

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Frank R. Addy, Circuit Court Judge

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AUG 31 2016

S.C. SUPREME COURT

SHELTON D. BROWN

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000138

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX.....i

ISSUE PRESENTED1

STATEMENT OF FACTS2

ARGUMENT6

CONCLUSION9

ISSUE PRESENTED

Whether the PCR court erred by finding plea counsel provided effective representation where counsel failed to object when the State made a recommendation on sentencing at the guilty plea where there was a written plea agreement between Petitioner and the State where Petitioner would plead guilty to second-degree criminal sexual conduct with a minor, and the State would *nolle pros* the remaining charges and make no recommendation on sentencing?

STATEMENT OF FACTS

According to the State, on January 21, 2010, fourteen-year-old Minor went to visit Chelsea Williams at a residence on Charleston Highway in Orangeburg County. App. 5, ll. 1- 3. Petitioner was also present. App. 5, ll. 1 – 3. Minor, Williams, and seventeen-year-old Petitioner decided to walk over to an abandoned building next door. App. 5, ll. 4 – 9. While inside the abandoned building, Petitioner and Williams held Minor down onto the floor and took her clothes off. App. 5, ll. 10 – 12. Petitioner then had sex with Minor while Williams continued to hold her down. App. 5, ll. 13 – 20.

On April 18, 2011, Petitioner waived presentment to the Orangeburg County Grand Jury and pled guilty before the Honorable R. Ferrell Cothran. App. 1; App. 5, l. 22 – App. 6, l. 7. Mark Wise represented Petitioner. Sarah A. Ford represented the State. App. 1.

At the beginning of the guilty plea, the solicitor told the court that the seventeen-year-old Petitioner had been charged with second-degree criminal sexual conduct with a minor and kidnapping. App. 2, l. 1 – App. 3, l. 21. Pursuant to a written plea agreement, Petitioner was pleading guilty to only the second-degree criminal sexual conduct charge and there was “no recommendation as to sentence.” App. 2, ll. 3 – 7. She explained to the court that the State would *nolle pros* the kidnapping charge and a second-degree criminal sexual conduct with a minor charge, from a separate incident, as “part of the plea negotiations.” App. 6, ll. 4 – 12.

The solicitor also informed the court that the parents of the alleged victim of the criminal sexual conduct charge that would be *nolle prossed* was present in the courtroom. Despite having told the court that there was no recommendation, the solicitor asserted:

“Because of the short time period in which all these incidents occurred and the nature of the crimes, **the parents would ask that the maximum sentence be given** to the Defendant, Mr. Brown. Your

Honor, the State would concur in that, although Mr. Brown is not here pleading guilty to all of those. He was charged with them, and the State was prepared to go forward to trial on all of those if he did not accept the plea negotiation with this particular charge.”

Your Honor, **we feel that a significant sentence would be appropriate in this case.”**

App. 6, ll. 16 – 25. (emphasis added)

Plea counsel did not object. App. 6 – 7. Judge Cothran sentenced Petitioner to twelve years’ imprisonment. App. 10, ll. 5 – 12. Petitioner did not appeal his guilty plea or sentence.

PCR Hearing

On April 4, 2012, Petitioner filed a PCR application. App. 12. The State filed its return on September 10, 2012, requesting an evidentiary hearing. App. 20. Petitioner filed an amended PCR application on December 23, 2013. App. 25. On October 27, 2015, a PCR hearing was held before the Honorable Frank R. Addy. App. 30. C. Brad Hutto represented Petitioner. J. Clayton Mitchell represented the State. App. 30.

At the hearing, plea counsel agreed that he failed to object when the State recommended a “significant sentence,” despite agreeing to make no recommendation. App. 39, ll. 5 – 7. However, counsel gave no reason why he failed to object to the State giving a recommendation in violation of the written plea agreement. App. 39, ll. 8 – 16.

Counsel asserted that Petitioner was only seventeen years old at the time he was charged and arrested. App. 34, ll. 15 – 16. On April 4, 2011, the State had sent Petitioner a written plea offer. App. 38, ll. 23 – 25; App. 62. As part of the written plea offer, the State agreed to let Petitioner plead guilty only to second-degree criminal sexual conduct with a minor, and there would be no recommendation on sentencing. App. 39, ll. 1 – 4. At the time Petitioner received

the plea offer, he had not yet had a preliminary hearing. App. 35, ll. 15 – 23. Counsel and Petitioner never discussed waiting until after a preliminary hearing to decide whether Petitioner should plead guilty. App. 35, ll. 15 – 23. Counsel, likewise, did not speak with Petitioner’s mother about his case. App. 34, l. 25 – App. 35, l. 3.

Counsel stated that there was no rape kit performed on the victim in Petitioner’s case. App. 36, ll. 3 – 5. Further, at the time of Petitioner’s plea, counsel had not yet received the report from SLED with a DNA analysis of Petitioner’s blood sample. App. 36, ll. 10 – 12. Counsel did not advise Petitioner to wait until he received the DNA results from SLED before deciding to plead guilty. App. 36, ll. 17 – 24.

Petitioner did not testify at the hearing regarding the allegations in his PCR application.

