCR court also found that Petitioner failed to prove any resulting prejudice from plea counsel’s alleged deficiency. Specifically, the court stated that Petitioner “failed to convince [the] court that, but for plea counsel’s alleged erroneous advice concerning sentencing, Petitioner would

not have pled guilty but rather would have proceeded to trial on the charges.” App. 96-97. The court denied Petitioner relief. App. 97.

Discussion

Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made due to the improper influence of plea counsel’s promise that the judge would sentence Petitioner to three and a half years imprisonment if he pled guilty. Petitioner was prejudiced by plea counsel’s influence because, as Petitioner’s testimony indicated, he would not have pled guilty but for plea counsel’s promise that he would be sentenced to three and a half years imprisonment. See App. 61, ll. 8-10.

The difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). “The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. “[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State,

393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275-276 (1942)). Additionally, a guilty plea that was “entered by one fully aware of the direct consequences . . . must stand *unless* induced by . . . misrepresentation (including unfulfilled or unfulfillable promises) . . .” Brady v. United States, 397 U.S. 742, 755 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (reversed on other grounds, 356 U.S. 26 (1958))). Accordingly, counsel provides ineffective assistance in the adversarial system when he induces the defendant to plead guilty.

In this case, Petitioner was induced into pleading guilty by plea counsel’s promise to Petitioner that Judge Manning was going to sentence him to three and a half years imprisonment if he pled guilty. Petitioner’s testimony was corroborated by plea counsel’s testimony that he told Petitioner the judge would “split down the middle” whatever sentence the solicitor asked for versus what sentence plea counsel requested. See App. 77, ll. 13-17. This promise prevented Petitioner’s guilty plea from being knowingly and voluntarily made and, consequently, rendered it invalid. See Berry, 381 S.C. at 635, 675 S.E.2d at 427. A plea is not voluntary when it is induced by misrepresentation including unfulfilled promises. See Brady, 397 U.S. at 755, 90 S.Ct. at 1472. A reasonably competent criminal defense attorney would not have promised Petitioner that he would be sentenced to three and a half years imprisonment when there was no sentence recommendation from the state and when it was not a negotiated plea.

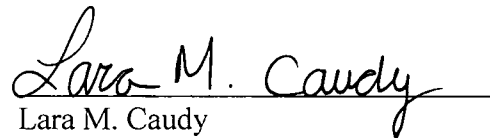
Additionally, there is a reasonable probability that but for plea counsel's promise, Petitioner would not have pled guilty and would have insisted on proceeding to trial. Petitioner testified that he would not have pled guilty had it not been for plea counsel's promise. App. 61, ll. 8-10. Thus, Petitioner was prejudiced by plea counsel's promise. Lockhart, 474 U.S. at 59. It was *only* because of this promise that Petitioner decided to plead guilty.

As a result of the invalid plea and the resulting prejudice, Petitioner's convictions should be reversed and he should be granted a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
G. THOMAS COOPER, CIRCUIT COURT JUDGE

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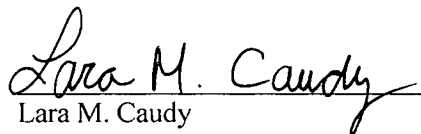
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lonzie Joseph Fox 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 January 17, 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 Lonzie Joseph Fox.

Respectfully submitted,



Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 21st day of May, 2014

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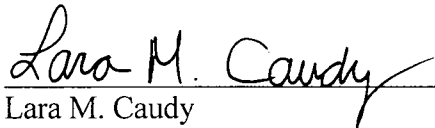
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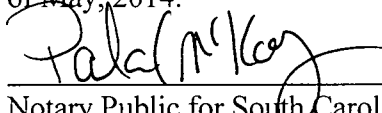
CERTIFICATE OF SERVICE

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 Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Lonzie Joseph Fox, #346956, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 21st day of May, 2014.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of May, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.