ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Laurens County

Donald B. Hocker, Circuit Court Judge

BRIAN KEITH STEPHENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000471

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether the PCR Court erred in finding that plea counsel was not ineffective where plea counsel provided baseless advice to Petitioner that he would receive a sentence of between eighteen and twenty years despite the plea agreement cap of twenty-five years, in view of the damages resulting from and circumstances surrounding the incident, Petitioner's lengthy prior record, and where the record shows that plea counsel was not prepared to proceed to trial?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Laurens County Grand Jury on November 6, 2009 and March 26, 2010 for Felony DUI Resulting in Death, Hit and Run with Death, Possession of Stolen Vehicle, Felony DUI with Great Bodily Injury, Hit and Run with Great Bodily Injury, and Hit and Run with Minor Personal Injury. App. 143 – 154.

On January 26, 2011, Petitioner entered a guilty plea to the above indicted offenses before the Honorable Eugene C. Griffith, Jr. Petitioner was represented by Bill Mayer, and the State was represented by Assistant Solicitor Jack Hammack. App. 1. The plea agreement included a negotiated maximum sentence of twenty-five years and dismissal of two additional charges of Felony DUI with Great Bodily Injury and Hit and Run with Great Bodily Injury. App. 3.

Judge Griffith accepted Petitioner's guilty plea and sentenced him to concurrent sentences of one year for Hit and Run with Minor Personal Injury, fifteen years and $10,100 fine for Felony DUI with Great Bodily Injury, ten years for Hit and Run with Great Bodily Injury, five years for Possession of Stolen Vehicle, twenty-five years and a $10,100.00 fine for Felony DUI Resulting in Death, and twenty-five years and a $10,100.00 fine for Hit and Run with Death. App. 23-24.

No direct appeal followed.

First PCR Application and Hearing (2011-CP-30-00721)

On April 27, 2011, Petitioner filed his application for post-conviction relief ("PCR") alleging ineffective assistance of counsel and involuntariness of his plea. App. 26 – 32. The State filed its Return on August 22, 2011. App. 33 – 36.

On March 14, 2012, an evidentiary hearing was held before the Honorable Frank R. Addy. Petitioner was represented by Gary Williams, and the State was represented by Assistant Attorney

General J. Rutledge Johnson. App. 37. The witnesses at the hearing were Petitioner and plea counsel, Bill Mayer.

At the PCR hearing, Petitioner testified that if he had known he was going to receive a twenty-five year sentence, he would not have pled guilty. App. 47, ll. 4-11. He testified that plea counsel told him that he would probably get between eighteen and twenty years, despite the possible range of zero to twenty-five years. App. 47, ll. 18-22. Petitioner did not mention any other promises to the Court because plea counsel told him that if he did, he would go before another judge who would give him the full twenty-five year sentence. App. 57, ll. 3-7. Petitioner also testified that officers had promised they would recommend a fifteen year sentence during interrogation, but plea counsel instructed him that the judge would not accept his plea if he told him that any other promises were made or if he expressed dissatisfaction with plea counsel. App. 45, ll. 14-18; App. 45, l. 25 – 46, l. 3; App. 48, ll. 9-19; App. 53, ll. 12-19. Plea counsel also failed to raise Petitioner's long-time drug addiction in mitigation and failed to explain the circumstances surrounding Petitioner's prior felony DUI with death offense. App. 48, l. 20 – 50, l. 24. Petitioner further stated that he did not dispute that he was in the car at the time of the accident, but he was not the driver. App. 54, ll. 16-23; App. 57, l. 21 – 58, l. 4. However, he testified that plea counsel told him that an Alford[1] plea was not an option and that it was not in his "best interest" to tell the Court that he was not the driver. App. 45, ll. 22-25; App. 54, l. 24 – 55, l. 2.

Plea counsel testified that this case was about "damage control." App. 62, ll. 20-22. He tried to negotiate a plea agreement with a lower cap, but that the Solicitor's office would not entertain it due to Petitioner's record and the severity of the offenses. App. 63, ll. 7-18. Thus, the

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

only formal offer ever made by the Solicitor was for zero to twenty-five years. App. 63, l. 21 – 64, l. 11. Plea counsel further stated that he reviewed the questions that would be asked at the plea hearing but never instructed Petitioner to answer in any particular fashion. App. 64, l. 16 – 65, l. 17. However, he did admit that he told Petitioner "The only thing you are being promised is the 25 cap. If you say you're promised something else, there is not a deal and that plea will stand out and that's where we are." App. 65, ll. 5-8. He also admitted that he did not expect Judge Griffith "to hit him with the maximum under the cap" and he had hoped for eighteen or twenty years. App. 70, ll. 22-25. Additionally, plea counsel did not view law enforcement's statements to Petitioner regarding a fifteen year sentence as anything more than an "empty promise" and did not think it was relevant to the plea hearing. App. 72, l. 13 – 73, l. 1. Plea counsel also testified that Petitioner never indicated to him that there was a third party driving the car at the time of the accident and defended his failure to present more evidence of mitigation during sentencing as being the "call [he] made" based on "the judge's reaction to things." App. 65, ll. 18-22; App. 69, l. 24 – 70, l. 19.

