 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

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OCT - 9 2014

S.C. Supreme Court

MICHAEL DANIELS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001007

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 based on the condition that plea counsel would file a motion to reconsider his sentence if the plea court sentenced him to life without parole and where plea counsel filed only a *pro forma* motion the same day as the guilty plea and never made a good faith effort to get the plea court to reconsider Petitioner's sentence after offering little evidence in mitigation during the guilty plea?

STATEMENT

A Bamberg County Grand Jury indicted Petitioner at the March 2011 term of General Sessions for murder and two counts of attempted murder. App. 86-91. Petitioner pled guilty on April 25, 2011 before the Honorable Doyet A. Early. App. 1. Assistant Solicitor J. Strom Thurmond, Jr. represented the state, and Laura A. McCann represented Petitioner. App. 1. Petitioner was sentenced by Judge Early to life without parole for murder, thirty years consecutive for attempted murder, and another thirty years consecutive for the second count of attempted murder. App. 35, ll. 4-16. Petitioner did not appeal.

On April 9, 2012, Petitioner filed an application for post-conviction relief (PCR) raising the issue contained in this petition. App. 46-50. The state filed a return to this application dated June 25, 2012. App. 51-55. The matter proceeded to an evidentiary hearing on January 23, 2014 before the Honorable Edgar W. Dickson. App. 57. Assistant Attorney General Daniel Gourley represented the state, and Janek C. Kazmierski represented Petitioner. App. 57. By order dated April 7, 2014, Judge Dickson denied Petitioner relief. App. 79-85.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty based on the condition that plea counsel would file a motion to reconsider his sentence if the plea court sentenced him to life without parole and where plea counsel filed only a *pro forma* motion the same day as the guilty plea and never made a good faith effort to get the plea court to reconsider Petitioner's sentence after offering little evidence in mitigation during the guilty plea.

Guilty Plea

The facts presented by the state at the guilty plea proceeding indicated that the murder took place during an armed robbery at the Tiger Express, the only gas station in Olar, South Carolina. The state alleged Petitioner entered the convenience store and shot all three people inside. Two of the complainants survived and identified Petitioner as the shooter. The solicitor told the plea court that Petitioner was located within an eighth of a mile from the Tiger Express about twenty-five minutes after the shooting and that he later confessed to the robbery and shooting. App. 15, l. 15 – 18, l. 12. Law enforcement also recovered surveillance footage from the convenience store that allegedly revealed Petitioner was the shooter. App. 19, ll. 6-8.

The only mitigation evidence presented by plea counsel was that Petitioner was “very, very young” at the age of twenty-one and that he had had a troubled childhood. Specifically, she explained that Petitioner had a physically abusive father and that he exhibited “behavioral problems throughout his life.” App. 24, l. 1 – 28, l. 25.

Judge Early ultimately sentenced Petitioner to life imprisonment for murder plus sixty years consecutive for the two counts of attempted murder. App. 35, ll. 4-16. Plea counsel filed a motion to reconsider Petitioner's sentence on the same day as his guilty plea. See App. 71, ll. 7-9. However, the motion to reconsider was *pro forma* and could have been filed in any case regardless

of the offense or sentence. See App. 56. No hearing on the motion was ever scheduled and there is no evidence in the record that plea counsel ever followed up on the motion once it was filed. See App. 73, ll. 5-7

PCR Hearing

Petitioner testified at the PCR hearing that he pled guilty in order to avoid the death penalty and because plea counsel promised him she would file a motion to reconsider his sentence if the plea court sentenced him to life without parole.¹ He maintained that plea counsel never told him after his guilty plea about whether she filed such a motion on his behalf. However, he later learned a motion to reconsider his sentence was filed by plea counsel, but he was never informed whether the motion was actually heard or whether a final determination had been made granting or denying the motion. App. 62, l. 13 – 63, 24; App. 67, l. 15 – 68, l. 1.

Petitioner testified that if he would have known a motion to reconsider his sentence was not going to be properly pursued, he would not have pled guilty. App. 63, l. 25 – 64, l. 3. He further maintained that plea counsel's promise to file a motion to reconsider his sentence if he was sentenced to life without parole was "an instrumental piece of the negotiations and the discussions" he had with plea counsel when deciding whether to plead guilty or proceed to trial. App. 64, ll. 4-8.

