ORIGINAL

RECEIVED
APR 30 2012
S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

KEVIN ALLISON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

DAYNE C. PHILLIPS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 6

CONCLUSION 11

ISSUE PRESENTED

Did the PCR court err in finding plea counsel provided effective assistance of counsel where plea counsel misadvised Petitioner regarding a direct consequence of his sentence by creating the expectation that Petitioner would serve his sentence in a work release program when in fact Petitioner was required to serve eighty percent of his prison sentence before being eligible for work release, and where Petitioner relied on plea counsel's erroneous advice in his decision to plead *nolo contendere*?

STATEMENT

Indictments and Plea Hearing

On March 25, 2010, Petitioner Kevin Allison was indicted by the York County Grand Jury for possession with the intent to distribute (PWID) crack cocaine. App. 96 – 97.

On April 20, 2010, Petitioner appeared before the Honorable John C. Hayes, III, and waived presentment to the York County Grand Jury on a distribution of crack cocaine charge. App. 2, l. 10 – 3, l. 25; 94 – 95. Petitioner was represented by Jonathan Sullivan, and the State was represented by Jenny Desch. App. 1. Petitioner then pled no contest to the PWID crack cocaine charge and to the distribution of crack cocaine charge. App. 4, l. 1 – 5, l. 4. As part of a plea agreement, the State agreed to a negotiated five year sentence and to dismiss a prior possession of marijuana, second offense charge. App. 5, ll. 5-6; 9, ll. 13-19. Judge Hayes accepted Petitioner's plea of *nolo contendere* and sentenced Petitioner to five years imprisonment on each charge, to run concurrent with the other. App. 9, ll. 6-12; 12, ll. 12-13. Petitioner did not appeal his convictions or sentences.

PCR Application and Evidentiary Hearing

On September 8, 2010, Petitioner filed his application requesting post-conviction relief (PCR). App. 14–21. The Respondent filed its return on April 21, 2011. App. 22–25. An evidentiary hearing was held before the Honorable Lee S. Alford on June 2, 2011. App. 26–80. Petitioner was represented by Brian Murphy, and the State was represented by Harrison Brant. App. 26. Petitioner and plea counsel, Jonathan Sullivan, testified at the evidentiary hearing.

Petitioner testified at the evidentiary hearing, "[plea counsel] said that I would be eligible for work release, and I'm not eligible for work release until the last 90 days of a 5-year sentence . . . ." App. 40, ll. 17-19; 47, ll. 16-18. Petitioner reiterated that plea counsel told him, "If I've got to write somebody, whatever, I will see that you go to work release." App. 42, ll. 13-14. Petitioner noted

that he had wanted to go to trial prior to pleading no contest. App. 31, ll. 14-15; 44, ll. 16-17.

Plea counsel admitted at the evidentiary hearing, "*I did mistakenly advise [Petitioner] that he would be eligible for work release*." App. 60, ll. 3-5 (emphasis added). Plea counsel also admitted, "I made a mistake thinking that only violent offenses would not be eligible for work release . . . I did advise, errantly advise [Petitioner] of that." App. 70, ll. 1-4. Plea counsel further stated that he "advised [Petitioner] that . . . it was in his best interests to take that offer" even though Petitioner had "always maintained . . . that he was innocent" and wanted to go to trial. App. 60, ll. 11-15; 63, ll. 8-11. However, Plea counsel stated that although he does remember telling Petitioner that he would be eligible for work release, he does not remember "telling [Petitioner] specifically when he would be eligible." App. 69, ll. 5-25. Plea counsel also stated that he had Petitioner sign an affidavit prior to his no contest plea. App. 81.

After hearing testimony from Petitioner and plea counsel, the PCR court decided to take the case under advisement and noted:

> But the question would be whether . . . [Petitioner's] attorney advised him he would be eligible for work – there's no guarantee anybody's going to get work release, I do not believe. But, if [Petitioner] would, that he would be eligible for work release. And he was advised of that and pled, that's a collateral consequence of his plea. But whether that would entitle [Petitioner] to get a new trial or not – *whether that would render ineffective assistance to the extent [Petitioner] would get a new trial again is a collateral issue. And, so I don't know.* That would be the issue.

App. 76, l. 20 – 77, l. 4 (emphasis added). The PCR court further noted, "I'd like to see if this case has come before the appellate courts before and what position they took. I'd like to see that." App. 79, ll. 15-17.

