

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Roger L. Couch, Circuit Court Judge

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AUG 12 2016

SC SUPREME COURT

RION BEATY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2016-000492

PETITION FOR WRIT OF CERTIORARI

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1.

The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974) where the state did not oppose the request and the undisputed evidence showed the notice of appeal filed by plea counsel was untimely.5

2.

Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel’s promise that he would be sentenced to ten years’ imprisonment if he pled guilty instead of proceeding to trial and where Petitioner was actually sentenced to fifteen years’ imprisonment.7

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ISSUES PRESENTED

1.

Whether the PCR court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) where the state did not oppose the request and the undisputed evidence showed the notice of appeal filed by plea counsel was untimely?

2.

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that he would be sentenced to ten years' imprisonment if he pled guilty instead of proceeding to trial and where Petitioner was actually sentenced to fifteen years' imprisonment?

STATEMENT

A Beaufort County Grand Jury indicted Petitioner on October 18, 2012 for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime based on a robbery that occurred at the South Beach General Store on Hilton Head Island. App. 114-119.

Petitioner's jury trial was scheduled to commence on Monday, April 22, 2013, the day he ultimately pled guilty. The night before, plea counsel visited Petitioner at the detention center and attempted to convince him to plead guilty. Petitioner said, "He [counsel] kept asking me . . . if he could get me ten years, would I take it." App. 56, ll. 5-12. However, Petitioner held firm that he wanted to proceed to trial. The following day, Petitioner was transported to the courthouse for his jury trial. He was dressed in a suit and tie. App. 57, ll. 21-25. Nonetheless, counsel "started talking to [Petitioner's] family . . . to try to persuade them to get [Petitioner] to take some time." App. 56, ll. 13-15.

While they were in court, counsel continued "talking to [Petitioner's] family and talking to [Petitioner] trying to persuade [Petitioner] to take the ten years." App. 57, ll. 7-9. Petitioner ultimately gave in to the pressure and agreed to plead guilty with the understanding that he would be sentenced to only ten years' imprisonment. App. 9-10. However, Petitioner "didn't get ten years." App. 57, ll. 10-11. Instead, Petitioner was sentenced to an aggregate of fifteen years' imprisonment. App. 57, l. 7; App. 24, ll. 104.

Petitioner's mother, Carol Ann Mitchell, and his stepfather, Lee Mitchell also thought Petitioner would be sentenced to only ten years based on plea counsel's statements. Carol said counsel "had us out in the lobby, me and the other family members" and wanted her and the others to tell Petitioner "to take the plea." Based on her discussion with counsel, she thought Petitioner would be sentenced to ten years if he pled guilty. She believed counsel was "talking about a ten-

year deal.” App. 49, ll. 1-24. Lee likewise stated that his family “was in a group outside in the lobby” and counsel told them Petitioner “was going to get ten years.” He believed his stepson, Petitioner, was “walking in for a 10-year deal.” App. 50, l. 25 – 51, l. 10.

Plea counsel admitted that he tried to convince Petitioner’s family to persuade Petitioner to plead guilty. He said he showed Petitioner’s family members still photographs from surveillance footage that captured the robbery. Counsel maintained that upon seeing these photographs “all of them stopped in their tracks at that point and said, whoa, we better re-think this.” Counsel admitted Petitioner’s family did not actually say this, but that is what he thought they were thinking. App. 76, l. 17 – 77, l. 25.

Petitioner ultimately pled guilty as indicted on April 22, 2013 before the Honorable J. Ernest Kinard, Jr. App. 1. Assistant Solicitor Benjamin T. Shelton represented the state, and Donald C. Colongeli represented Petitioner. App. 2. Petitioner was sentenced by Judge Kinard to fifteen years’ imprisonment for kidnapping, fifteen years concurrent for armed robbery, and five years concurrent for the weapons offense. App. 24, ll. 1-4.

The Court of Appeals dismissed Petitioner’s appeal by order filed July 8, 2013 because counsel failed to timely file the notice of appeal. App. 105.

On June 23, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 27-34. The state filed a return to this application dated August 28, 2015. App. 35-40. An evidentiary hearing was convened on October 20, 2015 before the Honorable Roger L. Couch. App. 41. Assistant Attorney General J. Rutledge Johnson represented the state, and James K. Falk represented Petitioner. App. 42. By order filed February 19, 2016, Judge Couch granted Petitioner a belated direct appeal. However, Judge Couch denied Petitioner’s remaining PCR allegations. App. 91-98. This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974) where the state did not oppose the request and the undisputed evidence showed the notice of appeal filed by plea counsel was untimely.

Judge Couch correctly granted Petitioner a belated direct appeal. The PCR court found Petitioner “did not knowingly and voluntarily waive his right to a direct appeal.” App. 112. Petitioner testified that he spoke to plea counsel’s secretary, who happened to be counsel’s wife, over the telephone shortly after his guilty plea and requested counsel file a notice of appeal. Based on this telephone conversation, Petitioner thought counsel properly filed a notice of appeal on his behalf. App. 66, l. 21 – 67, l. 10. Petitioner testified, “I was told that the paperwork was done fine.” App. 67, l. 1. Counsel admitted that he did not timely serve and file the notice of appeal. He maintained that while the notice of appeal was dated within ten days of Petitioner’s guilty plea, it was not mailed and properly served within the allotted time period. App. 84, l. 22 – 85, l. 19.

