ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

JOHN FOREST HAM, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001834

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in concluding Petitioner did not establish ineffective assistance of counsel because nothing in the plea transcript showed he did not understand the potential for consecutive sentencing where both Petitioner and plea counsel testified without contradiction at the PCR hearing that Petitioner believed the terms of his plea deal dictated that he would serve all of his sentences concurrently?

STATEMENT

On May 4, 2010, the Greenville County Grand Jury indicted Petitioner John F. Ham, Jr. for assault and battery with intent to kill; possession of a weapon during the commission of a violent crime; resisting arrest with a deadly weapon; pointing and presenting a firearm; failure to stop for a blue light; and kidnapping. App. 105-118. On May 19, 2010, Petitioner proceeded to a plea hearing before The Honorable Edward Miller. Alex Stalvey represented Petitioner and Mark Moyer represented the State. App. 1.

The State alleged Petitioner was involved in three separate incidents leading to the charges. On August 2, 2009, Petitioner fired a pistol near and stabbed an acquaintance with whom he had gotten into a fight, which led to the assault and battery charge. On August 28, 2009, police officers approached Petitioner sitting in the driver's seat of a parked vehicle and ordered him out. He drove away and led the officers on a brief chase before losing the officers. And on September 17, 2009, police caught Petitioner at an auto shop attempting to steal a license plate. Petitioner fled on foot and eventually accosted a bus driver while pointing a pistol and ordered the occupants off the bus. Petitioner drove away with one occupant still on the bus. He led police on a brief chase before they disabled the vehicle and arrested him as he attempted to flee on foot. App. 8, line 3—App. 10, line 24.

Petitioner pled guilty as charged. App. 5, line 17—App. 6, line 4. The plea court agreed to defer sentencing until a federal court could sentence him for his plea to a carjacking charge based on the incident on September 17, 2009. App. 10, line 25—App. 11, line 23. In agreeing to the deferral, Judge Miller asked Petitioner, "You understand why they want to defer sentence? . . . The purpose of that being to allow him to do his time in federal custody?" Petitioner and Solicitor Moyer answered affirmatively. App. 11, lines 14-19.

On September 1, 2010, Petitioner appeared before The Honorable G. Edward Welmaker for sentencing. Alex Stalvey and Mark Moyer again represented the parties. App. 13. Plea counsel informed the sentencing court that Petitioner received a sentence of twenty-six years for the federal carjacking charge and sought concurrent sentences for the state charges. App. 25, lines 13-25. The State's Victim's Advocate then addressed the plea judge and asked "that whatever sentence [the plea judge] impose[d] that it be ran consecutive to the time that [Petitioner] had already been sentenced." App. 23, line 24—App. 24, line 4; App. 26, line 17—App. 27, line 3. The sentencing judge then sentenced Petitioner to concurrent sentences of twenty years for the assault and battery and associated weapon charge; three years for the failure to stop for a blue light charge; five years for the resisting arrest charge; and five years for the presenting a firearm charge; and he imposed a consecutive twenty-two year sentence for the kidnapping charge. App. 28, line 15—App. 29, line 2.

During the sentencing hearing, Petitioner was also sentenced for separate charges from the State Grand Jury arising from dealings in methamphetamine. Mills Ariail represented Petitioner for these charges. He explained to the sentencing judge that Petitioner was pleading pursuant to a written agreement and asked for his time any sentencing to run concurrent to his federal sentence. App. 16, lines 19-25. For these charges, the plea judge sentenced Petitioner to four fifteen-year sentences, a ten year sentence, and a thirty day sentence, all to run concurrent with his federal sentence. App. 20, line 9-20.

On September 14, 2011, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 31-43; App. 97. The State filed a return on March 15, 2012. App. 44-49; App. 97. On June 18, 2014, Petitioner appeared at an evidentiary hearing before The Honorable Robin B. Stilwell. Rodney Richey represented Petitioner and Karen C. Ratigan and Ashley A. McMahon represented the State. App. 50.

Petitioner testified that he understood that plea counsel met with his federal plea counsel, Solicitor Moyer, and a third attorney, John Crout, who was simultaneously prosecuting separate charges against Petitioner from the State Grand Jury. The three attorneys had arranged with judges other than the sentencing judge for Petitioner to serve his state and federal sentences concurrently and in federal prison. App. 60, line 16—Ap. 61, line 6; App. 74, line 22—App. 75, line 11. Petitioner stated he signed a plea agreement, but this condition was not written therein. Instead, attorney Crout informed him of the arrangement. App. 61, line 24—App. 25, line 8. Petitioner repeatedly testified he would not have pled had he known he would not serve all of his sentences concurrently in federal prison. App. 63, line 18—App. 64, line 9; App. 68, line 22—App. 69, line 10.

