ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Robert E. Hood, Circuit Court Judge

ERIC MARSH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002325

JOHNSON PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether Petitioner's *Alford* plea was knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that he would be sentenced to three to five years imprisonment if he pled guilty instead of proceeding to trial and where Petitioner was actually sentenced to fifteen years imprisonment?

STATEMENT

A Richland County Grand Jury indicted Petitioner at the May 2011 term of General Sessions for second degree criminal sexual conduct with a minor. App. 122-123. Petitioner pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) on March 20, 2013 before the Honorable G. Thomas Cooper.[1] App. 1. Assistant Solicitor Margaret Fent Bodman appeared on behalf of the state, and Theodore N. Lupton represented Petitioner. App. 1. Petitioner was sentenced by Judge Cooper to fifteen years imprisonment. He was also ordered to register as a sex offender. App. 38, ll. 17-23.

The South Carolina Court of Appeals dismissed Petitioner's direct appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. App. 47; App. 111.

On October 18, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 41-46. The state filed a return to this application dated February 24, 2014. App. 47-51. With the assistance of counsel, Petitioner filed an amended application for post-conviction relief on April 24, 2014 raising the issue argued in this petition. App. 52. The matter proceeded to an evidentiary hearing on September 2, 2014 before the Honorable Robert E. Hood. App. 53. Assistant Attorney General Ashleigh Wilson represented the state, and Anna Good represented Petitioner. App. 53. By order dated October 6, 2014, Judge Hood denied Petitioner relief. App. 110-121.

This petition for writ of certiorari follows.

---

[1] Petitioner also pled guilty on this date to a related second degree criminal sexual conduct with a minor charge that was pending in Lexington County. He waived jurisdiction and venue and agreed to plead guilty to the Lexington County charge in Richland County. Petitioner was represented on the Lexington charge by Bennett E. Casto. App. 3, ll. 7-20. This PCR case concerns only Petitioner's Richland County conviction.

ARGUMENT

Petitioner's *Alford* plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that he would be sentenced to three to five years imprisonment if he pled guilty instead of proceeding to trial and where Petitioner was actually sentenced to fifteen years imprisonment.

Guilty Plea

At the beginning of the guilty plea proceeding, the assistant solicitor informed the court that the state was recommending a sentence cap of fifteen years imprisonment on both the Richland County charge and the Lexington County charge to run concurrent. App. 3, ll. 21-25. After Petitioner's plea counsel told the court Petitioner was pleading guilty pursuant to North Carolina v. Alford, the court advised Petitioner of his constitutional rights including his right to a trial by jury. Petitioner said he understood his rights, but wished to waive his rights and plead guilty. App. 6, l. 9 – 8, l. 15.

The court never advised Petitioner of the sentencing range for second degree criminal sexual conduct with a minor nor did it inform Petitioner that the court was not required to accept the recommendation from the state.

The assistant solicitor then told the court the facts of the case. The solicitor stated that on September 27, 2010, the alleged victim, who was fifteen years old, disclosed to her mother that Petitioner, who was the boyfriend of the alleged victim's sister, had been sexually assaulting her for a period of about six months. The alleged victim claimed that while she was visiting her sister, Petitioner would come get her at night and take her to the attached garage where he ultimately had vaginal sex with her. These events eventually lead to the Richland County charge.

The assistant solicitor maintained that on October 25, 2010, after the alleged victim had disclosed, Petitioner picked her up from the bus stop in the morning, forced her into his car, and drove her to an abandoned house in Lexington County where he had oral and vaginal sex with her. While the two were driving around, Petitioner allegedly forced the alleged victim to call the Richland County investigator and recant her previous accusations. App. 10, l. 10 – 14, 10.

After the alleged victim returned home, she immediately reported the incident to her parents and was taken to the hospital where a "rape kit" was completed. App. 14, ll. 11-25. Semen was located on the vaginal and rectal swabs and on the underwear submitted. The analysis showed the source of the semen came from one male. A "CODIS hit" matched Petitioner and a subsequent DNA analysis confirmed it was Petitioner's semen. App. 16, ll. 9-15.

Petitioner disagreed with the facts as stated by the solicitor. He maintained that "just about everything" the solicitor said was incorrect. Plea counsel interjected and stated that Petitioner was pleading guilty under Alford because "he disputes some of the allegations." Petitioner eventually said, "I admit to some of the evidence within that case, but I do not admit to everything." App. 17, l. 2 – 20, l. 12.

The court found Petitioner's decision to plead guilty was freely, voluntarily, and intelligently made. It also found a factual basis for the plea. App. 20, ll. 13-19.

During mitigation, plea counsel asked the court "to consider, if not a time served sentence, something in the three to five range." App. 27, ll. 18-22. Judge Cooper ultimately sentenced Petitioner to the maximum fifteen year cap. App. 38, ll. 17-23.

