STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Dillon County

Honorable Roger E. Henderson, Circuit Court Judge

ISAIAH MARCUS BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001417

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Was the guilty plea to murder rendered involuntary by trial counsel's failure to attempt to interview co-defendant, Mikal Bethea, who confirmed at the PCR hearing that he was the triggerman?

2. Was plea counsel ineffective in failing to call co-defendant, Mikel Bethea, as a witness at the motion to reconsider sentence to confirm that Bethea was the triggerman but was allowed to plead to voluntary manslaughter for a fifteen years sentence when Petitioner, who was not the triggerman, pled guilty to murder and received a forty-five (45) year sentence?

STATEMENT

In June of 2010, the Dillon County Grand Jury indicted Petitioner Brown for murder, indictment #2010-GS-17-0494. In August of 2010, the Dillon County Grand Jury indicted Petitioner for conspiracy, possession of a weapon during the commission of a violent crime and armed robbery, indictments #2010-GS-17-0616, 0617, 0618. On August 8, 2011, Petitioner appeared before the Honorable Howard P. King and pled guilty to murder, conspiracy, possession of a weapon during the commission of a violent crime and armed robbery. William Grove represented Petitioner at the guilty plea. Daniel Shipp prosecuted the case. Judge King sentenced petitioner to forty-five (45) years for murder, five (5) years concurrent for conspiracy, five years concurrent for the weapons charge and thirty (30) years concurrent for armed robbery. Petitioner filed a timely post-plea motion on August 17, 2011. On March 7, 2012, Judge King heard Petitioner's motions to reconsider sentence and/or withdraw the guilty plea. Judge King denied both motions. (App. pp. 58-61). A timely notice of intent to appeal was filed and the direct appeal perfected. On March 5, 2014, the South Carolina Court of Appeals dismissed the appeal. State v. Brown, Op. No. 2014-UP-96 (S.C. Ct.App. filed March 5, 2014).

On September 10, 2014, Petitioner filed an application for post-conviction relief. The State filed a return on November 21, 2014. Petitioner filed an amended application on January 6, 2016. On January 12, 2016, an evidentiary hearing was held before the Honorable Roger E. Henderson. Lance S. Boozer represented Petitioner at the hearing. Jessica E. Kinard represented the State. In a written order signed January 25, 2016, Judge Henderson granted the application for post-conviction relief and ordered a new trial. On February 4, 2016, the State filed a motion to alter or amend the order granting post-conviction relief. In a written order signed June 1, 2016, Judge Henderson granted the State's motion to alter or amend, denied relief and dismissed

the application. A timely notice of intent to appeal was served on June 20, 2016. This petition for writ of certiorari follows.

ARGUMENTS

1. The guilty plea to murder was rendered involuntary by trial counsel's failure to attempt to interview co-defendant, Mikal Bethea, who confirmed at the PCR hearing that he was the triggerman?

Petitioner was sixteen years old when he, Mikal Bethea and Matthew Cade were arrested and charged in the shooting death of Bennie Anderson on March 22, 2010. (App. p. 25, line 22 – p. 26, lines 1-6). On August 8, 2011, Petitioner, who was then eighteen years of age, pled guilty, without negotiation or recommendation, to murder, conspiracy, possession of a weapon during the commission of a violent crime and armed robbery. Judge King sentenced Petitioner to an aggregate term of forty-five (45) years. On November 16, 2011, Mikal R. Bethea pled guilty to voluntary manslaughter and the judge sentenced him to fifteen (15) years. (App. pp. 160-161). On November 17, 2011, Matthew Cade pled guilty to voluntary manslaughter and the judge sentenced him to seven (7) years. (App. pp. 162-163).

Petitioner filed a written motion to withdraw the guilty plea on August 17, 2011. On March 7, 2012, Judge King considered both Petitioner's motion to withdraw the guilty plea and motion to reconsider sentence. ((App. pp 36-62). Judge King denied both motions. (App. pp. 58-61). Plea counsel failed to call either Bethea or Cade to testify at the post plea hearing. Both co-defendants had entered guilty pleas prior to the hearing.

During the guilty plea the prosecutor first told the judge that Bethea was the shooter. (App. p. 18, lines 2-17). Later during the plea the prosecutor referenced two letters from juveniles who were incarcerated at the South Carolina Department of Juvenile Justice with Petitioner. According to the prosecutor, the letters claim that Petitioner said that he pulled the trigger. (App. p. 19, lines 4-25). Plea counsel asked the judge to impose the minimum sentence

but failed to argue that Petitioner was less culpable than Bethea because Bethea was the actual shooter. (App. pp. 29-30).

