

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Williamsburg County

R. Knox McMahon, Circuit Court Judge

STUFON NIXON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002671

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where he pled guilty due to a combination of plea counsel's mischaracterization of the strength of state's evidence against him and plea counsel's promise that he would be sentenced to thirty years imprisonment if he pled guilty instead of proceeding to trial since Petitioner testified that when he arrived at the Department of Corrections after his guilty plea and was able to review his file, he discovered the state did not have the evidence against him that plea counsel said it did and since Petitioner was actually sentenced to fifty years imprisonment?

STATEMENT

A Williamsburg County Grand Jury indicted Petitioner at the December 2009 term of General Sessions for murder, attempted armed robbery, and possession of a weapon during a violent crime. App. 95-96. On July 19, 2010, Petitioner pled guilty before the Honorable Clifton Newman. App. 1. Assistant Solicitor David Pascoe appeared on behalf of the state, and William LeGrand Carraway represented Petitioner. App. 1. He was sentenced by Judge Newman to fifty years for murder, twenty years concurrent for attempted armed robbery, and five years concurrent for the weapons offense. App. 35, ll. 11-18. Petitioner did not appeal.

On October 8, 2010, Petitioner filed an application for post-conviction relief (PCR). App. 37-43. The state filed a return to this application dated May 18, 2012. App. 46-50. The matter proceeded to an evidentiary hearing on October 3, 2013 before the Honorable R. Knox McMahon. App. 47. Assistant Attorney General Daniel Gourley represented the state, and Charles Brooks represented Petitioner. App. 51. By order dated November 26, 2013, Judge McMahon denied Petitioner relief. App. 86-93.

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 a combination of plea counsel's mischaracterization of the strength of state's evidence against him and plea counsel's promise that he would be sentenced to thirty years imprisonment if he pled guilty instead of proceeding to trial since Petitioner testified that when he arrived at the Department of Corrections after his guilty plea and was able to review his file, he discovered the state did not have the evidence against him that plea counsel said it did and since Petitioner was actually sentenced to fifty years imprisonment.

Guilty Plea

During this routine guilty plea proceeding, Judge Newman advised Petitioner of his constitutional rights and the maximum sentence he was facing on each charge. Petitioner told the judge that he understood both his constitutional rights and the maximum sentence, but wished to waive his rights and plead guilty. App. 5, l. 14 – 6, l. 24; App. 8, l. 5 – 9, l. 17. When asked by the judge what he did that made him guilty of the three charges, Petitioner responded, “I did shoot the victim, Kenia Scott” and “I tried to rob him.” App. 9, l. 18 – 10, l. 1.

Additionally, Petitioner told Judge Newman that he had had enough time to discuss his case with plea counsel and that plea counsel had done everything he thought “he could or should have done to assist [him].” App. 7, ll. 3-8. However, see *infra*, where Petitioner later testified that he did not have enough time to discuss his case with plea counsel and only pled guilty because plea counsel mischaracterized the strength of the state's evidence against him and promised him he would be sentenced to only thirty years imprisonment. App. 55, l. 21 – 57, l. 11; See 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)) (“[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.”).

After the solicitor told the judge the facts of the case as alleged by the state, which Petitioner later agreed were accurate, Judge Newman accepted Petitioner’s guilty plea as to each charge. App. 10, l. 3 – 13, l. 4. He ultimately sentenced Petitioner to fifty years imprisonment. App. 35, ll. 11-18.

PCR Hearing

At the PCR hearing, Petitioner testified that LeGrand Carraway was appointed to represent him and that it was because of Mr. Carraway’s advice that he ultimately pled guilty. He said he pled guilty because “Mr. Carraway told me . . . the State had evidence against me[,] that it didn’t look good for me to go to trial because he didn’t think we had a chance at trial. So that’s what he used . . . to get me to plead guilty.” App. 55, l. 24 – 56, l. 5. Petitioner explained that Carraway told him “the State had fingerprints[,] residues, firearms, stuff like that. Witnesses, statements against me.” App. 56, ll. 7-9.

