ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Pickens County

Robin B. Stilwell, Circuit Court Judge

JOHN FOREST HAM, JR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001608

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR judge erred in dismissing Petitioner's PCR application pursuant to Spoone v. State, 379 S.C. 138 (2008), where Petitioner did not voluntarily, knowingly, and intelligently waive his right to PCR review, defense counsel Ariail was ineffective for failing to ensure that Petitioner was officially in federal custody before having Petitioner plead guilty to and be sentenced on his state charges, and for failing to have the verbal agreement that Petitioner would serve his time in federal prison included in the written plea agreement?

STATEMENT OF THE FACTS

On October 15, 2008, in Pickens County, the State Grand Jury indicted Petitioner for two counts of trafficking in 400 or more grams of methamphetamine, distribution of methamphetamine, trafficking in from twenty-eight to 100 grams of methamphetamine, trafficking in from ten to twenty-eight grams of cocaine, and possession of marijuana. App. 191 – 212. On April 9, 2010, Petitioner pled guilty before the Honorable G. Edward Welmaker. App. 1. On September 1, 2010, Judge Welmaker sentenced Petitioner to a concurrent term of fifteen years imprisonment. App. 36. Petitioner was represented by Mills Ariail. John Crout represented the State. App. 29.[1] Petitioner did not appeal his guilty plea or sentence.

On February 7, 2012, Petitioner filed a PCR application. App. 65 – 82. Respondent filed a return on July 31, 2012 requesting an evidentiary hearing. App. 89 – 95. Respondent filed an amended return and motion to dismiss Petitioner's PCR application on May 13, 2014. App. 96 – 98. A PCR hearing was held in Greenville County before the Honorable Robin B. Stilwell. App. 125. Rodney Richey represented Petitioner. Ashley A. McMahan represented the State. App. 125.

On July 6, 2014, Judge Stilwell issued an order of dismissal granting Respondent's motion to dismiss Petitioner's PCR application. Petitioner appealed Judge Stilwell's order. This petition for writ of certiorari follows.

[1] Applicant had pending criminal charges in Greenville County and in federal court, which will be discussed infra.

ARGUMENT

The PCR judge erred in dismissing Petitioner's PCR application pursuant to Spoone v. State, 379 S.C. 138 (2008), where Petitioner did not voluntarily, knowingly, and intelligently waive his right to PCR review, defense counsel Ariail was ineffective for failing to ensure that Petitioner was officially in federal custody before having Petitioner plead guilty and be sentenced, and for failing to have the verbal agreement that Petitioner would serve his time in federal prison a part of the written plea agreement.

Plea Agreement

On April 9, 2010, Petitioner, defense counsel Ariail, and assistant attorney general Crout signed a plea agreement where the State agreed to recommend a fifteen-year concurrent sentence for all of Petitioner's State Grand Jury drug charges in exchange for Petitioner's full and truthful disclosure of any known illegal drug activity in Pickens County. App. 99 – 101. The sentence for those charges were to run concurrent to Petitioner's other pending charges in Greenville County and in federal court.

In addition to giving full disclosure of illegal drug activity, the plea agreement required Petitioner to "knowingly and voluntarily waive any post-conviction relief action." App. 103.

Guilty Pleas

In addition to State Grand Jury charges, Petitioner had outstanding criminal charges in Greenville County and in federal court. App. 19; App. 3. On May 4, 2010, grand jurors in Greenville County indicted Petitioner for assault and battery with intent to kill, possession of a weapon during the commission of a violent crime, pointing and presenting a firearm, resisting arrest with a deadly weapon, failure to stop for a blue light, and kidnapping. App. 176 – 185. Alex

Stalvey represented Petitioner on the Greenville charges. Mark Moyer represented the State. App. 17.

On April 9, 2010, Petitioner pled guilty to his pending State Grand Jury charges before Judge Edward Welmaker. App. 3. Assistant attorney general Crout explained to the judge that Petitioner had pending federal charges and requested that sentencing be deferred until after Petitioner was sentenced of his federal charges. App. 9, lines 16 – 19. At the time of the guilty plea, Petitioner was serving active time in the department of corrections for a probation violation. Counsel explained to the judge that Petitioner needed to be free so that the U.S. Marshalls could take him into custody. App. 13, lines 4 – 8. The judge agreed to sign a consent order to give Petitioner credit for time already served on his probation violation in an effort to facilitate his release into federal custody. App. 14, lines 1 – 22. Petitioner's sentencing was deferred. App. 14.

