

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

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JUN 11 2015

S.C. Supreme Court

TERRANCE MCCALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002285

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err by finding counsel provided effective representation where counsel told Petitioner that kidnapping carried a penalty of life imprisonment and if Petitioner accepted the State's plea offer of a negotiated twenty-year sentence, with dismissal of the kidnapping charge, he would be eligible for parole after serving sixteen years of his sentence, since Petitioner discovered, after pleading guilty, that kidnapping carried a penalty of thirty years' imprisonment and he would not be eligible for parole until serving eighty-five percent of his sentence, which prejudiced Petitioner?

STATEMENT OF THE FACTS

On March 29, 2010, a Spartanburg County Grand Jury indicted Petitioner for armed robbery, two counts of assault and battery of a high and aggravated nature (ABHAN), possession of a firearm during commission of a violent crime, pointing and presenting a firearm, and resisting arrest with a deadly weapon. App. 173 – 182. On October 22, 2010, Petitioner was also indicted for kidnapping and possession of a firearm during commission of a violent crime, which arose from the same incident. App. 183 – 184.

On January 31, 2011, Petitioner pled guilty to both counts of ABHAN, armed robbery, possession of a weapon during a violent crime, and pointing and presenting a firearm before the Honorable J. Derham Cole. App. 5 – 6. Andrea Price represented Petitioner. Barry Joe Barnette represented the State. App. 1.

Judge Cole sentenced Petitioner to twenty years' imprisonment, to run concurrently. App. 38 – 39. Petitioner appealed his guilty plea and sentence.

On April 18, 2011, the Court of Appeals dismissed Petitioner's appeal for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on May 18, 2011. App. 72.

Petitioner filed a PCR application on December 12, 2011. App. 41. Respondent filed its return on September 25, 2012, requesting an evidentiary hearing. App. 75. On January 22, 2014, a PCR hearing was held before the Honorable Roger L. Couch. App. 77. Leah B. Moody represented Petitioner. Suzanne H. White represented the State. App. 77.

On October 1, 2014, Judge Couch issued an order of dismissal. App. 162. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding counsel provided effective representation where counsel told Petitioner that kidnapping carried a penalty of life imprisonment and if Petitioner accepted the State's plea offer of a negotiated twenty-year sentence, with dismissal of the kidnapping charge, he would be eligible for parole after serving sixteen years of his sentence, since Petitioner discovered, after pleading guilty, that kidnapping carried a penalty of thirty years' imprisonment and he would not be eligible for parole until serving eighty-five percent of his sentence, which prejudiced Petitioner.

Guilty Plea

According to the State's version of the facts, on February 19, 2010, deputies with the Spartanburg County Sheriff's Officer were on patrol. App. 28, line 25 – App. 29, line 3. The deputies received a complaint about drug activity at a house on Williams Street in Spartanburg County. App. 29, lines 1 – 5. While Officers Harold and Strickland were observing the Williams Street house, they noticed a Toyota Celica drive up to the house. App. 29, lines 7 – 14. Officer Wilbanks, who was observing the house in an unmarked police car, noticed the Toyota drive up to the house for the second time that day. App. 29, lines 15 – 17.

After the Toyota drove away from the house, Officer Harold drove behind it and noticed the car had a "tinted tag" and a tag violation. App. 29, lines 18 – 21. Harold initiated a traffic stop of the car, while Officer Strickland pulled up behind him. App. 29, lines 22 – 24. Harold walked over to the driver's side and started talking to the driver. Strickland walked over to the passenger side and started talking to Petitioner. App. 29, line 25 – App. 30, line 2. After arresting the driver for possession of marijuana, officers "decided to put [Petitioner] in investigative detention." App. 30, line 17 – App. 31, line 12.

According to Officer Strickland, as he put the handcuffs on Petitioner, “they got into a fight.” App. 31, lines 14 – 17. Petitioner allegedly had a gun strapped to his ankle, pulled it out, and held it to Strickland’s neck. Petitioner demanded the officer’s gun, but the officer did not comply. App. 31, lines 22 – 25. Officer Strickland eventually gave Petitioner his gun. App. 32, lines 3 – 6. However, Officer Wilbanks drove up in his unmarked police car, got out of the car, and drew his weapon at Petitioner. Petitioner put his gun down and was placed under arrest. App. 32, lines 17 – 20.

