ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Pickens County

G. Edward Welmaker, Circuit Court Judge

RODNEY DAVIS YOUNG,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014-000296

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 would have not pled guilty to the charge of distribution of crack cocaine, second offense, and the related proximity charge had he not been misadvised by plea counsel that he would only have had to serve 65% of that sentence when the second offense distribution charge actually requires Petitioner to serve at least 85% of the sentence?

STATEMENT

Indictments

On September 12, 2012, Petitioner Rodney David Young was indicted by the Pickens County Grand Jury for (1) distribution of cocaine base [crack cocaine] in violation of S.C. CODE ANN. § 44-53-375(B)(2); (2) distribution of marijuana in violation of § 44-53-370(b)(2); (3) distribution of cocaine base within ½ mile of a park in violation of § 44-53-445; and (4) distribution of marijuana within close proximity of a park in violation of § 44-54-445. App. 80-96.

Guilty Plea

On January 28, 2013, Petitioner appeared before the Honorable Edward W. Miller to plead guilty to the above-referenced charges. App. 1-13. Petitioner was represented by John W. DeJong, and the State was represented by Assistant Solicitor J. Baker Cleveland, III. App. 1.

During sentencing, Petitioner's plea counsel informed Judge Miller that Petitioner never denied that he sold the marijuana but was adamant that he had not sold the crack cocaine. Plea counsel advised the court that a co-defendant named Kelly Sloan had actually sold the crack cocaine, and the assistant solicitor acknowledged that Sloan pled to selling the crack cocaine and was serving eight years on that charge. App. 8, ll. 17-20; 11, ll. 1-16.

Judge Miller sentenced Petitioner to eighteen years on the second offense distribution of crack cocaine charge, provided that upon the service of eight years, the balance be suspended to three years probation. Judge Miller sentenced Petitioner to eight years on the remaining charges with all sentences to run concurrent. He gave Petitioner

credit for 715 days. App. 13, ll. 12-16; 82; 87; 92; 97. Petitioner did not file a direct appeal.

PCR Application and Evidentiary Hearing

Petitioner filed his application for post-conviction relief on May 13, 2013, alleging in part that he was not properly advised by his plea counsel that he would have to serve 85% on his guilty plea for distribution of crack cocaine, second offense. Instead, Petitioner was led to believe by his plea counsel that he would only have to serve 65% of that sentence. App. 15-26. The State filed its Return on October 17, 2013. App. 27-33.

An evidentiary hearing was held before the Honorable G. Edward Welmaker on December 16, 2013. App. 34-67. Petitioner was represented by R. Mills Ariail, Jr., and the State was represented by Assistant Attorney General Karen C. Ratigan. App. 34. Both Petitioner and his plea counsel testified at the evidentiary hearing. App. 37-67.

Petitioner testified that he informed his plea counsel that he only wanted to plead guilty to the charges he was actually guilty of which was the selling of the marijuana and not the selling of any crack cocaine. App. 42, ll. 3-16. Petitioner noted that had always been his position and that he had consistently informed his plea counsel of that fact which plea counsel then told the plea judge. App. 42, ll. 15-16.

Petitioner testified that he ended up pleading guilty to the distribution of crack cocaine and related proximity charge because his plea counsel told him that was the best he could get. App. 42, l. 17 – 43, l. 2. Petitioner further testified that his plea counsel advised him that he would only have to serve 65% of the sentence on the distribution of crack cocaine charge and would be eligible for parole and work release. It turned out that Petitioner was required to serve 85% of the sentence for the distribution of crack cocaine

offense. Petitioner asserted that had he been advised correctly by his plea counsel as to the percentage of time he would have had to serve for that offense, he would have never pled guilty to that charge. App. 48, l. 7 – 49, l. 25.

At the evidentiary hearing, plea counsel conceded that he "probably shared with [Petitioner] that it was not eighty-five percent . . . ." App. 60, ll. 7-15. Plea counsel further admitted:

> And candidly, [Petitioner] asked me before this hearing started about that, and I told him I would look into it. But I can't honestly say that I told him it would be an eighty-five percent.

App. 60, ll. 17-20.

Plea counsel further acknowledged that the audio tapes recorded by the confidential informant during the alleged drug transaction only recorded the voices of the confidential informant and Kelly Sloan and that Petitioner's voice could not be heard on the tapes. App. 57, ll. 8-14.

