STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Carmen T. Mullen, Circuit Court Judge

JASON SANFORD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000410

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by the fact that neither plea counsel nor the plea judge advised Petitioner that any sentence imposed for murder would have to be served day for day?

STATEMENT

In April of 2012, the Anderson County Grand Jury indicted Petitioner Sanford for murder and possession of a weapon during the commission of a violent crime, indictment #2012-GS-04-968. On December 4, 2012, Petitioner and co-defendant, Lorenzo Sullivan, appeared before the Honorable J. Cordell Maddox and pled guilty to murder. Scott Robinson represented Petitioner at the plea. Pursuant to a recommendation by the State, Judge Maddox sentenced Petitioner and his co-defendant to thirty (30) thirty years. Petitioner did not appeal his sentence and conviction.

On June 12, 2013, Petitioner filed an application for post conviction relief. The State filed a return on July 2, 2014. On December 1, 2014, an evidentiary hearing was held before the Honorable Carmen T. Mullen. In a written order signed February 6, 2015, Judge Mullen denied relief and dismissed the application. A timely notice of intent to appeal was served on February 26, 2015. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by the fact that neither plea counsel nor the plea judge advised Petitioner that any sentence imposed for murder would have to be served day for day.

In his *pro se* application for post conviction relief Petitioner states that the guilty plea was not made knowingly because neither plea counsel nor the plea judge advised Petitioner that the mandatory minimum sentence of thirty (30) years for murder would have to be served day for day. (App. p. 37). During the PCR hearing Petitioner testified that plea counsel did not explain that the mandatory minimum sentence of thirty years would have to be served day for day. (App. p. 56, lines 3-15). Petitioner testified, "Well, when I took my plea, I didn't know that a thirty-year sentence was going to be a hundred percent day for day sentence. He [plea counsel] didn't explain to me that it was going to be a mandatory minimum of thirty years day-for-day. My understanding when he was explaining it to me, the only thing was eighty-five percent as a most serious violent crime. I didn't have no type of understanding that it was going to be a day-for-day sentence." (App. p. 56, lines 3-11). Petitioner testified that if he had known he had to serve the sentence day for day, he would have insisted on going to trial. (App. p. 56, lines 12-15; p. 57, line 21 – p. 58, 59, lines 1-4).

During the guilty plea the plea judge asked plea counsel, "And he understands that while there is a recommendation of 30 years, I'm not bound by that. I could sentence him to life in prison. Does he understand that?" (App. p. 10, lines 15-17). Plea counsel responded, "Yes, sir." (app. p. 10, line 18). The plea judge did not discuss parole eligibility or the fact that any sentence imposed for murder must be served day for day.

During the PCR hearing plea counsel testified that he did not advise Petitioner that he would be parole eligible after serving eighty–five percent of his sentence. (App. p. 86, line 22 – p. 87 lines

1-4). Plea counsel, however, never testified that he advised Petitioner that he would have to serve any sentence imposed for murder day for day. Pleas counsel testified that he does not give advice on parole eligibility. (App. p. 90, lines 12-13). In the order of dismissal the PCR judge wrote, "Counsel did not advise Applicant on parole eligibility and further noted that he does not advise his clients on the matter as a matter of his general practice." (App. p. 100).

The PCR judge ruled, writing in the order of dismissal:

> Last, this Court finds Applicant's allegation that counsel's performance was deficient and prejudicial for failing to advise him on parole eligibility to be without merit. In contrast, parole eligibility has been held to be a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). This Court further finds Applicant's contention that he would have proceeded to trial if had been advised on parole eligibility to be dubious and unavailing. Counsel's testimony and general practice approach on the matter was sound. Therefore, this allegation is summarily denied and dismissed.

(App. pp. 105-16). The PCR judge erred.

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).

Plea counsel was ineffective in failing to advise Petitioner that any sentence imposed for murder would have to be served day for day. In Randall v. State, 356 S.C. 639, 641, 591 S.E.2d 608, 609-10 (2004), this Court wrote:

> This Court has repeatedly acknowledged that normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983). See also Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000)(counsel is not ineffective for failing to advise a defendant regarding parole eligibility in connection with his guilty plea because it is a collateral consequence of sentencing); Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997) (unless counsel gives erroneous advice, parole information is not a ground for collateral attack of a guilty plea); Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)(guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence).

The present case does not involve plea counsel's failure to advise in regard to parole eligibility but rather the failure to advise in regard to parole **ineligibility**. Plea counsel's failure to advise Petitioner that he was not eligible for parole and would have to serve any sentence imposed for murder day for day was the equivalent of providing erroneous parole information. See Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). Petitioner testified that he believed that he was pleading guilty to an eighty-five percent most serious violent offense. (App. p. 56, lines 7-9).

In Brown v. State, 306 S.C. 381, 382-383, 412 S.E.2d 399, 400-401 (1991), this Court wrote, "The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is *not* informed of the collateral consequences. Parole eligibility typically is a collateral consequence of sentencing about which a defendant need not be specifically advised before entering a guilty

plea. This is because parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services." In contrast, the failure to advise of parole **ineligibility** should not be considered a collateral consequence as this is not within the province of Probation Parole and Pardon Services.

In Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the United States Supreme Court noted that while other courts have made the distinction between collateral and direct consequences of a guilty plea in the context of post conviction relief, the Supreme Court has never made that distinction. In Padilla the Court wrote:

> Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Strickland, 466 U.S., at 686, 104 S.Ct. 2052. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court. 253 S.W.3d, at 483–484 (citing Commonwealth v. Fuartado, 170 S.W.3d 384 (2005)). In its view, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." 253 S.W.3d, at 483. The Kentucky high court is far from alone in this view.
>
> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under Strickland, 466 U.S., at 689, 104 S.Ct. 2052. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

559 U.S. at 364-65, 130 S. Ct. at 1480-81, 176 L. Ed. 2d at 284. If this Court finds that the failure to advise that any sentence imposed for murder is parole ineligible and would have to be served day for day is a collateral consequence to sentencing, this Court should, pursuant to Padilla, refuse to make the distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance under Strickland. Counsel's failure

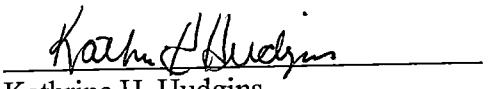
to advise Petitioner that the thirty year sentence, recommended by the State, would have to be served day for day, was objectively unreasonable and constitutes deficient performance.

There is reasonable probability that if plea counsel had advised Petitioner that any sentence imposed for murder would have to be served day for day, that Petitioner would not have pled guilty and instead would have insisted on going to trial. Petitioner testified that if he had known he had to serve the sentence day for day, he would have insisted on going to trial. (App. p. 56, lines 12-15; p. 57, line 21 – p. 58, 59, lines 1-4).

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2015.

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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 John Walt Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jason Sanford #340276, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 30th day of September, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of September, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.