During the guilty plea, the judge asked Petitioner whether the State promised him anything to induce him to plead guilty. Petitioner responded:

“A 20-year sentence that by, by law, something that passed last summer, I will only have to do 16 years of something.”

App. 15, lines 13 – 15.

The judge advised Petitioner:

“[I]f you receive a 20-year sentence and the law provides that you are eligible for parole after having served 80 percent of that sentence, that doesn’t mean that you’ll be released after 80 percent. That means the parole board will decide whether or not you should be released.”

App. 15, line 25 – App. 16, line 5.

Later in the plea, Petitioner asserted to the judge:

“My understanding when I came up here it was going to be 16 years.”

App. 17, lines 2 – 3.

Defense counsel joined in:

“That, that would be required under the law.”

App. 17, lines 4 – 5.

The judge then responded:

“Yeah. In other words, that’s what you have to do. You’ve got to serve at least that.”

App. 17, lines 6 – 7. Once again, before the State’s recitation of its version of the facts, the judge advised Petitioner:

“You’ve got to do 80 percent before you’re eligible for parole.”

App. 21, line 25 – App. 22, line 1.

Defense counsel did **not** object at any time the judge advised Petitioner he would be eligible for parole after serving eighty percent of his sentence. App. 15 – 22.

PCR Hearing

Petitioner testified during the PCR hearing. App. 78. Petitioner explained that the State made an offer of twenty-years for the armed robbery and ABHAN charges, which he rejected. Eight months later, the State indicted him for kidnapping for the same set of facts. App. 84, lines 22 – 25. Petitioner and defense counsel prepared for trial.

On the day of trial, while waiting to pick a jury, defense counsel told Petitioner that he needed to accept the plea offer that the state extended to him. App. 85, lines 7 – 8. Counsel informed Petitioner that “[he] was facing life in prison for kidnapping if [he] didn’t take the plea.” App. 85, lines 7 – 8. Counsel told Petitioner that, by accepting the plea offer of twenty years, with dismissal of the kidnapping charge, “[he] would serve no more than 16 years if that much.” App. 85, lines 21 – 23.

Petitioner stated that during the guilty plea, the plea judge advised Petitioner that he would have to serve eighty percent of his sentence, and counsel did not “object to that instruction from the Court.” App. 94, lines 20 – 22; App. 110, lines 9 – 10. Counsel did not inform Petitioner that he would have to serve eighty-five percent. In fact, Petitioner discovered that he would be ineligible

for parole until after serving eighty-five percent when he was moved from Level II custody to Level III custody in the South Carolina Department of Corrections.¹

Petitioner accepted the State's offer of twenty years because he did not want to face a life sentence and understood that he would only have to serve sixteen years in prison before he became eligible for parole. App. 94, lines 3 – 4; App. 99, lines 21 – 22. If Petitioner had known that the kidnapping charge carried a sentence other than life, he would have gone to trial. App. 121, lines 4 – 13.

Defense counsel also testified during the PCR hearing. App. 78. Counsel did not recall having discussions with Petitioner that he would only have to serve sixteen years of his sentence. App. 129, lines 3 – 4. Counsel also did not recall what she was thinking when she failed to object to the plea judge advising Petitioner that he would be eligible for parole after serving eighty percent, rather than eighty-five percent. App. 131, line 19 – App. 132, line 4. Counsel agreed that she calculated Petitioner's sentence as sixteen years prior to the plea, which was eighty percent of twenty. App. 132, line 24 – App. 133, line 1.

Order of Dismissal

Judge Couch dismissed Petitioner's PCR application. The judge found that Petitioner failed to meet his burden of proof as to all of his allegations of ineffective assistance of counsel. App. 167. The judge considered the issue of whether Petitioner would be eligible for parole after serving eighty percent versus eighty-five "a collateral matter." App. 168. Further, the judge found that defense counsel properly advised Petitioner to accept the State's plea offer. App. 169.

Discussion

¹Level II facilities are medium-security institutions. Level III facilities are high-security institutions designed to house violent offenders with longer sentences.