In the amended application for post-conviction relief Petitioner alleged, among other things, that plea counsel was ineffective in failing to investigate co-defendant Mikal Bethea and alleged that the guilty plea was not voluntary. (App. pp. 89-90). During the PCR hearing plea counsel admitted that he never spoke with or attempted to speak with co-defendant Mikal Bethea. (App. p. 140, lines 4-6). Plea counsel testified, "Given the fact that he [Bethea] had never made a statement to law enforcement and evidentiary speaking, he was in the best position. He had zero incentive to make any sort of statement implication himself and trying to take the blame for either Matthew or Isaiah." (App. p. 140, lines 13-18). Plea counsel also testified, "I don't think that would have helped. At the time Shipp [the prosecutor] thought that Mikal Bethea was the shooter. Everybody thought that Mikal Bethea was the shooter. There was never a question in anybody's mind. I don't know how Mikal Bethea actually saying it out loud would've helped Isaiah." (App. p. 141, lines 3-8). During the guilty plea, however, the prosecutor told the judge that two juveniles claimed that Petitioner admitted that he was the shooter. (App. p. 19, lines 4-25). While "everybody" may have thought Bethea was the shooter, plea counsel failed to make this important fact clear to the judge at the time of sentencing. When asked if he had any realistic expectation at all that Petitioner would receive a forty-five year sentence, plea counsel answered, "No. Again giving the mitigation in his case that he was culpable as an accomplice. I didn't think that he had any reason to expect anything more than the minimum." (App. p. 144, lines 4-6).

Petitioner called Mikal Bethea as a witness at the PCR hearing. Bethea admitted writing a letter dated July 24, 2012, but clocked March 13, 2015, indicating that he forced Petitioner to

participate in the robbery. (App. p. 126, line 16 – p. 127, lines 1-25). The letter was introduced in evidence at the PCR hearing. (App. p. 128, lines 1-7; p. 164). Bethea admitted that he brought the gun and testified, "He [Petitioner} was only really just standing next to the car, that's all he did." (App. p. 129, lines 9-12). Bethea testified that he would have made the same statement if called as a witness at trial. (App. p. 129, lines 18-20).

In the order of dismissal the PCR judge wrote:

> Counsel's investigations or lack thereof were completely reasonable in this scenario, as he had no reason to believe that Bethea would break his silence to speak against his own interest ,or that his attorneys would allow him to do so. This Court finds the testimony of counsel to be most credible as it relates to this allegation. This Court finds Bethea's testimony regarding his intent to speak on behalf of Applicant not to be credible. At this point in time, he has nothing to lose by attempting to help Applicant receive a new trial though, at the time of the plea, he had a great deal to lose. This Court cannot give any credit to Bethea's statements that he would have sacrificed his own case and future to benefit Applicant.

(App. p. 187). The PCR judge erred. Plea counsel was ineffective in failing to attempt to interview Bethea.

Plea counsel admitted that he never attempted to speak with Bethea. (App. p. 140, lines 4-6). The fact that Bethea's attorneys might not have allowed plea counsel to speak with Bethea is not a justification for not making an attempt to speak with Bethea. In contrast to the attorney's decision in Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011), counsel's failure to try and speak with Bethea was not part of a valid trial strategy. Instead, counsel's failure to attempt to speak with Bethea was based an assumption. Plea counsel assumed he would not be able to speak with Bethea. According to Bethea, the assumption was incorrect. Finding that plea counsel fulfilled his reasonable duty to investigate in the present case is the equivalent of finding that the failure to investigate because counsel assumed nothing of benefit would be discovered is

reasonable. This is not the standard established by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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).

Counsel was ineffective in failing to attempt to interview Bethea to demonstrate that Petitioner was not the shooter. Petitioner was prejudiced by counsel's deficient performance. During the plea counsel failed to argue that Petitioner was not the shooter. (App. pp. 29-30). As result, Petitioner received a forty-five year sentence while the shooter received a fifteen year sentence. There is a reasonable probability that if counsel had attempted to interview Bethea, Petitioner would not have pled guilty but would have insisted on going to trial.

2. Plea counsel was ineffective in failing to call co-defendant, Mikel Bethea, as a witness at the motion to reconsider sentence to confirm that Bethea was the triggerman but was allowed to plead to voluntary manslaughter for a fifteen years sentence when Petitioner, who was not the triggerman, pled guilty to murder and received a forty-five (45) year sentence.

