

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Sumter County
Clifton Newman, Circuit Court Judge

TROY PEARSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000026

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for failing to review
all of the discovery material with Petitioner, rendering the guilty plea involuntary.....4

CONCLUSION8

ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for failing to review all of the discovery material with Petitioner, rendering the guilty plea involuntary?

STATEMENT

In October of 2007, the Sumter County Grand Jury indicted Petitioner Pearson for murder and possession of a weapon during the commission of a violent crime, indictment #2007-GS-43-849. On May 29, 2008, Petitioner appeared before the Honorable R. Ferrell Cothran, Jr. and pled guilty to voluntary manslaughter. Jack Howle represented Petitioner at the plea. Harry Conner represented the State. Judge Cothran sentenced Petitioner to thirty (30) years. A timely notice of intent to appeal was filed and the direct appeal perfected. On January 26, 2010, the South Carolina Court of Appeals dismissed the appeal after review pursuant to Anders v. California, 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377 (1967). State v. Pearson, Op. No. 2010-UP-042 (S.C.Ct.App. filed January 26, 2010).

On July 9, 2010, Petitioner filed an application for post conviction relief. The State filed a return on February 17, 2011. On September 17, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young. J. David Weeks represented Petitioner at the evidentiary hearing. Megan E. Harrigan represented the State. In an order filed October 23, 2012, Judge Young denied relief and dismissed the application. A notice of intent to appeal was not filed.

On February 3, 2014, Petitioner filed a second PCR application alleging ineffective assistance of PCR counsel in failing to file a notice of intent to appeal. The State filed a return on May 13, 2014. On October 2, 2014, an evidentiary hearing was held before the Honorable Clifton B. Newman. Lance S. Boozer represented Petitioner at the evidentiary hearing. Daniel Gourley represented the State. In December of 2014, Judge Newman signed a consent order granting a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). A timely notice of intent to appeal was served on January 8, 2015. This Austin petition and a separately filed petition for writ of certiorari follow.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for failing to review all of the discovery material with Petitioner, rendering the guilty plea involuntary.

During the PCR hearing Petitioner testified that plea counsel did not provide him with the discovery material. (App. p. 44, lines 5-11; p. 47, lines 12-17; p. 47, line 23 – p. 48, line 1; p. 48, line 18 – p. 49, lines 1-3). Petitioner testified that he was unaware that the deceased was a prostitute infected with AIDS. (App. p. 49, lines 1-3). When plea counsel was asked if he received discovery material from the State, counsel answered:

Well like I say sometimes it's late in the game when we get it, but I have no reason to think that I would not [sic] gotten it. Now like I say, I already knew what his statement said. The only other thing that would have been in that report they gave me was his record, which was virtually none. Possibly the autopsy report itself. But like I say, there were no other witness statements that I was concerned with. There was no other information or evidence that I was aware of, that I really could go negotiate with him. There was nothing in there that was well what about this. Can you explain this or this could give us a different option. What ever I received, I did not trigger that way.

(App. p. 64, lines 1-15). When asked if Petitioner asked to see the entire discovery packet, plea counsel testified, "Mr. Weeks, I can't say that I recall him asking specifically to see anything else that I might have, to be honest." (App. p. 64, lines 16-20). While plea counsel indicated that he believed he shared with Petitioner the documents to support a negotiated plea, counsel did **not** testify that he provided Petitioner with the entire discovery packet. (App. p. 64, lines 21-24).

When asked if the discovery provided by the State included information that the deceased had cocaine in her system, counsel answered, "I am not sure, but other than when the plea was being made, I think there were some comments made in regard to whether or not she had any cocaine in her system. Or had been using cocaine." (App. p. 68, lines 3-7). Petitioner testified that

if he had seen the discovery material, he would not have pled guilty and instead would have proceeded to trial. (App. p. 48, lines 18-21).

In the order of dismissal the PCR judge wrote:

After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is credible while Applicant's testimony is not credible. The Applicant has failed to prove that counsel was ineffective in his representation of the Applicant. Counsel met with his client on at least two separate occasions and fully discussed the charges against the Applicant, the State's evidence, and Applicant's version of the facts. Based on these consultations, Counsel performed a thorough investigation and at the request of his client, entered into negotiations with the State to secure a favorable plea deal for his client. This Court finds that Counsel's performance was reasonable and effective.

(App. pp. 77-78). The PCR judge erred.

Plea counsel was ineffective in failing to provide the entire discovery packet to Petitioner. Petitioner should have been informed that the deceased was a prostitute with AIDS and cocaine in her system at the time of her death. Plea counsel failed to provide Petitioner with this information. Plea counsel only met with his client, charged with murder, twice. Petitioner received a negotiated sentence of thirty (30) years, the maximum sentence allowed for voluntary manslaughter. Petitioner was prejudiced by counsel's deficient performance.

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.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the


voluntary and intelligent character of a 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." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

The guilty plea in the present case was rendered involuntary by the fact that plea counsel failed to provide the Petitioner with the entire discovery packet and failed to advise Petitioner that the deceased was a prostitute infected with AIDS who was high on cocaine at the time of her death. There is a reasonable probability that, but for counsel's deficient performance, Petitioner would not have pled guilty and instead would have proceeded to jury trial.

CONCLUSION

Based on the above argument, this court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
Clifton Newman, Circuit Court Judge

TROY PEARSON,

PETITIONER,

V.

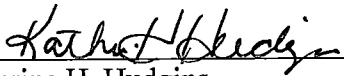
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-000026

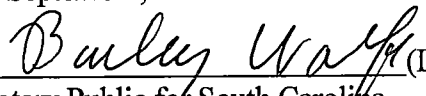
CERTIFICATE OF SERVICE

I certify that a true copy of the 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 Troy Pearson # 328627, at Lee Correctional Institution this 8th day of September, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of September, 2015.


Notary Public for South Carolina (L.S.)

My Commission Expires: October 24, 2021.