

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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DEC - 9 2015

Certiorari to Florence County
D. Craig Brown, Circuit Court Judge

S.C. Supreme Court

RODNEY D. IVEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001314

JOHNSON PETITION FOR WRIT OF CERTIORARI

JOHN H. STROM
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in finding plea counsel provided effective assistance of counsel where Petitioner asserts that he would have gone to trial had plea counsel not told him the plea judge would sentence him to no more than thirty years imprisonment?

STATEMENT

Indictment

On January 5, 2012, the Florence County Grand Jury indicted Petitioner for the murder of his wife, Devin Ham Ivey. App. 80. At a later date, Petitioner was directly indicted for burying a body without proper notice and giving false information to law enforcement. App. 3, ll. 2-7.

Plea Hearing

On June 8, 2012, a plea hearing was held before the Honorable Michael G. Nettles. App. 1 - 31. Chief Public Defender Scott Floyd represented Petitioner and Solicitor Ed Clements represented the State. The guilty plea was entered without negotiations or recommendations, but the State declined to file a notice of intent to seek the death penalty. App. 3, ll. 3-19. The State also *not proessed* the other charges for burying a body without proper notice and giving false information to law enforcement *Id.*

The State recounted the factual basis for plea. Petitioner and his wife had rented a hotel room at the Budget Inn outside of Olanta. App. 6, ll. 7 - 11, ll. 12. Petitioner began heavily using cocaine. At some point, his wife attempted to leave the hotel and Petitioner, in a rage, choked her to death. *Id.* The State averred that after murdering her Petitioner laid her body in one of the hotel bed and covered her with bed sheets. Petitioner continued to do drugs and, when visited in his hotel room by his drug dealer and others, he claimed that his wife was simply “passed out.” *Id.*

Petitioner then buried her body several days later wrapped in hotel bed sheets and reported her missing. *Id.* Petitioner denied involvement in her “disappearance,” but inconsistencies in his explanation of her disappearance ultimately led the police to arrest him. Several days after being arrested, Petitioner confessed to law enforcement and led them to her body. *Id.*

Judge Nettles accepted the factual basis for the guilty plea and, following a colloquy with Petitioner, found that Petitioner had freely and voluntarily entered into the guilty plea. App. 11, ll. 23 - 15, ll. 9.

Plea counsel argued for the minimum sentence of thirty years citing to Petitioner's history of drug abuse and his longtime work as an informant for local law enforcement which had allowed him to avoid jail time for past violent offenses. App. 24, ll. 3-22. Counsel noted that, with the help of law enforcement, Petitioner had received a personal recognizance bond for an unspecified property crime just three months before killing his wife. *Id.* Judge Nettles sentenced Petitioner to life imprisonment. App. 30, ll. 1-11.

On June 9, 2012, Petitioner attempted to file a *pro se* notice of appeal. In an effort to state the grounds for appeal Petitioner argued that "I was told one thing by my lawyer and another [thing] happened when I got in front of the Judge so I want an appeal on my sentence." App. 32. On April 23, 2013, the South Carolina Court of Appeals filed an order dismissing Petitioner's notice of appeal for failing, "to provide sufficient reasoning for filing an appeal from a guilty plea." App. 33.

PCR Application and Evidentiary Hearing

On October 31, 2013, Petitioner filed an application requesting post-conviction relief (PCR) alleging that "the conditions at current plea I've taken contradicts what me and my attorney agreed upon." App. 34 - 40. The State filed a Return on April 22, 2014. App. 41 - 47.

An evidentiary hearing was held before the Honorable D. Craig Brown on April 15, 2014. App. 48. Jonathan Waller represented the Petitioner. Assistant Attorney General Joshua Thomas represented the State. Petitioner and plea counsel both testified at the hearing.

Petitioner's Testimony

Petitioner testified that plea counsel led him to believe that, if he pled guilty he would receive thirty years, the minimum sentence. App. 59, ll. 2-22. Petitioner conceded that he knew the guilty plea was “an open plea,” however he had been assured by plea counsel that Judge Nettles would only sentence him to thirty. App. 59, ll. 19 - 60, ll. 19.

Petitioner stated that plea counsel had also assured him that none of the investigators or prosecutors would speak against the thirty year sentence. *Id.* In reality, many of the investigators and Solicitor Clements spoke against Petitioner during the plea hearing and urged Judge Nettles to impose a harsh sentence. *Id.* Noting that he had previously pled not guilty at an earlier court proceeding, Petitioner also testified that “the only reason I pled guilty was because I thought [plea counsel] was going to get me the thirty years.” App. 61, ll. 1-15.

