

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
L. Casey Manning, Circuit Court Judge

RECEIVED

APR 16 2015

S.C. Supreme Court

ISAAC FLYNN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-002085

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err by finding counsel provided effective representation where counsel failed to immediately object and move to withdraw Petitioner's guilty plea when, during the plea, the prosecutor offered extraneous, unrelated, and uncharged sexual allegations against Petitioner from another state, before the judge accepted the guilty plea, and Petitioner received a much harsher sentence than anticipated prior to the lodging of these extraneous, highly prejudicial sexual allegations?

STATEMENT OF THE FACTS

On February 23, 2013, Petitioner waived presentment to the Kershaw County Grand Jury and pled guilty to second degree criminal sexual conduct with a minor, attempted second degree criminal sexual conduct with a minor, second degree criminal solicitation of a minor, and attempted dissemination of obscene material to a person under age eighteen, before the Honorable G. Thomas Cooper. App. 4. Petitioner was represented by Neil J. Riley. Assistant Attorney General Bethany B. Miles represented the State. App. 1. Judge Cooper sentenced Petitioner to a concurrent sentence of twenty years' imprisonment. App. 27 – 28.

On August 14, 2013, Petitioner filed a PCR application. App. 30 – 36. The State filed its Return on December 11, 2013 requesting an evidentiary hearing. App. 37 – 42. Petitioner filed an amended PCR application on July 8, 2014. App. 43 – 44. On July 16, 2014, a PCR hearing was held before the Honorable L. Casey Manning. App. 45. Kristy Goldberg represented Petitioner. Megan Harrigan Jameson represented the State. App. 45.

On September 24, 2014, Judge Manning issued an order of dismissal. App. 113. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding counsel provided effective representation where counsel failed to immediately object and move to withdraw Petitioner's guilty plea when, during the plea, the prosecutor offered extraneous, unrelated, and uncharged sexual allegations against Petitioner from another state, before the judge accepted the guilty plea, and Petitioner received a much harsher sentence than anticipated prior to the lodging of these extraneous, highly prejudicial sexual allegations.

Guilty Plea

According to the State, law enforcement became involved with this case on February 6, 2012. App. 10, lines 20 – 21. Ms. Shepard, the minor's mother, reported that Petitioner had been engaging in a sexual relationship with the minor, who was fifteen years old at the time. App. 10, lines 21 – 25. Shepard and the minor lived in Kershaw County, South Carolina.

Petitioner, who was thirty-seven years old, allegedly met the minor through his daughter's Facebook account. App. 11, lines 1 – 4. Petitioner befriended the minor and began communicating with her on Facebook. Petitioner purportedly used his daughter's account as well as another false account in the name of "Tina Smith" to contact the minor. Petitioner began having sexual conversations with the minor and sent her pictures of his genitalia. App. 11, lines 9 – 10.

According to the State, "in late 2011, early 2012," Petitioner travelled from his home in North Carolina to Kershaw County to engage in sexual acts with the minor. App. 11, lines 10 – 16. After Shepard informed law enforcement of what had allegedly taken place between Petitioner and her daughter, an undercover identity was set up on Facebook of a fourteen-year old girl, "Jennifer Nixon." App. 11, lines 22 -25. Law enforcement set up the false account so that "Jennifer" would

be friends with the same friends as Petitioner. Petitioner sent “Jennifer” a friend request and began chatting with her on Facebook and by phone. App. 12, lines 1 – 4.

On March 22, 2012, Petitioner made arrangements to travel from North Carolina to Kershaw County to meet “Jennifer.” He was supposed to bring “alcoholic beverages and condoms.” App. 12, lines 14 – 19. Petitioner was arrested after he arrived at a park in Kershaw County to meet “the fourteen year old girl.” App. 12, lines 23 – 25. Petitioner purportedly admitted to chatting with “Jennifer” on Facebook, as well as having sexual conduct with Ms. Shepard’s daughter. App. 13, lines 1 – 5.

As she recited the State’s version of the facts, the prosecutor began telling the judge that Petitioner “also admitted to having sex with another sixteen year old girl in Maryland.” App. 13, lines 5 – 6. The prosecutor offered that Petitioner solicited two twelve year old girls to take their shirts off. App. 13, lines 7 – 12. The prosecutor also stated that “[s]tatements were given to law enforcement by other young girls” and that

“[t]he victim provided additional information to law enforcement regarding a cousin that she has in Maryland who . . . was sixteen that [Petitioner] also traveled to have sexual intercourse with as well as sent her images of child pornography.”

App. 13, lines 13 – 17.

The prosecutor went further, alleging to the court that

“[o]ther information involving [Petitioner] having conversations with what’s possibly another victim up on Maryland, that information has been sent up to Maryland.”

App. 13, lines 18 – 20.

Defense counsel did not object while the prosecutor was providing the judge with the extraneous facts, but instead, responded after she finished. Counsel responded that “this has nothing to do with what [Petitioner is] pleading to here today.” App. 13, lines 21 – 22.

After counsel's interjection and at the judge's request, the prosecutor offered the facts on which the four indictments were based. App. 14, lines 7 – 8. The judge then accepted Petitioner's guilty plea. App. 15, line 19. Counsel asked the judge "to consider a split sentence." App. 24, lines 24 – 25. However, the judge sentenced Petitioner to the recommended twenty-year concurrent sentence. App. 27 – 28.