However, Petitioner testified that once he arrived at the Department of Corrections and had an opportunity to look at his entire file, he “noticed . . . that what Mr. Carraway said . . . the State had against me - - they really didn’t have what he said they had against me.” He specified, “They [the state] didn’t have any fingerprints, any residue, none of the witness statements or anything against me.” Petitioner maintained that he if he had known what evidence the state actually had against him, he “would have insisted on going to trial.” App. 56, l. 13 – 57, l. 1.

Additionally, Petitioner testified that Carraway told him “[he] wouldn’t get more than thirty years [imprisonment]” if he pled guilty instead of going to trial. He said, “I thought I was getting

thirty years.” Petitioner maintained that if he would have known he could be sentenced to fifty years imprisonment, he “would have insisted on going to trial.” App. 57, ll. 2-11.

On cross-examination, Petitioner testified that he only met with plea counsel one time. He explained that Carraway never reviewed the discovery materials with him. Instead, the “only thing [Carraway] did . . . when he brought the discovery to me, he just pulled out my statement and that was it. He never went over the rest of the discovery with me.” Petitioner maintained that the “only thing [Carraway] said was we didn’t have a chance at trial.” App. 60, ll. 7-18.

Furthermore, Petitioner testified that he did not have enough time with plea counsel before he pled guilty. When asked by the assistant attorney general why he told the guilty plea judge that he did have enough time with counsel, Petitioner said, “[T]he only reason why I told the judge that [was] because [of] . . . the advice that [plea] counsel gave me.” Petitioner explained that the only reason he did not speak up and tell the plea judge that he did not think he had enough time with counsel was because plea counsel told him he was going to be sentenced to thirty years. He testified that if he would have known he was not going to receive thirty years, he would have spoken up. App. 60, l. 22 – 62, l. 10.

Additionally, Petitioner testified that plea counsel never told him he was facing up to life imprisonment on the murder charge. While he acknowledged that the plea judge informed him “he had the authority to sentence [him] to life in prison,” he maintained that he did not know he could tell the judge “[his] counsel promised [him] [he] was going to get 30 years.” He said, “I didn’t know that I could do that” and “I didn’t know that I could actually tell the judge what my counsel told me.” App. 62, l. 11 – 63, l. 23.

Plea counsel, LeGrand Carraway, testified that he was appointed to represent Petitioner and would visit Petitioner each time he went to the detention center, which was about once a week. He

estimated that he met with Petitioner about fifteen to twenty times before he pled guilty. App. 65, l. 20 – 66, l. 4. Carraway testified that he reviewed the discovery materials with Petitioner and discussed possible defenses with him. He explained that after viewing the state’s evidence, he was of the opinion that Petitioner needed to plead guilty because the state’s evidence was “overwhelming.” App. 66, ll. 16-24. However, Carraway maintained that it was Petitioner’s decision to plead guilty and that, if Petitioner had elected to go to trial, he was prepared to try the case. App. 66, l. 25 – 67, l. 17.

Carraway admitted on cross-examination by PCR counsel that he did not have a record of the number of meetings with Petitioner or the dates, but maintained that he went to the jail every week. He said he would just go to the jail “[t]o see everybody.” App. 68, ll. 16-23. He admitted that he did not interview any of the state’s witnesses, but merely “talked to [Petitioner] and . . . went over his statement.” App. 68, l. 24 – 69, l. 3. Carraway maintained that Petitioner’s statement to law enforcement, which he received during discovery, incriminated himself in the murder. App. 69, l. 9 – 71, l. 22. Carraway also testified that the state had several witnesses that saw the shooting. App. 71, l. 25 – 72, l. 18.

Additionally, Carraway maintained that he did not tell Petitioner he was going to be sentenced to thirty years imprisonment. He said, “I told him it was up to the judge.” App. 75, ll. 5-10. However, Carraway never said that he advised Petitioner of the maximum sentence he was facing on each charge.

