

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Honorable R. Markley Dennis, Circuit Court Judge

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AUG 17 2016

SC SUPREME COURT

LLOYD WRIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001380

BRIEF OF PETITIONER

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ISSUE PRESENTED

Were Petitioner's Sixth Amendment rights violated where Petitioner would have accepted the State's prior, more favorable plea offer of twenty-five years had counsel competently advised Petitioner that the imposition of a sentence of life imprisonment without parole was mandatory, not at the discretion of the trial court, if he was found guilty?

STATEMENT

Indictment

On December 10, 2007, the Charleston County Grand Jury indicted Petitioner, Lloyd Wright, on the charges of distribution of cocaine base and distribution of cocaine base within the proximity of a school. App. 434 – App. 436.

Trial and Direct Appeal

On May 19 – 20, 2009, Petitioner proceeded to trial before the Honorable Kristi L. Harrington and a jury. Petitioner was represented at trial by James W. Smiley and the State by Assistant Solicitors Stephanie Linder and Bryan M. Byrd.

The jury returned a verdict of guilty on both charges as indicted. App. 358, l. 25 – App. 359, l. 22. Judge Harrington sentenced Petitioner to life without parole (LWOP) based on prior drug offenses. App. 370, ll. 22-25.

The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion filed on June 30, 2011. *State v. Wright*, 2011-UP-363 (S.C. Ct. App. filed June 30, 2011).

PCR and Evidentiary Hearing

On March 19, 2013, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 381 – App. 374. On December 3, 2013, the State filed a Return. App. 382 – App. 387. On April 15, 2014, an evidentiary hearing was held before the Honorable R. Markley Dennis. App. 388 – App. 421. Petitioner was represented by Christopher Murphy and the State by Assistant Attorney General Ashleigh R. Wilson. Judge Dennis denied Petitioner's application by an order filed on October 10, 2013. App. 425 – App. 433.

ARGUMENT

Petitioner's Sixth Amendment rights were violated where Petitioner would have accepted the State's prior, more favorable plea offer of twenty-five years had counsel competently advised Petitioner that the imposition of a sentence of life imprisonment without parole was mandatory, not at the discretion of the trial court, if he was found guilty.

Relevant Facts

Due to citizens' complaints, the Charleston Police and the F.B.I. conducted an undercover investigation into an open-air drug market in the area of Romney Street and Athens Court in Charleston. App. 178, ll. 3-25. On September 19, 2007, law enforcement arranged for Investigator Karen Springmeyer to make an undercover controlled buy. App. 192, ll. 2-20. Springmeyer drove into the area in a vehicle with an auto-video recorder inside. App. 132, ll. 2-12.

Once there she was approached by Petitioner who put his hand inside the car, allegedly holding cocaine base. App. 209, ll. 3-25. Springmeyer then handed him fifty dollars in marked bills. App. 216, ll. 1-7. Petitioner was arrested three weeks later on October 9, 2007. App. 160, ll. 1-24. The marked money was not recovered. App. 119, ll. 14 – 25. Petitioner was initially represented by Lisa Gay, but retained James Smiley prior to trial. App. 368, ll. 23-25.

Plea Offers

On May 18, 2009, before proceeding with Petitioner's trial, the court inquired about the status of any plea offers from the State. App. 5, ll. 1-8. Specifically, the court asked if it was to sentence Petitioner consecutively on all counts, "how much time is Mr. Wright facing?" *Id.* at ll. 9-12. Defense counsel replied that Petitioner faced one hundred-sixty years. *Id.* at ll. 14. The court then confirmed that the State had filed its notice of intent to seek life without parole. *Id.* at 15-18.

The court questioned Petitioner, "do you understand that once we call the jury here today, then [the State] is going to revoke [its] offer to you of a negotiated twenty-five. Do you understand

that?" *Id.* at 19-23. Petitioner responded in the affirmative. *Id.* When prompted, Petitioner also stated that he had sufficient time to discuss the offer with counsel. App. 6, ll. 3-7.

In addition to the charges in the present case, Petitioner was facing additional charges from other undercover, controlled buys in which he was allegedly involved. App. 404, ll. 20-23. The plea offer of twenty-five years would have resulted in those charges being dismissed. App. 409, ll. 8-12.

Trial

At trial the undercover video footage of the drug buy was published to the jury. App. 186, ll. 1 – 16. Investigator Springmeyer testified, describing the operation. Her supervising officer, Corporal Todd Hurteau, also testified as did other law enforcement officers involved in the operation. Counsel attempted unsuccessfully to strike Hurteau's testimony, as he relied on reports written by subordinates when giving testimony. App. 146, l. 11 – App. 147, l. 25.

