 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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DEC 19 2014

Certiorari to York County
John C. Hayes, III, Circuit Court Judge

S.C. Supreme Court

JOHNNY CROCKETT,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014- 000957

JOHNSON PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
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ISSUE PRESENTED

Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel where defense counsel failed to accurately inform him of the consequences of the application of the enhancement statute based on the Petitioner's prior convictions?

STATEMENT

Procedural History

Initially, the State alleged Petitioner committed grand larceny by stealing items from a company called CTR. App. 176, 11-15. At the conclusion of the preliminary hearing on May 11, 2010, the magistrate dismissed the grand larceny charge. App. 176, 15-16. Subsequently, the prosecution offered Petitioner a plea offer to time served concerning unrelated pending charges for receiving stolen goods, and two years incarceration for manufacturing marijuana. App. 177, 1-3. When Petitioner refused the plea offer, the state asked the grand jury to indict Petitioner on the charge of possession of stolen goods related to the subsequent sale of the items stolen from CTR to a scrap yard. App. 177, 9-10.

On February 17, 2011, Petitioner was indicted by the York County Grand Jury for possession of stolen property having an approximate value of Five Thousand Five Hundred Dollars (\$5,500.00) in violation of S.C. Code § 16-13-180. App. 251. Due to Petitioner's prior convictions, the indictment included an enhancement statute, S.C. Code § 16-1-57, which increased the maximum penalty for the offense to ten (10) years. App. 251; see SC CODE ANN. § 16-1-90(E).

On March 16 and 17, 2011, Petitioner appeared before the Honorable Paul M. Burch and was tried by a jury for the offense listed in the indictment. App. 1-179. Petitioner was represented at trial by Jonathan Sullivan and Mark McKinnon and the State was represented by Assistant Solicitor Amy Sikora. App. 1. The jury found the defendant guilty. App. 174, 6-11. Judge Burch sentenced Petitioner to the maximum possible sentence of ten years, provided for under the enhancement statute. App. 178, 13-14.

On direct appeal, Appellate Defender Susan Hackett filed an Anders Brief on behalf of Petitioner on February 1, 2012. App. 180-192. The appeal was summarily dismissed on August 22, 2012 pursuant to the Anders procedure. App. 193-194.

Application for Post-Conviction Relief and Evidentiary Hearing

On February 22, 2013, Petitioner filed his application for post-conviction relief (“PCR”) alleging ineffective assistance of counsel. App. 196-201. The State filed its Return on or about May 29, 2013. App. 202-207. An evidentiary hearing was held before the Honorable John C. Hayes, III on April 15, 2014. App. 208-243. Petitioner was represented by Leah B. Moody, and the State was represented by Rutledge Johnson. App. 208. Petitioner and one of his trial attorneys, Jonathan Sullivan, testified at the hearing. App. 211-242.

At the PCR hearing, Petitioner testified that he requested to see the discovery provided by the State and that his attorney indicated that the only item was the Petitioner’s rap sheet, leading Petitioner to believe there was no evidence against him. App. 224, 1-11. Petitioner also testified that his attorney failed to explain to him the indictment process or the difference between the original charge against Petitioner and the charge in the indictment. App. 225, 3-9.

Trial counsel testified that Petitioner was not willing to accept a plea offer that required jail time on an unrelated manufacturing marijuana charge, so he rejected the State’s plea offers on both charges of his unrelated charges. App. 233, 1-10. After this, trial counsel was notified by the solicitor that they were going to resurrect, by indictment, a prior case that was dismissed at preliminary hearing while Petitioner was represented by Katie Taylor. App. 234, 10-14. Trial counsel testified that it was the marijuana case in which the Petitioner was less inclined to take a plea offer, not this case. App. 236, 21-25; 237, 1-2. Trial counsel testified that he met with Petitioner several times prior to the trial date, but his only specific note regarding a meeting in

preparation for the instant case was February 23, 2011. App. 237, 21-24. However, when asked if he had the opportunity to explain to Petitioner about his enhancement of this charge, trial counsel responded “That I do not recall.” App. 241, 8-10.

