

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

Clifton Newman, Circuit Court Judge

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AUG 11 2015

S.C. Supreme Court

ASHERDON HOLLOWAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002692

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective in failing to move for reconsideration of the aggregate sixty two year sentence imposed?

STATEMENT

In February of 2010, the Sumter County Grand Jury indicted Holloway for Murder, attempted armed robbery, possession of a weapon during the commission of a violent crime and assault and battery with intent to kill, indictment #2010-GS-43-0323. On February 16, 2012, Holloway appeared before the Honorable R. Ferrell Cothran and pled guilty to murder, attempted armed robbery and assault and battery with intent to kill. John C. Clark represented Holloway at the guilty plea. Jason Corbett prosecuted the case. Judge Cothran sentenced Holloway to fifty (50) years for murder, fifteen (15) years concurrent for attempted armed robbery and twelve (12) years consecutive for assault and battery with intent to kill. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Holloway, No. 2014-UP-023 (Ct.App. filed January 22, 2014).

On February 24, 2014, Holloway filed an application for post conviction relief. The State filed a return on August 1, 2014. On October 2, 2014, a post conviction relief [PCR] evidentiary hearing was held before the Honorable Clifton B. Newman. Lance W. Boozer represented Holloway at the PCR hearing. Daniel Gourley represented the State. In a written order signed November 12, 2014, Judge Newman denied relief and dismissed the application. A timely notice of intent to appeal was served on December 15, 2014. This appeal follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective in failing to move for reconsideration of the aggregate sixty two year sentence imposed.

Petitioner pled guilty, without the benefit of any plea bargain (App. p. 12, lines 22-23), to murder, attempted armed robbery and assault and battery with intent to kill. A child was fatally shot during an attempted robbery. During the PCR hearing Petitioner Holloway alleged that plea counsel was ineffective in failing to object to the sentence imposed. (App. pp. 63-64). Holloway was sentenced to an aggregate term of sixty two (62) years. At the time of the shooting Holloway was only eighteen (18) years old. (App. p. 13, lines 18-19). During the PCR hearing Holloway alleged that the sentence was excessive, the result of passion and prejudice and should have been objected to in order to preserve the issue for appellate review. (App. p. 63, lines 20-24). Plea counsel admitted at the PCR hearing that he was “stunned” by the sentence imposed. (App. p. 83, lines 19-20). When asked if he considered objecting to the consecutive sentence plea counsel answered, “And to be honest with you, I don’t think an objection would have changed his opinion. I mean, this, you know, it’s almost like you had to be there to hear the facts, to hear the cries of this mother, and so I don’t think it would have changed his opinion.” (App. p. 84, lines 13-18).

During the guilty plea counsel told the judge, “In twenty –one years of practicing law I think this is perhaps the worst set of facts that I’ve ever seen.” (App. p. 12, lines 12-14). Plea counsel also told the plea judge, “To be honest with you I was expecting to see a monster when I got there and I basically saw a young boy and I just could not make sense of what I read and what happened because what happened didn’t fit who I was talking to.” (App. p. 12, lines 18-22).

When asked if he discussed filing a motion to reconsider sentence with Petitioner, plea counsel answered, “Well, we talked and, you know, I acknowledged that it was more than what I thought he would give him, but I don’t know if we talked specifically about a reconsideration. I

know he didn't request reconsideration because if he did I would have filed a motion for that.” (App. p. 85, lines 1-6).

In the order of dismissal the PCR judge wrote, “This Court finds Applicant’s allegation that Plea counsel was ineffective for failing to object [to] the plea judge’s sentence to be without merit.” (App. p. 95). The PCR judge erred. Trial counsel was ineffective in failing to move to reconsider the aggregate sixty two (62) year sentence imposed.

The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). If plea counsel had filed a timely motion to reconsider sentence, the judge would have been well within his discretion to reduce the sentence imposed.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland,

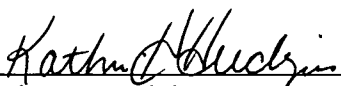
466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Plea counsel was ineffective in failing to move for reconsideration of the sixty two (62) year sentence imposed. If a timely motion to reconsider had been filed, the plea judge would have had the opportunity to reduce the sentence. If the plea judge denied the motion to reconsider sentence, Holloway could have appealed that decision arguing that the plea judge abused his discretion in refusing to reconsider the sentence. There is a reasonable probability that but for counsel's deficient performance, Holloway would have received a reduced sentence.

CONCLUSION

Based on the above argument, the sentence and conviction should be reversed and the case remanded for new proceedings.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of August, 2015.

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IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

ASHERDON HOLLOWAY,

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STATE OF SOUTH CAROLINA,

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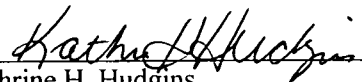
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Asherdon Holloway 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 October 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 Asherdon Holloway.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of August, 2015

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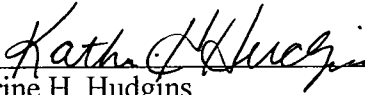
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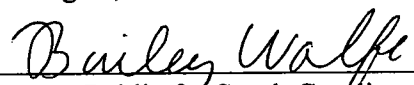
CERTIFICATE OF SERVICE

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 Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Asherdon Holloway, #349764, at Broad River Correctional Institution this 11th day of August, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.