Counsel also sought to obtain a copy of the joint Charleston Police-FBI operational plan, or, in the alternative, move for a *Brady* violation. *Id.* The court overruled the objection finding that the State did not have access to the plan and that no discovery violation had taken place. *Id.*

Sentencing

After denying Petitioner's post-trial motions, the trial court moved to sentencing. App. 368, ll. 1. Defense counsel acknowledged that Petitioner's proximity charge was a third strike and carried a life sentence. *Id.* at ll. 4-22. Counsel referenced Petitioner's drug addiction as a mitigating factor. *Id.* The State immediately countered that both the proximity charge and the distribution charge were third strikes, thus the State was asking for two life sentences. App. 369, ll. 23-25.

Counsel responded, “Really? I didn’t know the third was a strike. I know the proximity was, but I... Okay. Well, I guess they’re both life sentences, and I stand corrected...” App. 370, ll. 1-6. Petitioner declined to speak at the sentencing portion and the court sentenced Petitioner to two sentences of life without parole. App. 370, l. 22 – App. 371, l. 4.

PCR Evidentiary Hearing

At the evidentiary hearing, Petitioner stated that he believed the State was seeking a sentence of life without parole, but that the trial court retained discretion to sentence Petitioner to as little as ten years up to life imprisonment. App. 394, l. 15 – App. 395, l. 2. Petitioner said that he had discussed with Gay and later with Smiley that if he rejected the plea deal, the State was going to seek a life sentence. App. 393, ll. 7-24. Petitioner averred that if he had known the imposition of a life sentence was mandatory, he would have taken the guilty plea and negotiated twenty five year sentence. App. 395, ll. 2-12.

Petitioner also testified that his meetings with counsel focused on the undercover video footage, not possible plea offers. App. 397, ll. 2-22. Petitioner stated that counsel told him the police report, which was used at trial, would be inadmissible because no one signed it. *Id.* Upon taking the stand, Smiley believed that he explained the implications of the State’s decision to seek life without parole:

If [Petitioner] thought that life without the possibility of parole meant that a judge could do less than that, he never -- he never communicated that to me. I thought it was pretty self-explanatory that life without parole was life without parole. ***So we didn't have a discussion about what that means.***

App. 407, ll. 2-8 (*emphasis added*). Counsel conceded that he did not recall telling Petitioner that the imposition of life without parole was mandatory instead of discretionary. *Id.* at ll. 9-22.

Counsel also stated that he believed the Petitioner was a drug addict, but then insisted that Petitioner understood the implications of the State seeking a life sentence. App. 403, l. 16 – App. 404, l. 2. Counsel testified that the twenty five year offer was made while Petitioner was represented by Gay. App. 400, ll. 18-24.

According to counsel, Gay was also Petitioner's attorney when he was served with notice of the State's intent to seek life without parole, but counsel admitted he was aware of the State's notice. App. 401, ll. 4-11. When asked about a possible fifteen year plea deal, counsel could not recall if it was a formal offer from the State or an offer he made to the State. App. 409, ll. 1-7. Counsel also claimed that he told Petitioner that the State had a strong case. App. 410, ll. 9-22.

After the parties rested, Judge Dennis issued a ruling from the bench denying Petitioner's application. App. 417, ll. 16. Judge Dennis expressed concern that the trial court did not insure Petitioner understood the full implications of being found guilty at trial:

I also [use PCR Applications] as a learning tool for me in what I do when I'm trying a case. One of the things that I do when and I'm not faulting Judge Harrington at all, because we went through with you totally. ***But I make sure that I say, 'you understand that I don't have any choice.'***.... the judge goes through that. ***She said it doesn't say, necessarily, that she doesn't have any options. She says, 'I can sentence you up to a hundred sixty years.'***"

App. 418, l. 9 – App. 419, l. 7 (*emphasis added*). Judge Dennis then stated that he wished he had the benefit of hearing testimony from Petitioner's first attorney, but that "there's no question that we had a way of avoiding [a sentence of life without parole] prior to this trial, and he rejected it." App. 420, ll. 2-5.

Order of Dismissal

In denying Petitioner's application, the PCR court erroneously held that, "considering the serious nature of a life sentence, *it is unlikely trial counsel* or the Applicant's previous counsel did not discuss with the Applicant the serious nature of the mandatory life sentence he was facing." App. 432 (*emphasis added*). The PCR court also concluded that Petitioner did not meet his burden of proving counsel failed to advise him on the mandatory nature of life without parole. App. 431.