Order of Dismissal

On September 12, 2011, Judge Alford ruled in his Order of Dismissal that Petitioner failed to prove plea counsel provided ineffective assistance of counsel and denied Petitioner PCR relief. App. 82 – 92. Relevant to this petition, the PCR court found that "the record before this Court and the relevant statutory provisions indicate [Petitioner] is eligible for work release." App. 88. The PCR court noted that Petitioner pled no contest to a "no parole offense" and that the statute governing work release requires an inmate who is serving a sentence for a no parole offense to serve 80 percent of their sentence before becoming eligible for work release. App. 88; *See* S.C. Code Ann. § 16-1-10 *et al.* (Supp. 2009); S.C. Code Ann. § 24-13-125 (Supp. 2009). The PCR court found that Petitioner "is therefore eligible for work release, and the advice of counsel was not erroneous." App. 88. Based on the testimony presented at the plea and evidentiary hearings, the PCR court found that Petitioner "did not plead [no contest] in reliance on [his] eligibility for parole or work release; therefore, he failed to meet his burden of proof as to these claims." App. 89. The PCR court ultimately held that Petitioner "failed to prove *beyond preponderance of the evidence* that he would not have pled [no contest] but for such advice."[1] App. 88 – 89 (emphasis added).

---

[1] *See Frasier v. State*, 351 S.C. 385, 570 S.E.2d 172 (2002) (finding "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP.").

ARGUMENT

The PCR court erred in finding plea counsel provided effective assistance of counsel because plea counsel misadvised Petitioner regarding a direct consequence of his sentence by creating the expectation that Petitioner would serve his sentence in a work release program when in fact Petitioner was required to serve eighty percent of his prison sentence before being eligible for work release, and where Petitioner relied on plea counsel's erroneous advice in his decision to plead *nolo contendere*.

Petitioner testified at the evidentiary hearing that plea counsel told him, "If I've got to write somebody, whatever, I will see that you go to work release." App. 42, ll. 13-14. Plea counsel corroborated Petitioner's testimony when he admitted, *"I did mistakenly advise* [Petitioner] *that he would be eligible for work release."* App. 60, ll. 3-5. Plea counsel thus misadvised Petitioner regarding a direct consequence of his sentence by creating the expectation that Petitioner would serve his sentence in a work release program when in fact Petitioner was required to serve eighty percent of his sentence before being eligible for work release. App. 40, ll. 17-19; 88; *See* S.C. Code Ann. § 24-13-125 (Supp. 2009). Accordingly, the PCR court erred in finding that plea counsel provided effective assistance of counsel because Petitioner relied on plea counsel's erroneous advice in his decision to plead no contest. App. 82 – 92; *See Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to guilty plea challenges).

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him). "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, 683 S.E.2d 471 (2009) (citing *Hill*, 474 U.S. at 57-59).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Suber v. State,* 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, "the 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, 572-74, 713 S.E.2d 611, 612-15 (2011). However, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590, 596 (2007). Accordingly, the applicant must overcome this presumption to receive relief. *See Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989).

Deficient Performance

In this case, plea counsel's performance was deficient, as it fell below "an objective standard of reasonableness" when he misadvised Petitioner about a direct and serious consequence of Petitioner's sentence. App. 60, ll. 3-5; 70, ll. 1-4; *See Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding constitutionally defective performance is generally found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty). Specifically, plea counsel testified that he remembered telling Petitioner that he would be eligible for work release, but does not remember "telling [Petitioner] specifically when he would be eligible." App. 69, ll. 5-25. Plea counsel had a duty to

ensure his advice regarding whether Petitioner was eligible for the work release program and when Petitioner would become eligible for the work release program was accurate, so that Petitioner understood all of the consequences of pleading no contest.[2] *Cf. Frasier v. State*, 351 S.C. 385, 570 S.E.2d 172 (2002) (finding that a defendant need not be informed of the collateral consequences of his sentence such as parole eligibility; however, if an attorney undertakes to advise a defendant of the collateral consequences of his sentence, then the advice must be accurate); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

An "unsound result" occurred in this case because Petitioner did not knowingly, voluntarily, and intelligently enter a plea of *nolo contendere*, as plea counsel created an expectation that Petitioner would serve his sentence in a work release program when in fact Petitioner was required to serve eighty percent of his sentence before being eligible for work release. App. 40, ll. 17-19; 88; *Accord Brady*, 397 U.S. at 758; *Boykin*, 395 U.S. 238; *Ray v. State*, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant's guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel). In a common sense understanding, Petitioner being eligible for the work release program ninety days before the end of his five year sentence is *not* what is implied by plea counsel's ardent promise that Petitioner would be eligible for the work release program. App. 42, ll. 13-14.

