

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Greenville County
Perry H. Gravely, Circuit Court Judge

BRIAN K. SEKERCHAK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002307

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT

 The PCR court erred in denying Petitioner Sekerchak's application by finding that Petitioner Sekerchak had waived his right to post-conviction relief and ineffective assistance of counsel when he signed the plea agreement but failed to find whether the advice Petitioner received from his plea counsel to agree to the plea agreement was constitutionally defective 7

CONCLUSION 10

PETITION TO BE RELIEVED AS COUNSEL 11

ISSUE PRESENTED

Did the PCR court err in denying Petitioner Sekerchak's application by finding that Petitioner Sekerchak had waived his right to post-conviction relief and ineffective assistance of counsel when he signed the plea agreement but failed to find whether the advice Petitioner received from his plea counsel to agree to the plea agreement was constitutionally defective?

STATEMENT

In 2010 and 2011 in Greenville, a group of six people became involved in trafficking the drug methamphetamine. These people sold methamphetamine to each other and to other people. Brian Sekerchak was one of these six people. App. 7, ll. 10 – 25.

On the dates of June 23, 2010; January 27, 2011; March 15, 2011; June 1, 2011; August 16, 2011, Sekerchak sold methamphetamine to a confidential informant (CI) who worked with the Greenville County Sheriff's Office and the South Carolina Law Enforcement Division (SLED). The total amount of methamphetamine sold during that time period weighed more than one hundred grams. App. 8, ll. 1 – App. 9, ll. 14.

On December 13, 2011, the State Grand Jury indicted Petitioner Sekerchak on five counts of distribution of methamphetamine, and possession with intent to distribute methamphetamine (PWID). App. 61-72. On April 20, 2012, Sekerchak appeared before the Honorable Letitia H. Verdin and entered a guilty plea to the lesser charge of twenty-eight to one hundred grams. Sekerchak was represented by Michael Johnson, and the state was represented by Josh Underwood. App. 1; App. 8, ll. 1 – 5. After accepting Sekerchak's plea and finding that it was "freely and voluntarily made," the judge deferred sentencing. Plea counsel said that he would address the court at sentencing. App. 10, ll. 1 – 23.

On December 6, 2013, Sekerchak appeared before the Honorable Letitia H. Verdin for sentencing. The state's attorney told the court that Sekerchak did cooperate with the state, and did testify at trial against one of his co-defendants, Clyde Davis, earlier in the year. The attorney said that "in light of Mr. Sederchak's cooperation, the state's recommendation was 15 to 18 years." App. 15, ll. 1 – App. 16, ll. 25.

Defense counsel then asked the court for a sentence in the 10 to 12 year range. He explained that Sekerchak was 43 years of age and had been addicted to methamphetamine from the first time he used it at the age of 14. He cooperated fully in the investigation. The judge sentenced Sekerchak to 15 years and ran all of the sentences concurrent. App. 17, ll. 1 – App. 18, ll. 22.

Sekerchak did not appeal his convictions nor sentences. App. 57. On September 12, 2014, Sekerchak filed an application for post-conviction relief (PCR). App. 56. In his PCR application, Petitioner wrote that his lawyer told him “there was no reason to appeal.” Petitioner Sekerchak wrote that he “didn’t really understand how to appeal himself.” App. 21. He later wrote in his application: “Why didn’t he appeal at the court?” App. 24.

The state filed a return on February 12, 2015 asking that the application be summarily dismissed on the basis that Sekerchak waived his right to file an application for post-conviction relief (PCR) when he signed the plea agreement with the state for his guilty plea. App. 30-App.34. An evidentiary hearing was held on October 21, 2015 before the Honorable Perry H. Gravely. Sekerchak was represented by R. Mills Arail, Jr. and the state was represented by Larone Washington. App. 35. Plea counsel, Michael Johnson, was not present at the PCR hearing. App. 35 –App. 48.

At his PCR hearing, the state’s attorney told the court that the state was asking that Sekerchak’s PCR application be dismissed because he signed a plea agreement with the state agreeing to waive his right to a PCR. The plea agreement was attached with the state’s return and motion. App. 36, ll. 1 – 12. Sekerchak’s PCR attorney argued that Sekerchak believed that he was not “knowingly and voluntarily” waiving his right to a PCR. And it was Sekerchak’s understanding and belief that he was getting ten years when he signed the plea agreement. The PCR court reviewed the plea agreement. App. 36, ll. 14 – App. 37, ll. 21.

Petitioner Sekerchak testified that he did sign a plea agreement with the state as part of his plea with the state grand jury. However, Petitioner was alleging ineffective assistance of counsel as he stated that he never read the plea agreement. He did not know that he was waiving his right to a PCR in the plea agreement. Sekerchak did not remember if his plea attorney, Mr. Johnson, told him about waiving his rights. His attorney never said anything about filing an appeal. He did remember his attorney telling him that he was "going to get me ten years after I signed the plea." App. 37, ll. 22 – App. 39, ll. 25.