Order of Dismissal

Judge Hayes’ Order of Dismissal denying Petitioner’s PCR application was filed April 18, 2014. App. 244-249. Judge Hayes ruled that “Applicant has failed to meet his burden of proof in alleging that trial counsel was ineffective by failing to investigate and prepare for the Applicant’s case.” App. 248.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner was denied his Sixth Amendment right to effective assistance of counsel where defense counsel failed to accurately inform him of the consequences of the application of the enhancement statute based on the Petitioner's prior convictions.

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). 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 charge in the indictment under S.C. Code § 16-13-180(C)(2) prescribes a penalty of a fine of “not less than one thousand dollars or imprison[ment] not more than three years, if the value of the property is more than two thousand dollars but less than ten thousand dollars.” However, in this case, the Petitioner was charged under the enhancement statute in S.C. Code §

16-1-57, which requires that a third or subsequent conviction for an offense “for which the term of imprisonment is contingent upon the value of the property involved must ... be punished as prescribed for a Class E felony.” Pursuant to S.C. Code § 16-1-90(E), a Class E felony is punishable by incarceration for not more than ten years. Thus, Petitioner’s maximum possible sentence significantly increased from three years to ten years due to the enhancement statute. This is also a stark contrast to the State’s plea offer of two years on the manufacturing marijuana charge and time served on the other charges.

“[T]he Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). In evaluating whether to accept a guilty plea a defendant must weigh a variety of factors and “such decisions must be made knowingly and voluntarily with the advice of constitutionally competent counsel.” Berry, 381 at 634-35, 675 S.E.2d at 427. Trial counsel indicated at the PCR hearing that he could not recall whether he explained the enhancement of the charge to Petitioner. App. 241, 7-10. This would not only include the qualifying nature of the prior offense, but also the consequences of the application of the enhancement statute. The increased potential penalty would be essential in the Petitioner’s ability to evaluate the State’s plea offer versus the risk of going to trial. Petitioner’s testimony at the PCR hearing on the need for an appraiser to testify regarding the value of the property is demonstrative of his lack of understanding of the application of the enhancement statute, which no longer required the State to prove the value of the stolen property and significantly increased the maximum sentence. App. 215, 15-25; 232, 1-3.

The second step in the analysis focuses on whether Petitioner was prejudiced by the deficient representation such that there is reasonable probability that the outcome would have been different had the deficiency not occurred. Strickland, 466 U.S. at 694. Petitioner testified to the disparity in the \$150.00 worth of scrap metal versus the ten year sentence. App. 215, 21-25; 216, 1. Had Petitioner understood the potential sentence that he was facing when he went to trial and that the value of the property became immaterial under the enhancement statute, he would have given greater consideration to the State's plea offers and there is a reasonable probability that he would not have gone forward with a trial in this case and would have pled guilty.

Petitioner is accordingly entitled to the grant of post-conviction relief because his trial counsel should have accurately informed him of the consequences of the application of the enhancement statute based on the Petitioner's prior convictions. Petitioner is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Johnny Crockett respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in cursive script, reading "Laura R. Baer", is written over a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
JOHN C. HAYES, III, CIRCUIT COURT JUDGE

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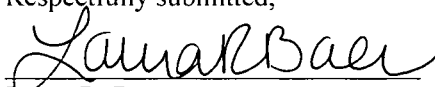
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny W. Crockett 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 April 15, 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 Johnny W. Crockett.

Respectfully submitted,



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of December, 2014

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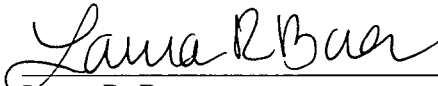
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CERTIFICATE OF SERVICE

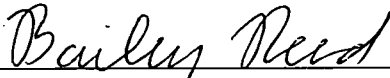
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire and Johnny W. Crockett, , at this 19th day of December, 2014.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of December, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.