Order of Dismissal

The PCR court issued an order of dismissal on January 8, 2016. App. 63. The court recognized that this Court has rendered counsel ineffective for failing to withdraw a guilty plea once the State disregards the plea agreement. App. 68. The PCR court also acknowledged that plea counsel failed to object when the State made a recommendation in violation of the plea agreement. App. 69. However, the court found that there was no evidence presented that Petitioner would not have pled guilty had he known the State would recommend a substantial sentence. App. 69. The court ruled that since Petitioner did not testify, he had “failed to demonstrate prejudice.” App. 69.

Petitioner appealed the court’s order of dismissal. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding plea counsel provided effective representation where counsel failed to object when the State made a recommendation on sentencing at the guilty plea where there was a written plea agreement between Petitioner and the State where Petitioner would plead guilty to second-degree criminal sexual conduct with a minor, and the State would *nolle pros* the remaining charges and make no recommendation on sentencing.

This Court has held that defense counsel is ineffective for failing to withdraw a defendant's guilty plea when the State disregards a plea agreement. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). Failing to protect a defendant's "right to enforce the plea agreement with the Solicitor's office [falls] below 'prevailing professional norms.'" Jordan, 297 S.C. at 54, 374 S.E.2d at 685.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). In the context of a guilty plea, a court will conduct a two-prong test when determining whether defense counsel's assistance was ineffective. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Hill, 474 U.S. at 58 – 59. Whether counsel was "deficient" turns on whether the guilty plea was entered voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). See Hill, 474 U.S. at 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970))).

Second, the applicant must show that he was prejudiced by counsel's deficient performance during the guilty plea process. Hill, 474 U.S. at 59. Specifically, the applicant must show 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." Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997). Thus, an applicant is entitled to post-conviction relief when the State recommended a sentence in violation of a negotiated plea agreement in which the State agreed **not** to make a recommendation. See Smith v. State, 413 S.C. 194, 775 S.E.2d 696 (2015).

Here, plea counsel was ineffective for failing to object when the State recommended a "significant sentence" at Petitioner's guilty plea. Plea counsel was also ineffective for failing to object when the alleged victim's parents, of the *nolle prossed* charge, requested the maximum sentence. Both requests were a breach of the plea agreement, and counsel did nothing. Counsel admitted that he did not object during the plea despite there being a written plea agreement between Petitioner and the State. See Jordan, supra.

The State agreed **in writing** to make no recommendation on sentencing. There is a big difference between not recommending a sentence and asking the court for a "substantial sentence." Moreover, the charge for which the alleged victim's parents asked for the maximum sentence was *nolle prossed*.

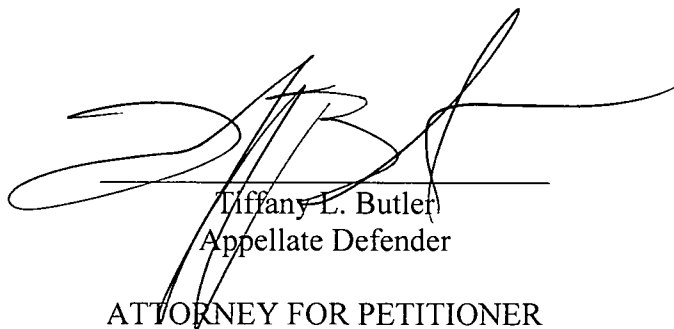
Although Petitioner did not testify at the PCR hearing regarding whether he wanted a trial, counsel informed the court that Petitioner was only seventeen years old and a student in high school at time he was arrested and charged. The incident occurred in January 2011 and Petitioner pled guilty in April 2011, only three months later. Petitioner did not have a preliminary hearing prior to pleading guilty. Counsel had not received Petitioner's DNA test results from SLED and there was no rape kit done on the victim.

Because of Petitioner's young age at the time he was charged, counsel had not received all of the evidence in the case, counsel had not spoken with Petitioner's parents about the case, and Petitioner was given a plea offer only three months after the incident, Petitioner could not have intelligently made the decision to plead guilty and waive his right to a jury trial. The record supports a finding that Petitioner would not have pled guilty had he known the State would not adhere to the written plea agreement.

Due to counsel's ineffective assistance in failing to object when the State made a recommendation on sentencing in violation of the plea agreement, Petitioner was deprived of his right to enforce the agreement. Thus, Petitioner is entitled to a new trial.

CONCLUSION

For the reasons argued above, Petitioner Shelton Brown respectfully requests this Court to grant his petition for writ of certiorari.



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

Honorable Frank R. Addy, Circuit Court Judge

SHELTON D. BROWN

PETITIONER,

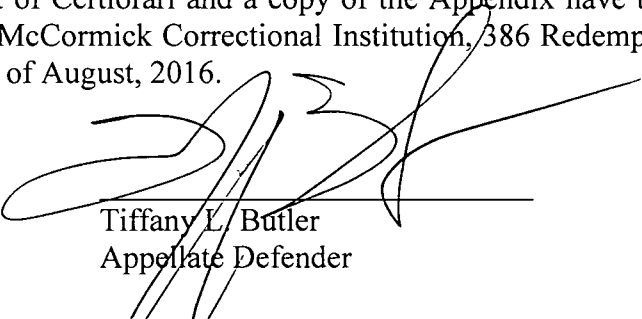
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Clay Mitchell, 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 on Shelton D. Brown, #345782, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 31st day of August, 2016.


Tiffany L. Butler
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 31st day of August, 2016.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: 03/01/2026