In the amended application for post-conviction relief Petitioner alleges that plea counsel was ineffective in failing to properly prepare for a reconsideration hearing. (App. p. 90). On August 17, 2011, Petitioner filed a written motion to withdraw the guilty plea. On March 7, 2012, Judge King considered both Petitioner's motion to withdraw the guilty plea and motion to reconsider sentence. (App. pp 36-62). Judge King denied both motions. (App. pp. 58-61).

While not argued during the guilty plea, during the reconsideration hearing plea counsel argued that Petitioner should receive a sentence of less than forty-five years because he was not the shooter. Counsel stated:

> What is relevant, Judge, is essentially we have what I consider a nonshooting, less culpable co-defendant charged under the hand of one, the hand of all who's going to, if things remain as they are, serve more than three times the sentence imposed on the person who we would have suggested and very likely the State would have suggested with a successful trial against Mikal Bethea, that Mikal Bethea was the shooter. Mikal Bethea is going to serve somewhere in the range of 85 to 95 percent of a 15-year sentence whereas Isaiah Brown as of today is serving day-for-day on a 45-year sentence, Judge.

(App. p. 45, lines 12-23). The State did not concede that Bethea was the shooter. Plea counsel failed to call either Bethea or Cade to testify at the hearing. Both co-defendants had entered guilty pleas prior to the reconsideration hearing.

The State objected to the motion to reconsider sentence based on the fact that prior to Bethea's trial they offered Petitioner a sentence reduction in exchange for testimony against Bethea. (App. p. 51, line 12 – p. 52, lines 1-21). Petitioner declined to testify against Bethea. The judge refused to reconsider the forty-five year disparate sentence imposed stating, "I say all that to say that Mr. Brown had ample opportunity to help himself and to have his sentence

reduced by one third, but has failed to take advantage of that opportunity and I see no reason that the sentence should be reconsidered. For that reason, the motion to reconsider is denied." (App. p. 61, lines 17-23). The fact that Petitioner did not testify for the State does not justify ignoring an otherwise valid reason to reconsider the sentence imposed.

The ground for reconsidering Petitioner's sentence was based on the disparate sentences between the shooter, Bethea, who received a fifteen year sentence and the non-shooter, Petitioner, who received a forty-five year sentence. It was critically important to establish that Bethea was the shooter. During the PCR hearing Bethea admitted to being the shooter. (App. pp. 127-129). Plea counsel was ineffective in failing to call Bethea as a witness at the reconsideration hearing to confirm that he was the shooter.

In denying relief the PCR judge found that Bethea's testimony that he would have testified that he was the shooter was not credible because it was unlikely that Bethea would testify against his own interest. At the time of the reconsideration hearing, however, Bethea had already pled guilty and received a fifteen year sentence. There is no reason to doubt Bethea's testimony from the PCR hearing as it would have applied at the reconsideration hearing, after Bethea's guilty plea. Bethea's testimony at the reconsideration hearing would not have been against his own interest.

The authority to change a sentence rests solely and exclusively within the discretion of the sentencing judge. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). An abuse of discretion occurs where the conclusions of the trial court are either controlled by an error of law or lack evidentiary support. State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). A sentencing judge may impose different sentences for co-defendants when the record clearly reflects an appropriate basis for a disparate sentence. See State v. Follin, 352 S.C. 235,

255, 573 S.E.2d 812, 822 (Ct. App. 2002). In moving for reconsideration of the sentence trial counsel needed to show that there was **not** an appropriate basis for the thirty year difference between the sentence imposed upon Petitioner and the sentence imposed upon Bethea. Plea counsel, however, failed to demonstrate that the failure to reconsider sentence constituted an abuse of discretion as the decision lacked evidentiary support. Such a showing could have been made through the testimony of Bethea admitting that he was the shooter.

Plea counsel was ineffective in failing to call Bethea as a witness at the reconsideration hearing. Petitioner was prejudiced by counsel's deficient performance. There is a reasonable probability that Bethea's testimony confirming that he and not Petitioner was the gunman would have convinced the judge to reconsider the forty-five sentence imposed.

CONCLUSION

Based on the above arguments this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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ISAIAH MARCUS 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 Caitlin Hastings, 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 Isaiah Marcus Brown, #347241, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 21st day of February, 2017.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of February, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 7/3/2023.