ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

FEB 29 2016

SC SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

ERICK WANNAMAKER

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001772

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Wannamaker's guilty plea was entered freely, voluntarily, and knowingly because he thought he had to serve only 65% of the sentence when the sentence required 85% service 7

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Wannamaker's guilty plea was entered freely, voluntarily, and knowingly because he thought he had to serve only 65% of the sentence when the sentence required 85% service?

STATEMENT

In April 2011, the Orangeburg County Grand Jury indicted Erick Wannamaker on the charge of attempted murder. In May 2012, the Orangeburg County Grand jury indicted Wannamaker on a second charge of attempted murder. On August 7, 2012, Wannamaker appeared before the Honorable Edgar Dickson and entered a guilty plea to two counts of the lesser charge of assault and battery of a high and aggravated nature (ABHAN). Wannamaker was represented by Douglas Mellard, and the state was represented by Thomas Scott. App. 1.

During the guilty plea, the solicitor provided the facts to the court on each incident. On January 8, 2011, Petitioner Wannamaker was at the Dancer Club. Wannamaker's family was involved in the operation of this club. While there, he got into a physical altercation with an acquaintance, Daniel Mayes. Petitioner Wannamaker pulled a handgun and fired several shots "possibly toward the ground." Mayes was shot in his hand. App. 10, ll. 1 – 19; App. 60, ll. 10 – 14.

The second incident occurred on April 23, 2011 at a birthday party for Wannamaker's mother at a building at the fairgrounds. Wannamaker and his sister had rented this building for the occasion. One of the guests named Bowman went outside and was talking on his cell phone. Petitioner Wannamaker went out and became upset because he thought Bowman was talking with a woman standing nearby. The two men exchanged words, and Wannamaker pulled a gun and fired several shots. One shot hit Bowman in the arm. App. 10, ll. 20 – App. 11, ll. 11; App. 14, ll. 3 – 17.

Wannamaker claimed that he did not ask for trouble but that these two victims had a reputation for trouble. Wannamaker said he did what he had to do to defend himself. App. 19, ll. 15 – App. 21, ll. 4.

The state recommended a cap of ten years for sentencing. App. 2, ll. 8. As part of the plea bargain, the state dismissed a 2006 charge for assault and battery with intent to kill (ABWIK). App.

47, ll. 7 – 23. The solicitor told the plea court that Wannamaker's record was a "common law" assault and battery of a high and aggravated nature for which he did serve time. App. 11, ll. 12 – 17. Wannamaker told the court that the prior ABHAN conviction was a misdemeanor. App. 12, ll. 17 – 25.

The plea judge sentenced Wannamaker to nine years on each of the charges to run concurrent. App. 23, ll. 1 – 5.

Wannamaker did not appeal his convictions nor sentences. App. 69.

On June 4, 2013, Wannamaker filed an application for post-conviction relief (PCR). The state filed a return on October 1, 2013. An evidentiary hearing was held on May 19, 2015 before the Honorable Maite Murphy. Petitioner Wannamaker was represented by Jonathan Walker, and the state was represented by J. Clayton Mitchell. App. 37.

At the PCR hearing, Wannamaker's PCR attorney told the court that Wannamaker's allegation of ineffective assistance of counsel was that his attorney did not inform him that he would be required to serve 85% of his sentence but that he would have to serve only 65%. App. 39, ll. 1 – 7.

Petitioner Wannamaker told the court that his issue really was that he should be serving only 65% of his sentence. App. 57, ll. 12 – 16. He testified that he served time in prison previously for a misdemeanor ABHAN. App. 40, ll. 1-25; App. 43, ll.1 -18. He had to serve only 65% of that sentence. App. 58, ll. 14 – 17. At that time, he had a 2006 charge of ABWIK which was dismissed as part of the plea agreement. App. 43, ll. 2 – 23; App. 56, ll. 23- App. 57, ll. 23.

Wannamaker testified that he asked his attorneys whether the charge was 85% or 65%. Although they told him they would look into it, he did not get an answer. App. 50, ll. 23 – App. 51, ll. 2. If he had known that the state was asking for ten years with an 85% sentence, he would not

have pled guilty. He would have gone to trial. He was ready to go to trial as he felt he had a chance due to the records and reputations of the two victims. App. 55, ll. 11 – 20. His attorneys felt it was in his best interest to plead guilty to avoid a potential life sentence if the state chose to try his charges separately. App. 46, ll. 1 – App. 47, ll. 6.