Order of Dismissal

The PCR court found “the guilty plea transcript, along with [plea] [c]ounsel’s credible testimony, reveals [Petitioner] freely and voluntarily pled guilty.” App. 90. In support of this finding, the PCR court noted that plea counsel “testified he never promised [Petitioner] a certain

sentence nor did he coerce [Petitioner] into pleading guilty” and that “he was prepared to take the case to trial, but ultimately [Petitioner] chose to plead guilty.” App. 90. Additionally, the court noted that Petitioner stated during the guilty plea proceeding that he was satisfied with plea counsel’s services and that he had done everything Petitioner had asked him to do. App. 90. Moreover, the PCR court found Petitioner failed to show actual prejudice from any alleged deficiency of plea counsel. App. 91.

Discussion

Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to a combination of plea counsel’s mischaracterization of the strength of state’s evidence against him and plea counsel’s promise that he would be sentenced to thirty years imprisonment if he pled guilty instead of proceeding to trial. Petitioner was prejudiced by plea counsel’s advice because, as Petitioner’s testimony indicated, he would not have pled guilty but for plea counsel’s characterization of the state’s evidence and his promise that Petitioner would only be sentenced to thirty years imprisonment. See App. 55, l. 21 – 57, l. 11.

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

“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 Newman was going to sentence him to thirty years imprisonment if he pled guilty instead of proceeding to trial. 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 thirty

years imprisonment when there was no sentence recommendation from the state and when it was not a negotiated plea.

Furthermore, Petitioner was induced into pleading guilty by plea counsel's mischaracterization of the strength of state's evidence against him. Specifically, Petitioner maintained that plea counsel told him the state had fingerprint evidence, results from gunshot residue testing, ballistics evidence, and witness statements implicating Petitioner in the attempted armed robbery and shooting. However, Petitioner testified during the PCR hearing that when he looked at his file after his guilty plea, he discovered the state "really didn't have what [plea counsel] said they had against me." He said the state "didn't have any fingerprints, any residue, [any] . . . witness statements or anything against me." App. 56, ll. 13-23. Petitioner's testimony that he discovered this after his guilty plea and his testimony that all plea counsel showed him before his guilty plea was his own statement to law enforcement was corroborated by plea counsel's testimony that "I didn't talk to any of the witnesses. Basically, [I] talked to [Petitioner] and we went over his statement." App. 68, l. 24 – 69, l. 3.

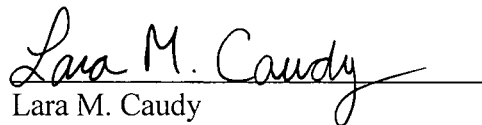
Moreover, there is a reasonable probability that but for plea counsel's mischaracterizations of the evidence and his promise that Petitioner would be sentenced to only thirty years imprisonment, Petitioner would not have pled guilty and "would have insisted on going to trial." See App. 56, l. 24 – 57, l. 11; see also App. 58, ll. 3-10. Thus, Petitioner was prejudiced by plea counsel's influence and promise. Lockhart, 474 U.S. at 59. It was *only* because of this advice and promise that Petitioner decided to plead guilty. See App. 58, ll. 3-10; see also App. 55, l. 21 – 57, l. 11.

As a result of the invalid plea and the resulting prejudice, Petitioner's convictions should be reversed and this case remanded to the Williamsburg County Court of General Sessions for 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 9th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO WILLIAMSBURG COUNTY
R. KNOX MCMAHON, CIRCUIT COURT JUDGE

STUFON NIXON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002671

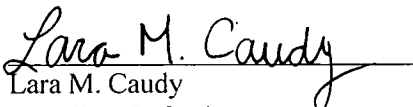
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Stufon Nixon 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 October 3, 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 Stufon Nixon.

Respectfully submitted,


Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County
R. Knox McMahon, Circuit Court Judge

STUFON NIXON,

PETITIONER,

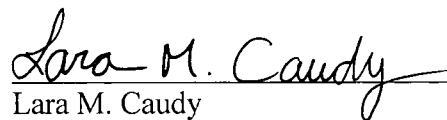
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

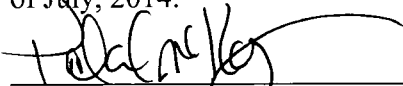
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Stufon Nixon, #288195, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 9th day of July, 2014.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of July, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.