

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 30 2014

Certiorari to Richland County
James R. Barber, III, Circuit Court Judge

S.C. Supreme Court

JAYMES M. WOOD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002543

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. The day before Petitioner pled guilty, the presiding judge sentenced a defendant to probation following the defendant's guilty plea to assaulting a child in the defendant's care as a daycare worker. A media firestorm followed calling the judge's sentence too lenient. During Petitioner's guilty plea to criminal sexual conduct with a minor in the second degree, the plea judge revealed his daughter had been sexually assaulted as a child. Did plea counsel's failure to move to recuse the plea judge in light of these circumstances violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law?

II. Did plea counsel's failure to move to withdraw Petitioner's guilty plea when the plea judge revealed his daughter had been sexually assaulted during Petitioner's guilty plea to criminal sexual conduct with a minor in the second degree violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law?

STATEMENT OF THE CASE

A Richland County grand jury indicted Petitioner for criminal sexual conduct with a minor in the second degree. App. 127-128. On December 9, 2008, Petitioner appeared before the Honorable Kenneth G. Goode to enter a guilty plea to the charged offense. Margaret Fent represented the state, and Luke Shealey represented Petitioner. App. 1. Judge Goode sentenced Petitioner to fifteen years' imprisonment. App. 17, lines 17-21; App. 129. Petitioner filed a motion for reconsideration of sentence on December 12, 2008. App. 19. On December 9, 2009, the Honorable Alison Lee heard the motion. Anna Good represented the state, and Luke Shealey continued his representation of Petitioner. App. 20. Judge Lee denied the request to reduce Petitioner's sentence. App. 35, line 17 – App. 39, line 3.

Petitioner filed a timely notice of appeal, which was perfected by LaNelle Durant. App. 41-50. The state, represented by William Blich, Jr., filed a brief opposing appellate relief. App. 51-66. On February 9, 2012, the Court of Appeals affirmed Petitioner's conviction and sentence finding the issue unpreserved for appellate review. App. 67-68.¹

On October 22, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 69-80. An evidentiary hearing convened on October 1, 2013 before the Honorable James R. Barber. Paul B. Rogers represented Petitioner, and Mary S. Williams represented the state. App. 89. By an order filed on November 5, 2013, Judge Barber denied Petitioner relief. App. 117-126.

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

¹ Petitioner raised the following issue in his brief: Whether the plea judge erred by not recusing himself from the case where appellant was pleading guilty to CSC with a minor and the plea judge stated just prior to sentencing that his own daughter had been assaulted when she was eight years old. App. 44.

STATEMENT OF FACTS

On December 8, 2008, Judge Goode accepted the guilty plea of Talisha Smith to causing great bodily injury to a child. Smith was a home day care provider for children, including Kendra Gaddie. Smith admitted to striking Kendra in the head causing traumatic brain injury. Although the offense carried a sentence of up to twenty years in prison, Judge Goode sentenced Smith to probation. Thereafter, a media firestorm erupted. “Judge Goode was roundly attacked by the media, criticized.” Kendra’s family lobbied members of the South Carolina Legislature for a mandatory minimum sentence for the offense. Eventually, lawmakers passed Kendra’s Law requiring training for home day care providers. App. 23, lines 11-23; App. 106, lines 2-16. Additionally, Judge Goode’s fitness was questioned by lawmakers. Eventually, Judge Goode retired. App. 24, lines 1-4.

Petitioner’s Guilty Plea

The following day, Petitioner pled guilty to criminal sexual conduct with a minor in the second degree before Judge Goode. App. 1. Plea counsel was unaware of Talisha Smith’s plea the previous day or of the adverse publicity received by Judge Goode for what was perceived as a too lenient sentence. However, plea counsel later admitted that he should have been aware of the intense media scrutiny prior to advising Petitioner to plead guilty. App. 106, lines 17-25.

During the guilty plea proceedings, the prosecutor provided Judge Goode with a factual basis for the plea. Appellant, who was nineteen years of age at the time, was visiting with a friend on August 4, 2007. Minor, who was fourteen years old at the time, arrived to visit with friends as well. Minor and Appellant went into another room and Minor performed oral sex on Appellant. In a statement to police, Appellant admitted he knew Minor’s age and that Minor had performed oral sex on him. App. 4, line 24 – App. 5, line 25. Thereafter, Judge Goode found there was a

substantial factual basis for the plea, found the guilty plea was “freely, voluntarily, knowingly, and intelligently” entered, and accepted the plea of guilty. App. 6, lines 10-14.

