STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable J. Derham Cole, Circuit Court Judge

BRANDON GOLDEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002034

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Did the PCR judge err in not finding plea counsel ineffective for failing to argue that the possession with intent to distribute marijuana charge should be treated as a second rather than a third offense?

STATEMENT

In September of 2013, the York County Grand Jury indicted Petitioner Golden for possession of a schedule II narcotic, oxycodone, indictment #2013-GS-46-3318. In December of 2013, the York County Grand Jury indicted Petitioner for possession with intent to distribute marijuana, indictment #2013-GS-46-4457. On February 26, 2014, Petitioner appeared before the Honorable Paul M. Burch and pled guilty as charged. Ashley Anderson represented Petitioner at the guilty plea. Marina Hamilton represented the State. Judge Burch treated the possession with intent to distribute marijuana as a third offense and sentenced petitioner to six (6) years in prison. Judge Burch sentenced Petitioner to six (6) months concurrent for the possession charge. Petitioner did not appeal the sentence or conviction.

On July 28, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on October 23, 2014. On January 21, 2015, an evidentiary hearing was held before the Honorable J. Derham Cole. William Michael Hemlepp, Jr. represented Petitioner at the PCR hearing. J. Rutledge Johnson represented the State. In a written order signed August 23, 2016, Judge Cole denied relief and dismissed the application. A timely notice of intent to appeal was served on September 28, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in not finding plea counsel ineffective in failing to argue that the possession with intent to distribute marijuana charge should be treated as a second rather than a third offense.

During the guilty plea the State advised the judge that the possession with intent to distribute [PWID] marijuana charge should be treated as a third offense. (App. p. 6, line 24 – p. 7, lines 1-9). The prosecutor told the judge that Petitioner had a possession of marijuana charge in 2012, a possession of marijuana charge in 2009, a possession of marijuana charge in 2004, and a PWID marijuana charge and a proximity charge in 2003. (App. p. 6, line 24 – p. 7, lines 1-9). Plea counsel verified that the proximity charge was for marijuana. (App. p. 7, lines 22-24). Plea counsel, however, did not argue that the prior possession of marijuana charges should not enhance the PWID marijuana charge because the possession charges were handled as bond forfeitures rather than convictions. Additionally, plea counsel did not challenge the possession of marijuana charge from 2004 as a first offense and not enhancing pursuant to S.C. Code §44-53-470(a)(2). Plea counsel erred. The PWID marijuana charge to which Petitioner pled guilty should have been treated as a second rather than a third offense.

Plea counsel did not argue that the PWID marijuana charge should be treated as a second offense. During the PCR hearing plea counsel admitted that she did not challenge enhancement on the record during the guilty plea. (App. p. 52, lines 23-25). Instead, plea counsel and the prosecutor met with the chief administrative judge at the time, Judge Alford, and asked for guidance in regard to enhancement. (App. p. 50, line 24 – p. 51, lines 1-14). Plea counsel testified that Judge Alford advised that the possession of marijuana charge from 2004 would not serve as an enhancement pursuant to S.C. Code §44-53-470(a)(2) because it was a first offense.

(App. p. 51, lines 22-24). Plea also testified that Judge Alford advised that the possession of marijuana charge from 2009 would not serve as an enhancement because it was a bond forfeiture. (App. p. 51, line 24 – p. 52, lines 1-4). Judge Alford further advised plea counsel, however, that the PWID marijuana from 2003 and the possession of marijuana charge from 2012 would serve to enhance the current PWID marijuana offense. (App. p. 51, lines 19-21; p. 52, lines 4-11). As to the 2012 possession of marijuana charge, plea counsel testified, "But he had a 2012 guilty plea or plea in magistrate court that just indicated a guilty plea with a fine on the record. The judge viewed that could be eligible because he viewed the language of the statute the way that the first was put at the front of not violating – or possession – marijuana possession first offense, the way it says first violation that he viewed it as being a chronological first violation." (App. p. 52, lines 4-11). Again, during the guilty plea before Judge Burch, plea counsel did not challenge the use of the prior possession of marijuana charges as enhancements.

