STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

J. Derham Cole, Circuit Court Judge

DAVID L. PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002563

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where plea counsel incorrectly advised Petitioner that attempted armed robbery was not a violent crime or a most serious offense since the plea court's correction of this incorrect advice still left Petitioner with no option other than to continue with the guilty plea since counsel was not prepared for trial?

STATEMENT

A Cherokee County Grand Jury indicted Petitioner at the August 18, 2011 term of General Sessions for two counts of armed robbery and one count of attempted armed robbery. App. 73-81. On April 16, 2012, Petitioner pled guilty to two counts of common law robbery and one count of attempted armed robbery before the Honorable Roger C. Couch. App. 1. Assistant Solicitor Matthew Kendall represented the state, and Mitchell Slade represented Petitioner. App. 1. Judge Couch sentenced Petitioner to eight years imprisonment on each count to run concurrently. App. 20, ll. 9-10. Petitioner did not appeal.

On August 23, 2012, Petitioner filed an Application for Post-Conviction Relief (PCR). App. 22-28. The state filed a return to this application dated August 19, 2013. App. 29-33. The matter proceeded to an evidentiary hearing on September 30, 2013 before the Honorable J. Derham Cole. App. 34. Assistant Attorney General Suzanne H. White represented the state and J. Kenneth Robertson represented Petitioner. App. 34. By order dated March 13, 2014, Judge Cole denied Petitioner relief. App. 65-72.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel incorrectly advised Petitioner that attempted armed robbery was not a violent crime or a most serious offense since the plea court's correction of this incorrect advice still left Petitioner with no option other than to continue with the guilty plea since counsel was not prepared for trial.

Guilty Plea

At the beginning of the guilty plea proceeding, the assistant solicitor informed the court that Petitioner was pleading guilty to two counts of common law robbery and one count of attempted armed robbery. The solicitor indicated that his sentence recommendation was eight and half years imprisonment on each count to run concurrently. App. 4, ll. 4-11.

Judge Couch then advised Petitioner of the maximum sentence range on each charge and that attempted armed robbery was a violent, most serious offense that would count as a strike under South Carolina's two strikes law.[1] The court explained, "In the future if you pled guilty to or were found guilty of other offenses that qualified as a strike or [were] classified as violent, serious, or must serious, your plea in that case could be used in the future to make future sentences much more severe. It could result in a sentence of life imprisonment without the possibility of ever receiving a parole." Petitioner indicated that he had discussed this matter with plea counsel and that he understood the consequences of his plea. App. 6, ll. 2-15.

However, plea counsel expressed his confusion and notified the court that he had advised Petitioner that attempted armed robbery was a nonviolent offense. Judge Couch then allowed Petitioner and counsel to step down to further discuss and confirm the violent nature of attempted armed robbery. App. 7, l. 14 – 8, l. 8.

[1] See S.C. Code Ann. § 17-25-45.

When the parties came back on the record, the solicitor notified the court that he had changed his sentence recommendation from eight and a half years to eight years imprisonment to reflect Petitioner's unawareness of the violent nature of attempted armed robbery. App. 8, ll. 12-19. Plea counsel then explained, "Your Honor, I did want to say I appreciate you letting us stand this aside. I had told David [Petitioner] that the attempted armed robbery was a nonviolent offense. It is, in fact, a violent offense. I made a mistake. I just wanted to make sure we put that on the record clearly so this wouldn't be an issue somewhere down the line." App. 8, l. 21 – 9, l. 2.

Petitioner told the court that he was satisfied with his discussions with plea counsel during the break about the violent nature of attempted armed robbery and that counsel had fully explained the meaning of both the violent and most serious classifications with him. Tr. 9, ll. 3-21. Petitioner then said he was pleading guilty to the charges. App. 10, ll. 306.

After the court advised Petitioner of his constitutional rights, including his right to a trial by jury, and the solicitor reviewed the facts of the case, Judge Couch accepted Petitioner's guilty plea finding it was freely and voluntarily given and that there was a factual basis for the plea. App. 12, l. 10 – 17, l. 18. Judge Couch followed the state's sentence recommendation and sentenced Petitioner to eight years imprisonment on each count to be served concurrently. App. 20, ll. 9-10.

PCR Hearing

At the PCR hearing, Petitioner testified that plea counsel told him attempted armed robbery was a nonviolent offense when he agreed to plead guilty. He said he first learned of the violent nature of the charge during his guilty plea when Judge Couch advised him "that the charge was a violent, most serious charge and that it would count as one of my strikes." App. 37, ll. 13-21. Petitioner testified that he did not want to plead guilty to a violent or most serious offense and that when Judge Couch allowed him to step down during his guilty plea, he told plea counsel he

"wanted to get a continuance and go to trial." Tr. 37, l. 22 – 38, l. 5. However, plea counsel told him during their discussions that if Petitioner did not plead guilty that day, his case would be called for trial the following morning. Petitioner knew plea counsel was not prepared for trial because the two had not discussed their defense strategy and counsel had not contacted any witnesses or obtained any surveillance footage of the alleged robberies. App. 38, ll. 4-12. Petitioner testified that he had no other choice at the stage but to plead guilty.