PCR Hearing

Petitioner testified at the PCR hearing that from the beginning he always maintained his innocence and wanted to go to trial. App. 67, l. 22 – 68, l. 1. He said counsel told him it was in his

best interests to plead guilty because if he did not plead guilty then the solicitor would enhance his charges and he would be sentenced to life without parole. App. 62, ll. 20-24. Petitioner also maintained that while plea counsel advised him the sentencing range was zero to a cap of fifteen years, he also told Petitioner that no one ever receives the maximum sentence, and that Petitioner would be sentenced to somewhere between three and five years. App. 63, ll. 2-16; App. 75, ll. 19-25.

Moreover, Petitioner said that if he would have known he could be sentenced to more than five years, he would not have pled guilty and would have insisted on going to trial. App. 68, ll. 6-10; App. 75, ll. 9-13.

Theodore Lupton, Petitioner's plea counsel, testified that Petitioner "was resistant to the idea of pleading [guilty] to anything that didn't get him out [of jail]," but that Petitioner eventually agreed it was in his best interests to plead guilty. App. 85, ll. 3-10. Lupton explained that initially the solicitor "was looking at this as an LWOP [life without parole] case" and that it "took quite a bit of negotiations just to get [the solicitor] to . . . agree to the cap of 15 [years]." App. 84, ll. 19-24. According to Lupton, avoiding a possible life without parole sentence was "a big factor" in Petitioner's decision to plead guilty. App. 85, ll. 22-24.

Lupton maintained that he and Petitioner's counsel on his Lexington County charge "both made it clear" to Petitioner that the solicitor was recommending a cap of fifteen years imprisonment and that Petitioner could be sentenced anywhere in the range of zero to fifteen years. He said Petitioner wanted a sentence somewhere "in the three to five range" and he agreed to ask the court for a sentence in that range. However, Lupton testified that he told Petitioner he expected a sentence higher than five years. On the other hand, Lupton admitted he told Petitioner it was

unlikely he would be sentenced to the maximum fifteen year cap, but claimed he "made it clear to him that it could happen." App. 85, l. 25 – 86, l. 15.

Order of Dismissal

The PCR court found Petitioner's guilty plea was entered freely and voluntarily and that plea counsel had properly advised Petitioner of the potential sentence he could receive if he pled guilty. App. 117-118. The court further found Petitioner's testimony that plea counsel told him he would receive a sentence in the three to five year range not credible. App. 118. The court stated, "[Petitioner's] wishful thinking with regard to the sentence he would receive after pleading guilty did not equal a misapprehension by [Petitioner] concerning the possible range of sentence [he] could receive." App. 119.

Discussion

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that he would be sentenced to three to five years imprisonment if he pled guilty instead of proceeding to trial and where Petitioner was actually sentenced to fifteen years imprisonment.

The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). "The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59. "[T]he 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." Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275-276 (1942)). Additionally, a guilty plea that was "entered by one fully aware of the direct consequences . . . must stand *unless* induced by . . . misrepresentation (including unfulfilled or unfulfillable promises) . . . " Brady v. United States, 397 U.S. 742, 755 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (reversed on other grounds, 356 U.S. 26 (1958)). Accordingly, counsel provides ineffective assistance in the adversarial system when he induces the defendant to plead guilty.

In this case, Petitioner was induced into pleading guilty by plea counsel's promise to Petitioner that Judge Cooper was going to sentence him to three to five years imprisonment if he pled guilty. Petitioner's testimony was corroborated by the fact that plea counsel asked the court during Petitioner's guilty plea to sentence him somewhere in the three to five year range. His

testimony was also corroborated by plea counsel admission at the PCR hearing that he told Petitioner he would not be sentenced to the maximum fifteen year cap.

Plea counsel's promise prevented Petitioner's guilty plea from being knowingly and voluntarily made and, consequently, rendered it invalid. See Berry, 381 S.C. at 635, 675 S.E.2d at 427. A plea is not voluntary when it is induced by misrepresentation including unfulfilled promises. See Brady, 397 U.S. at 755, 90 S.Ct. at 1472. A reasonably competent criminal defense attorney would not have promised Petitioner he would be sentenced to three to five years imprisonment when the state was recommending a cap of fifteen years and when it was not a negotiated plea.

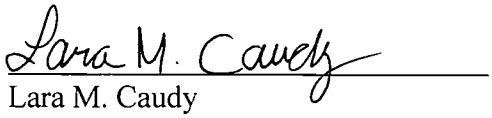
Additionally, there is a reasonable probability that but for plea counsel's promise, Petitioner would not have pled guilty and would have insisted on proceeding to trial. Petitioner testified that he would not have pled guilty had it not been for plea counsel's promise. App. 68, ll. 6-10. Thus, Petitioner was prejudiced by plea counsel's promise. Lockhart, 474 U.S. at 59. It was *only* because of this promise that Petitioner decided to plead guilty.

As a result of the invalid plea and the resulting prejudice, Petitioner's guilty plea should be vacated and he should be granted a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
ROBERT E. HOOD, CIRCUIT COURT JUDGE

ERIC MARSH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002325

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric Marsh 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 September 2, 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 Eric Marsh.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 21st day of May, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Robert E. Hood, Circuit Court Judge

ERIC MARSH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002325

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 Clay Mitchell, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Eric Marsh, #354716, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 21st day of May, 2015.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day of May, 2015.

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