In mitigation, Appellant explained “there was absolutely nothing forcible” about the sexual encounter between Appellant and Minor. Appellant elaborated that “[t]here was no coercion.” App. 10, lines 21-23; App. 11, lines 15-16. The judge responded, “All due respect, he said it wasn’t a violent situation. You know, I consider it just absolutely one of the most violent situations. I have a twenty-six year-old daughter who was violated at Girl Scout camp when she was eight. She hasn’t recovered from that yet.” App. 17, lines 6-11. He continued, “So, it’s violent in my eyes, and unfortunately for Mr. Woods, it’s my eyes that count today in a way that exceeds some type physical injury.” App. 17, lines 13-16. Immediately thereafter, Judge Goode sentenced Petitioner to fifteen years’ imprisonment. App. 17, lines 17-21.

Petitioner’s Motion for Reconsideration

On December 12, 2008, Petitioner filed a motion for reconsideration of his sentence. App. 19. The Honorable Alison Lee presided over a hearing on the motion on December 9, 2009. Shealey continued his representation of Petitioner, and Anna Good represented the state. App. 20. Petitioner explained the motion was based upon the media criticism of Judge Goode concerning his “lenient” sentencing of Smith the day prior to Petitioner’s guilty plea. App. 23, lines 11-25; App. 32, lines 12-17. Additionally, the motion was based upon Judge Goode’s revelation immediately prior to sentencing that his daughter “was violated.” App. 24, lines 12-14. Plea counsel stated that he should have moved to withdraw the guilty plea at that time, but neglected to do so. App. 24, lines 15-16. Plea counsel went on to argue for a reduced sentence due to the nature of the offense and Petitioner’s age and his supportive family. App. 24, line 20 – App. 25, line 24; App. 31, line 9

– App. 34, line 25. Ultimately, Judge Lee denied the motion to reconsider his sentence. App. 35, line 17 – App. 39, line 3.

Petitioner's PCR Hearing

During the PCR hearing, Petitioner testified that he was willing to admit his guilt and was looking for a plea bargain. App. 97, line 17 – App. 98, line 1. Unfortunately, the solicitor was unwilling to extend an offer, but was willing to allow Petitioner to enter an “open plea.” Petitioner agreed to an open plea because Judge Goode “was known to be a more lenient judge” according to plea counsel. App. 98, lines 2-13. Prior to his guilty plea, Petitioner was unaware of any publicity Judge Goode had received concerning a lenient sentence. App. 98, line 25 – App. 99, line 4. Additionally, Petitioner was unaware of Judge Goode's daughter having been sexually assaulted as a young girl. Obviously, Petitioner was unaware of the impact of the incident on Judge Goode. App. 99, lines 11-21. When the judge made this revelation, plea counsel failed to discuss with Petitioner the options of withdrawing the guilty plea or moving to recuse Judge Goode. App. 99, line 22 – App. 100, line 7. Petitioner would have requested to plead guilty on a different date or in front of a different judge had he known of the intense media scrutiny surrounding Judge Goode's sentencing practices. App. 99, lines 5-10. Had Petitioner been aware of the unfavorable press coverage surrounding Judge Goode or of Judge Goode's daughter having been sexually assaulted, he “would not have gone forward with the plea.” App. 100, lines 14-22. On cross-examination, Petitioner made clear that he was asking for a new trial. App. 101, lines 15-19.

Plea counsel testified that he was unaware of Judge Goode's daughter having been “violated” at camp as a young girl or the effect that circumstance had upon Judge Goode. Plea counsel viewed Judge Goode as a lenient plea judge and “fair sentencer.” Additionally, plea counsel was not aware of the media scrutiny surrounding Judge Goode on the day of Petitioner's

plea as a result of Judge Goode's imposition of a probationary sentence on Smith the day before. Plea counsel admitted that the Smith case was "very high-profile" and that he should have been aware of the backlash. Plea counsel "would not have pled him at all in front of any judge that day with the intense media scrutiny on this courthouse." He elaborated that he

Particularly would not have taken [Petitioner] in front of Judge Goode, knowing that he was receiving such intense scrutiny, backlash, criticism on that. So, I certainly wouldn't have done that, which I did, and I think that was the next plea he ever did, and I think that was the last plea he ever did after that, and then he resigned.

App. 107, lines 1-6; App. 112, lines 5-7.

