

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

MAR 18 2016
SC SUPREME COURT

Certiorari to Anderson County
Edgar W. Dickson, Circuit Court Judge

STEVEN MCELRATH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001081

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

KATHRINE H. HUDGINS
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for failing to file a motion to reconsider the forty year consecutive sentence imposed?

STATEMENT

In June of 2007 the Anderson County Grand Jury indicted Petitioner, Steven C. McElrath for kidnapping and criminal sexual conduct first degree, indictments #2007-GS-04-1896, 1897. On May 19, 2008, Petitioner appeared before the Honorable J.C. Nicholson, Jr. and pled guilty as charged. Scott Robinson represented Petitioner. Kristen W. Reeves prosecuted the case. Judge Nicholson sentenced Petitioner to thirty (30) years for kidnapping and ten (10) years consecutive for criminal sexual conduct first degree. A timely notice of intent to appeal was filed. On September 23, 2008, the South Carolina Court of Appeals dismissed the appeal pursuant Rule 203(d)(1)(B)(iv) for failure to provide a written explanation showing that there is an issue which can be reviewed on appeal. (App. p. 107).

On January 2, 2009, Petitioner filed an application for post conviction relief, 2009-CP-04-0012. The State filed a return on April 2, 2009. Petitioner filed an amended PCR application on January 29, 2010. On June 15, 2010, an evidentiary hearing was held before the Honorable R. Lawton McIntosh. George L. Sands represented Petitioner at the PCR hearing. West Lee represented the State. In an order signed August 13, 2010, Judge McIntosh denied relief and dismissed the application. (App. pp. 97-106). On July 2, 2010, prior to the judge signing the order of dismissal, Petitioner filed a *pro se* Rule 59(e) motion to alter or amend. (App. pp. 108-111).

On September 9, 2011, Petitioner filed a second application for post conviction relief. (App. pp. 112-145). On February 9, 2012, the State filed a return and partial motion to dismiss. (App. pp. 146-151). On July 30, 2014, Petitioner appeared before the Honorable Edgar W. Dickson. Carolyn E. Galloway represented Petitioner. John Walt Whitmire represented by the State. The State stipulated that Petitioner was entitled to a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). In an order signed April 30, 2015, Judge Dickson granted the belated

appeal but denied relief on all other grounds. A timely notice of intent to appeal was served on May 12, 2015. This Johnson petition for writ of certiorari and a separately filed petition for writ of certiorari addressing the right to an Austin claim follow.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for failing to file a motion to reconsider the forty year consecutive sentence imposed.

Petitioner was just eighteen years old at the time of the incident resulting in his arrest for kidnapping and criminal sexual conduct first degree. (App. p. 19, lines 14-23). Petitioner was nineteen years old at the time he entered the guilty pleas. (App. p. 3, lines 15-16). The guilty pleas were entered without negotiations or recommendation as reflected on the sentencing sheets. (App. pp. 33-34). Based on Petitioner's young age and lack of a prior record, plea counsel asked for a suspended or split sentence. (App. p. 20, lines 11-16). Instead, the judge sentenced Petitioner to thirty (30) years for kidnapping and a consecutive ten (10) years for criminal sexual conduct. Plea counsel did not file a motion to reconsider sentence.

During the PCR hearing Petitioner testified, "He [plea counsel] told me if I went to trial, I would receive the max sentence, which was 60 years. To my understanding, I was thinking that like him telling me that if I would go ahead and plead guilty that I would receive under that 20- year mark that he turned down and it ended up pleading for mercy from the court, but it ended up being the maximum sentence for a kidnapping charge." (App. p. 81, lines 2-8). Plea counsel admitted that he did not file a motion to reconsider sentence. (App. p. 88, lines 14-25). Plea counsel claimed that there was no basis for a motion to reconsider sentence despite the fact that Petitioner was only eighteen years old with no prior record but received a forty year sentence.

In the order of dismissal the PCR judge found that Petitioner failed to meet his burden of proving plea counsel was ineffective in failing to file a motion to reconsider sentence. (App. p. 103). The PCR judge erred. Plea counsel was ineffective in failing to file a motion to reconsider the forty year sentence imposed.

The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). If a timely motion to reconsider sentence had been filed, the plea judge would have had the authority to reconsider the sentence imposed. When the judge declined to impose a suspended or split sentence, as requested, plea counsel should have filed the motion to reconsider.

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)).

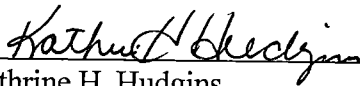
“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character 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 file a motion to reconsider the forty year sentence imposed. There is a reasonable probability that but for counsel’s deficient performance, the plea judge would have reduced the sentence based on Petitioner’s age and lack of criminal record.

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 18th day of March, 2016.

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CERTIORARI TO ANDERSON COUNTY
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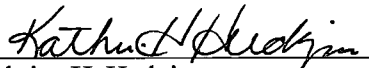
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven McElrath 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 July 30, 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 Steven McElrath.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of March, 2016

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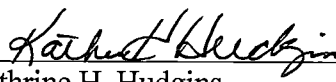
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CERTIFICATE OF SERVICE

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 Patrick Schmeckpeper, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Steven McElrath, #328413, at McCormick Correctional Institution this 18th day of March, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of March, 2016.


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