

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

DUSTIN RAY SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000526

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by the fact that Petitioner believed he would receive a sentence of seven or eight years but instead was sentenced to thirteen years?

STATEMENT

In March of 2013, the Richland County Grand jury indicted Petitioner Simmons for kidnapping, resisting arrest while assault on a police officer, assault and battery first degree and burglary first degree, indictments#2013-GS-40-1996, 1997, 1999, 2105. In April of 2013, the Richland County Grand Jury indicted Simmons for an additional count of resisting arrest while assault on a police officer, 2013-GS-40-2000. On August 14, 2013, Simmons pled guilty as charged before the Honorable Robert E. Hood. Courtney Gibbes represented Simmons. Hans Pauling represented the State. Pursuant to the State's recommended sentence of a cap of fifteen (15) years, Judge Hood sentenced Simmons to thirteen (13) years and ordered sexual offender registry. A timely notice of intent to appeal was filed but dismissed pursuant to Rule 203(d)(1)(B)(iv) SCACR.

On January 7, 2014, Simmons filed an application for post conviction relief. The state filed a return on March 28, 2014. On December 9, 2014, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. Anna R. Good represented Simmons at the PCR hearing. J. Clayton Mitchell represented the State. In a written order filed March 2, 2015, Judge Kinard denied relief and dismissed the application. A timely notice of intent to appeal was served and filed on March 13, 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 Petitioner believed he would receive a sentence of seven or eight years but instead was sentenced to thirteen years.

In the application for post conviction relief Petitioner alleges that the guilty plea was unintelligent and involuntary. (App. p. 42). During the PCR hearing when asked what he thought his sentence was going to be, Petitioner answered, "Well, She had told my brother I was going to do seven or eight years, but she said I wasn't going to do the whole 13 years. I thought I was going to do about six or seven." (App. p. 58, lines 20-23). Petitioner stated that counsel did not actually tell him that he would receive a sentence of seven or eight years but his brother told him that counsel told the brother that Petitioner would receive a sentence of seven or eight years. (App. p. 59, lines 2-9). Petitioner testified that he would not have pled guilty if he had known he was going to receive a thirteen year sentence. (App. p. 60, lines 1-6).

Plea counsel testified at the PCR hearing, "And I think - I've heard him say seven or eight years. I think that's what we hoped to get was seven or eight years. I know he knew it was up to the judge. We discussed that. We discussed he was facing zero to fifteen" (App. p. 70, lines 22-25). During the guilty plea counsel advised the plea judge that Petitioner had been diagnosed with low functioning IQ, bipolar and depressive disorder. (App. p. 4, lines 10-25).

In the order of dismissal the PCR judge wrote:

Applicant claims Counsel advised him he would receive a sentence between 7-8 years of imprisonment, thus rendering his guilty plea involuntary. This Court finds this contention without merit. This Court finds the record reflects Applicant was advised of the waiver of his constitutional rights by the plea court. This court finds very credible Counsel's testimony regarding her preparations and advice concerning the case and the amount of time Applicant was facing. The record reflects Applicant admitted his guilt to the plea court. This Court finds Applicant's testimony regarding a promise of a particular sentence not credible. The record reflects that

applicant was further advised by the pleas court of the maximum sentence he could receive on each charge.

The PCR judge erred. Plea counsel was ineffective in failing to fully explain a "sentencing cap" to her client with a low functioning IQ and a history of mental health issues.

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)).

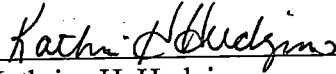
“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character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

Counsel's failure to fully explain a “sentencing cap” to her client with a low functioning IQ and a history of mental health issues fell below an objective standard of reasonableness. There is a reasonable probability that, but for counsel's error, Petitioner would not have pled guilty, but would have insisted on going to trial. Petitioner testified that he would not have pled guilty if he had known he would receive a thirteen year sentence. (App. p. 60, lines 1-6).

CONCLUSION

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

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

DUSTIN RAY SIMMONS,

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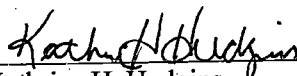
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dustin Ray Simmons 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 December 9, 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 Dustin Ray Simmons.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of November, 2015

STATE OF SOUTH CAROLINA

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Certiorari to Richland County

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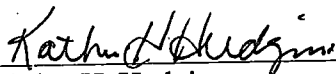
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RESPONDENT

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 Clay Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Dustin Ray Simmons, #243368, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827 this 12th day of November, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of November, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.