Order of Dismissal

Judge Welmaker issued his Order of Dismissal on January 21, 2014 denying and dismissing Petitioner's PCR application. App. 69-77. With respect to whether plea counsel misadvised Petitioner that he would only have to serve 65% of the sentence on the distribution of crack cocaine charge, Judge Welmaker ruled Petitioner "failed to meet his burden of proving plea counsel misadvised him about the time he would have to serve on his sentence" and "plea counsel did not err." App. 75.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective assistance of counsel where Petitioner would have not pled guilty to the charge of distribution of crack cocaine, second offense, and the related proximity charge had he not been misadvised by plea counsel that he would only have had to serve 65% of that sentence when the second offense distribution charge actually requires Petitioner to serve at least 85% of the sentence.

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 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). As such, 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).

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. "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). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

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 (1969). Therefore, 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 (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(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. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

"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 determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886

(2007).

In this case, the PCR court erred in denying Petitioner's claim of ineffective assistance of counsel where Petitioner proved that (1) plea counsel gave him erroneous advice that he would only have to serve 65% of the sentence on the second offense distribution of crack cocaine charge; and (2) he was prejudiced by that deficient performance where he affirmatively testified that he would not have pled guilty to that charge had he been correctly advised that such offense required him to serve at least 85% of the sentence.

Deficient Performance and Prejudice

S.C. CODE ANN. § 24-13-150(A) mandates that any "inmate convicted of a 'no parole offense' as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections . . . is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least **eighty-five percent** of the actual term of imprisonment imposed." (emphasis added). Section 24-13-100 defines a "no parole offense" as a "class A, B, or C felony . . . ." Under § 16-1-20(A), a "Class A felony" is an offense where the term of imprisonment is not more than thirty years.

A second offense for the distribution of crack cocaine, of which Petitioner was convicted, carries a prison term for up to thirty years and therefore is a Class A felony. S.C. CODE ANN. § 44-53-375(B)(2). Accordingly, this offense is a no parole offense for which Petitioner must serve at least 85% of the actual term of imprisonment.

Plea counsel admitted at the evidentiary hearing that he advised Petitioner that the distribution of crack cocaine charge would not be an 85% sentence. App. 60, ll. 7-10. Plea

counsel's advice to Petition was legally incorrect, and therefore the PCR court's ruling that Petitioner "failed to meet his burden of proving plea counsel misadvised him about the time he would have to serve on his sentence" and that "plea counsel did not err" is not supported by the facts and law applicable to Petitioner's case. Plea counsel was deficient in failing to correctly advise Petitioner that the second offense distribution of crack cocaine charge required him to serve at least 85% of the sentence rather than 65%. See Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000) (finding trial counsel deficient in failing to advise petitioner that threatening a public official was a felony rather than a misdemeanor).

Petitioner testified that he would not have pled guilty to the second offense distribution of crack cocaine charge had he known it required service of at least 85% of the sentence. App. 49, ll. 14-25. The PCR court found Petitioner's testimony not credible; however, there was no evidence contradicting or conflicting with Petitioner's testimony. The only evidence in the record was Petitioner's testimony that had his plea counsel not misinformed him as to the amount of time he would have to serve, he would not have pled guilty to that offense. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (holding petitioner had satisfied the prejudice prong when "the only evidence in the record on this point [was] petitioner's own testimony that had trial counsel not misinformed him that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty").

In Petitioner's case, the only evidence was that Petitioner would have not pled guilty had he known the second offense distribution of crack cocaine charge required 85% of the sentence to be served. Petitioner is thus entitled to the grant of post-conviction relief with

respect to the second offense distribution of crack cocaine charge and the related proximity charge.

CONCLUSION

For the reasons set forth herein, Petitioner Rodney David Young respectfully requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial on his convictions for (1) distribution of cocaine base [crack cocaine] in violation of S.C. CODE ANN. § 44-53-375(B)(2); and (2) distribution of cocaine base within ½ mile of a park in violation of § 44-53-445.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of October, 2014.

STATE OF SOUTH CAROLINA
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Certiorari to Pickens County
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RODNEY DAVIS YOUNG,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014-000296

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, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Rodney Young, #345281 at Ridgeland Correctional Institution, this 8th day of October, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of October, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.