Order of Dismissal (2011-CP-30-00721)

On April 16, 2012, Judge Addy issued an Order of Dismissal denying Petitioner's PCR application. He ruled that plea counsel was not ineffective for not presenting the fifteen year "offer" made by police to the plea court. Judge Addy also found that Petitioner's plea was voluntary despite Petitioner's testimony that he was advised by plea counsel that he would get a lesser sentence and that he was otherwise coerced. Lastly, Judge Addy found no merit in the contention that Petitioner had insufficient time to discuss the case with plea counsel, whom he only met with two to three times. App. 78 – 84.

Petitioner's PCR counsel did not file a timely Notice of Appeal.

Belated Austin[2] Review Granted

Petitioner filed a subsequent PCR application on September 16, 2013, asserting that his first PCR counsel, Gary Williams, was ineffective in failing to file a timely notice of appeal. App. 89 – 95. The State filed its Return and Motion to Dismiss All Claims Except Austin Review on October 25, 2013. App. 96 – 103.

An evidentiary hearing was held on February 18, 2014 before the Honorable Donald B. Hocker. Petitioner was represented by Carson Henderson, and the State was represented by Assistant Attorney General J. Rutledge Johnson. App. 104. On February 28, 2014, Judge Hocker issued an Order of Dismissal denying Petitioner's application for post-conviction relief. App. 136 – 142. Petitioner filed a timely Notice of Appeal.

On February 11, 201, Petitioner filed his Petition for Writ of Certiorari raising the question of waiver of the right to appellate review of the previous post-conviction relief. On April 29, 2015, the State filed a letter in lieu of a formal Return indicating that they no longer contested Petitioner's assertion that he is entitled to belated review of PCR issues pursuant to Austin v. State.

On July 23, 2015, this Court issued an Order granting the petition for a writ of certiorari from Judge Hocker's order, dispensing with further briefing, and reversing Judge Hocker's determination that Petitioner was not entitled to a belated review of Judge Addy's Order of Dismissal. This Court further ordered the parties to file an Austin petition from Judge Addy's order in accordance with King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

This petition for writ of certiorari on the King v. State issue follows.

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[2] Austin v. State, 305 S.C. 453, 246 S.E.2d 395 (1991).

ARGUMENT

The PCR Court erred in finding that plea counsel was not ineffective where plea counsel provided baseless advice to Petitioner that he would receive a sentence of between eighteen and twenty years despite the plea agreement cap of twenty-five years, in view of the damages resulting from and circumstances surrounding the incident, Petitioner's lengthy prior record, and where the record shows that plea counsel was not prepared to proceed to trial.

Plea counsel was deficient in advising Petitioner that the plea judge would give him a sentence of eighteen to twenty years even though the agreed upon cap was a twenty-five year sentence such that Petitioner's plea was not knowing, intelligent, and voluntary. Petitioner pled guilty and was sentenced to concurrent sentences with a total length of twenty-five years. But for plea counsel's advice, Petitioner would not have pled guilty and would instead have proceeded to trial and advanced his third party guilt theory. Beyond the obvious unreasonableness of any guarantee by an attorney regarding sentencing absent a judge's binding himself to a negotiation, plea counsel's sentencing advice was unreasonable in light of Petitioner's lengthy criminal history, which included a prior felony DUI with death, and the fact that the incident occurred within a day of Petitioner's release from incarceration for multiple counts of check fraud. App. 12, l. 20 - 13, l. 12. Additionally, the incident resulted in the death of one victim and injuries to two other victims. App. 3, l. 12 – 6, l. 4; App. 11, l. 18 – 12, l. 1; App. 13, ll. 14-15. Moreover, the solicitor made clear both before and after acceptance of the plea that the State was seeking imposition of a full twenty-five year sentence. App. 12, l. 18 – 13, l. 21; App. 21, l. 19 – 22, l. 3. In light of these facts and circumstances, plea counsel's advice was deficient and resulted in prejudice to Petitioner.

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 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the

adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). 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).

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. "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). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 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)). "The second, or 'prejudice,' requirement ... focuses on

whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59. In other words,

> 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.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

Reversal is required where counsel provides erroneous sentencing advice that induces the client's guilty plea. Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 486 (1991). In the present case, plea counsel indicated that his discussions with Petitioner did not relate to any trial strategy, but was rather a "damage control" effort whereby counsel was attempting to get the best plea bargain for Petitioner possible. App. 62, l. 20 – 63, l. 3. Plea counsel advised Petitioner that he could not enter an Alford plea or tell the plea judge about the third party driver of the vehicle otherwise his plea would not be accepted and he would risk being in front of a judge who would sentence him to the full twenty-five year sentence. App. 45, ll. 22-25; App. 54, l. 24 – 55, l. 2; App. 57, ll. 5-7. While both Petitioner and plea counsel admitted that a twenty-five year sentence was a possibility at the plea hearing, neither reasonably believed that Petitioner would actually get the full twenty-five year sentence. App. 47, ll. 15-22; App. 65, ll. 5-6. Plea counsel testified: "Did we expect Judge Griffith to hit him with the maximum under the cap? Uh, no, I didn't. I had hoped 20, 18, somewhere in the middle." Tr. 70, ll. 22-25.

