

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Lancaster County
William Jeffrey Young, Circuit Court Judge

S.C. Supreme Court

KEITH ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002103

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did the PCR court err in failing to grant Petitioner a belated direct appeal where plea counsel failed to file a notice of appeal following Petitioner's request?
- II. Did the PCR court err in failing to find plea counsel ineffective where Petitioner testified plea counsel guaranteed he would receive a sentence of no more than thirty years and the plea judge sentenced Petitioner to forty-five years' imprisonment?

STATEMENT

On September 6, 2012, the Lancaster County grand jury indicted Petitioner for murder (2012-GS-29-1160), burglary in the first degree (2012-GS-29-1162), possession of a firearm during the commission of a violent crime (2012-GS-29-1163), attempted murder (2012-GS-29-1164), and possession of a knife during the commission of a violent crime (2012-GS-29-1165). App. 117-118; 120-121; 123-124; 126-127; 129-130; 132-133. The charges were called for trial on December 3, 2012 before the Honorable Brooks P. Goldsmith. Doug Barfield represented the state, and Mike Lifsey represented Petitioner. App. 1. During the jury selection process, Petitioner decided to enter a guilty plea. App. 3, lines 1 – 19. Judge Goldsmith sentenced Petitioner to five years' imprisonment for each of the weapons charges, thirty years' imprisonment for armed robbery, thirty years' imprisonment for attempted murder, forty-five years' imprisonment for murder, and forty-five years' imprisonment for burglary in the first degree. All sentences were to be served concurrently. App. 52, line 13 – App. 53, line 11; App. 119; App. 122; App. 125; App. 128; App. 131; App. 134. Petitioner did not file a notice of appeal.

Subsequently, Petitioner filed an application for post-conviction relief (PCR). App. 55 – 62. The matter proceeded to an evidentiary hearing on July 28, 2014 before the Honorable W. Jeffrey Young. W. Michael Hemlepp, Jr. represented Petitioner and Croom Hunter represented the state. App. 70. By an order filed on September 22, 2014, Judge Young denied Petitioner relief. App. 107-116.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

I. The PCR court erred in failing to grant Petitioner a belated direct appeal where plea counsel failed to file a notice of appeal following Petitioner's request.

Relevant Facts

During the plea colloquy, the solicitor informed the plea judge of the guilty plea discussions as follows:

Your Honor, there have been plea discussions concerning [Petitioner]'s case and basically those discussions include the following: Number one, that all sentences on each of these indictments be run concurrent each with the other. And I think this is sort of a hybrid negotiation recommendation, but the negotiated part of it, I guess, is other than the murder charge he get the maximum sentences that the law provides on each offense other than on the murder charge. And then on the murder charge, Your Honor, he is pleading guilty to murder – he's pleading guilty as charged on all of these, and on the murder charge he gets any sentence you want to give him provided by the statute other than a life sentence, which means [thirty] years or any higher number you deem is appropriate after you've heard everything you need to hear in the case.

App. 3, line 21 – App. 4, line 10. Upon questioning by the judge, Petitioner revealed he had consumed cocaine, marijuana, and alcohol, but received no treatment for his addictions. App. 6, line 16 – App. 7, line 3. Further, Petitioner revealed that he had received mental health treatment. App. 7, lines 4 – 10. Numerous times during the plea colloquy, Petitioner revealed his limited understanding of the criminal justice system and the guilty plea proceeding. For example, Petitioner told the judge he had problems understanding discussions with plea counsel. App. 7, line 23 – App. 8, line 1; see also App. 17, lines 8 – 9 (Petitioner informed the judge he did not understand the big words being used). Additionally, Petitioner told the judge that he disagreed with the solicitor's recitation of the facts, but indicated he was pleading guilty anyway. App. 14, line 11 – App. 16, line

1. In fact, Petitioner told the judge he acted in self-defense. App. 16, lines 2 – 7. Despite the defense, Petitioner wanted to “go ahead and plead and get it over with.” App. 16, lines 10 – 11.

