 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

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DEC 23 2014

S.C. Supreme Court

BARON LEWIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000777

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was the guilty plea rendered involuntary by counsel's failure to secure a more favorable plea agreement prior to advising Petitioner to cooperate with law enforcement?

STATEMENT

In February of 2008, the Richland County Grand Jury indicted Lewis for two counts of assault and battery with intent to kill, attempted armed robbery and conspiracy to commit armed robbery, indictments #2008-GS-40-396, 397, 398, 399. On March 15, 2010, Lewis appeared before the Honorable G. Thomas Cooper and pled guilty to all four charges. The State also dismissed a murder charge in exchange for the guilty plea. (App. p. 4, lines 6-7). Tivis C. Sutherland and Gregory B. Collins represented Lewis at the guilty plea. Aaron Jophlin prosecuted the case. Judge Cooper sentenced Lewis to fourteen (14) years concurrent for the assault and attempted armed robbery charges and five (5) years concurrent for the conspiracy charge.

On April 30, 2010, Lewis filed an application for post conviction relief. On May 23, 2012, an evidentiary hearing was held before the Honorable L. Casey Manning. Rowland Alston, III, represented Lewis at the PCR hearing. Robert D. Corney represented the State. In a written order signed September 12, 2012, Judge Manning denied relief and dismissed the application. Counsel for Lewis received a copy of the order on September 19, 2013. On September 26, 2013, Lewis filed a motion to alter or amend the judgment. The State filed a return on March 28, 2014. On April 1, 2014, Judge Manning signed an order denying the motion to alter or amend. A timely notice of intent to appeal was filed on April 14, 2014. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea was rendered involuntary by counsel's failure to secure a more favorable plea agreement prior to advising Petitioner to cooperate with law enforcement.

Lewis testified at the PCR hearing that counsel was ineffective in failing to obtain a better plea deal. (App. p. 73, lines 15-17). Lewis provided information to law enforcement in the hope of receiving an eight year sentence. (App. p. 69, line 18 – p. 70, lines 1-6). Lewis testified that after he provided information he had nothing to bargain with for a lesser sentence. (App. p. 72, lines 4-13). As a result Lewis, was forced to accept the negotiated plea for a sentence of between twelve (12) and fifteen (15) years. Lewis received a fourteen (14) year sentence.

Plea counsel testified that he hoped Petitioner's cooperation with law enforcement would result in a better plea deal but the best deal he was able to negotiate with the State was a negotiated sentence of between twelve (12) and fifteen (15) years. (App. p. 82, lines 4-24). Plea counsel testified that he did not believe the State was being fair to Petitioner in not offering a better plea deal in exchange for the information Petitioner provided about others involved. (App. p. 80, line 10 – p. 81, lines 1-5). Plea counsel disagreed with the State's assertion that Petitioner should not benefit from a more lenient plea deal because he waited too long to cooperate. (App. p. 79, lines 1-7).

The PCR judge found that plea counsel's performance was not objectively unreasonable. (App. p. 90). The PCR judge wrote, "Applicant, after hesitating for a while, did ultimately cooperate by providing the names of the other individuals involved in the robbery to law enforcement and by helping to try to set up a wiretapped conversation with them; however, according to counsel's credible testimony, by that time the information disclosed was not helpful and was insufficient to persuade the state to extend the eight (8) year plea offer Applicant sought." (App. p. 90). The PCR judge erred. Plea counsel did not testify that the information Petitioner

provided to law enforcement was no longer helpful. Plea counsel was ineffective in failing to secure the eight year plea agreement prior to advising Petitioner to cooperate.

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)).


“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. “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, 413, 683 S.E.2d 471, 474 (2009).

The guilty plea in the present case was rendered involuntary by counsel’s failure to secure a more favorable plea agreement **prior** to advising Petitioner to cooperate with law enforcement. After petitioner provided information to law enforcement, he had nothing left with which to bargain for the eight year plea agreement he sought. At that point Petitioner was forced to accept the offer from the State of a negotiated sentence of between twelve (12) and fifteen (15) years. Plea counsel was ineffective in failing to secure the eight year plea agreement prior to advising Petitioner to cooperate. There is a reasonable probability that but for counsel’s advice to cooperate with law enforcement, Petitioner would not have pled guilty and instead would have exercised his right to a jury trial.

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 23rd day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
L. CASEY MANNING, CIRCUIT COURT JUDGE

BARON LEWIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000777

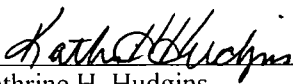
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Baron L. Lewis 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 May 23, 2012. 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 Baron L. Lewis.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of December, 2014

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IN THE SUPREME COURT

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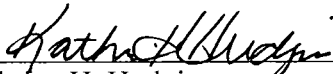
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-000777

CERTIFICATE OF SERVICE

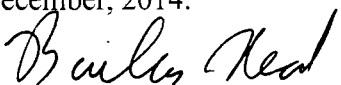
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Clay Mitchell, Esquire and Baron L. Lewis, #152591, at Kirkland Correctional Institution this 23rd day of December, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of December, 2014.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.