

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

CARLOS D. SMITH,

ORIGINAL

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S.C. SUPREME COURT

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2016-001565

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR judge correctly find that plea counsel's erroneous advice that Respondent faced a sentence of life without the possibility of parole upon conviction of a serious offense pursuant to S.C. Code §17-25-45 because of two prior convictions for assault and battery with intent to kill rendered the guilty pleas involuntary when the two prior convictions arose from a single incident at the same time and location and would have been treated as one strike rather than two?

STATEMENT OF THE CASE

In March of 2012, the Spartanburg County Grand Jury indicted Respondent for distribution of crack cocaine, third offense, indictment #2012-GS-42-1993. In May of 2012, the Spartanburg County Grand Jury indicted Respondent for contributing to the delinquency of a minor and possession of marijuana second offense, indictments #2012-GS-42-2489, 2490. In January of 2013, the Spartanburg County Grand Jury indicted Respondent for three counts of distribution of crack cocaine third offense, distribution of crack cocaine within the proximity of a school, possession of oxycodone, third offense and possession of weapon by a person convicted of a violent crime, indictments #2012-GS-42-6352-6357.

On October 8, 2013, Respondent appeared before the Honorable J. Mark Hayes, II and pled guilty as charged. Timothy Ray represented Respondent at the plea. Scott Spivey represented the State. Judge Hayes sentenced Respondent to twelve years concurrent for each of the distribution charges, ten years concurrent for the proximity charge, five years concurrent for the oxycodone and firearm charge, three years concurrent for the contributing to the delinquency of a minor and one year concurrent for the marijuana charge. Respondent did not appeal.

On June 16, 2014, Respondent filed an application for post-conviction relief [PCR]. The State filed a return on April 7, 2015. On January 12, 2016, an evidentiary PCR hearing was held before the Honorable R. Ferrell Cothran, Jr. J. Brandt Rucker represented Respondent. Alicia A. Olive represented the State. On June 8, 2016, Judge Cothran signed an order granting relief and ordering a new trial. The State filed a notice of intent to appeal and on February 17, 2017 filed a petition for writ of certiorari. This return follows.

ARGUMENT

The PCR judge correctly found that plea counsel's erroneous advice that Respondent faced a sentence of life without the possibility of parole upon conviction of a serious offense pursuant to S.C. Code §17-25-45 because of two prior convictions for assault and battery with intent to kill rendered the guilty pleas involuntary when the two prior convictions arose from a single incident at the same time and location and would have been treated as one strike rather than two.

Plea counsel provided erroneous sentencing advice which affected the voluntary nature of the guilty plea. Petitioner does not dispute that Respondent's two prior convictions for assault and battery with intent to kill [ABWIK] should be treated as one strike rather than two. (Petition for Writ of Certiorari p. 11 fn. 3). At time of the plea and at the time of the PCR hearing plea counsel, however, believed that the two prior convictions for ABWIK counted as two separate strikes pursuant to S.C. Code §17-25-45. (App. p. 66, lines 6-16). During the plea counsel told the plea judge, "In entering the plea, obviously these charges, these charges are strikes and they, -- he could have been struck out and received a life sentence if we would of gone forward with the trial. So, that's part of his decision in going ahead and entering the plea." (App. p. 19, lines 10-14).

The indictments cover incidents from five different dates: February 17, 2011; December 28, 2011; January 18, 2012; August 27, 2012 and October 4, 2012. Respondent testified at the PCR hearing that the day of the guilty pleas the State was ready to go forward with trial on the distribution and proximity charges from January 18, 2012. (App. p. 46, lines 9-17). PCR counsel asked Respondent, "Did Mr. Ray inform you that you were eligible for life without parole based on that?" (App. p. 46, lines 18-19). Respondent answered, "He told me if I was found guilty, I was going to get a life sentence." (App. p. 46, lines 20-21). Later in the PCR

hearing Respondent testified that plea counsel advised him that he was eligible for a sentence of life without parole on all of his drug charges. (App. p. 47, lines 22-25). Respondent was asked, "Did Mr. Ray tell you, you need to go ahead and plead guilty, because even if we win this one, you are eligible for life without parole on the other cases?" (App. p. 51, lines 15-18). Respondent answered, "Yes, sir." (App. p. 51, line 19). Respondent testified that he now knew that was not true because he only had one strike. (App. p. 51, lines 20-23). Plea counsel's advice that Respondent faced a sentence of life without parole was incorrect. Respondent would not be exposed to a sentence of life without parole unless he had two prior qualifying offenses. If Respondent had been found guilty of the distribution and proximity charges that were set for trial on the day of the plea, the State would not have been able to seek a sentence of life without parole because the two ABWIK convictions constituted one strike pursuant to S.C. Code §17-25-50.