Specifically, Petitioner said, "I notified my attorney that I wanted to continue it and that I wanted to go to trial. He said he wasn't going to get [a] continuance, we were going to take the plea today or go to trial in the morning. Based upon the fact that we weren't trial ready, I mean, it was no way possible to go to trial the next day." App. 43, ll. 16-22.

Mitch Slade, Petitioner's plea counsel, testified that there were times when Petitioner really wanted to go to trial and other times when he was willing to plead guilty. App. 47, ll. 20-21. He admitted he made a mistake when he advised Petitioner that attempted armed robbery was a nonviolent offense. Slade said he realized his error during the hearing when Judge Couch told Petitioner the consequences of pleading guilty. App. 48, ll. 17-19. The court agreed to allow the parties to step down so that Slade could properly advise Petitioner of the consequences of pleading guilty to a violent and most serious offense and determine whether Petitioner still wanted to go forward with the plea. App. 48, l. 20 – 49, l. 1.

Slade maintained that he told Petitioner he either had to accept the plea offer that day or go to trial because he believed if Petitioner turned down the offer that day, the solicitor would refuse to make another offer. Slade believed this was the only way for Petitioner to avoid the mandatory minimum ten year sentence that armed robbery carried. App. 49, ll. 1-17. Moreover, Slade maintained that if Petitioner had turned down the plea offer, his case would not have been tried the

following day. He said Petitioner's case would not have been put on the trial docket until at least the next term of court. Specifically, he said, "I'm sure that had we chosen the trial option we would have been given the time to get whatever we needed to do done in order to prepare [for trial]." App. 49, ll. 17-19; App. 50, ll. 6-18; App. 51, l. 21 – 53, l. 2.

Order of Dismissal

The PCR court found that while it was clear plea counsel misadvised Petitioner as to the violent nature of attempted armed robbery, this error was cured by the plea court and further discussions between Petitioner and plea counsel. The court also found that Petitioner failed to establish that he would have proceeded to trial but for plea counsel's incorrect advice. Therefore, the court concluded that Petitioner failed to prove plea counsel rendered ineffective assistance of counsel or that he was prejudiced by counsel's representation. App. 70-71.

Discussion

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel advised Petitioner before he pled guilty that attempted armed robbery was a nonviolent offense when in fact the charge was classified as violent and most serious and would count as one of Petitioner's strikes under South Carolina's two strikes law.

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea 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, but would have insisted on going to trial." Kolle v. State, 386 S.C. 578, 588-89, 690 S.E.2d 73, 78-79 (2010) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); See Strickland v. Washington, 466 U.S. 668 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the

outcome of trial." Kolle, 386 S.C. at 588-89, 690 S.E.2d at 78-79 (quoting Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997)).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Kolle, 386 S.C. at 588-89, 690 S.E.2d at 78-79 (quoting 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." Kolle, 386 S.C. at 588-89, 690 S.E.2d at 78-79 (quoting Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)). "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.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Additionally, "[t]he 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)).

In this case, plea counsel's performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Plea counsel was ineffective because he misadvised Petitioner of the violent nature of attempted armed robbery and that it was classified as a most serious offense before Petitioner pled guilty. Counsel's error was not cured by the plea court because even after the court advised Petitioner of the correct classifications, plea counsel told Petitioner if he did not go forward with the guilty plea that day, his case would be tried

the follow morning. Because Petitioner knew plea counsel was not prepared to go to trial the following day, he was forced to accept the plea offer and plead guilty. If plea counsel would have advised Petitioner of the correct law, Petitioner would have told counsel that he did not want to plead guilty and counsel could have started preparing for trial. Petitioner specifically testified that he did not want to plead guilty to a violent and most serious offense.

Plea counsel's ineffective assistance of counsel prevented Petitioner from making a "voluntarily and intelligent choice among the alternative courses of action open to [him]." See Hill v. Lockhart, 474 U.S. at 56 (quoting Alford, 400 U.S. at 31) (internal quotation marks omitted). Because plea counsel's deficient performance rendered Petitioner's guilty plea invalid, this Court should reverse the order of the PCR court and remand for 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

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

DAVID L. PARKER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002563

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David L. Parker 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 that was held on January 9, 2013. 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 David L. Parker.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of June, 2015

STATE OF SOUTH CAROLINA
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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 Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and David L. Parker, #250125, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29335, this 17th day of June, 2015.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day of June, 2015.

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