

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JUL 28 2014

Certiorari to Greenville County

S.C. Supreme Court

Robin B. Stilwell, Circuit Court Judge

JOSHUA ADRIAN PARIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002542

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel provided effective assistance of counsel where Petitioner asserts that he would have gone to trial if his plea counsel had not led him to believe that he was pleading guilty with a recommendation of twelve years by the State, that the plea judge was going to accept the twelve year recommendation, and that he would receive no more than a twelve year sentence?

STATEMENT

Indictments

On June 22, 2010, Petitioner Joshua Adrian Paris was indicted by the Greenville County Grand Jury for (1) three counts of armed robbery; (2) one count of attempted armed robbery; and (3) conspiracy. App. 101-120.

Guilty Plea

On May 23, 2011, Petitioner appeared before the Honorable Edward W. Miller to plead guilty to the above-referenced counts. App. 1 – 30. Petitioner was represented by E.P. Godfrey, Jr., and the State was represented by Assistant Solicitor Christine K. Sustakovitch. App. 1.

The State claimed that Petitioner was an employee of a McDonald's restaurant, and on December 14, 2008, Petitioner let two men with guns and a third man into the restaurant. One man went to the back of the restaurant and loaded up a bag of money with the Petitioner. Two of the men with guns forced three employees onto the floor. One employee had his cell phone taken and another employee had his wallet taken. A third employee had his keys pulled off of him, but the men realized that there was nothing of value to take from him. App. 10, l. 17 – 11, ll. 14.

Petitioner said he was a victim of the robbery, but the State contended that the other three men would testify at trial that Petitioner was the one who came up with the idea to rob the McDonald's. The other three men admitted their responsibility in the robbery. App. 11, l. 13 – 13, l. 15.

Petitioner's three co-defendants each pled guilty. Comenci Watts agreed to testify at any trial of Petitioner, and the State recommended that he receive ten years. App. 15, ll. 11-14. Tycree Waite did not want to initially cooperate and was sentenced to fourteen years. App. 15, ll. 15-23. Waite had a change of heart and agreed to cooperate with the State by agreeing to testify at any trial against Petitioner. Waite's attorney was planning to ask for Waite's sentence to be reduced to ten years based on his decision to now cooperate with the State. App. 16, ll. 4-13. Daryl Donaldson agreed to give a statement, and the State recommended ten years for him. App. 15, l. 24 – 16, l. 3.

Petitioner had no prior criminal record. App. 14, ll. 8-9. He was barely eighteen years old when the incident happened. App. 17, ll. 23-24. His plea counsel explained to the plea judge that Petitioner did not realize that the other men were going to bring guns into the restaurant. App. 19, l. 24 – 20, l. 1.

At the conclusion of the plea hearing, Judge Miller sentenced Petitioner to fifteen years each on the three armed robbery counts and the one attempted armed robbery count. Judge Miller sentenced Petitioner to five years for conspiracy. The sentences were to run concurrently. App. 28, ll. 18-19; 104; 108; 112; 116; 120. Petitioner appealed his guilty plea but the South Carolina Court of Appeals dismissed the appeal on September 9, 2011. App. 32.

Application for Post-Conviction Relief and Evidentiary Hearing

On May 17, 2012, Petitioner filed an application for post-conviction relief ("PCR"), alleging among other things that (1) his plea counsel failed to compel compliance with a plea agreement and failed to properly investigate the case and prepare for trial; and (2) that he was punished more severely than his co-defendants. Petitioner also alleged that his plea

counsel failed to move for reconsideration of the sentence. App. 31 – 40. The State filed its Return on or about August 31, 2012. App. 41 – 46.

On August 27, 2013, Petitioner filed an Amended Petition for Post-Conviction Relief and alleged that plea counsel was ineffective by:

1. failing to object to the State's failure to present an indictment to the grand Jury within ninety (90) days after receipt of the arrest warrant;
2. failing to object to the State's failure to petition the trial court for an order delaying action on the warrant for a successive ninety (90) day period; and
3. failing to object to object to the trial court's harsh sentencing of Petitioner in comparison to the co-defendants in violation of Petitioner's right to Equal Protection.