On May 19, 2010, Petitioner pled guilty to his pending Greenville County charges before Judge Edward Miller. App. 17. Judge Miller asked Petitioner whether he understood that the attorneys wanted to defer sentencing to allow Petitioner to do his time in federal custody. App. 27, lines 14 – 19. Petitioner responded that he understood. App. 27, lines 14 – 19. The judge accepted Petitioner's plea and deferred sentencing until after Petitioner was sentenced on his federal charges. App. 27, lines 22 – 25.

On September 1, 2010, Petitioner was sentenced for the State Grand Jury charges. App. 31. Assistant Attorney General Crout stated that Petitioner was pleading pursuant to the written plea agreement signed on April 9, 2010. App. 32. Crout explained to the judge that Petitioner had been sentenced to 319 months imprisonment in federal court on August 31, 2010. App. 33. Crout requested that Petitioner's sentences "be served and basically be completed in the time period that he serves his federal sentence." App. 33. Both Crout and defense counsel Ariail asked the plea

judge to impose the recommended fifteen year sentence, pursuant to the plea agreement, and run it concurrent to the federal sentence. App. 34.

Judge Welmaker followed the State's recommendation and sentenced Petitioner to fifteen years imprisonment for his State Grand Jury charges to be served concurrent to his federal sentence. App. 36.

Petitioner was also sentenced for his Greenville County charges on September 1, 2010 before Judge Welmaker. App. 44 – 45. Solicitor Mark Moyer explained to Judge Welmaker that Petitioner had pled to the Greenville charges before Judge Miller on May 19, 2010, but sentencing was deferred. App. 37. The solicitor requested a fifteen year sentence on the Greenville charges and asked that it run concurrent to Petitioner's federal sentence and the sentence imposed for the State Grand Jury charges. App. 41.

During the sentencing, Brittany Roper, the victim's advocate for Greenville County, requested a consecutive sentence on behalf of the victim of the kidnapping charge, Tommy Williamson. App. 42. Judge Welmaker declined to follow the State's recommendation. The judge sentenced Petitioner to concurrent terms of twenty years for assault and battery with intent to kill, five years for pointing and presenting a firearm, five years for resisting arrest with a deadly weapon, and three years for failure to stop for a blue light. App. 45; App. 128 – 129. That sentence was to run concurrent to Petitioner's federal sentence. App. 128 – 129.

Judge Welmaker then sentenced Petitioner to twenty-two years imprisonment for the kidnapping charge to run concurrent to the failure to stop for a blue light. App. 45; App. 128 – 129. Petitioner was sentenced to a total of twenty-five years for his state charges and twenty-six years for the federal charges. App. 129. The two terms were consecutive. App. 129.

PCR Hearing

At the PCR hearing, Respondent moved the dismiss Petitioner's PCR application pursuant to Spoone v. State, 379 S.C. 138 (2008). Citing Spoone, Respondent argued that Petitioner "agreed to waive his right to appeal in a PCR" when he signed the plea agreement for his Grand Jury charges with defense counsel Ariail and the assistant attorney general Crout. App. 6, lines 8 – 13. Respondent explained that during the guilty plea, the judge asked Petitioner if he was "aware that the agreement that [he] signed is binding and that he's pleading freely and voluntarily." App. 130, lines 22 – 25. However, Respondent acknowledged that the plea judge did not specifically ask Petitioner whether he agreed to waive his right to PCR review. App. 131, lines 13 – 23.

PCR counsel argued that dismissing the Petitioner's application for post-conviction relief is an "extreme measure for the Court to take." App. 132, lines 4 – 6. He explained that the "spirit of this plea agreement" was to have Petitioner's sentence for his state and federal charges served in federal court. App. 132, lines 6 – 10. PCR counsel requested testimony to determine whether the plea agreement was valid and whether the State kept their end of the bargain. App. 132, lines 15 – 20. He argued that the intent behind the agreement was for Petitioner to serve his sentence in federal court and because Petitioner remained in the South Carolina Department of Corrections, the State violated the "spirit" of the agreement. App. 132, lines 23 – 24.

