

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
R. Knox McMahon, Circuit Court Judge

JUNIOR L. KIKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000150

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in concluding that Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered where plea counsel threatened Petitioner he would be found guilty of the charges and receive life sentences if he went to trial?

STATEMENT

On October 13, 2011, a Lancaster County grand jury indicted Petitioner for murder (2011-GS-29-1121), burglary in the first degree (2011-GS-29-1122), armed robbery (2011-GS-29-1123), and possession of a firearm during the commission of a violent crime (2011-GS-29-1124). App. 127-128; App. 130-131; App. 133-134; App. 136-137. On September 16, 2013, Petitioner appeared before the Honorable J. Ernest Kinard, Jr., to enter guilty pleas to the charges. App. 1. Doug Barfield represented the state, and Jason Turnblad represented Petitioner. App. 1. According to the solicitor, the case was scheduled for trial on that date, but the state had extended a plea offer to Petitioner, which had been accepted. App. 3, ll. 1-13. The offer required Petitioner to enter guilty pleas to the four charges in exchange for a negotiated sentence of thirty years' imprisonment. App. 3, ll. 9-12. At the conclusion of the proceeding, Judge Kinard accepted the guilty plea and sentenced Petitioner to thirty years' imprisonment for murder, thirty years' imprisonment for burglary in the first degree, thirty years' imprisonment for armed robbery, and five years' imprisonment for the weapon. App. 25, ll. 10-16; App. 135; App. 129; App. 132; App. 138. He ordered all sentences to be served concurrently. App. 25, ll. 10-16; App. 135; App. 129; App. 132; App. 138.

Through counsel, Petitioner filed a notice of appeal on September 23, 2013. App. 27-28. The Court of Appeals dismissed the notice on December 6, 2013, for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. App. 29. Remittitur was sent on December 27, 2013. App. 30.

On May 15, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 31-41. Subsequently, the state filed its return. App. 42-46. The matter proceeded to an evidentiary hearing on August 11, 2015, before the Honorable R. Knox McMahan. App. 47.

Nathan Sheldon represented Petitioner, and Justin Hunter represented Petitioner. App. 47. At the conclusion of the hearing, Judge McMahon took the matter under advisement. App. 110, ll. 1-2. By an order filed December 17, 2015, Judge McMahon denied Petitioner relief from his convictions and sentences. App. 117-126.

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

ARGUMENT

The PCR court erred in concluding that Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered where plea counsel threatened Petitioner he would be found guilty of the charges and receive life sentences if he went to trial.

Relevant facts

Guilty plea hearing

At the start of the guilty plea hearing, the solicitor announced that the parties had entered into a plea agreement on the eve of trial. App. 3, ll. 1-15. In fact, the case was scheduled for trial on the day of the guilty plea, and the jury venire was waiting if Petitioner decided not to accept the state's offer. App. 3, ll. 8-9; App. 5, ll. 4-7. After the prosecutor set out the terms of the plea negotiations, the judge advised Petitioner that his sentence for murder, though negotiated for a term of years, would require Petitioner to serve the entire thirty years. App. 8, ll. 11-12 (explaining that the sentence for murder "is a day for day type sentence"); App. 8, ll. 14-16. When Petitioner expressed surprise, the judge explained this concept in greater detail. App. 8, ll. 14-23. Petitioner explained to the plea judge that he was "a little bit confused" "[b]ecause when [he] signed that paper they didn't say day for day." App. 9, ll. 2-14. In fact, he was told that he would be required to serve eighty-five percent on the murder charge. App. 9, l. 15. Specifically, Petitioner was told he would serve "26 and a half" years if he entered the guilty plea in accordance with the negotiated terms. App. 9, ll. 15-16.

In response to Petitioner's confusion and surprise, the plea judge informed him

Well, murder is day for day. But if you pled guilty straight-up I would be limited to 30, chances are I would give you more because it looks like you're getting light, even though that's tough if you give somebody 30 when you could give them all the way to life. So if you were found guilty and I gave you 42 years you would have to serve 42 years on the murder charge. But I can't give you more than thirty is the bottom line on a negotiated sentence.

App. 9, ll. 17-25. Petitioner told the judge that he understood, but had been given incorrect advice. App. 10, ll. 1-2 (stating, “I just didn’t understand the day for day part, I was told 85”). Even when the judge sentenced Petitioner in accordance with the negotiated plea agreement, Petitioner expressed surprise and concern that he would have to serve the thirty-year sentence “day for day” and his doubt that he would even live thirty years. App. 25, ll. 17; App. 26, l. 3.