App. 47.

An evidentiary hearing was held before the Honorable Robin B. Stilwell on August 28, 2013. App. 48 – 89. Petitioner was represented by Caroline M.W. Horlbeck, and the State was represented by Assistant Attorney General Karen C. Ratigan. App. 48. Petitioner, his father Phillip Adrian Paris, Jr., and plea counsel each testified at the hearing. App. 51 – 82.

Petitioner testified that he hired plea counsel around February 2009 but that plea counsel had many health problems and was out for about a good year. App. 51, ll. 10 – 24. Petitioner said he probably met with his plea counsel about ten times. App. 51, l. 25 – 52, l. 1. During the time that plea counsel was ill, Petitioner was not able to meet with him or with anyone else from plea counsel's office. App. 52, ll. 15 – 23. Petitioner did not hear from plea counsel during that time and was wondering what was going on with his case and only found out later that plea counsel was ill. App. 52, l. 24 – 53, l. 1.

Petitioner testified that his plea counsel went over some of the discovery with him, but not everything including a DVD that Petitioner only saw after he was incarcerated.

App. 53, l. 24 – 54, l. 17. Therefore, Petitioner had not seen the DVD evidence against him before he pled guilty. App. 54, ll. 18-25.

Petitioner testified that while he discussed his charges with his plea counsel, he never discussed the indictments themselves and any issues with the indictments. Petitioner subsequently learned that Rule 3 of the South Carolina Rules of Criminal Procedure requires the State to prepare an indictment for presentment to the grand jury within ninety (90) days after the receipt of an arrest warrant. Petitioner asserted that he was arrested in December 2008 but that his indictments were not presented to the grand jury until June 2010. Petitioner's plea counsel never advised Petitioner of this rule of criminal procedure and never filed any motion regarding the State's failure to comply with the rule's time limit. Petitioner believed that his plea counsel should have filed such a motion to dismiss the indictments. App. 55, l. 1 – 56, l. 24.

Petitioner testified that he made two different statements to law enforcement. In his first statement, Petitioner said he had nothing to do with the incident. In his second statement, Petitioner incriminated himself because the police told him if he cooperated with them, they would try to help him get a lesser sentence or pre-trial intervention. The police told Petitioner if he did not cooperate, Petitioner would be sent to a maximum security prison. App. 56, l. 25 – 58, l. 12.

Petitioner said that he did cooperate with the law enforcement which is why his co-defendants were eventually arrested. App. 58, ll. 12-13. Petitioner's plea counsel, however, never asked Petitioner why his second statement had changed so drastically from his first statement. Petitioner, however, did tell his plea counsel that the police said he could possibly get pretrial intervention. App. 58, ll. 14 – 22.

Plea counsel told Petitioner that he did not need to worry about the armed robbery charges because his “worst case scenario was strong armed robbery” since Petitioner did not have a weapon and would probably be looking at a youthful offender offense. App. 58, l. 22 – 59, l. 1.

Ultimately, Petitioner was not able to apply for pretrial intervention because of the seriousness of his offense. App. 59, ll. 2 – 7. The State never offered to reduce the charges to strong armed robbery. App. 59, ll. 8-10.

Plea counsel never discussed challenging the circumstances surrounding the statements Petitioner gave to law enforcement, and Petitioner was not aware that he could have challenged the admissibility of his statements at trial. App. 59, ll. 11 – 19. If he had known that he could have challenged the admissibility of those statements at trial, Petitioner would not have pled guilty. App. 59, l. 24 – 60, l. 3.

Petitioner testified that he did turn down a ten year plea offer because he wanted to go to trial. He decided at the last minute not to go to trial because his felt that his plea counsel was not prepared to go to trial. Plea counsel informed Petitioner that he had spoken with the solicitor and that if Petitioner insisted on going to trial, she was going to push for the maximum penalty. App. 60, l. 21 – 61, l. 24.

