STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

ERIC TODD BURGESS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-00351

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to notify Petitioner of the State's offer to allow him to plead guilty to the lesser included offense of assault and battery first degree?

STATEMENT

The Greenville County Grand Jury indicted Petitioner Burgess for attempted murder, indictment #2010-GS-23-8937. From the indictment it appears that witness J.A. Horne of the Greenville County Sheriff's Office testified before the grand jury on October 21, 2010. (App. p. 163). A clerk's office stamp reflects that the indictment was received on November 17, 2010. (App. p. 163). The term, however, is listed as May and the year 2010 is scratched out and replaced with the year 2011. (App. p. 163). The body of the indictment reflects that the grand jury met on May 10, 2011. (App. p. 164). While there was an objection to the timing of the indictment pursuant to Rule 3(c), SCRCrimP., there was no objection to the irregularities appearing on the face of the indictment.

On January 18, 2012, Burgess proceeded to jury trial before the Honorable Robin B. Stilwell. Larry Cooke represented Burgess at trial. Bryna S. Seay prosecuted the case. The jury found Burgess guilty of the lesser included offense of assault and battery of a high and aggravated nature. Judge Stilwell sentenced Burgess to seven (7) years in prison. Burgess did not appeal his sentence and conviction.

On June 14, 2012, Burgess filed an application for post conviction relief. The State filed a return on November 30, 2012. Burgess filed an amended post conviction relief application in January of 2013. On December 17, 2013, an evidentiary hearing was held before the Honorable G. Edward Welmaker. Rodney Richey represented Burgess at the PCR hearing. Karen Ratigan was present on behalf of the State. In a written order signed February 5, 2014, Judge Welmaker denied relief and dismissed the application. A timely notice of intent to appeal was served on February 20, 2014. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to notify Petitioner of the State's offer to allow him to plead guilty to the lesser included offense of assault and battery first degree.

Petitioner was indicted for attempted murder in either October 21, 2010, the date the witness is listed as appearing before the grand jury, or May 10, 2011, the date listed in the body of the indictment. (App. pp. 163-164). In a letter dated May 11, 2011, Assistant Solicitor Bryna Seay wrote to trial counsel, Larry Cooke, and offered to allow Petitioner to plead guilty to the lesser included offense of assault and battery first degree. (App. p. 225). During the PCR hearing Petitioner testified that he did not receive any plea offers from the State. (App. p. 190, line 16 – p. 191, lines 1-25). Petitioner testified that if trial counsel had discussed the offer, Petitioner would have accepted and pled guilty to the lesser included offense of assault and battery first degree. Trial counsel testified that he discussed the plea offer with Petitioner and Petitioner rejected the offer. (App. p. 202, line 10 – p. 203, lines 1-4).

In the order of dismissal the PCR judge wrote, "This Court finds the Applicant failed to meet his burden of proving trial counsel did not relay a plea offer. This Court specifically finds trial counsel is more credible than the Applicant on this issue. This Court notes trial counsel's file contained notes that his assistant attempted to convey the plea offer and that he did convey it a week later. This Court also notes trial counsel testified the Applicant opting to refuse the offer. This Court finds trial counsel fulfilled his responsibilities in this regard. See Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009)(holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance)." The PCR judge erred.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 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, 104 S.Ct. 2052). 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, 104 S.Ct. 2052. "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, 104 S.Ct. 2052). 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, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Davie v. State, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009), the South Carolina Supreme Court wrote:

> As we view these cases, we believe an adoption of a rule that counsel's failure to convey a plea offer constitutes deficient performance would be consistent with the majority of other state and federal jurisdictions. The theory underlying these decisions is that such conduct constitutes unreasonable performance under the prevailing professional standards established by the American Bar Association or state-specific ethical rules of conduct. Pursuant to these professional standards, counsel is required to fully communicate with the client so that the client can make an informed decision regarding any proposals by the State. (citations omitted).

In Missouri v. Frye, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012), the United States Supreme Court wrote, "This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." The plea offer in the present case was a formal offer and trial counsel had a duty to convey the offer to Petitioner.

"The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. In Missouri v. Frye, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012), the Court wrote:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result

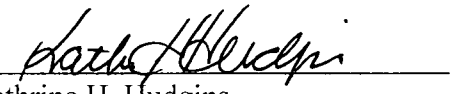
> of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance").

There is a reasonable probability that Petitioner would have accepted the offer to plead guilty to assault and battery first degree, a lesser included offense of the charged offense of attempted murder and a lesser included offense of assault and battery of a high and aggravated nature, the offense for which the jury found petitioner guilty. See S.C. Code §16-3-600(D)(3). There is nothing to suggest that the prosecution would have withdrawn the offer prior to the expiration date. There is also nothing to suggest that the judge would not have accepted the plea to assault and battery in the first degree. There is a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to the lesser charge.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric Todd Burgess 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 December 17, 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 Eric Todd Burgess.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of October, 2014

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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 Eric Todd Burgess, # 349367, at Allendale Correctional Institution this 22nd day of October, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of October, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.