Plea counsel testified that the solicitor would not entertain a maximum possible sentence of less than twenty-five years. App. 63, l. 7 – 64, l. 11. He further understood that the State's request for a higher cap related to Petitioner's lengthy record, including a prior felony DUI with death in

1996 for which he served ten years, and the damages resulting from the incident. App. 63, ll. 16-18. The driver of the vehicle, David Williams, died as a result of his injuries. His wife, Connie, also suffered injuries, and his adult daughter, Ally, was ejected from the vehicle and underwent several facial reconstruction surgeries as a result of the her injuries. App. 3, l. 12 – 6, l. 4; App. 11, l. 18 – 12, l. 1; App. 13, ll. 14-15. Petitioner was found at a Citgo station and arrested. His blood alcohol level was .157 and he tested positive for cocaine and marijuana. App. 12, ll. 1-20.

Even before acceptance of the guilty plea, the solicitor said: "[Q]uite frankly with that prior record and prior felony DUI we would obviously ask for the max." App. 13, ll. 16-21. Then, during the sentencing portion of the plea hearing, the solicitor argued:

> Your Honor, just briefly, for the past 27 years Mr. Stephens has seen little or no time out of prison. His record is this thick since he was 17 and they started keeping an adult record. He has not done more than a matter of months outside of prison in 27 years. He served time for felony DUI with death. Just gets out of prison less than a day prior to this on other charges, killed another person in a car, in a stolen car. Again as I said, that is why we would ask for a maximum sentence in this. It is, some people you just can't rehabilitate.

App. 21, l. 19 – 22, l. 3; see also App. 12, l. 20 – 13, l. 12. Thus, plea counsel's advice to Petitioner that he would receive a sentence between the fifteen years that Petitioner wanted and the twenty-five years that the State requested, was not objectively reasonable in light of the facts of the case and Petitioner's record. Petitioner was induced into accepting the plea offer by his belief, premised on plea counsel's unfounded advice, that he would receive a maximum sentence of twenty years.

Petitioner was prejudiced by plea counsel's deficient representation in that he pled guilty and received a sentence of twenty-five years rather than the eighteen to twenty years that he expected. Petitioner testified that had he known that he would receive the twenty-five year sentence, he would not have pled guilty. App. 47, ll. 4-6. Petitioner's testimony makes clear that he

took plea counsel's advice regarding evaluating risk seriously and was willing to avoid trial if incarceration would be for twenty years or less, but would have gone to trial rather than agree to any sentence of greater than twenty years. A defendant may "intelligently conclude[] that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." Alford, 400 U.S. at 37, 91 S.Ct. at 167. Petitioner's risk assessment was reasonable in light of his testimony that he could have raised a third party guilt defense at trial contrasted with the reality that even the best defenses are not always successful.

The State's case consisted of witness identifications of the vehicle that struck the van, physical evidence confirming that the stolen car was the one that caused the fatal accident, the fact that Petitioner was found in the woods behind the gas station where the stolen vehicle was found, DNA indicating that Petitioner was in the car at some point, and blood alcohol and drug testing confirming Petitioner was too drunk to drive and was under the influence of cocaine and alcohol four hours after the incident. App. 11, l. 6 – 12, l. 20. However, there was still no direct evidence to indicate that Petitioner was the driver of the stolen car at the time that it struck the van. App. 57, 2l. 1 – 58, l. 4. When asked if he felt like he was fully prepared for Petitioner's case, plea counsel responded that he was "certainly prepared ***for the plea***." App. 67, ll. 10-14 (emphasis added). Had the case proceeded to trial, plea counsel would have expectedly transitioned out of "damage control" mode and fully explored Petitioner's defenses, including third party guilt. See App. 65, ll. 13-17; App. 69, ll. 9-17. Thus, there is a reasonable probability that Petitioner would have proceeded to trial but for plea counsel's misadvise regarding sentencing.

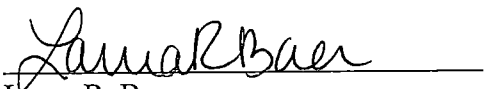
Therefore, plea counsel was ineffective. Plea counsel was deficient in providing baseless advice to Petitioner that the plea judge would not sentence him to the maximum under the agreed upon cap resulting in the entry of an unknowing, unintelligent, and involuntary plea. Petitioner was

prejudiced because were it not for this misrepresentation, Petitioner would not have pled guilty but would instead have proceeded to trial. Petitioner is accordingly entitled to vacation of his guilty plea and new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Brian Keith Stephens respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LAURENS COUNTY
DONALD B. HOCKER, CIRCUIT COURT JUDGE

BRIAN KEITH STEPHENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000471

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brian Keith Stephens 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 Febrary 18, 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 Brian Keith Stephens.

Respectfully submitted,

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of October, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Donald B. Hocker, Circuit Court Judge

BRIAN KEITH STEPHENS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000471

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari in this case has been served on J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Brian Keith Stephens, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, on this 19th day of October, 2015.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of October, 2015.

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