Plea counsel told Petitioner that if he went ahead and pled guilty, he would only get twelve years. App. 62, ll. 1-11. Petitioner also testified that he was not aware that he was pleading without a recommendation from the State until after he was sentenced and saw the sentencing sheets. He believed when he pled guilty that he was receiving a twelve year sentencing recommendation from the State. Petitioner maintained that he would not have

pled guilty if he had known he was pleading guilty without a sentencing recommendation. He would have went ahead with trial App. 62, l. 16 – 63, l. 15.

Petitioner further testified that he believed that his equal protection rights were violated where he received a harsher sentence than his co-defendants, especially where his co-defendants were the ones actually possessing the weapons and actually committing the robbery. App. 64, l. 12 – 65, l. 13. Plea counsel did not object to Petitioner being sentenced more harshly than his co-defendants. App. 65, ll. 14-16.

Petitioner's father, Phillip Adrian Paris, Jr. testified that he along with other family members retained plea counsel to represent Petitioner and that he accompanied his son each time his son met with plea counsel. App. 67, ll. 1 – 13. Paris met with Petitioner and plea counsel the night before the trial was scheduled, and Paris recalled that plea counsel told Petitioner that pleading guilty was his best option because the State was going to recommend twelve years. App. 67, l. 16 – 68, l. 9.

Plea counsel testified that he reviewed the discovery with Petitioner and discussed with Petitioner the statements he made to law enforcement. App. 72, l. 16 – 73, l. 12. Plea counsel said he had hoped that Petitioner's cooperation with law enforcement would help the case but it did not in the end. App. 73, ll. 11-12. Plea counsel said he spoke with the police officers about getting the charged reduced but that the officers were not willing to reduce the charges. App. 74, ll. 3-6.

Plea counsel said the State would not agree to reduce the charges to strong armed robbery. App. 75, ll. 2 – 15. He said the solicitor told him that the officers wanted Petitioner to get twelve years and that the officers would not budge. App. 75, ll. 10-14.

Plea counsel testified that he discussed the concept of accomplice liability and the “hand of one” with Petitioner to try to explain to Petitioner how he could face the same charges as his co-defendants even though he never had a gun. App. 75, ll. 18 – 25.

Plea counsel said that Petitioner decided to plead guilty prior to the morning of trial. The solicitor told plea counsel that he was fine with twelve years and that she had informed Judge Miller that she was fine with twelve years. App. 77, l. 20 – 78, l. 8. Plea counsel claimed that he did not guarantee a twelve year sentence to Petitioner, but told Petitioner that he was trying to get twelve years. App. 79, ll. 14 – 17.

Plea counsel did testify that there was an understanding in the courtroom that Petitioner was supposed to just get twelve years after he pled guilty. App. 79, ll. 20-23. Plea counsel testified that during chambers, Judge Miller knew that he and the solicitor were seeking the twelve years. App. 80, ll. 8 – 19.

Judge Miller, however, was having some reservations about the twelve year sentence. Petitioner, however, was not able to hear Judge Miller’s reservations about the twelve year sentencing recommendation because that was all done in chambers and during a bench conference. App. 80, l. 20 – 81, l. 23.

At the conclusion of the evidentiary hearing, Judge Stilwell denied Petitioner’s PCR application. App. 82, l. 19 – 88, l. 2.

Order of Dismissal

On October 24, 2013, Judge Stilwell filed his written Order of Dismissal. App. 90-99. He ruled there was no evidence that Petitioner was pressured into entering a guilty plea or that his plea counsel had not properly investigated or prepared for the case. Judge Stilwell further ruled that plea counsel’s failure to object to the indictments being issued

more than ninety days after the arrest warrant was not an automatic ground for relief as the failure to seek the indictments within ninety days did not invalidate the warrant or prevent subsequent prosecution. Finally, Judge Stilwell found that Petitioner failed to meet his burden of proving that plea counsel misadvised him about the sentence he would receive if he pled guilty. App. 94-96.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective assistance of counsel where Petitioner asserts that he would have gone to trial if his plea counsel had not led him to believe that he was pleading guilty with a recommendation of twelve years by the State, that the plea judge was going to accept the twelve year recommendation, and that he would receive no more than a twelve year sentence.