When the plea judge asked if anyone had promised him anything in exchange for his guilty plea, Petitioner responded, “It just won’t be life.” App. 20, lines 18 – 21. Thereafter, the judge accepted the guilty plea. App. 21, lines 5 – 9. Plea counsel then asked the judge to sentence Petitioner to thirty years’ imprisonment. Plea counsel argued the sentence was appropriate due to the severe physical abuse Petitioner suffered at the hands of his father. Plea counsel further informed the judge of Petitioner’s youth – only twenty-years old – at the time of the guilty plea. He explained that due to Petitioner’s youth, a sentence of a substantial term of years would result in Petitioner serving more time in prison than out “presuming he survives the rigors of prison.” App. 48, line 4 – App. 50, line 19.

The prosecutor countered the request for sentences of thirty years with a request that the judge “give him every year, every year that [the judge] will give him over [thirty] years for what he has done.” The solicitor had planned “to try to strike him out” if no plea agreement could be reached. The solicitor stated he intended to try the cases separately in order to invoke the recidivism statute. App. 51, line 7 – App. 52, line 12. Immediately following the solicitor’s argument Judge Goldsmith sentenced Petitioner to five years’ imprisonment for each of the weapons charges, thirty years’ imprisonment for armed robbery, thirty years’ imprisonment for attempted murder, forty-five years’ imprisonment for murder and forty-five years’ imprisonment for burglary in the first degree. All sentences were to be served concurrently. App. 52, line 13 – App. 53, line 11; App. 119; App. 122; App. 125; App. 128; App. 131; App. 134.

At the PCR hearing, Petitioner testified that he requested plea counsel file a notice of appeal, but plea counsel failed to do so: “I asked – I told him to put me in for appeal, but I never got put in

for appeal.” App. 81, lines 11 – 12; App. 86, lines 4 – 7. On the other hand, plea counsel, who testified on behalf of the state, claimed Petitioner never requested that he file a notice of appeal. App. 94, lines 15 – 18.

Generally, the PCR court found plea counsel’s testimony credible and Petitioner’s testimony not credible. App. 112. Regarding this specific issue, the PCR order stated: “This Court further finds that [Petitioner] has failed to establish any evidence to show he requested an appeal of his guilty plea.” App. 113. The PCR judge then made separate and specific credibility findings regarding this issue: “This Court finds [Petitioner]’s testimony in this regard to be not credible and finds [plea counsel]’s testimony to be credible.” App. 113. Thus, the PCR judge denied Petitioner’s requested for belated direct review.

Discussion

In South Carolina, “[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Pursuant to the rules and statutes governing PCR proceedings, an applicant is entitled to a full adjudication on the merits of the original petition. Id. This includes the right to seek appellate review of the denial of PCR and the right to assistance of counsel in that appeal. Id. 337 S.C. at 261, 523 S.E.2d at 755-56. This Court held an individual can appeal a denial of a PCR application after the statute of limitations has expired if the individual either (1) requested and was denied an opportunity to seek appellate review or (2) did not knowingly and intelligently waive the right to appeal. Austin, 305 S.C. at 455, 409 S.E.2d at 396. The South Carolina Supreme Court held that the procedures prescribed by Anders v. California, 386 U.S. 738 (1967) applied in PCR matters. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1998). Thus, appellate counsel is required to engage in a conscientious investigation of the possible grounds of appeal and brief arguable issues

before appellate counsel may ask to withdraw. Anders, 386 U.S. at 744. The United States Supreme Court held: “The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.” Id.

Thus, the question for the lower court was did Petitioner request an appeal and was denied an opportunity to seek appellate review or did Petitioner knowingly and intelligently waive the right to appellate review. The lower court determined Petitioner did not request an appeal; however, this determination was erroneous in light of the evidence presented. Petitioner testified unequivocally that he requested plea counsel file a notice of appeal so that an appellate court could examine the guilty plea proceedings. Petitioner pled guilty to all of the charges against him receiving no reduction or dismissal of any of the numerous charges. Additionally, the plea agreement called for Petitioner to receive maximum sentences on all charges except three counts. The remaining three charges - murder and first degree burglary – exposed Petitioner to mandatory minimum sentences. In fact, the murder conviction would require Petitioner serve at least thirty years’ imprisonment without the opportunity for early release through earned credits. Ultimately, the plea judge sentenced Petitioner to forty-five years’ imprisonment, which was fifteen years more than the minimum for murder and thirty years more than the minimum for burglary in the first degree. The only consideration Petitioner received for his acceptance of responsibility was the agreement he would not receive a life sentence. However, the imposition of a forty-five year sentence without the opportunity for early release was a de facto life sentence. As expressed by plea counsel, Petitioner would be sixty-five years old at the time of his release “presuming he survives the rigors of prison.” See App. 49, lines 21 – 24. Plea counsel’s failure to file a notice of appeal on Petitioner’s behalf was deficient performance prejudicial to Petitioner.