Although plea counsel thought of moving to withdraw the guilty plea when Judge Goode revealed the impact his daughter's sexual assault had on him, he failed to do so as a result of inexperience. He admitted that he should have moved to withdraw, which would have preserved the issue for appeal, at a minimum. App. 107, lines 7-18. If Judge Goode had refused plea counsel's motion to withdraw, plea counsel would have moved to recuse. App. 107, lines 22-23. Plea counsel testified the result of Petitioner's case would have been different had plea counsel moved to withdraw or moved to recuse Judge Goode because the issues would have been preserved for appeal at the very least. App. 109, line 9 – App. 110, line 8. Plea counsel admitted that he provided ineffective assistance by failing to move to withdraw the guilty plea or move to recuse Judge Goode. App. 110, lines 16-22.

Concerning Judge Goode's comment about his daughter's sexual abuse, the PCR judge found that "[i]n the context of the plea, it appears that Judge Goode was making a comment that even without ostensible violence, all crimes of this nature have perpetual effects upon the victims." The PCR court then held the sentence pronounced by Judge Goode was within the permissible range and "did not appear to be motivated by any bias or prejudice." App. 121-122. Further, the PCR court held Petitioner's desire to have plea counsel move to withdraw his plea was the result of

a sentence in excess of what he expected and not the result of any error during the plea or his desire for a trial. App. 122. Thus, the PCR judge found no deficient performance and no prejudice. App. 122.

Concerning Petitioner's claim regarding recusal, the PCR court found Judge Goode's "remark about his daughter" did not show personal bias or prejudice against Petitioner, but merely noted "the judge's reflection that even though not a crime ostensibly involving violence, the event would affect the victim." App. 123. Turning to the issue of recusal based on media scrutiny, the PCR court found this claim "without merit." App. 123. "Judges, in the execution of their duties, are inherently subject to public scrutiny." Thus, "[t]o fail to move for recusal of a judge in one case due to scrutiny in a separate, unrelated case, without more, would not be outside the realm of competence." App. 123. Additionally, the PCR judge "decline[d] to find prejudice in the length of [Petitioner]'s sentence." App. 123.

ARGUMENT

I. The day before Petitioner pled guilty, the presiding judge sentenced a defendant to probation following the defendant's guilty plea to assaulting a child in the defendant's care as a daycare worker. A media firestorm followed calling the judge's sentence too lenient. During Petitioner's guilty plea to criminal sexual conduct with a minor in the second degree, the plea judge revealed his daughter had been sexually assaulted as a child. Plea counsel's failure to move to recuse the plea judge in light of these circumstances violated Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

The Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently because the defendants waive important constitutional rights. Boykin v. Alabama, 395 U.S. 238, 242-243 (1969). This Court has held that a defendant must "be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999)(citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). 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). In cases involving guilty pleas, the prejudice prong requires a showing that there

is a reasonable probability, but for counsel's errors, Petitioner would have insisted upon a trial. Hill v. Lockhart, 474 U.S. 52 (1985).

“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system has always endeavored to prevent even the probability of unfairness.” In re Murchison, 349 U.S. 133, 136 (1955). According to South Carolina's Code of Judicial Conduct, “a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.” Canon 2, CJC, Rule 501, SCACR. The comment to Canon 2 provides: “A judge must avoid all impropriety and appearance of impropriety.... The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.”

Generally, “[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . .” Canon 3(E)(1), CJC, Rule 501, SCACR. The comments provide that “[a] judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.” Additionally, the commentary explains that under Canon 3(E)(1), “a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any specific rules in Section 3E(1) apply.”

In Simpson v. Simpson, 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008), the Court of Appeals confronted the issue of judicial recusal. After citing the relevant Canons in the Code of Judicial Conduct, the Court explained the “party seeking disqualification must do more than merely allege bias on the judge's behalf; the party must present some evidence of judicial prejudice or bias.” Id. at 524, 660 S.E.2d at 277. In Mallett v. Mallett, 323 S.C. 141, 145, 473

S.E.2d 804, 807 (Ct. App. 1996), the Court of Appeals examined when a judge's impartiality may be reasonably questioned due to instances where the judge has a personal bias or prejudice against a party. "Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case." Id. "[T]he bias must be personal as distinguished from judicial." Id. at 146, 473 S.E.2d at 808.

Plea counsel provided deficient performance by failing to move to recuse Judge Goode based upon the intense public scrutiny of Judge Goode's sentencing practices following the guilty plea and sentencing of Smith the day before Petitioner's guilty plea and when Judge Goode revealed that his daughter had been sexually assaulted as a child impacting his view. At a minimum, the issue would have been preserved for review, which would have allowed Petitioner to raise it on appeal. When Petitioner attempted to raise the issue, the Court of Appeals correctly found the issue unpreserved as it was not raised to and ruled upon by the trial court. Following the Smith guilty plea, Judge Goode was under tremendous scrutiny by the public concerning his sentencing. The Gaddie family campaigned to change the laws in South Carolina to require a mandatory minimum for the criminal offense. Eventually, the family's campaign succeeded in the promulgation of Kendra's Law. Not long after the Smith guilty plea, and Petitioner's guilty plea, Judge Goode resigned from the bench. Judge Goode's comments on the record concerning his daughter's childhood sexual assault and the impact it had on his views regarding sexual assaults. Judge Goode looked at charges of sexual assault – particularly those involving underage individuals – through the lens of a father whose child was assaulted sexually. This personal bias prevented Judge Goode from exercising his duties fairly and impartially.