At the evidentiary hearing, Petitioner testified that he had wanted to go to trial on the charges against him, but only pled guilty after his plea counsel told him the solicitor was going to make a recommendation of twelve years and that Petitioner would therefore only receive a twelve year sentence. Petitioner did not realize until after he was sentenced that he actually pled guilty without a sentencing recommendation. He testified that if he had known that the State was not making a twelve year recommendation and that he was pleading without any recommendation, he would have went ahead and gone to trial. App. 61, l. 18 – 63, l. 15; see Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding ineffective assistance of counsel when plea counsel erroneously advised the defendant about his potential sentence prior to his guilty plea); see also Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991) (finding defendant’s guilty plea was not intelligently and voluntarily made based on plea counsel’s erroneous sentencing advice). Thus, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 114 - 118; See Hill v. Lockhart, 474 U.S. 52 (1985) (applying the Strickland v. Washington, 466 U.S. 668 (1984) standard to guilty plea challenges based on ineffective assistance of counsel).

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970). An “unsound result”

occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); see also Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

Furthermore, “[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (citing Hill, 474 U.S. at 57-59). “The defendant’s undisputed testimony that he would not have pled guilty to the charges but for trial counsel’s advice is sufficient to prove that defendant would not have pled guilty.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

In this case, an “unsound result” occurred because plea counsel’s erroneous sentencing advice created an unreasonable expectation which hindered Petitioner’s ability to fully understand the sentencing consequences of his guilty plea. See Boykin, 395 U.S. 238. Petitioner testified that he did not understand until after he was sentenced that he was in fact not pleading guilty with a twelve year recommendation from the State. App. 62, l. 16 – 63, l. 15. Petitioner’s father also testified at the evidentiary hearing that Petitioner was led to believe by his plea counsel that the State was going to recommend a twelve year sentence.

App. 67, l. 24 – 68, l. 9. Petitioner’s father testified that he never heard from plea counsel that the State was in fact not going to recommend twelve years. App. 71, ll. 14-17.

Plea counsel testified himself that there was supposed to be an understanding in the courtroom that Petitioner would not face more than twelve years, but that during chambers and bench conferences, Judge Miller, the plea judge, expressed reservations about handing down a twelve year sentence. App. 80, l. 8 – 81, l. 23. Plea counsel also unequivocally stated at the evidentiary hearing that Petitioner did not hear Judge Miller express his reservations about the twelve years. App. 81, ll. 21-23. There is nothing in the plea hearing transcript that shows that Petitioner would have known that the plea judge was not likely to sentence Petitioner to only twelve years until after the plea judge accepted Petitioner’s guilty plea and then began the sentencing process. Therefore, when Petitioner pled guilty, he thought the State was recommending a sentence of twelve years and that there was no question the plea judge was going to accept the twelve years. Petitioner had no idea that the plea judge had informed plea counsel that he was likely not going to sentence Petitioner to only twelve years but to a greater prison term.

Petitioner was prejudiced by plea counsel’s deficient performance because Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to the unreasonable expectation plea counsel created as to his potential sentence and due to the failure of his plea counsel to inform him that the plea judge was most likely going to sentence him to a period greater than twelve years. See Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant’s guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel).

Accordingly, the PCR court erred in denying Petitioner relief where “there [wa]s a reasonable probability that, but for counsel’s errors, [Petitioner] would not have pled guilty and would have insisted on going to trial.” Hill, 474 U.S. at 57-59; see also Boykin, 395 U.S. 238.

CONCLUSION

Based upon the foregoing reasons, Petitioner Joshua Adrian Paris respectfully requests that this Court grant his Petition for Writ of Certiorari and allow full briefing on the issue raised herein.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

JOSHUA ADRIAN PARIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002542


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua Adrian Paris 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 August 28, 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 Joshua Adrian Paris.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

JOSHUA ADRIAN PARIS,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-002542

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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Joshua Adrian Paris, #346142, at Kirkland Correctional Institution this 28th day of July, 2014.


Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of July, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.