After the prosecutor presented a factual basis for the guilty plea, Petitioner told the judge he “just had a couple of questions” about what the prosecutor stated. App. 19, ll. 17-18. Petitioner explained that no one informed him or his lawyer about a pistol that had been recovered and linked to the murder. App. 19, ll. 18-21. When Petitioner expressed that he had another question, the judge took a break. App. 19, ll. 21-22.

When the proceedings were back on the record, Petitioner informed the judge that the “only reason” he was not going to trial was because he was “not prepared.” App. 20, ll. 3-4. He explained that evidence necessary for his defense – phone records – were never obtained. App. 20, ll. 4-9. In response, the plea judge stated, “Well, I know 30 years is a long time but it’s better than life.” App. 20, ll. 10-11.

Later, when the judge was inquiring about the credit Petitioner would receive for time served, Petitioner again expressed his confusion about the sentence he would serve. App. 23, ll. 3-12. He noted that the “plea sheet” he received from the state included charges other than those for which he was pleading guilty and that he had served time in jail on those charges as well, and Petitioner expressed concern about receiving credit for time served on those charges. App. 23, ll. 9-12. To this, this solicitor responded that Petitioner had other charges pending that were not resolved by the guilty plea. App. 23, ll. 13-14. The solicitor explained that Petitioner had served “some time on this murder case before he bonded out,” and “they’ll calculate how much time

that is.” App. 23, ll. 13-17. The judge agreed, and informed Petitioner that he would not calculate the credit for time served. App. 23, ll. 18-21. Again, Petitioner expressed his confusion in light of the plea sheet referencing other charges. App. 23, ll. 22-25. Despite Petitioner’s confusion, plea counsel spoke up to inform the court that he was “sure they’ll give him credit.” App. 24, ll. 1-3.

Despite all the obvious confusion, the judge accepted the guilty plea and sentenced Petitioner according to the negotiated terms. App. 25, ll. 10-16; App. 135; App. 129; App. 132; App. 138.

PCR hearing

Petitioner told the PCR judge that he accepted the state’s plea offer because he was “scared.” App. 59, ll. 2-3. Throughout his relationship with plea counsel, Petitioner maintained that he was unwilling to accept any guilty plea offer unless the sentence was for less than fifteen years. App. 60, ll. 7-13; App. 63, ll. 13-14; App. 65, ll. 1-3. When one of the co-defendants provided a statement to law enforcement, plea counsel “just gave up” and told Petitioner that if he did not accept the state’s offer, he would “get life.” App. 60, ll. 17-19. Petitioner did not want to accept the plea offer and during the guilty plea hearing, he went outside to smoke a cigarette and “call the news.” App. 60, ll. 20-22. However, plea counsel told Petitioner and his father that if he did not accept the offer, he would “get life.” App. 60, ll. 23-24. Petitioner boiled down plea counsel’s advice as follows: “Take a plea today or take a trial and get life in prison.” App. 64, ll. 2-13. Petitioner explained that if plea counsel had not convinced him that he “was getting life in prison” he would not have entered the guilty plea. App. 69, ll. 7-14.

Plea counsel confirmed that Petitioner’s trial was set to start the day of the guilty plea proceeding if Petitioner did not accept the offer. App. 99, ll. 3-12. Plea counsel also confirmed

that Petitioner informed him that he was willing to accept a plea offer if the sentence range were between ten and fifteen years. App. 90, l. 24 – App. 91, l. 1. Specifically, Petitioner “wanted something that was violent, a 85 sentence.” App. 91, ll. 1-2. Shortly thereafter, the solicitor offered to permit Petitioner to plead guilty as charged, to take a life sentence off the table, and run all sentences concurrently. App. 91, ll. 7-13. A week later, the solicitor informed plea counsel “he could not come off of thirty.” App. 91, l. 15. Then, the solicitor offered to “negotiate a specific number.” App. 92, ll. 3-6. Ultimately, the solicitor agreed to a negotiated sentence of thirty years. App. 92, ll. 14-18. According to plea counsel, Petitioner accepted the terms. App. 92, ll. 13-14.

Plea counsel claimed that he told Petitioner he “would have a very good chance of getting life in prison.” App. 101, ll. 4-7. When questioned regarding whether Judge Kinard would impose a life sentence in this situation, plea counsel responded, “I think at times he trial tax[es] a little bit.” App. 101, ll. 11-12.