II. The PCR court erred in failing to find plea counsel ineffective where Petitioner testified plea counsel guaranteed he would receive a sentence of no more than thirty years and the plea judge sentenced Petitioner to forty-five years' imprisonment.

Relevant Facts

Petitioner incorporates all relevant facts discussed in Issue I, supra. At the PCR hearing, Petitioner testified that plea counsel advised him to plead guilty in exchange for a thirty-year sentence. App. 75, line 19 – App. 76, line 10. Petitioner decided to accept the plea offer of thirty years because he thought it “was a good reasonable number.” App. 76, line 21 – App. 77, line 11. Petitioner testified that if he had known he may receive a sentence greater than thirty years he would not have pled guilty and he would have insisted on going to trial. App. 79, lines 2 – 3. More specifically, Petitioner would have continued with his trial if he had known he could get forty-five years in prison. App. 80, lines 11 – 15.

Plea counsel claimed the solicitor never offered a plea agreement whereby Petitioner would receive a thirty-year sentence in exchange for his guilty plea to the charges. App. 92, lines 18 – 22. Plea counsel claimed he never told Petitioner he would be sentenced to thirty years in prison. Rather, he claimed, he told Petitioner he would ask the judge to impose thirty years. App. 93, lines 12 – 19.

The PCR court found no evidence to support Petitioner’s allegation that plea counsel advised him he would receive a specific sentence by pleading guilty. More specifically, the PCR court found Petitioner failed to establish that plea counsel promised him he would receive a thirty year sentence. Thus, the PCR judge denied Petitioner relief on this ground.

Discussion

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty

pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

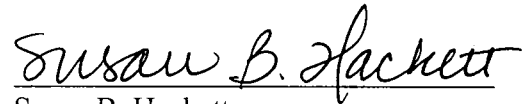
In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)(citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435.

Petitioner testified unambiguously that plea counsel informed him the plea agreement was for a sentence of thirty years. Petitioner's testimony is reasonable and credible in light of the guilty plea proceeding. Petitioner's only benefit for pleading guilty was that he would not receive a life sentence according to plea counsel. However, the term of years imposed amounted to a de facto life sentence, especially considering the forty-five year sentence must be served day-for-day. In light of Petitioner's testimony that plea counsel assured him a thirty-year sentence and the record demonstrating his receipt of a de facto life sentence despite the plea agreement's term that Petitioner not receive a life sentence, this Court should find plea counsel rendered deficient performance prejudicial to Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant him belated review of his guilty plea. Further, Petitioner respectfully requests this Court grant full briefing on the direct appeal issue presented and the PCR issue presented.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2015.

STATEMENT OF AUSTIN QUESTION

Did the plea judge err in sentencing Petitioner to forty-five years in prison, which amounted to a de facto life sentence, where the plea agreement specifically provided Petitioner, who was twenty years old at the time of the guilty plea, would not be sentenced to life imprisonment?

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LANCASTER COUNTY
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

KEITH ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

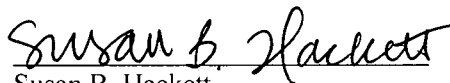
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Keith Robinson 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 July 28, 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 Keith Robinson.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of February, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

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KEITH ROBINSON,

PETITIONER,

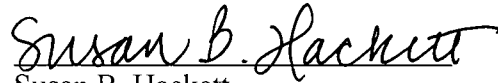
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

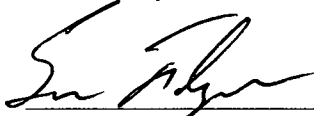
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Keith Robinson, #353355, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of February, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.