Plea Counsel's Testimony

Plea counsel recalled that Petitioner had initially reported his wife missing to police and denied knowledge of her whereabouts. App. 64, ll. 15 - 66, ll. 15. However, when pressed by law enforcement to explain inconsistencies in his story, Petitioner eventually confessed to choking his wife to death. He also led police to her body. App. 64, ll. 8-25. Counsel claimed that the confession was consistent with the physical evidence and corroborated by people who had seen Petitioner while he was staying at the hotel.

Plea counsel testified that they had a *Jackson v. Denno* hearing to determine the admissibility of Petitioner's confession. Ultimately, Judge Seals held that the confession was admissible. App. 65, ll. 10 - 66, ll. 22. Counsel recollected that their strategy had been to plead guilty if the confession was admissible.

Plea counsel denied that he advised Petitioner that Judge Nettles would sentence him to thirty years and, on the contrary, allegedly explained that Petitioner could receive a minimum of thirty years and a maximum of life imprisonment. App. 66, ll. 20 - 67, ll. 16. Counsel averred that it was Petitioner's decision to plead guilty and that he never intimated to Petitioner that he had some "sort of knowledge that Judge Nettles was going to give him thirty years." *Id.*

Order of Dismissal

The PCR court denied Petitioner's application by a written order of dismissal filed on May 15, 2015. App. 73 - 78. Judge Brown ruled that Petitioner had failed to prove that his guilty plea was induced by the "mis-advice of plea counsel" App. 76. The court determined that plea counsel had adequately investigated Petitioner's case and had explained the range of sentences Petitioner's faced. App. 77.

ARGUMENT

The PCR court erred in finding plea counsel provided effective assistance of counsel where Petitioner asserts that he would have gone to trial had plea counsel not told him the plea judge would sentence him to no more than thirty years imprisonment.

At the evidentiary hearing, Petitioner stated that based on plea counsel's sentencing advice and counsel's assertion that he knew the judge; Petitioner believed he was going to receive the minimum mandatory sentence of thirty years. App. 59, ll. 10 - 60, ll. 19. Petitioner was sentenced to life imprisonment. App. 30, ll. 1-11.

Petitioner also testified that he would not have pled guilty and would have gone to trial if he knew he could be sentenced to life imprisonment, "the only reason I pled guilty was because I thought he was going to get me the thirty years. App. 61, ll. 9-10; *see Ray v. State*, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991) (defendant's guilty plea was not intelligently and voluntarily made based on plea counsel's erroneous sentencing advice). Thus, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 73 - 78; *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the *Strickland v. Washington*, 466 U.S. 668 (1984) (standard to guilty plea challenges based on ineffective assistance of counsel)).

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, 89 S.Ct. 1709 (1969) (a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

Furthermore, “[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, 683 S.E.2d 471 (2009) (citing *Hill*, 474 U.S. at 57-59).

In this case, an “unsound result” occurred because plea counsel’s erroneous sentencing advice created an unreasonable expectation, which hindered Petitioner’s ability to fully understand the sentencing consequences of his guilty plea. *See Boykin*, 395 U.S. 238. Petitioner recalled at the evidentiary hearing, “I knew it was an open plea, but from what he -- I thought he was going to get me the 30 years I asked him was he going to get me the 30 years and he said he was sure he could. That he could get me in front of Judge Nettles, who was a good judge, and I just felt like he was going to get it for me.” App. 59, ll. 24 - 60, ll. 2.

Petitioner was also prejudiced by plea counsel’s deficient performance because Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to the unreasonable expectation plea counsel created as to his potential sentence. *See Ray*, 303 S.C. 374, 401 S.E.2d 151 (1991).

Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when “there is a reasonable probability that, but for counsel’s errors, [Petitioner] would not have pled guilty and would have insisted on going to trial.” App. 68 – 69; *Hill*, 474 U.S. at 57-59; *See Boykin*, 395 U.S. 238.

CONCLUSION

Based on the foregoing reasons, Petitioner Rodney Ivey's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
D. CRAIG BROWN, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rodney D. Ivey states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 15, 2015. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Rodney D. Ivey.

Respectfully submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of December, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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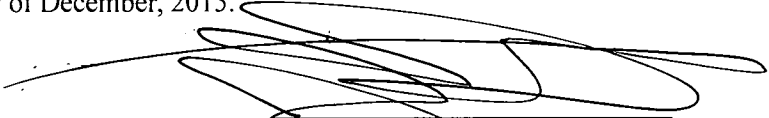
STATE OF SOUTH CAROLINA,

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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 J. Croom Hunter, Esquire and Rodney D. Ivey, #324929, at Kirkland Correctional Institution this 9th day of December, 2015.


John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of December, 2015.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.