S.C. Code §17-25-25(B) provides:

Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for:

- (1) a serious offense;
- (2) a most serious offense;
- (3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or
- (4) any combination of the offenses listed in items (1), (2), and (3) above.

Distribution of crack third offense is considered a serious offense pursuant to S.C. Code §17-25-45(C)(2)(a) because it carries a maximum penalty of thirty years. The proximity charge is considered a serious offense because it is specifically enumerated in S.C. Code §17-25-45(C)(2)(b). S.C. Code §17-25-50 provides, "In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses

which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.” See State v. Woody, 359 S.C. 1, 596 S.E.2d 907 (2004). Respondent’s two prior ABWIK convictions would be considered one offense and the distribution and proximity charges would be considered one offense. At the time of the plea, Respondent had two convictions for ABWIK which would have counted as one most serious offense. The one most serious offense would not have triggered the enhanced life sentence. A conviction after trial on the distribution and proximity charges would not have triggered the enhanced life sentence. If the State obtained convictions for the distribution and proximity charges, then any subsequent conviction for a serious offense would trigger the enhancement provision of S.C. Code §17-25-45(B). Plea counsel, however, advised Respondent that a conviction for any one of his serious offenses would result in a sentence of life without parole. Plea counsel’s advice was incorrect.

In the order granting relief the PCR judge wrote:

Plea counsel advised the applicant that his two previous ABWIK combined with a conviction for distribution of crack cocaine within one half mile of a school made him eligible for a potential life without parole sentence because it is a serious offense. Specifically, plea counsel advised him that the two ABWIK’s would be treated as two prior convictions for most serious offenses, and combined with a conviction for distribution of crack cocaine within half mile of a school would be a serious offense, and those combined convictions would require a sentencing judge to sentence him to life without parole.

(App. p. 83). The PCR judge then found:

In this case, the applicant’s previous convictions for ABWIK arose out his pleading guilty to shooting two people in a car. Under Woody, it is clear that this would be deemed one occurrence or one course of conduct, and would only be counted as one strike because it counted as one most serious offense. Plea counsel misinformed the applicant about the status of the law. South Carolina’s Supreme Court has ruled that “the Sixth amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes.” Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009). In this case, plea

counsel did not meet the proper standard under Strickland, and the applicant was prejudiced by this failure. Accordingly, this case must be remanded for a new trial.

(App. p. 84). The PCR judge correctly found that plea counsel misinformed Respondent about the qualifying nature of the prior offenses.

On certiorari in a PCR action, this Court applies an “any evidence” standard of review. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). Accordingly, the Court will affirm the PCR court's findings if any evidence of probative value exists in the record. Narciso v. State, 397 S.C. 24, 34–35, 723 S.E.2d 369, 374 (2012). However, the Court will reverse the PCR judge's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). The PCR judge's decision is not controlled by an error of law. The record supports the PCR judge's finding of deficient performance.

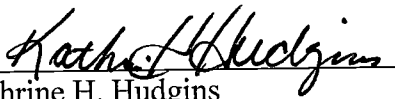
The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged 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. The two-part test also “applies to challenges to guilty pleas based on ineffective assistance of counsel.” Hill v.

Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). “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.” Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (emphasis added) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)).

Plea counsel was deficient in advising Respondent that conviction at trial for the distribution and proximity charges would result in a sentence of life without parole. Providing erroneous advice about the qualifying nature of a prior offense for enhancement purposes falls below an objective standard of reasonableness. See Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009). Respondent was prejudiced by plea counsel's deficient performance. 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. During the PCR hearing Respondent was asked, “But for that discussion with Mr. Ray about the effect of the LWOP notice, life without parole notice, would you have entered the guilty plea that day?” (App. p. 48, lines 18-21). Respondent answered, “No, I would have went on to trial.” (App. p. 48, line 22). Respondent testified that he was not guilty and he believed that the State's evidence against him was weak. (App. pp. 48-50). The guilty plea was rendered involuntary by plea counsel's erroneous sentencing advice. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991).

CONCLUSION

Based on the above argument this Court should deny the petition for writ of certiorari, affirm the finding of the PCR judge and remand the case for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

CARLOS D. SMITH,

RESPONDENT

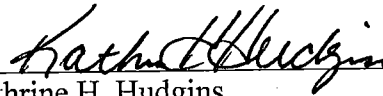
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Carlos D. Smith, #00276619, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 27th day of April, 2017.



Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR RESPONDENT
this 27th day of April, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023