STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable D. Craig Brown, Circuit Court Judge

OBLIN BANEGAS-MALDONADO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000198

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective in failing to file a motion to reconsider sentence in light of the consecutive sentences imposed and the judge's comment, made immediately prior to sentencing, that the jury's verdict of guilty of the lesser included offense of voluntary manslaughter was "gracious"?

STATEMENT

In April of 2009, the Lexington County Grand Jury indicted Petitioner for murder and burglary first degree, indictments #2009-GS-32-0820, 0821. On November 1, 2010, Petitioner proceeded to jury trial before the Honorable Clifton Newman. Elizabeth J. Fullwood and Sally J. Henry represented Petitioner at trial. David Shawn Graham and Derrick E. Mobley prosecuted the case. The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and guilty of burglary first degree. Judge Newman sentenced Petitioner to twenty-five (25) years for voluntary manslaughter and fifteen (15) years consecutive for burglary. A timely notice of intent to appeal was filed and the direct appeal perfected. Deputy Chief Appellate Defender Wanda H. Carter filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On June 20, 2012, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Oblin Banegas-Maldonado, No. 2012-UP-373 (S.C. Ct.App. filed June 20, 2012).

On October 12, 2012, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 17, 2013. Petitioner, through counsel, filed an amended application for post-conviction relief on May 16, 2014. On December 8, 2015, an evidentiary hearing was held before the Honorable D. Craig Brown. Anna R. Good represented Petitioner at the PCR hearing. Patrick Schmeckpeper represented the State. In a written order signed January 15, 2016, Judge Brown denied relief and dismissed the application. A timely notice of intent to appeal was served on February 2, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to file a motion to reconsider sentence in light of the consecutive sentences imposed imposed and the judge's comment, made immediately prior to sentencing, that the jury's verdict of guilty of the lesser included offense of voluntary manslaughter was "gracious."

After the jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and guilty of burglary first degree, the judge stated, "I think the jury has been gracious in its conclusion that the offense was voluntary manslaughter and not murder, and I support the jury's verdict in that regard." (App. p. 514, lines 12-15). The judge then sentenced Petitioner to consecutive sentences of twenty-five (25) years for murder and fifteen (15) for burglary. (App. p. 514, line 20 – p. 515, lines 1-3). Although trial counsel presented mitigation at sentencing and asked the judge to impose concurrent sentences (App. pp. 510-513), trial counsel did not filed a motion to reconsider the consecutive sentences imposed.

In the amended PCR application Petitioner alleged that he was sentenced unfairly based upon the judge's feelings and not on the jury's verdict and trial counsel failed to object to the sentence. (App. p. 538). In the order of dismissal the PCR judge wrote:

> Applicant alleges counsel was ineffective in failing to object to his sentence. Applicant seemed particularly concerned with the trial judge's comment that the jury was "gracious" in their verdict of voluntary manslaughter rather than murder. This Court finds such comments were not improper. While it is true that it is inappropriate for judge to comment on the facts, these comments were post-verdict. As a result, there was no possibility that these statements would have impacted the jury's deliberations.
>
> Further, Applicant has not presented this Court with any meritorious objection counsel could have made. A trial judge has wide discretion in determining what sentence to impose. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. Id. As the sentences were within the lawful range, and there is no indication that the trial judge abused his discretion in running the sentences consecutively to one

> another, this Court finds Applicant has failed to meet his burden to prove counsel was ineffective in failing to make an objection. This allegation is therefore denied and dismissed.

(App. p. 579, fns #5, #6 and #7 omitted). The PCR judge erred. Trial counsel was ineffective in failing to file a motion to reconsider the consecutive sentences imposed.

In State v. Campbell, 376 S.C. 212, 215–16, 656 S.E.2d 371, 373 (2008)(fn omitted), the South Carolina Supreme Court wrote:

> It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires. State v. Hinson, 303 S.C. 92, 399 S.E.2d 422 (1990). *See also* State v. Best, 257 S.C. 361, 186 S.E.2d 272 (1972) (trial judge is without authority to pursue a case after the term of court has adjourned). Each week of court is a separate term. State v. Mixon, 275 S.C. 575, 274 S.E.2d 406 (1981). The rule has two exceptions: a timely post-trial motion and a motion for a new trial based on after-discovered evidence. Rule 29, SCRCrimP. Rule 29 states that, except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten days after the imposition of the sentence. Rule 29 further states that the court's jurisdiction to hear the motion will not expire with the term of court if the party has filed a timely motion. However, if the motion is not made within ten days of sentencing, the court will be without jurisdiction to entertain the motion.

In the present case trial counsel failed to file a motion to reconsider sentence.

In State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008) the South Carolina Court of Appeals wrote:

> The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). Here, the State made a timely motion to reconsider based upon additional information which Victim's father, who was not present at the original sentencing, could provide, as well as to clarify alleged misstatements made by Hicks' counsel during sentencing. We find the circuit court acted within its authority in hearing the motion to reconsider Hicks' sentence.

In contrast to Hicks, in the present case the judge was not given the opportunity to exercise his authority to reconsider the consecutive sentences imposed because trial counsel failed to file a motion to reconsider sentence. The consecutive sentences imposed combined with the judge's comment that the jury's verdict was "gracious" support a motion to reconsider sentence. In State v. Ates, 297 S.C. 316, 317–18, 377 S.E.2d 98, 99 (1989), this Court wrote:

> In the course of criminal trials in South Carolina, the judge must refrain from all comment which tends to indicate his opinion on the weight or sufficiency of evidence, the credibility of witnesses, the guilt of the accused, or the facts in controversy. Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987); State v. Smith, 288 S.C. 329, 342 S.E.2d 600 (1986); State v. Pruitt, 187 S.C. 58, 196 S.E. 371 (1938). We recently applied this principle and reversed the conviction in State v. Campbell, 374 S.E.2d 668 (S.C.1988).

Although the judge made the comment in the present case after the jury returned the verdict, the comment was made just prior to the judge imposing the consecutive sentences. The judge did not have the opportunity to reflect on his comment and the effect it may have had on the consecutive sentences imposed.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland,

466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to file a motion to reconsider the consecutive sentences imposed in light of the judge's comment made just prior to sentencing. There is a reasonable probability that, if trial counsel had filed a motion to reconsider sentence, the judge would have granted the motion and imposed concurrent sentences.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari and order further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable D. Craig Brown, Circuit Court Judge

OBLIN BANEGAS-MALDONADO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Oblin Banegas-Maldonado states:

1. SHE is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. SHE has reviewed the record of petitioner's trial before Judge D. Craig Brown, which was held on December 8, 2015 (PCR Hearing), and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. SHE has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Oblin Banegas-Maldonado.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of September, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 9th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable D. Craig Brown, Circuit Court Judge

OBLIN BANEGAS-MALDONADO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Oblin Banegas-Maldonado, #343494, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 6th day of September, 2016.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of September, 2016.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026