Next, plea counsel appeared and testified that he agreed with Petitioner to try to help him serve his time in federal prison, but he could not guarantee it. App. 78, lines 10-19; App. 79, lines 15-17. Counsel Ariail then appeared and testified that Petitioner clearly wanted to be in federal custody, so he agreed to work with plea counsel and the federal prosecutor to arrange that. However, he also said he could not guarantee the arrangement. App. 86, lines 14-25. Asked whether "[t]he intent of his sentence was [ever] to be a consecutive sentence . . . to his federal time," counsel Ariail replied, "Clearly, I can tell you I've never heard anybody saying we're trying to get consecutive sentences for him. And I understand he's got those now and that was never any spirit of the this thing." App. 87, lines 9-16. Counsel Ariail was then asked, "[I]f you had said, Hey, look, your federal sentence is going to run consecutive to your state sentence, do you believe that he would have pled to these state charges?" He replied, "I mean, I don't think so. I mean, we never got into that discussion in regards to it because I never had that discussion with [federal plea counsel] or [plea counsel] in regards to it. I mean . . . ." App. 88, lines 1-7.

The PCR court issued an order of dismissal on August 1, 2014 concluding Petitioner failed to establish ineffective assistance of counsel. App. 97-104. Specifically, the order stated the evidence did not support a finding that Petitioner did not plead knowingly because "no evidence in the guilty plea transcript [supports] [Petitioner's] assertion that his guilty plea was not knowing . . . ." App. 101.

ARGUMENT

The PCR court erred in concluding that Petitioner knowingly pled guilty by looking solely at the plea transcript, and the evidence in the record as a whole shows unquestionably that Petitioner did not understand he could receive consecutive sentences for his state charges.

The PCR court erred in concluding that Petitioner knowingly pled guilty by looking solely at the plea transcript, and the evidence in the record as a whole shows unquestionably that Petitioner did not understand he could receive consecutive sentences for his state charges. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland,* 466 U.S. at 687. The two-part test adopted in *Strickland* "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart,* 474 U.S. 52, 58 (1985); *see generally Brady v. United States*, 397 U.S. 742, 758 (1970) ("Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.").

Specifically, 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," a defendant sufficiently undermines the required

voluntary and intelligent character of a plea. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); *accord State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (holding record must reflect that defendant freely and intelligently waived constitutional trial rights and had full understanding of the consequences of the plea); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea"). It follows that deficient representation may deprive a defendant of his Constitutional right "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

In this case, overwhelming evidence in the record shows plea counsel wrongly led Petitioner to believe that all of his state and federal sentences would run concurrent, and he would not be subject to consecutive sentencing that the sentencing judge imposed. Petitioner stated he believed that plea counsel had arranged with his federal plea counsel, Solicitor Moyer, and attorney Crout to serve his state and federal sentences concurrently and in federal prison. Both plea counsel and counsel Ariail corroborated the arrangement in their testimonies to the PCR court. And while both specifically testified that they never guaranteed to Petitioner that he would spend time in federal prison, neither remotely contradicted Petitioner's asserted belief that all of his sentences would run

concurrently. The transcript of the sentencing hearing also shows plea counsel adhered to the purported arrangement by explaining to the sentencing judge that Petitioner was pleading pursuant to a written agreement and by asking for concurrent sentencing.

Moreover, the transcript of the plea and sentencing hearings show the courts recognized the existence of the agreement for concurrent sentencing. The plea court agreed to defer sentencing for the on-the-record purpose of allowing the federal court to sentence Petitioner to federal custody so Petitioner could "do his time" for the state charges there as well. And again, at the sentencing hearing, plea counsel specifically informed the sentencing judge of Petitioner's written plea agreement and his federal sentence, and he asked for concurrent sentencing for the state charges. As a result, the sentencing judge agreeably issued concurrent sentences for all of the state grand jury charges. Indeed, the only impetus explaining the sentencing judge's departure from concurrent sentences was the specific request for it by the State's Victim's Advocate—not an infirmity in the terms of the plea agreement as propounded by plea counsel or Petitioner.

The order of dismissal stated no evidence in the guilty plea transcript showed the guilty plea was not knowing. In drawing this conclusion the PCR court erred by failing to look outside of the plea transcript to the record as a whole. Indeed, as explained above, plain evidence inside the plea transcript and out showed Petitioner did not understand the potential sentencing consequences of the plea, and nothing the PCR court pointed to in its order or in the record generally, including in the transcript of his plea colloquy, shows Petitioner was aware of the potential for consecutive sentences.

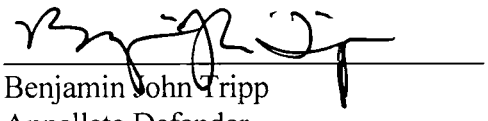
Finally, Petitioner repeatedly testified he would not have pled had he known he would not serve all of his sentences concurrently in federal prison. Counsel Ariail confirmed at the PCR hearing that the motive driving the plea deal was to have Petitioner serve consecutive sentences in

federal prison, and he testified he did not believe Petitioner would have pled had he understood the potential for a different outcome. Thus, the record establishes without contradiction that plea counsel deficiently informed Petitioner of the potential consequences of his guilty plea and that Petitioner would not have pled had he been properly informed. Plea counsel was therefore ineffective in undermining the required knowing character of Petitioner's guilty plea.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner John F. Ham, Jr.'s petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of March, 2015.

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CERTIFICATE OF SERVICE

I certify that a true copy of the 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, this 2nd day of March, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day of March, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.