Respondent argued that looking at "the four corners of the agreement as a contract, nowhere in this plea agreement does it say it's [the State's] intent that [the] sentence run concurrent or consecutive to the federal charges." App. 133, lines 1 – 5. However, Judge Stilwell agreed to hear testimony from Petitioner and defense counsel in furtherance of Petitioner's application. App. 133, lines 16 – 18.

Petitioner testified at the PCR hearing. He explained to Judge Stilwell that his federal public defender, Jim Loggins, along with defense counsel Ariail, assistant attorney general Crout, and solicitor Moyer, all agreed to work together to allow Petitioner to serve his sentence in federal court if he pled guilty to all of his state charges. App. 136, lines 1 – 5. Further, explained Petitioner, if he pled guilty to all of his charges, his state sentence would run concurrent to his federal sentence. App. 136, lines 5 – 6.

Petitioner stated that Crout had visited him in jail and told him that he would arrange it so that Petitioner would be in federal custody when he was sentenced for his state charges. App. 136, line 23 – App. 137, line 4. Petitioner acknowledged that this communication was verbal and was not a part of the agreement. App. 137, lines 4 – 8. Petitioner stated that he signed the plea agreement for his State Grand Jury charges under the belief that he would serve his sentence in federal prison. App. 138, lines 6 – 8. If he knew he would have to serve his state sentence first, explained Petitioner, he would have elected to go to trial. App. 138, lines 22 – 25.

Defense counsel Ariail also testified at the PCR hearing. Counsel stated that Petitioner told him from the beginning that he wanted to serve his time in federal prison. App. 161, lines 10 – 15. Counsel explained that he and Petitioner's other attorneys had the judge sign consent orders in an attempt to release Petitioner into federal custody so that he would be in federal custody at the time he was sentenced for his state charges. App. 162, lines 1 – 6. However, the Federal Bureau of Prisons "didn't give any credence to that Order and disregarded it." App. 162, lines 6 – 8. Defense counsel acknowledged that Petitioner would not have pled to his charges if he knew his state and federal time would be consecutive. App. 162, line 19 – App. 163, line 4. Counsel also admitted that when the plea agreement was signed, he was still trying to work on getting Petitioner into federal custody. App. 163, lines 16 – 23.

Order of Dismissal

Judge Stilwell granted Respondent's motion to dismiss Petitioner's PCR application. App. 173. The judge agreed with Respondent that Petitioner voluntarily and knowingly waived his right to PCR review. App. 173. The judge also found that Petitioner understood the plea agreement and that the agreement was binding. App. 173.

Discussion

The PCR judge erred in dismissing Petitioner's PCR application pursuant to Spoone v. State. Petitioner did not voluntarily, knowingly, and intelligently waive his right to PCR review. Further, defense counsel Ariail was ineffective for failing to ensure that Petitioner was officially in federal custody before having Petitioner plead guilty and be sentenced. Defense counsel was also ineffective for failing to have the verbal agreement that Petitioner would serve his time in federal prison included in the written plea agreement.

Petitioner did not voluntarily and knowingly waive his right to PCR review of his conviction and sentence.

Any person who has been convicted of, or sentenced for, a crime has a statutory right to seek post-conviction relief of the conviction and sentence. S.C. Code Ann. § 17-27-20(a). Whether a defendant has knowingly and voluntarily waived such a statutory right "must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both." Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012) (citing Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000)).

In Spoone v. State, 379 S.C. 138, 665 S.E.2d 605, this Court held that a defendant may waive his right to appellate and PCR review by a written plea agreement if the waiver was made

voluntarily, knowingly, and intelligently. In that case, Spoone pled guilty of murder, burglary, first degree, and possession of a weapon during a violent crime as part of a written plea agreement.

Under the plea agreement, Spoone would plead guilty to all charges and "waive any and all appeals, PCR applications, federal habeas petitioner and any and all methods of review." Id. at 140, 665 S.E.2d at 606. During the guilty plea, the plea judge asked Spoone if he agreed to "waive all appeals, PCR applications, federal habeas corpus petitions and any other methods of review" of his guilty plea and sentence." Id. The plea asked Spoone, again, if he understood that he had "given up all of [his] rights as to appeal and to have this case further considered." Id. at 141, 665 S.E.2d at 606. Spoone responded affirmatively to each question.

