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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Edgefield County

Honorable D. Craig Brown, Circuit Court Judge

TOMMIE L. PIXLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000243

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by plea counsel's erroneous advice in regard to parole eligibility?

STATEMENT

In November of 2013, the Edgefield County Grand Jury indicted Petitioner Pixley for distribution of crack cocaine, indictment #2013-GS-19-591. On February 9, 2015, Petitioner appeared, in Saluda County, before the Honorable R. Knox McMahon and pled guilty. Andrew Farley represented Petitioner at the plea. Ervin Maye represented the State and advised the judge that this was a second offense. Pursuant to negotiations with the State, Judge McMahon sentenced Petitioner to five (5) years in prison. A notice of intent to appeal was not filed.

On April 1, 2015, Petitioner filed an application for post- conviction relief [PCR]. On May 12, 2015, and December 4, 2015, Petitioner filed amended PCR applications. The State filed a return on December 7, 2015. On December 9, 2015, an evidentiary hearing was held before the Honorable D. Craig Brown. In a written order signed February 1, 2016, Judge Brown denied relief and dismissed the application. A timely notice of intent to appeal was served on February 9, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by plea counsel's erroneous advice in regard to parole eligibility.

During the PCR hearing Petitioner testified that he decided to plead guilty rather than proceed to trial because plea counsel advised him that that he would only have to serve sixty-five percent of his five year sentence before being eligible for parole. When asked why he decided to plead guilty Petitioner testified, "Because I took his advice to plead guilty because it was—you know, I had like twelve more months. I had been locked up eighteen months and he told me it was nonviolent, five years at 65 percent, so I asked him do you think you could get the plea lower than that and he said no because they're giving it to you as a nonviolent, 65 percent." (App. p. 47, lines 5-11). Petitioner testified that he would not have pled guilty if he had known he would not be eligible for parole after serving sixty-five percent of his sentence. (App. p. 47, lines 12-15).

When asked about his advice in regard to parole eligibility, plea counsel testified:

> You know, I told him just like I tell anyone, you know, there's certain classifications within the prison system that one you get to wherever you're gonna be going, whether Kirkland or Broad River or whatever, depending on certain things they can classify you into different areas that – that can make you eligible for 65 percent or 85 percent. I never guarantee anybody what that is. I don't think we have any control over that as trial counsel or with the judges.

(App. p. 64, lines 1-9). Plea counsel's advice that parole eligibility was solely up to the South Carolina Department of Corrections was erroneous.

Parole eligibility is statutorily determined. S.C. Code § 24-13-150 provides:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, an inmate convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including an inmate serving time in a local facility

> pursuant to a designated facility agreement authorized by Section 24-3-20 or Section 24-3-30, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed.

S.C. Code § 24-13-100 provides that, "For purposes of definition under South Carolina law, a "no parole offense" means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more." Distribution of crack cocaine second offense, the charge to which petitioner pled guilty, carries a penalty of not less than five years and not more than thirty years. S.C. Code §44-53-375(B)(2). Pursuant to S.C. code §16-1-20(A), distribution of crack cocaine second offense is a class A felony. Prior to passage of the Omnibus Crime Reduction and Sentencing Reform Act in June 2010, distribution of crack cocaine second offense was a "no parole" offense,

In Bolin v. S. Carolina Dep't of Corr., 415 S.C. 276, 781 S.E.2d 914, (Ct. App. 2016), reh'g denied (Feb. 24, 2016), however, the South Carolina Court of Appeals clarified that a second offense under section 44–53–375(B) is no longer a no-parole offense. In Bolin the Court wrote:

> However, on June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act) became effective. While the Act did not amend the definition of the term "no-parole offense" in section 24–13–100 or decrease the maximum sentence for a second offense of possession with intent to distribute methamphetamine or conspiracy to manufacture methamphetamine, it added the following language to section 44–53–375(B): "*Notwithstanding any other provision of law,* a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and *is eligible for parole,* supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits."

Id., 415 S.C. at 282, 781 S.E.2d at 917. It appears that prior to the Bolin decision the South Carolina Department of Corrections treated distribution of crack cocaine second offense as

"no parole" offenses requiring service of eighty- five percent of the sentence before becoming eligible for parole. Petitioner testified that he learned that he would not be eligible for parole after serving sixty-five percent of his sentence when he arrived at the South Carolina Department of Corrections and was classified. (App. p. 54, lines 9-25). Plea counsel was ineffective in erroneously advising Petitioner that he would be parole eligible after serving either sixty-five percent or eighty-five percent of his sentence because, prior to the decision in Bolin, distribution of crack cocaine second offense was treated as a "no parole offense" requiring service of eighty-five percent.

In the order of dismissal the PCR judge wrote:

Applicant alleges that trial counsel was ineffective for misadvising Applicant regarding the terms of the negotiated sentence and how that sentence is calculated within the Department of Corrections. Applicant further alleges that this ineffectiveness rendered his guilty plea involuntary.

> This Court finds Applicant has failed to meet his burden with respect to either of these allegations. In light of the thorough colloquy during Applicant's guilty plea, as well as conflicting testimony presented at the evidentiary hearing, Applicant's testimony that counsel told him he would only have to serve sixty-five (65) percent of his sentence is not credible. This Court finds that counsel's testimony to the contrary to be entirely credible. As it is Applicant's burden to prove each allegation, and Applicant has not presented any other evidence in support of his first two allegations, they are necessarily denied and dismissed.

(App. p. 83). The PCR judge erred. Plea counsel's testimony was not contrary to Petitioner's testimony. Petitioner testified that plea counsel told him he would only have to serve sixty-five percent. Pleas counsel testified that he advised Petitioner that he would either have to serve sixty-five percent or eighty-five percent. The advice was erroneous because at the time of the plea distribution of crack cocaine second offense was treated as a "no parole" offense.

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.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v.

State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

"The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. "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, 413, 683 S.E.2d 471, 474 (2009).

Plea counsel was ineffective in providing erroneous parole information. See Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000) (defendant can only attack a guilty plea on the basis of "collateral consequences" where he is affirmatively misadvised) (overruled in part on other grounds); Strader v. Garrison, 611 F.2d 61, 62 (4th Cir. 1979). There is a reasonable probability that if Petitioner had known that the Department of Corrections was going to treat distribution of crack cocaine as a "no parole" offense requiring service of eighty-five percent of the sentence, he would not have pled guilty but would have insisted on going to trial.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Edgefield County

Honorable D. Craig Brown, Circuit Court Judge

TOMMIE L. PIXLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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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 Patrick Schmeckpeper, 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 Tommie L. Pixley, #, at 1559 Highway 191, Johnston, SC 29832 this 12th day of August, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

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

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