---

[2] The decision to grant or deny an application for participation in the work-release program involves "the exercise of discretion or judgment" protected by S.C. Code Ann. § 15-78-60(5) (Supp. 2005). *See* S.C. Code Ann. § 24-3-20(b) (1989) (providing the Board of Corrections "may" grant work-release when it "determines that the character and attitude of a prisoner reasonably indicates that he may be so trusted ..."); *see also Gunter v. State,* 298 S.C. 113, 116, 378 S.E.2d 443, 444 (1989) ("The Board of Corrections has discretion whether to allow an inmate even to participate in a work release program.") (emphasis added); *cf. Davis v. State,* 274 S.C. 549, 265 S.E.2d 679 (1980) (Board, rather than sentencing judge, is to "determine" a prisoner's eligibility under S.C. Code Ann. § 24-3-20).

Additionally, plea counsel's deficient performance could not be cured by the plea colloquy because the plea judge did not question Petitioner regarding when his eligibility for the work release program. Instead of focusing on the influential effect of plea counsel's affirmations regarding the work release program and Petitioner's comprehension of that guarantee, the PCR court illogically focused on whether Petitioner was actually eligible for the work release program. App. 88. Therefore, based on the testimony presented at the evidentiary hearing, plea counsel's advice regarding a direct consequence of Petitioner's sentence was at best, extremely confusing to Petitioner and constituted constitutionally defective performance. *See Hill*, 474 U.S. at 57-59.

Prejudice

Furthermore, Petitioner was prejudiced by plea counsel's deficient performance because it constituted the basis for Petitioner's decision to plead guilty. Specifically, Petitioner testified at the evidentiary hearing that he wanted to go to trial prior to entering his no contest plea. App. 31, ll. 14-15; 44, ll. 16-17. Plea counsel admitted at the evidentiary hearing that Petitioner had "always maintained . . . that he was innocent" and wanted to go to trial. App. 60, ll. 11-15. However, plea counsel testified that he "advised [Petitioner] that . . . it was in his best interests to take that offer[.]" App. 63, ll. 8-11.

Furthermore, the PCR court incorrectly labeled plea counsel's deficient performance as a collateral consequence of Petitioner's sentence and was unsure of the controlling law in this case:

> And [Petitioner] was advised of that and pled, that's a collateral consequence of his plea. But whether that would entitle [Petitioner] to get a new trial or not – *whether that would render ineffective assistance to the extent [Petitioner] would get a new trial again is a collateral issue. And, so I don't know.* That would be the issue.

App. 76, l. 24 – 77, l. 4 (emphasis added). The PCR court further noted, "I'd like to see if this case has come before the appellate courts before and what position they took. *I'd like to see that.*" App.

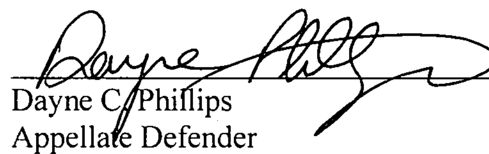
79, ll. 15-17 (emphasis added). Petitioner's PCR appeal can provide that opportunity by granting Petitioner's petition for writ of certiorari.

Based on the testimony presented at the evidentiary hearing, "there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pleaded guilty and would have insisted on going to trial." *See* Hill, 474 U.S. 56. Therefore, the PCR court erred in finding that plea counsel provided effective assistance of counsel because Petitioner relied on plea counsel's erroneous advice in his decision to plead no contest. App. 82 – 92.

CONCLUSION

Based on the foregoing reasons, Kevin Allison's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2012.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Lee S. Alford, Circuit Court Judge

KEVIN ALLISON,

PETITIONER,

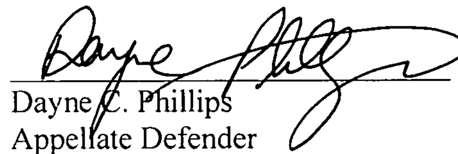
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

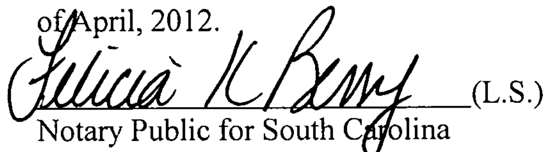
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire this 30th day of April, 2012.



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day of April, 2012.



_____________(L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020 .