In the order of dismissal[1] the PCR judge wrote, "Counsel also testified that she did not make a motion on the record regarding Applicant's charge being a second offense because she had already received the plea judge's interpretation and the solicitor was not willing to do pretrial motions." (App. p. 69). First, the plea judge, Judge Burch, was never presented with any challenge to the use of the prior possession charges as enhancements. Second, plea counsel did not need a pretrial motion to challenge the enhancements at sentencing. Plea counsel testified that, "The State would not agree to do anything on the record in terms of a motion." (App. p. 52, lines 21-22). Petitioner, however, pled guilty as indicted with no recommendation from the State. Plea counsel did not need a motion to challenge the enhancements at sentencing. Plea

[1] The order of dismissal contains a section in regard to the voluntariness of the guilty plea and a section in regard to the jurisdiction of the court. These issues were not raised by Petitioner have nothing to do with Petitioner's PCR action and appear to refer to a completely different Applicant. (App. pp. 72-74).

counsel was ineffective in failing to challenge the use of the prior possession charges as enhancements.

S.C. Code §44-53-470(a)(2) provides:

A) An offense is considered a second or subsequent offense if:

(2) for an offense involving marijuana pursuant to the provisions of this article, the offender has at any time been convicted of a first, second, or subsequent violation of a marijuana offense provision of this article or of another state or federal statute relating to marijuana offenses, except a first violation of a marijuana possession provision of this article or of another state or federal statute relating to marijuana offenses;

The possession of marijuana charge from 2004 should not serve as an enhancement pursuant to S.C. Code §44-53-470(a)(2) because it is a first violation of possession of marijuana. Plea counsel was ineffective in failing to challenge the enhancement.

Under South Carolina law, bond forfeitures cannot be used as a prior conviction unless expressly authorized by statute. Scott v. South Carolina, 334 S.C. 248, 513 S.E.2d 100 (1999) (holding a bond forfeiture is not the equivalent of a conviction). There is no South Carolina statute allowing the use of bond forfeitures for possession of simple marijuana. "We conclude the Legislature did not intend for a bond forfeiture to be the equivalent of a conviction under Section 44–53–470." Scott v. State, 334 S.C. 248, 255, 513 S.E.2d 100, 104 (1999). The possession of marijuana charge from 2009 should not serve as an enhancement because it was a bond forfeiture and not a conviction. Plea counsel was ineffective in failing to challenge the enhancement.

Additionally, plea counsel should have challenged the possession of marijuana charge from 2012. While plea counsel testified at the PCR hearing that the possession charge from 2012 resulted in a guilty plea, the State had the burden to prove, at sentencing, that the 2012

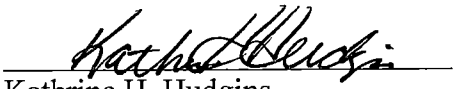
possession charge was not a bond forfeiture. Plea counsel was ineffective in failing to challenge the enhancement.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Counsel was in effective in failing to challenge the use of the prior possession of marijuana charges to enhance the PWID marijuana to a third offense. Petitioner was prejudiced by counsel's deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the PWID marijuana charge would have been treated as second offense rather than a third offense. As a second offense, Petitioner would be eligible for parole. As a third offense carries a maximum sentence of twenty (20) years, Petitioner is not eligible for parole. See S.C. Code §44-53-370(b)(2); 24-13-100.

CONCLUSION

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



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of April, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon Golden 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 J. Derham Cole, which was held on January 21, 2015, 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 Brandon Golden.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 21st day of April, 2017.

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
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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 Justin J. Hunter, 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 Brandon Golden, #310102, at Brandon Golden, #310102 Fort Mill City Detention Center, 111 Academy Street, Fort Mill, SC 29715, this 21st day of April, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

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

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