“The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge’s findings.” *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991); *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967).” *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480 (1992).

Petitioner testified he asked counsel to file a notice of appeal. Counsel admitted he failed to timely serve the notice. This evidence supports the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to White, 236 S.C. 110, 108 S.E.2d 35.

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's promise that he would be sentenced to ten years' imprisonment if he pled guilty instead of proceeding to trial and where Petitioner was actually sentenced to fifteen years' imprisonment.

The difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). “The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotation marks and citation omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. (quoting McMann v. Richardson, 397 U.S. 759 (1970)) (internal quotation marks omitted). On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. “[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) (quoting Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)) (internal quotation marks omitted).

Additionally, a guilty plea that was “entered by one fully aware of the direct consequences . . . must stand *unless* induced by . . . misrepresentation (including unfulfilled or unfulfillable promises) . . . ” Brady v. United States, 397 U.S. 742, 755 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (*reversed on other grounds*, 356 U.S. 26 (1958))). Accordingly, counsel provides ineffective assistance in the adversarial system when he induces the defendant to plead guilty.

In this case, Petitioner was induced into pleading guilty by plea counsel’s promise that he would only be sentenced to ten years’ imprisonment. Moreover, it is apparent that counsel put undue pressure on Petitioner to plead guilty. Petitioner told counsel the night before he was scheduled for trial that he did not want to plead guilty and wished to go forward with a jury trial. Petitioner was transported to the courthouse the following morning with the expectation that he was going to trial. He was even dressed in a suit and tie. It was not until counsel repeatedly told Petitioner to plead guilty and assured him he would only be sentenced to ten years that Petitioner ultimately caved and agreed to plead guilty. Counsel also recruited Petitioner’s family members to persuade Petitioner to plead guilty by telling them Petitioner would be sentenced to only ten years.

While counsel maintained that he did not guarantee Petitioner would be sentenced to ten years, he admitted “there was *a great deal of miscommunication* between Mr. Beaty [Petitioner] and myself to the extent that he was locked in on that ten-year figure. I apologized and felt bad *afterwards*, but [I] tried to explain to them [Petitioner and his family] that that was a possibility, there was never any guarantee that ten years would be given.” App. 84, ll. 7-10 (emphasis added). At a minimum, counsel failed to clearly communicate with Petitioner and ensure that he understood that, while there was a chance Petitioner would be sentenced to only ten years’ imprisonment, there was no guarantee, and that the court could sentence him up to sixty-five years. It appears from

counsel's testimony that he tried to correct the miscommunication *only after* Petitioner had pled guilty and was sentenced. Because of counsel's failure to properly communicate with Petitioner, Petitioner could not make a "voluntary and intelligent choice" about whether he should plead guilty or proceed to trial. See Hill, 474 U.S. at 56.

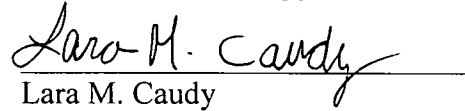
Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability that but for counsel's promise that Petitioner would be sentenced to only ten years, Petitioner would not have pled guilty and would have insisted on proceeding to trial. It was only because of counsel's promise that Petitioner pled guilty.

Moreover, to the extent counsel maintained he told Petitioner there was no guarantee he would be sentenced to ten years, Petitioner was prejudiced by counsel's failure to properly communicate. If counsel would have properly conveyed this to Petitioner, Petitioner would have gone forward with a jury trial. The fact that Petitioner was ultimately sentenced to fifteen years imprisonment is further evidence of prejudice since this sentence exceeded the ten years he was promised by counsel.

As a result of Petitioner's involuntary guilty plea, this Court should reverse Petitioner's convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari, permit full briefing on the issues presented, and consider Petitioner's belated direct appeal.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Roger L. Couch, Circuit Court Judge

RION BEATY,

PETITIONER

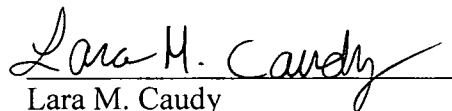
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

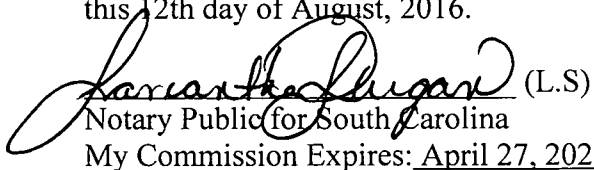
The undersigned certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served upon Rion Beaty, #337153, at Ridgeland Correctional Institution, P.O. Box 2039, Ridgeland, SC 29936, this 12th day of August, 2016.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of August, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.