Discussion

Trial counsel's failure to insure that Petitioner was fully aware that rejecting the State's plea offer would result in a mandatory sentence of life without parole should Petitioner be found guilty at trial, constituted deficient performance, and absent this deficient performance, Petitioner would have accepted the State's plea offer. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The United States Supreme Court established the constitutional right to *effective* assistance of counsel in *Powell v. Alabama*, 287 U.S. 45 (1932).

To establish ineffective assistance of counsel, the Petitioner must satisfy a two-prong test set forth in *Strickland*. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

The second prong of the *Strickland* test requires a showing that the deficient performance of counsel prejudiced the petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 117-118, 386 S.E.2d at 625. Specifically, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

Counsel’s representation constituted deficient performance as Petitioner would have accepted the State’s prior more favorable plea offer of twenty-five years had counsel competently advised Petitioner that the imposition of a sentence of life without parole was mandatory should Petitioner be found guilty at trial. App. 397, l. 23 – App. 398, l. 14; *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625.

Defense counsel has a duty to render competent advice regarding the full implications of being found guilty at trial and has a duty to fully inform Petitioner of the risks he was facing by rejecting the plea offer. *See Lafler v. Cooper*, 566 U.S. ____, 132 S.Ct. 1376 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to situations where “inadequate assistance of counsel caused non-acceptance of a plea and additional proceedings led to a less favorable outcome”); *see also Missouri v. Frye*, 566 U.S. ____, 132 S.Ct. 1399 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected, and reaffirming *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 pleas).

As the Supreme Court emphasized in *Frye*: “*In today’s criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant*” and “*defense counsel has responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires.*” *Id.* at 1407 (*emphasis added*). Therefore, “[a]nything less [than effective counsel during plea negotiations] . . . might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” *Id.* at 1408 (citing *Massiah v. United States*, 377 U.S. 201 (1964) (quotation citation omitted)).

There was no evidence presented at the Petitioner’s PCR hearing or in the trial record to support the PCR court’s assumption that counsel discussed the mandatory nature Petitioner’s sentencing. *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999) (PCR court findings not supported by probative evidence will not be upheld on appeal). Counsel could not recall if he had specifically explained to Petitioner that the imposition of life with parole was mandatory. App. 406, ll. 9-22. Instead counsel testified that he believed that the risk of mandatory life without parole was self-explanatory. App. 403, l. 16 – App. 404, l. 2.

Petitioner stated at the PCR hearing that he assumed the trial court retained discretion when sentencing him. App. 394, l. 15 – App. 395, l. 2. Petitioner also said that, he believed he faced a sentencing range of ten years imprisonment to life imprisonment. App. 395, ll. 1-8. Notably, the trial court told Petitioner that *he was facing up to one hundred sixty years if she chose to sentence him consecutively on all counts*. App. 5, ll. 1-19. The trial court did not ask Petitioner if he knew that a guilty verdict on the proximity charge or the distribution charge

would *automatically* result in a mandatory life sentence. *Id.*

As the PCR Court noted, the trial judge never told Petitioner “I don’t have a choice” with respect to imposing a life sentence. App. 418, l. 9 – App. 419, l. 7. To an untrained layman, the trial court’s questioning and Smiley’s answers on Petitioner’s behalf clearly imply that the judge retained discretion to impose a range of sentences. Nevertheless, in denying Petitioner relief the PCR court speculated, without any competent evidence, that Petitioner had *likely* been informed by counsel that the imposition of a sentence of life imprisonment without the possibility of parole was mandatory.

Accordingly, the PCR court erred in finding that trial counsel’s failure to fully advise and insure that Petitioner understood that the imposition of a sentence life without parole was mandatory upon being found guilty, did not constitute deficient performance falling below prevailing professional norms for a criminal defense attorney. *See Strickland*, 466 U.S. at 687-88.

Prejudice

As to prejudice, trial counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Cherry v. State*, 300 S.C. 386 S.E.2d 624 (1989), 466 U.S. at 692. Petitioner testified that had he believed the imposition of a life sentence rested in the discretion of the trial court. App. 394, l. 1 – App. 395, l. 2. .

Petitioner said that, had he known a life sentence was mandatory, he would have accepted the State’s plea offer of twenty-five years. In following counsel’s deficient advice, Petitioner rejected a twenty-five year plea offer and proceeded to trial where he was found guilty and

sentenced to two terms of life without parole.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” App. 458 - 464; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, allow further briefing, and ultimately reverse Petitioner's convictions.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Honorable R. Markley Dennis, Circuit Court Judge

LLOYD WRIGHT,

PETITIONER,


V.

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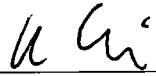
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has 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 Brief of Petitioner have been served on Lloyd Wright, 304199 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC, 29472, this 17th day of August, 2016.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of August, 2016.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 5/12/2025.