PCR Hearing

Petitioner testified during the PCR hearing. Petitioner admitted to having sex with a girl in Maryland but explained that she was seventeen, not sixteen, which law enforcement had confirmed. App. 56, lines 12 – 15. Petitioner stated that he never confessed to soliciting the twelve year old girls, nor was he charged for it. App. 56, line 23 – App. 57, line 23. Petitioner also explained that law enforcement scanned his computer for child pornography, but "there was no child porn on [his] computer." App. 58, lines 5 – 8.

Petitioner stated that there was "no agreed-upon sentence" and that, to his understanding, sentencing was up to the judge. App. 59, lines 17 – 20. He explained that counsel objected to the extraneous information after "he leaned over and told counsel." App. 58, lines 16 – 23.

Defense counsel also testified. He acknowledged that the State made only a recommendation of twenty years. App. 89, lines 14 – 22. Counsel also explained that the prosecutor "kept dwelling upon other things that were completely extraneous" and that he "finally objected." App. 91, lines 7 – 9. Nonetheless, counsel admitted that he did not see a reason to "stand down" or withdraw Petitioner's guilty plea based on the State's unproven, extraneous allegations. App. 92, lines 23 – 25. Counsel stated that he did not want to withdraw "knowing [Petitioner] was facing a potential 60 years." App. 101, lines 2 – 3.

Order of Dismissal

The PCR judge dismissed Petitioner's allegations. The judge stated that counsel "took appropriate measures to protect his client when the prosecutor commented on unindicted alleged conduct." App. 124. The judge also stated that counsel "articulated a valid strategic basis for not moving to stand down based on a . . . fear that his client could receive a harsher sentence from a different court." App. 124.

Discussion

The PCR judge erred by finding counsel provided effective representation. Counsel failed to immediately object and move to withdraw Petitioner's guilty plea when, during the plea, the prosecutor offered extraneous, false, and highly prejudicial allegations which were unrelated to the indictments for which Petitioner was pleading guilty. Petitioner was never arrested for those allegations. Further, the judge had not yet accepted Petitioner's guilty plea, and counsel was requesting a lesser sentence.

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). In the context of a guilty plea, a court will conduct a two-prong test when determining whether defense counsel's assistance was ineffective. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Hill, 474 U.S. at 58 – 59. 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, 474 U.S. at 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)).

Second, the applicant must show that he was prejudiced by counsel’s deficient performance during the guilty plea process. Hill, 474 U.S. at 59. Specifically, the applicant must show that “but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Id. 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, defense counsel should have immediately objected to the extraneous, unindicted, alleged conduct that the prosecutor offered the court during Petitioner’s guilty plea. Counsel knew that the plea judge had not yet accepted the plea and that the State was only making a recommendation, to which the judge was not bound. Moreover, Petitioner stated the allegations were not true.

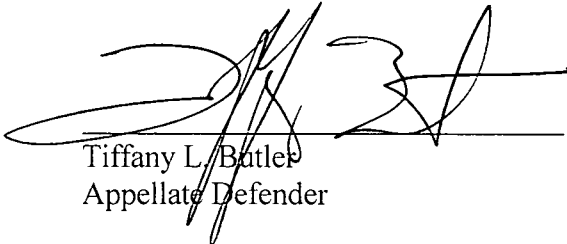
As soon as the prosecutor stated allegations for which Petitioner had not been charged or indicted, the guilty plea was tainted. The judge was allowed to consider alleged conduct that was not the subject of Petitioner’s guilty plea. Petitioner had not confessed to committing those offenses. The fact that the State was only making a recommendation gave counsel the opportunity to argue for a lower sentence, which he did. However, the judge had already heard the extraneous, unduly prejudicial allegations against Petitioner which were not relevant to the guilty plea.

But for defense counsel’s ineffective performance during the guilty plea, Petitioner would not have pled guilty. Petitioner would have had the opportunity to plead guilty in front of another plea judge, who had not been tainted by extraneous, unproven allegations that Petitioner said were not true, and to successfully request a sentence that was lower than twenty years.

CONCLUSION

For the grounds argued above, Petitioner Isaac Flynn respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

ISAAC FLYNN,

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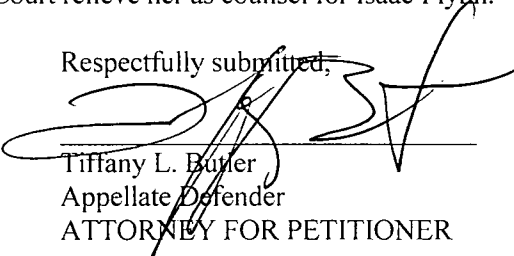
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Isaac Flynn 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 16, 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 Isaac Flynn.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of April, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
L. Casey Manning, Circuit Court Judge

ISAAC FLYNN,

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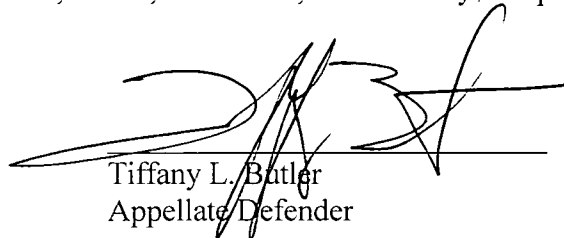
V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

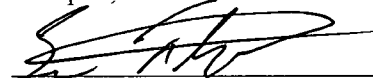
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Clayton Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Isaac Flynn, #354469, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 16th day of April, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of April, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.