Sekerchak acknowledged that he knew the plea agreement included a range of sentence of fifteen to eighteen years. Nevertheless, his attorney still told him that if he cooperated with the state by wearing a wire, doing some work for SLED, and testifying against his co-defendant, Clyde Davis, he would try to get Sekerchak ten years. App. 40, ll. 6 – App. 41, ll. 24.

On cross examination, Sekerchak said he never saw in the plea agreement where the state was recommending a range of fifteen to eighteen years although he signed the agreement. App. 44, ll. 1 – 23.

The PCR judge stated on the record at the hearing:

So the Motion to Dismiss is granted on those two grounds: one to dismiss the application on the merits; and also, as to the fact that the PCR was waived.

App. 46, ll. 15- App. 47, ll. 19.

In her order, the PCR judge ruled that Sekerchak's claim of ineffective assistance of counsel was waived by him, and therefore "must be dismissed with prejudice and the state's motion to dismiss is granted." The judge wrote that Sekerchak waived his right to post-conviction relief and appeal when he and his lawyer signed the plea agreement. Although Sekerchak claimed that he never read the agreement, and did not remember signing it, the judge wrote: "However, a competent

person generally is presumed to have knowledge and understanding of a document he or she signs.”

The judge cited In Re King's Will, 132 S.C. 63, 128 S.E. 850 (1925).

Sekerchak's attorney filed an appeal. This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred in denying Petitioner Sekerchak's application by finding that Petitioner Sekerchak had waived his right to post-conviction relief and ineffective assistance of counsel when he signed the plea agreement but failed to find whether the advice Petitioner received from his plea counsel to agree to the plea agreement was constitutionally defective.

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.

In Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008), the Supreme Court held that the defendant’s waiver of his right to appellate, post-conviction, and habeas review was made voluntarily, knowingly, and intelligently when he signed the plea agreement. The plea agreement provided that “petitioner agrees to waive any and all appeals, PCR applications, federal habeas petitions and any and all other methods of review of this guilty plea and sentence.” The Supreme Court affirmed the circuit court’s dismissal of the defendant’s PCR application.

In Sanders v. State, 412 S.C. 611, 773 S.E.2d 580 (2015), the Supreme Court held that a defendant who waives his right to collateral review is still entitled to challenge whether the advice he received from his attorney in agreeing to that waiver was constitutionally defective. The Court reversed and remanded the case for an evidentiary hearing on the narrow issue of whether Sanders received ineffective assistance of counsel in being advised to enter into the agreement.

Sekerchak was denied effective assistance of counsel in the advice he received from his plea counsel. Sekerchak testified that he did not read the agreement which meant that he relied on his plea counsel which he had a right to do. Counsel needed to insure that Sekerchak understood every

word in the agreement. There was no mention of the plea agreement at the guilty plea. The plea judge made no inquiry into the agreement and if Sekerchak understood it. She did not ask if Sekerchak understood that he was waiving his appellate and PCR rights. App. 1 – 10. Plea counsel did not testify at the motion hearing. The only evidence before the PCR court was the plea agreement and Petitioner Sekerchak's testimony.

It was clear from his PCR application that Sekerchak did not understand the rights he had waived. On Appendix Page 23 in his PCR application, Sekerchak wrote that his plea attorney talked him into signing the plea agreement. On Appendix Page 24 of his PCR application, Sekerchak wrote: "Why didn't he appeal at the court?" He did not know that he had waived his appellate rights so he reasonably did not know he had waived his right to a PCR.

In Sanders v. State, id., the Supreme Court cited a Seventh Circuit case, Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999) as follows:

Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself--the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.

CONCLUSION

Based on the above, certiorari should be granted, the order of the PCR court reversed, and the case remanded for an evidentiary hearing of whether Sekerchak received ineffective assistance of counsel in being advised to enter into the plea agreement.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
PERRY H. GRAVELY, CIRCUIT COURT JUDGE

BRIAN K. SEKERCHAK,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-002307

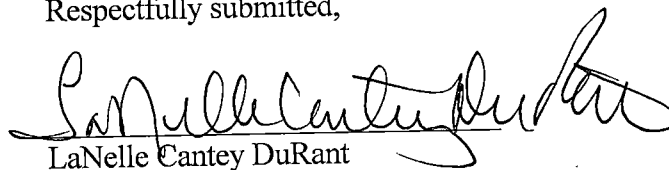
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brian K. Sekerchak 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 October 21, 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 Brian K. Sekerchak.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "LaNelle Cantey DuRant".

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of March, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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BRIAN K. SEKERCHAK,

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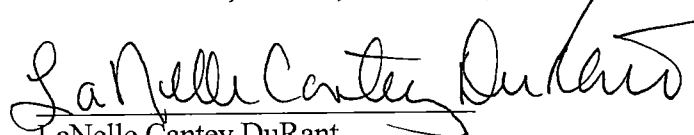
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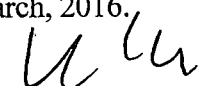
CERTIFICATE OF SERVICE

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 LaRone K. Washington, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Brian K. Sekerchak, #174115, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355, this 28th day of March, 2016.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of March, 2016.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: May 12, 2025.