

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

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S.C. Supreme Court

GERALD SMITH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-000951

BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT.

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ISSUE PRESENTED

The Court of Appeals correctly ruled that plea counsel was ineffective for failing to object when the solicitor recommended the sentencing court impose the maximum sentence.

STATEMENT

On October 25, 2005, respondent appeared before the Honorable Reginald Lloyd in Richland County and pled guilty to voluntary manslaughter. A twenty-four (24) year sentence was imposed. April Sampson, Esquire represented respondent.

Respondent appealed his conviction and the appeal was dismissed by the Court of Appeals on April 11, 2008, after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Smith, Op. No. 2008-UP-226.

Respondent filed an application for post-conviction relief on October 28, 2008. An evidentiary hearing was held on December 8, 2009, before the Honorable L. Casey Manning. Respondent was present and was represented by Tricia Blanchette, Esquire. Respondent was represented by Brian T. Petrano, Assistant Attorney General. Respondent and his brother, Douglas R. Smith, testified at the hearing. April Sampson also testified at the hearing.

On May 4, 2010, Judge Manning issued an order denying and dismissing respondent's application for post-conviction relief. A subsequent Rule 59(e) motion was denied on June 10, 2010.

Respondent filed a petition for writ of certiorari with the Court of Appeals on February 4, 2011. Respondent filed a return dated March 21, 2011. The Court of Appeals granted the petition on January 17, 2013, and directed the parties to submit briefs. Respondent's brief was submitted on February 19, 2013. Respondent's brief was submitted on June 21, 2013. On February 5, 2014, the Court of Appeals issued an opinion reversing the decision of the lower court and granting respondent relief and remanded the case for resentencing.

Respondent filed a petition for rehearing on February 18, 2014. The Court of Appeals denied the petition on March 21, 2014. Respondent filed a petition for writ of certiorari on June 30, 2014.

Respondent filed a return on August 5, 2014. On December 10, 2014, this Court granted the petition. The brief of petitioner was filed on December 12, 2014.

This brief of respondent follows.

ARGUMENT

The Court of Appeals correctly ruled that plea counsel was ineffective for failing to object when the solicitor recommended the sentencing court impose the maximum sentence.

Respondent was originally charged with murder. A co-defendant, Areheart, was also involved. Plea counsel testified that she reached a negotiated agreement with the solicitor where the murder charge would be reduced to manslaughter in exchange for respondent testifying against the co-defendant. In addition, at respondent's guilty plea the State would be silent as to sentencing. (App. p. 156, lines 1-22).

On November 15, 2004, respondent appeared before the Honorable Clifton Newman and pled guilty to voluntary manslaughter. Sentencing was deferred until after respondent's help with the Areheart case. On October 13, 2005, respondent appeared before the Honorable Reginald Lloyd for sentencing. The solicitor explained the plea agreement to Judge Lloyd but left out the part about the State being silent as to sentencing. The solicitor stated she did not believe respondent was forthcoming enough to help with the Areheart case so they could not proceed to try Areheart for murder. She did acknowledge, however, that respondent did have a memory impairment due to a drug addiction to Oxycodone. The solicitor went on to describe the crime in detail along with crime scene photos. (App. p. 57, line 19 – p. 62, line 13). She then asked Judge Lloyd to sentence respondent to the maximum. (App. p. 64, lines 22-23).

Plea counsel disagreed with the State's presentation and noted that respondent had always been willing to testify. She said respondent's memory problems and addictions make it where he cannot be entirely consistent when he is asked questions. (App. p. 65, line 1 – p. 66, line 13). She noted that the State let Areheart plead guilty to accessory after the fact with a 10 year sentence and 65% parole eligibility. (App. p. 68, lines 15-22).

Judge Lloyd initially sentenced respondent to 27 years. (App. p. 71, lines 19-20). On reconsideration, the sentence was changed to 24 years. (App. p. 85, lines 23-24).

At no time did plea counsel ever object to the solicitor asking for the maximum sentence and advise the plea court that the negotiated sentence called for the State to be silent at sentencing.¹ Respondent stated at the evidentiary hearing that the solicitor knew from day one when the negotiating started that he had memory problems. (App. p. 143, lines 12-20). He was in total shock when the solicitor requested the maximum sentence rather than remaining silent as agreed. (App. p. 144, lines 4-11). If he had known this was going to happen, he would not have pled guilty but would have proceeded to trial. (App. p. 148, line 8 – p. 149, line 4).

Plea counsel testified that she told the solicitor when she wanted to negotiate that respondent had memory problems and had given four different statements. The solicitor knew this because she had the different statements.² (App. p. 159, line 17 – p. 160, line 12). Counsel said in past cases before Judge Lloyd he had given defendants as little as 10 years when the homicide involved a drug dealer. (App. p. 167, lines 8-25). The victim in this case was a drug dealer.

Plea counsel testified that it was a mistake on her part not to object and advise the court that the State had agreed to and was supposed to remain silent. (App. p. 170, lines 19-23; app. p. 173, lines 9-11; app. p. 174, lines 5-7).

In post-conviction, an applicant may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2)

¹ The complete plea agreement should have been put on the record. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

² The solicitor also chose not to use respondent as a witness against Areheart because Areheart's attorney filed a motion to disqualify respondent as a witness. (App. p. 60, lines 6-15).

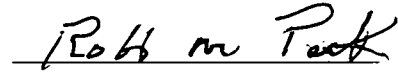
that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, respondent must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E. 2d 312 (1995).

In this case, counsel had admitted her error. She also admitted that she obtained ten (10) year sentences for her clients on cases of this type previously. In Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000), the Court held a defense attorney ineffective for failing to object when the solicitor recommended that the trial judge impose the maximum sentence in violation of a negotiated plea agreement. In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), another defense attorney was held ineffective in failing to withdraw a guilty plea after the State reneged on a plea bargain. The Court of Appeals was correct in finding plea counsel ineffective for failing to object when the solicitor asked the Court to impose the maximum sentence. Respondent is incorrect in stating "it appears Judge Lloyd was made aware of the prior agreement." (Cert. Petition p. 12). There is nothing in the record to show the extent of his knowledge of the plea agreement. And that did not excuse plea counsel from making a timely objection when the State asked for the maximum sentence. Without a timely objection, there was nothing to preserve on a direct appeal.

CONCLUSION

Respondent's writ should be dismissed.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 12th day of January, 2015

STATE OF SOUTH CAROLINA

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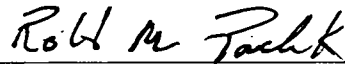
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-000951

CERTIFICATE OF SERVICE

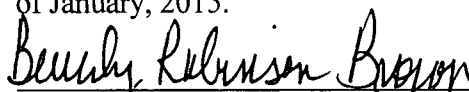
I certify that a true copy of the brief of respondent, in this case has been served on David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 12th day of January, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 12th day
of January, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: December 9, 2024