

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SO SUPREME COURT

Certiorari to Dillon County
Thomas A. Russo, Circuit Court Judge

WILLIE MORRISON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002250

JOHNSON PETITION FOR WRIT OF CERTIORARI

Susan B. Hackett
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Violating Petitioner’s right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, plea counsel provided ineffective assistance where Petitioner testified plea counsel informed him that pursuant to the guilty plea negotiations, he was facing a sentence between zero and twenty years, but the state recommended a sentence of thirty years, which the judge imposed7

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ISSUE PRESENTED

Did plea counsel provide ineffective assistance, violating Petitioner's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, where Petitioner testified plea counsel informed him that pursuant to the guilty plea negotiations, he was facing a sentence between zero and twenty years, but the state recommended a sentence of thirty years, which the judge imposed?

STATEMENT

On August 9, 2012, a Dillon County grand jury indicted Petitioner for murder (2012-GS-17-0368), possession of a weapon during a violent crime (2012-GS-17-370), burglary in the first degree (2012-GS-17-0371). App. 68-69; App. 71-72; App. 74-75. On April 18, 2013, a Dillon County grand jury indicted Petitioner for burglary in the second degree (2012-GS-17-0821). App. 77-78. On October 9, 2013, Petitioner pled guilty to the lesser-included offense of voluntary manslaughter, possession of a weapon during a violent crime, burglary in the first degree, and burglary in the second degree. App. 1; App. 2, ll. 7-15. The Honorable Paul M. Burch accepted the plea. App. 1. Shipp Daniel represented the state, and Nicholas Lewis represented Petitioner. App. 1.

During the guilty plea hearing, the state explained the guilty plea offer included the reduction of the charge from murder to voluntary manslaughter and a recommendation of thirty years' imprisonment. App. 2, ll. 7-15. Later, the state emphasized the recommendation was "a very strong recommendation" of thirty years, which was the maximum sentence for voluntary manslaughter. App. 2, l. 25 – App. 3, l. 1. The state agreed to dismiss two shoplifting charges as well. App. 3, ll. 3-5. The assistant solicitor explained "the reason for a lesser-included to voluntary manslaughter is that [Petitioner] has given some significant assistance to both the state and federal law enforcement on multi issues." App. 11, ll. 20-23.

Thereafter, Judge Burch engaged in a general guilty plea colloquy with Petitioner. Judge Burch noted that murder "could carry up to life and a voluntary manslaughter carries up to thirty years." App. 4, ll. 5-7. He also informed Petitioner that burglary "carries up to thirty years - - up to life - - it carries up to life." App. 5, ll. 8-9.

The Latta Police Chief told the judge that on March 27, 2012, shortly after 3 a.m., the police received a call about a gunshot. App. 8, ll. 20-21. Jesse Barr, the deceased had been shot at his home, but had no telephone, so he went to a neighbor's house to call for help. App. 8, ll. 22-24. When the police arrived, the deceased told the police that "Waldo," had shot him. App. 9, ll. 1-3. At some later point, the deceased stated Petitioner shot him. App. 9, l. 3. Barr later died at the hospital. App. 9, ll. 4-5.

The Latta Police received "a phone call from the emergency room in Florence" indicating Petitioner "was there with a gunshot wound." App. 9, ll. 12-14. Officers met with Petitioner, who gave them "some information which actually led to two other arrests being made in it." App. 9, ll. 15-19. According to the Chief, Petitioner "stated that he intended on going there to rob him, and that when he got there there was gunshots from both of them." App. 9, ll. 20-22. Later, the assistant solicitor added that Petitioner had "no idea or any recollection of what happened to Mr. Barr because he was so strung out on whatever he was strung out on." App. 19, ll. 19-22.

Additionally, the Chief told the judge that the burglary in the second degree charge concerned the burglary of a nightclub, in which "there was blood left where they broke in." App. 10, ll. 3-5. Subsequent to Petitioner's arrest related to the death of Barr, the police obtained his DNA, which was connected to the blood left at the scene. App. 10, ll. 6-8.

According to plea counsel, Petitioner did not go to the home of the deceased with the intent to shoot him, and the assistant solicitor agreed there was "no evidence to support the idea that [Petitioner] went to [Barr]'s house that night with the intention to kill him." App. 13, ll. 10-11; App. 19, ll. 16-18; App. 20, ll. 1-3. Plea counsel said, "Unfortunately, by the time he got there things had escalated and there was not enough time unfortunately for him to change his

mind and someone lost their life.” App. 13, ll. 11-14. Plea counsel asked the judge to “consider granting him some leniency here” and noted Petitioner’s cooperation with the authorities. App. 13, ll. 16-17; App. 13, ll. 22-23. In direct response to plea counsel’s request for leniency, the assistant solicitor asked the judge “to understand the leniency [Petitioner] has already received by not pleading to a day for day murder charge which is significant.” App. 18, ll. 17-21. Thus, the state asked that “the maximum sentence for involuntary [*sic*] should be imposed.” App. 18, ll. 22-23.

At the conclusion of the guilty plea proceeding, Judge Burch sentenced Petitioner to thirty years’ imprisonment for voluntary manslaughter, thirty years’ imprisonment for burglary in the first degree, five years’ imprisonment for the weapons charge, and ten years’ imprisonment for burglary in the second degree. He ordered the sentences to be served concurrently. App. 20, l. 20 – App. 21, l. 4; App. 70, App. 73; App. 76; App. 79.