Plea counsel's deficient performance prejudiced Petitioner because Petitioner would not have entered a guilty plea before Judge Goode had he known of Judge Goode's bias due to the

public outcry over his sentencing practices or of Judge Goode's bias resulting from his daughter's sexual assault. Petitioner and plea counsel made this clear through their testimony during the PCR hearing and by filing a motion to reconsider the sentence raising the issue of Judge Goode's bias due to the media attention and his daughter's sexual assault.

II. Plea counsel's failure to move to withdraw Petitioner's guilty plea when the plea judge revealed his daughter had been sexually assaulted during Petitioner's guilty plea to criminal sexual conduct with a minor in the second degree violated Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

The Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently because the defendants waive important constitutional rights. Boykin v. Alabama, 395 U.S. 238, 242-243 (1969). This Court has held that a defendant must "be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999)(citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). 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). In cases involving guilty pleas, the prejudice prong requires a showing that there is a reasonable probability, but for counsel's errors, Petitioner would have insisted upon a trial. Hill v. Lockhart, 474 U.S. 52 (1985).

During the PCR hearing, the state argued that Petitioner should be denied relief because his motion to withdraw was based upon receipt of a greater than anticipated sentence. App. 115, lines

4-14; See State v. Cantrell, 250 S.C. 376, 380, 158 S.E.2d 189, 191-192 (1967). The state misapprehended the nature of Petitioner's claim. Plea counsel should have moved to withdraw the guilty plea prior to sentencing – when Judge Goode stated that his daughter had been sexually assaulted. App. 115, lines 15-18.

In Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009), this Court granted Rolan relief from his conviction and sentence based upon plea counsel's ineffective assistance in failing to move to withdraw his guilty plea. Rolan requested a jury trial and only decided to enter a guilty plea after his attorney advised the impaneled jury would likely find him guilty. During the guilty plea, Rolan repeatedly stated he was innocent. Thus, this Court found plea counsel was ineffective in failing to move to withdraw the plea. Id. at 413, 683 S.E.2d at 474. Further, this Court held plea counsel's failure prejudiced Petitioner because "[e]ven if the plea judge had denied [Rolan]'s motion to withdraw his plea, [Rolan] could have raised this issue on direct appeal." Id. at 414, 683 S.E.2d at 474.

In Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 685 (1988), this court found counsel ineffective in failing to move to withdraw Jordan's guilty plea where Jordan only agreed to plead guilty when he believed the prosecutor would not oppose probation, but during the plea hearing, the prosecutor vigorously opposed counsel's request for probation. This Court held that Jordan's counsel's conduct in failing to protect Jordan's right to enforce the plea agreement with the prosecutor fell below prevailing professional norms. Id. Concerning prejudice, this Court held "[c]onsidering the original vehemence of Jordan in pursuing his right to trial by jury, we further hold that there is a reasonable probability that but for the fact that Jordan's attorney failed to object to the continuation of the guilty plea proceeding once the solicitor reneged on the plea bargaining

agreement, that Jordan would not have pleaded guilty, but would have insisted on going to trial.”

Id.

Plea counsel provided deficient performance by failing to move to withdraw the plea when Judge Goode revealed that his daughter had been sexually assaulted as a child impacting his view. As explained above, had counsel moved to withdraw the guilty plea, the issue would have been preserved for review even if Judge Goode had denied the request. Judge Goode expressed his bias on the record concerning defendants charged with criminal sexual conduct with minors when he revealed his daughter’s sexual assault and how that impacted his outlook. He was unable to divorce himself from that experience in order to render a fair and impartial sentence. Plea counsel’s deficient performance prejudiced Petitioner because Petitioner would not have entered a guilty plea before Judge Goode had he known of Judge Goode’s bias resulting from his daughter’s sexual assault.

CONCLUSION:

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

JAYMES M. WOOD,

PETITIONER,

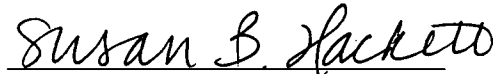
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jaymes M. Woods #315669, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 30th day of June, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of June, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.