Plea counsel, Laura McCann, testified at the hearing that she filed a motion to reconsider Petitioner's life sentence on the same day he pled guilty "because it was such a serious case," and

¹ There is no evidence in the record that the state had served Petitioner or plea counsel with a formal notice of intent to seek the death penalty. Additionally, the only aggravating circumstance in this case that would have permitted the state to seek the death penalty was that the murder was committed during the commission of an armed robbery. See S.C. Code Ann. § 16-3-20(C)(a).

that she was later “informed it was denied.”² However, McCann could not remember whether she had actually told Petitioner she filed the motion and that it was denied. She said, “I did not make a trip up to Lee [Correctional Institution] to inform him of that. I don’t know that it wasn’t sent to him in a letter or something. I don’t recollect.” However, she later admitted that there was nothing in her file indicating she sent a letter to Petitioner. App. 71, ll. 7-13; App. 72, l. 21 – 73, l. 16.

McCann further testified that Petitioner was “potentially facing the death penalty,” but that the solicitor had agreed “to remove the death penalty from this case if he [Petitioner] pled to two counts of attempted murder and one count of murder with no [sentence] recommendations.” App. 72, ll. 2-4; App. 71, ll. 19-22.

Order of Dismissal

While noting Petitioner testified “that his plea was contingent on his attorney’s representation that she would file a motion to reconsider his sentence and that he would not have pled absent this promise,” the PCR court found Petitioner failed to prove plea counsel was ineffective under prevailing professional norms or that he was prejudiced by plea counsel’s performance. App. 83.

Discussion

Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made since his decision to plead guilty was based largely on the condition that plea counsel would file a motion to reconsider his sentence if the trial court sentenced him to life without parole. Petitioner was prejudiced because he testified that he would not have pled guilty if he would have known a motion to reconsider his sentence was not going to be properly pursued. App. 63, l. 25 – 64, l. 3.

² Upon information and belief, PCR counsel was unable to locate a written order denying the motion to reconsider Petitioner’s sentence with either the Bamberg County Clerk of Court or the Second Circuit Solicitor’s Office.

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 she induces the defendant to plead guilty.

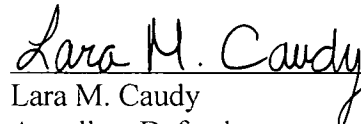
In this case, Petitioner was induced into pleading guilty by plea counsel's promise that she would file a motion to reconsider Petitioner's sentence if the plea court sentenced him to life without parole. However, plea counsel did not properly pursue this motion after she filed it on April 25, 2011, the same day as Petitioner's guilty plea. She did not ensure that a hearing was held on the motion where she could present testimony or other mitigation evidence to help convince the court to reduce Appellant's sentence of life imprisonment plus sixty years. She also did not raise any specific grounds in the written motion itself as to why the court should reconsider Petitioner's sentence. The motion was *pro forma* and could have been filed in any case regardless of the offense or sentence. See App. 56. Furthermore, counsel altogether failed to communicate with Petitioner about filing the motion and the court's ultimate denial of the motion. Petitioner was prejudiced by plea counsel's deficient performance because he testified he would not have pled guilty if he would have known plea counsel was not going to properly pursue a motion to reconsider his sentence. App. 63, l. 25 – 64, l. 3.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

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 October, 2014.

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IN THE SUPREME COURT

CERTIORARI TO BAMBERG COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

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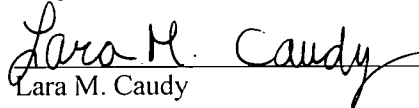
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Daniels 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 23, 2014. 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 Michael Daniels.

Respectfully submitted,



Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of October, 2014

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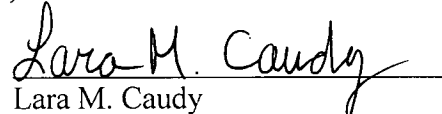
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APPELLATE CASE NO. 2014-001007

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 and Michael Daniels, #319408, at Lee Correctional Institution this 9th day of October, 2014.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.