Looking to the Fourth Circuit, this Court held that "the particular facts and circumstances" of the case must be considered to determine whether a waiver was knowing and voluntary. *Id.* at 143, 665 S.E.2d at 608. See United States v. Broughton-Jones, 71 F.3d 1143, 1146 (4th Cir. 1995) (To determine whether a waiver is effective, the court examines the particular facts and circumstances surrounding the case.).

This Court considered "(1) the background, experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing" to find that Spoone's waiver of his right to a PCR was made voluntarily, knowingly, and intelligently. Id.

Here, although the purported waiver was in the written plea agreement, neither Judge Welmaker nor Judge Miller asked Petitioner whether he agreed to waive his right to appeal or seek PCR review during the plea colloquy. While the State was only "recommending" a concurrent fifteen year sentence, neither judge informed Petitioner that any recommendation given by the State did not have to be accepted by the court. Neither plea judge ensured that Petitioner understood that they were not bound by the State's recommendation.

Considering the factors discussed in Spoone, the plea colloquies by Judge Welmaker and Judge Miller were insufficient to ensure Petitioner was fully informed of his right to seek PCR review and whether he fully understood that, once the guilty plea was accepted, the right would be forfeited.

Defense counsel was ineffective.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, 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; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. In analyzing this prong, a court will use an objective standard of reasonableness. Id. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury." Brady v. United States, 397 U.S. 742, 758 (1970). Accordingly, the Court "take[s] great precautions against unsound results." Id. An "unsound result" occurs when a criminal defendant does not knowingly, voluntarily, or intelligently plead guilty. Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, whether counsel was "deficient" turns on whether the guilty plea was entered voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). See Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("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.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

To show that the defendant was prejudiced by counsel's deficient performance during the guilty plea process, he must show that "but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Hill, 474 U.S. 52 at 59. When a court is evaluating 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).

Here, Petitioner made it clear during the PCR hearing that he wanted his state and federal time to run concurrent. Petitioner also clearly stated that he wanted to serve his time in federal custody. Petitioner articulated that he signed the plea agreement under the belief that he would in fact serve all of his time concurrently and in federal custody. Defense counsel even admitted that all of the attorneys were working to get Petitioner into federal custody so he would serve his sentences concurrently.

Judge Welmaker and Judge Miller were each made aware that all of the parties wanted Petitioner to serve his time in federal prison. Judge Miller even asked Petitioner during the plea

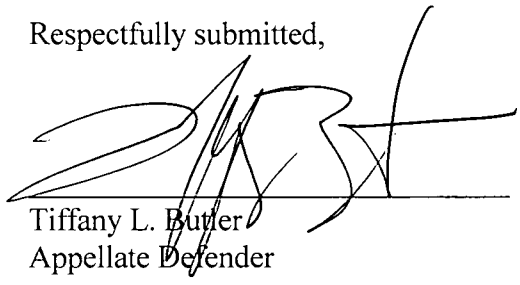
whether he understood what the parties were trying to accomplish in their request to have sentencing deferred. Defense counsel should have waited until Petitioner was sentenced and housed in a federal facility before having Petitioner plead guilty to any of the state charges.

Since Petitioner and all of the attorneys involved in Petitioner's cases were in accord with Petitioner serving his sentences in federal custody, the agreement should have been in writing. If counsel had memorialized that Petitioner was to serve his sentences in a federal facility and had waited until Petitioner was actually in federal custody before arranging a guilty plea and sentence, there would not have been any problems with the Federal Bureau of Prisons. Petitioner would be serving one concurrent twenty-six year sentence in a federal facility rather than remaining in state prison and facing a fifty-one year aggregate term of imprisonment. Had Petitioner known that he would have to serve consecutive time and serve that time in a state facility, he would have gone to trial rather than pleading guilty.

CONCLUSION

For the foregoing reasons, Petitioner John Forrest Ham respectfully requests this Court to grant his petition for writ of certiorari.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of March, 2015.

STATE OF SOUTH CAROLINA
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JOHN FOREST HAM, JR,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001608

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 Ashley A. McMahan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of March, 2015.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of March, 2015.

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