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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

George C. James, Jr., Circuit Court Judge

MAURICE GLOVER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001686

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1. Did the PCR judge correctly find that Petitioner did not knowingly and intelligently waive the right to direct appeal and was entitled to a belated direct appeal pursuant White v. State?

2. Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by the fact that Petitioner believed he was pleading to a recommendation by the State for a sentence of zero to ten years but at the guilty plea the State recommended a sentence of ten years?

STATEMENT

In April of 2013, the Sumter County Grand Jury indicted Petitioner Glover for numerous counts of forgery contained in indictments #2012-GS-43-0821(amended)(1 count), 2013-GS-43-0312, (5 counts), 2013-GS-43-0313, (6 counts), 2013-GS-43-0362(2 counts), 2013-GS-43-0363(2 counts), 2013-GS-43-0364(2 counts), 2013-GS-43-0365(8 counts), 2013-GS-43-0366(5 counts), 2013-GS-43-0367(2 counts), 2013-GS-43-0368(1 count) and 2013-GS-43-0464(4 counts). On July 21, 2014, Petitioner appeared before the Honorable R. Ferrell Cothran and pled guilty to thirteen counts of forgery. Harry Devoe represented Petitioner at the plea hearing. Bronwyn McElveen represented the State. Judge Cothran sentenced Petitioner to ten (10) years concurrent for each count. Counsel did not file a notice of intent to appeal.

On October 14, 2014, Petitioner filed an application for post conviction relief. The State filed a return on January 6, 2015. On April 15, 2015, an evidentiary hearing was held before the Honorable George C. James. Lance Boozer represented Petitioner at the PCR hearing. Daniel F. Gourley represented the State. In a written order filed July 9, 2015, Judge James denied relief but found that Petitioner was entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). A timely notice of intent to appeal was served on August 7, 2015. This petition for writ of certiorari and a separately filed White v. State brief follow.

ARGUMENTS

1. The PCR judge correctly found that Petitioner did not knowingly and intelligently waive the right to direct appeal and was entitled to a belated direct appeal pursuant White v. State.

During the PCR hearing plea counsel admitted that he failed to file a notice of intent to appeal after Petitioner asked him to file the notice of intent to appeal. (App. p. 120, lines 3-7). Plea counsel stated, "I felt he pled straight up. He had a good deal with the 10 years, which is supposedly possibly served. And I didn't see anything to be gained by filing the appeal." (App. p. 120, lines 9-12).

In the order finding that Petitioner was entitled to a belated appeal the PCR judge wrote, "This Court notes, Plea Counsel admitted that Applicant told him that he wanted to appeal the guilty plea. However, Plea Counsel stated that he did not file a notice of appeal because he did not believe there were any meritorious grounds for an appeal. Plea Counsel opined that there was nothing to gain from an appeal as Applicant received the recommended sentence and twelve additional charges were *nol prossed* pursuant to the plea." (App. p. 135).

When a criminal defendant requests an appeal, but counsel fails to file an appeal, counsel is deemed deficient. In such a case, the defendant is entitled to a belated appeal without showing the appeal would likely have had merit. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); Rodriguez v. United States, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969). The PCR judge correctly found that Petitioner is entitled to a belated appeal.

2. The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by the fact that Petitioner believed he was pleading to a recommendation by the State for a sentence of zero to ten years but at the guilty plea the State recommended a sentence of ten years.

During the PCR hearing Petitioner testified that another attorney, Deborah Butcher, initially represented him but after a lengthy period of pre-trial detention, Petitioner hired Attorney Devoe for a bond hearing. (App. pp. 101-102). Petitioner testified that up to the time of his bond hearing in 2014, the State's only plea offer was for a ten year sentence. (App. p. 102, lines 10-18). Petitioner stated that after his bond was denied in 2014, the State offered to allow him to plead guilty for a recommended sentence of between zero and ten years. (App. p. 102, lines 2-22). When Petitioner entered his guilty plea, he believed he was pleading with the recommendation of zero to ten years. (App. p. 103, lines 2-16). Petitioner testified that he would not have pled guilty if he had known the State was recommending a ten year sentence. (App. p. 103, lines 17-20).

In the order of dismissal the PCR judge found that Petitioner failed to prove that plea counsel was ineffective. (App. pp. 134-135). The PCR judge erred. Plea counsel was ineffective in failing to explain that the State was recommending a ten year sentence rather than a sentencing range of zero to ten years.

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)).

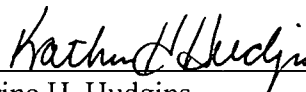
“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character 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 explain that the State was recommending a sentence of ten years rather than a sentencing range of zero to ten years. There is a reasonable probability that, but for counsel’s deficient performance, Petitioner would not have pled, but would insisted on going to trial.

CONCLUSION

Based on the above arguments this Court should grant the belated appeal and grant the petition for writ of certiorari to allow further briefing on the PCR issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of April, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
GEORGE C. JAMES, JR., CIRCUIT COURT JUDGE

MAURICE GLOVER,

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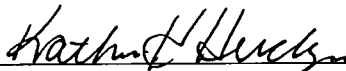
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Maurice Glover 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 April 13, 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 Maurice Glover.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of April, 2016

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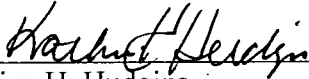
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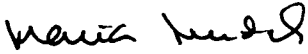
CERTIFICATE OF SERVICE

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 Julie Coleman, Esquire and Maurice Glover, #302711, at Evans Correctional Institution, this 20th day of April, 2016.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of April, 2016.


_____(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.