The PCR judge erred by finding counsel provided effective representation where counsel told Petitioner that kidnapping carried a penalty of life imprisonment and if Petitioner accepted the State's plea offer of a negotiated twenty-year sentence, with dismissal of the kidnapping charge, he would be eligible for parole after serving sixteen years of his sentence. After pleading guilty, Petitioner discovered that kidnapping carried a penalty of thirty years' imprisonment and he would not be eligible for parole until serving eighty-five percent of his prison sentence, which prejudiced Petitioner.

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); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). 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 there is a reasonable probability that "but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927

(2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997). 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); Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

In South Carolina, a “no parole” offense is an offense “punishable by a maximum term of imprisonment for twenty years or more.” S.C. Code Ann. § 24-13-100 (1976). A defendant sentenced to the Department of Corrections after being convicted of a “no parole” offense, is not eligible for early release, discharge, or community supervision, until he has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. § 24-13-150(A) (1976).

According to Section 16-3- 910, a person found guilty of kidnapping “must be imprisoned for a period not to exceed thirty years.” Armed robbery, under the S.C. Code, carries a penalty of “not less than ten years or more than thirty years.” S.C. Code Ann. §16-11-330(A) (1976). Therefore, kidnapping and armed robbery are both “no parole” offenses under the Code. An inmate convicted of either offense must serve eighty-five percent of his prison sentence before he is eligible for early release. See S.C. Code § 24-13-150(A).

Here, counsel provided ineffective representation. Counsel communicated to Petitioner that he was facing life in prison for kidnapping if he proceeded to trial. Counsel also explained to Petitioner that he would only serve sixteen years in prison if he accepted the State’s twenty-year offer for pleading to the armed robbery and ABHAN charges. However, counsel incorrectly advised Petitioner.

Kidnapping carries a maximum penalty of thirty years’ imprisonment. Armed robbery, which also carries a maximum of thirty years’ imprisonment, is a “no parole” offense, which requires an inmate to serve eighty-five percent of his sentence before becoming parole eligible, not

eighty percent. Further, when the plea judge incorrectly advised Petitioner that he would have to serve eighty percent of his sentence before being parole eligible, defense counsel did not object. In fact, she never objected during the guilty plea.

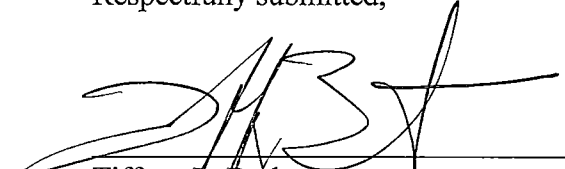
Petitioner pled guilty only because he was told by counsel that he faced life in prison if he was convicted of the kidnapping charge. Petitioner also believed that he would only serve sixteen years if he accepted the twenty year sentence the State offered him. In fact, Petitioner **told** the plea judge, during the guilty plea, that he understood he would only serve sixteen years. App. 15, lines 13 – 15; App. 17, lines 2 – 3. See Hammond v. United States, 528 F. 2d 15 (4th Cir. 1975) (finding counsel ineffective and defendant's guilty plea involuntary where defendant had been induced to accept plea offer on erroneous advice from counsel that if he did not plead guilty, he could be subject to a maximum sentence of ninety or ninety-five years when he, in fact, could have received a maximum sentence of fifty-five years).

If defense counsel had not incorrectly advised Petitioner that he could get life in prison if he was found guilty at trial, but would only serve sixteen years if he accepted the State's plea offer, Petitioner would not have pled guilty and would have proceeded to trial.

CONCLUSION

For the reasons argued above, Petitioner Terrance McCall respectfully requests this Court to grant his petition for writ of certiorari.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
ROGER L. COUCH, CIRCUIT COURT JUDGE

TERRANCE MCCALL,

PETITIONER,

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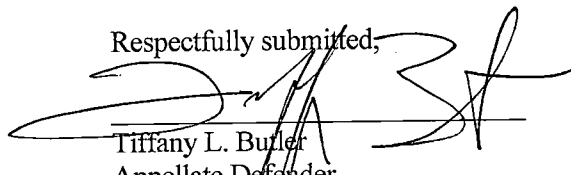
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terrance McCall 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 January 22, 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 Terrance McCall.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of June, 2015

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IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Circuit Court Judge

TERRANCE MCCALL,

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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 Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Terrance McCall, #339911, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 11th day of June, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of June, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.