Wannamaker's plea counsel, Douglas Mellard, testified that he worked on the plea deal for some time. App. 59, ll. 1 – App. 61, ll. 11. He explained that Wannamaker was charged under the "new law" for attempted murder because the law changed in 2010. The new law also created a "statutory ABHAN" which was a lesser of attempted murder. He stated that he if he had advised Wannamaker of anything about the 85% or 65% time, he would have advised him that it was 85% time. Counsel testified that he had sent letters to Wannamaker telling him that the charge of attempted murder was 85%. App. 61, ll. 1 – App. 25. He admitted that he did not discuss with Wannamaker the difference between the "new" ABHAN under the 2010 law, and the "old" ABHAN. App. 64, ll. 13 – 16.

On June 24, 2015, Judge Murphy issued an order denying Wannamaker's PCR application and dismissing it with prejudice. App. 68 – 76. The judge ruled that she found Petitioner Wannamaker's testimony to be not credible, and found plea counsel's testimony to be "credible and persuasive on all matters." App. 72. The judge found that Wannamaker did not meet his burden of proof in his claim that he pled guilty involuntarily and unknowingly. The judge also ruled that Wannamaker did not prove that he suffered any prejudice. App. 75. The judge found Wannamaker's testimony that counsel failed to tell him he would serve 85% of his sentence rather than 65% not credible. The order provided that plea counsel testified that he advised Wannamaker that he must serve 85% of ABHAN because "it was classified as a violent offense." App. 73. The judge denied Wannamaker's PCR application with prejudice.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Wannamaker's guilty plea was entered freely, voluntarily, and knowingly because he thought he had to serve only 65% of the sentence when the sentence required 85% service.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". Strickland v. Washington, 466 U.S.668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must

show with certain certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege". State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

In Craddock v. State, 327 S.C. 303, 491 S.E.2d 251 (1997), the Supreme Court ruled that where a defendant pleads guilty in exchange for trial counsel's promise of a certain sentence, and does not receive that sentence, his guilty plea is invalid.

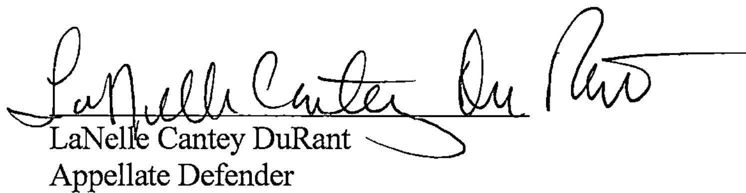
Wannamaker's plea counsel was ineffective for not insuring that Wannamaker understood clearly that his ten year sentence offer was an 85% sentence instead of 65%. It was reasonable for Wannamaker to assume that a conviction for ABHAN would still be 65% as his prior ABHAN conviction had been. Plea counsel admitted that he did not explain to Wannamaker that the 2010 law changed ABHAN to a twenty year sentence and required 85% service of the sentence.

As shown by his testimony, plea counsel was not sure he had told Wannamaker the sentence would require 85%. Counsel testified that he had written Wannamaker that the attempted murder charge was an 85 % sentence, but he did not say he had told him that about the ABHAN sentence. The PCR court erred in not finding plea counsel ineffective for not providing Wannamaker all of the information he needed to enter his guilty plea knowingly and voluntarily.

CONCLUSION

Based on the above, certiorari should be granted, the order of the PCR court reversed, and the case remanded.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of February, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
MAITE MURPHY, CIRCUIT COURT JUDGE

ERICK WANNAMAKER

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001772

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Erick Wannamaker 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 May 19, 2015. 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 Erick Wannamaker.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

ERICK WANNAMAKER

PETITIONER,

V.

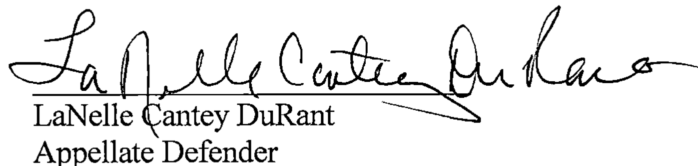
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001772

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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Erick Wannamaker, #321756, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 29th day of February, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of February, 2016.

______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.