Order of dismissal

In his order denying Petitioner relief, Judge McMahan found Petitioner “failed to demonstrate that his guilty plea was entered involuntarily.” App. 124. In arriving at this conclusion, Judge McMahan found plea counsel’s testimony to be credible and found Petitioner’s testimony to be not credible. App. 124. The judge offered no reasoning for these findings, however. App. 124. According to the PCR judge, Petitioner “was aware of the nature of the charges he was facing and the possible penalties.” App. 124. The judge determined that Petitioner “made a well-reasoned decision to plead guilty, rather than proceed to a jury trial on the charges where [Petitioner] not only confessed, but he was identified as the shooter by an eyewitness.” App. 124. In determining Petitioner’s guilty plea was voluntary and “of his own

free will,” the PCR court found there was “no evidence to suggest that [Petitioner]’s plea was forced or coerced, despite [Petitioner]’s claim that he felt he did not have any other choice.” App. 124.

The PCR judge noted that Petitioner testified that plea counsel “told him if he did not plead, he would be found guilty and sentenced to life in prison.” App. 124. The PCR judge further noted that plea counsel testified “that he did not tell [Petitioner] he would receive a specific sentence if found guilty.” App. 124. After noting this testimony, the PCR judge found plea counsel’s testimony credible and stated he did “not believe that [plea] counsel put undue pressure on [Petitioner] to force him to plead guilty.” App. 124. Accordingly, the PCR court found Petitioner’s guilty plea was knowingly and voluntarily entered. App. 124.

Discussion

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).

This Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. Hinson found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991)(reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing).

In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), the defendant pled guilty based upon the expectation that the solicitor would neither recommend nor oppose a sentence of probation. Id. at 53, 374 S.E.2d at 684. At the plea, a different solicitor represented the State and vigorously opposed probation. Id. This Court found plea counsel's failure to move to withdraw the sentence constituted ineffective assistance of counsel and reversed. Id. at 54-55, 374 S.E.2d at 684-85.

In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), this Court found plea counsel was ineffective for erroneously advising the defendant that he faced a sentence of life without parole. Id. at 375, 401 S.E.2d at 152. The state argued that since the defendant faced a possible seventy-five year sentence, he could not have been prejudiced by the erroneous advice. Id. at 376, 401 S.E.2d at 152-53. The Ray Court dismissed the state's reliance on a "possible" maximum sentence because had the defendant proceeded to trial, he could have faced a much shorter sentence. Id.

The undisputed evidence before the PCR court was that Petitioner was demanding a jury trial until the eve of trial. Petitioner had informed plea counsel that he would not accept a plea offer of a sentence greater than fifteen years' imprisonment. Nevertheless, plea counsel

convinced Petitioner that if he failed to accept the state's offer of a negotiated sentence of thirty years' imprisonment, then he would serve the remainder of his life in prison because he had no hope of convincing a jury that he was not guilty or only guilty of a lesser-included offense and that the presiding judge was one who would charge a "trial tax" if Petitioner exercised his constitutional rights. Cf. Castro v. State, Op. No. 27648 (S.C. Sup. Ct. filed July 20, 2016)(Shearouse Adv. Sh. No. 29 at 15)(holding a "judge abuses his or her discretion when he or she *considers* the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant")(emphasis in original). Even during the guilty plea, Petitioner's reticence was clear. Petitioner expressed his confusion with the terms of the offer, his compulsion to enter the plea only due to plea counsel's lack of preparation, and his lack of understanding of the term of years he would be required to serve. Plea counsel's coercive and threatening advice rendered Petitioner's guilty plea involuntary. As a result, this Court should vacate his guilty plea and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner requests this Court vacate his guilty plea and remand for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
R. Knox McMahon, Circuit Court Judge

JUNIOR L. KIKER,

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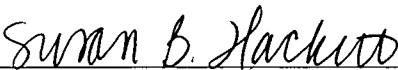
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Junior Lee Kiker 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 August 11, 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 Junior Lee Kiker.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lancaster County
R. Knox McMahon, Circuit Court Judge

JUNIOR L. KIKER,

PETITIONER,

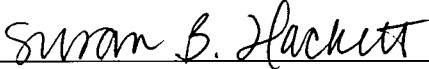
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STATE OF SOUTH CAROLINA,

RESPONDENT

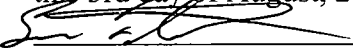
CERTIFICATE OF SERVICE

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 Johanna Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Junior Lee Kiker, #321516 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of August, 2016.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of August, 2016.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.