On May 7, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 23-29. On July 29, 2015, the matter proceeded to an evidentiary hearing before the Honorable Thomas A. Russo. App. 36. Tristan Shaffer represented Petitioner. App. 36. Joshua Thomas represented Petitioner. App. 36.

During the hearing, plea counsel informed the PCR court that he advised Petitioner to waive his right to a jury trial and enter a guilty plea. App. 42, ll. 7-15. Plea counsel did not “think [Petitioner] had too many” defenses. App. 43, ll. 2-10. Plea counsel received at least three plea offers in the case: “At one point I think it might have been 30, and the only point it might have gotten to 20. But the final - - final offer was 30 to - - voluntary manslaughter.” App. 43, ll. 21-25. Plea counsel claimed that during his discussion with Petitioner regarding the final plea offer, plea counsel said he was “hopeful” he “could maybe get something in the range of

20.” App. 44, ll. 1-10. “That was [plea counsel’s] idea, [his] projection.” App. 44, ll. 10-11. According to plea counsel, the state agreed to recommend a thirty-year sentence and plea counsel explained what this meant to Petitioner. App. 45, ll. 9-17. Finally, plea counsel claimed he never promised Petitioner he would “get anything less than 30.” App. 45, ll. 18-20.

Petitioner admitted that he and another person went to the home of the deceased on the night of his death. App. 46, ll. 15-24. Petitioner knocked on the door and announced his presence, but Barr refused to admit them. App. 46, l. 24 – App. 47, l. 4. Shortly thereafter, “the door came open” and Barr “opened fire.” App. 47, ll. 5-7. Petitioner, who was shot in the hand, ran. App. 47, ll. 15-19. Petitioner returned gunfire. App. 47, ll. 8-12. Prior to entering the guilty plea, Petitioner believed the solicitor’s recommendation was for a sentence between zero and twenty years for voluntary manslaughter. App. 51, ll. 3-12; App. 51, l. 25 – App. 52, l. 1.

In the order denying relief, the PCR judge held Petitioner “failed to meet his burden to show trial counsel provided incorrect sentencing advice.” App. 65. The PCR judge found that plea counsel testified the state’s “initial offer was for a sentence of thirty years” and that he “explained the nature of the recommended sentence” to Petitioner. App. 65. Additionally, the judge found that plea counsel informed Petitioner “they may be able to convince the judge to issue a sentence in the twenty year range.” App. 65. According to the judge, plea counsel “maintained he did not promise [Petitioner] a sentence lower than thirty years.” App. 65. The judge also found that Petitioner “thought he would get a sentence of zero to twenty years.” App. 65. After making these findings, and without any explanation, the judge found “plea counsel’s testimony on this issue credible and dispositive.” App. 65. Additionally, and also without any explanation, the judge found Petitioner’s “testimony [was] not credible.” App. 65. Thereafter, the PCR judge found plea counsel’s advice was not deficient. App. 66. Further, the PCR judge

found the plea colloquy “cured” any “misconception” Petitioner “may have had about the possible sentence.” App. 66. Finally, the PCR court found Petitioner had not demonstrated prejudice and denied Petitioner relief on this ground. App. 66.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Violating Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, plea counsel provided ineffective assistance where Petitioner testified plea counsel informed him that pursuant to the guilty plea negotiations, he was facing a sentence between zero and twenty years, but the state recommended a sentence of thirty years, which the judge imposed.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner 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. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

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, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d

264, 265 (1982) *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). 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, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

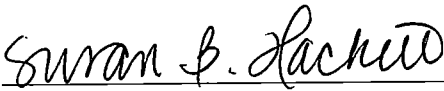
In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)(citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435.

Petitioner testified that plea counsel informed him the plea agreement was for a sentence between zero and twenty years. Plea counsel, unsurprisingly, testified the agreement was for the state to recommend a sentence of thirty years' imprisonment – the statutory maximum for voluntary manslaughter. The PCR judge offered no reason for his finding that Petitioner's testimony was not credible, but that plea counsel's testimony was credible; yet, this credibility finding was the basis for his determination that plea counsel's performance was not deficient. This Court should grant Petitioner post-conviction relief because he relied upon erroneous advice from counsel that he would receive a sentence between zero and twenty years, when his sentencing exposure was thirty years and the state "strongly recommended" the maximum sentence.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the lower court and grant him a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of June, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dillon County
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WILLIE MORRISON,

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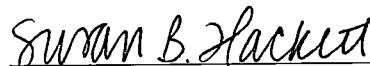
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Willie Morrison 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 29, 2015. In her opinion seeking certiorari from the order of dismissal is without merit.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has 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 Willie Morrison.

Respectfully submitted,



Susan B. Hackett

Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of June, 2016.

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WILLIE MORRISON,

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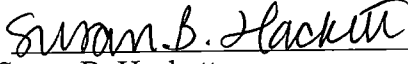
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APPELLATE CASE NO. 2015-002250

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Caitlin Hastings, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Willie Morrison, #306544 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of June, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of June, 2016


(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.