

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable George C. James, Circuit Court Judge

RYAN DARRELL IRBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002165

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in finding plea counsel provided effective assistance of counsel where plea counsel misadvised Petitioner that he would only have to serve 85% of his sentence for murder and Petitioner relied on plea counsel's erroneous advice in his decision to plead guilty?

STATEMENT

Introduction

On August 30, 2013, a black male wearing a camouflage jacket and armed with a pistol walked into the Illusion Smoke Shop on Poinsett Highway in Greenville and demanded money from cashier Theodore McClellan. App. 8, l. 13 – 11, l. 19. Before McClellan could hand over any money, the robber shot him in the chest. *Id.* McClellan died almost immediately. The robber fled.

Police identified Petitioner as the likely robber based on the accounts of several eyewitnesses. *Id.* However, one of the customers present for the robbery was unable to identify Petitioner in a police lineup. Another customer who identified Petitioner as the shooter initially refused to cooperate with police and had an extensive criminal record. *Id.*

Indictment

On April 21, 2015, the Greenville County Grand Jury indicted Petitioner for murder, possession of a weapon during the commission of a violent crime, and armed robbery. App. 92 – 93.

Guilty Plea

Petitioner entered a guilty plea before the Honorable Letitia H. Verdin on August 13, 2015. Amanda Wicker represented Petitioner. Assistant Solicitor Christy Sustakovitch represented the State. Following negotiations with defense counsel, the State recommended Petitioner be sentenced to thirty years. App. 13, ll. 11-21.

Judge Verdin accepted the plea and the State's negotiation, she sentenced Petitioner to two concurrent terms of thirty years for murder and armed robbery and a consecutive five year sentence for possession of a weapon during the commission of a violent crime. App. 19, l. 25 – 20, l. 10. Petitioner did not file an appeal.

Post-Conviction Relief Application and Evidentiary Hearing

On September 30, 2015, Petitioner filed an application for post-conviction relief (PCR) alleging, among other grounds, that counsel failed to properly advise on sentencing. App. 21 – 27. On January 29, 2016, the State filed a Return. App. 28 – 31.

On June 15, 2016, an evidentiary hearing was held before the Honorable George C. James. Assistant Attorney General Johnny James represented the State. R. Mills Ariail, Jr. represented the State. App. 33 – 80. Petitioner and plea counsel both testified.

Petitioner testified that plea counsel told him he would only serve eighty-five percent of his sentence incarcerated. App. 41, l. 3 – 43, l. 12. Petitioner stated that the fact that he would only serve 26.5 years was the reason he decided to accept the plea instead of standing trial. *Id.*

Petitioner further stated that he was surprised when he entered SCDC to learn that he was in fact serving thirty years and that sentences imposed for a murder conviction must be served day for day and the weapons possession charge must be served concurrently. *Id.*

Plea counsel recalled that Petitioner's case was an identification case and that a number of the State's key witnesses either could not identify Petitioner or had serious criminal records. App. 63, l. 14 – 34, l. 23. The weakness of the State's case allowed plea counsel to negotiate with the State for a recommendation of thirty years, the minimum sentence possible for murder. The State had initially considered seeking the death penalty. App. 61, ll. 1-11.

Counsel did not specifically recall advising Petitioner that he would have to serve every day of his thirty year sentence if he pled guilty. App. 66, l. 1 – 68, l. 16. However, counsel claimed that it was her usual practice to review sentencing with clients prior to any guilty plea and that she would not – as a matter of practice – tell a client pleading guilty to murder that he would only have to serve 85% of his sentence incarcerated. App. 76, ll. 4-14.

Order of Dismissal

On September 9, 2016, the PCR court denied Petitioner's application in a written order. App. 81 – 89. The court found that, while there was no evidence from the guilty plea transcript or from the evidentiary hearing that Petitioner was told he would have to serve all thirty years of his sentence incarcerated, plea counsel's testimony regarding her normal practice was credible. App. 86 - 87.

Therefore, the court ruled that Petitioner had failed to prove that counsel was ineffective for failing to explain to him that he would have to serve every day of his thirty year sentence while incarcerated. *Id.* This petition follows.

ARGUMENT

The PCR court erred in finding plea counsel provided effective assistance of counsel because Petitioner testified at the evidentiary hearing that he “would have went to trial” had he not followed plea counsel’s erroneous advice that he would only have to serve 85% of his sentence incarcerated. App. 87. *See Hill v. Lockhart*, 474 U.S. 52 (1985).

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results.” *Brady v. United States*, 397 U.S. 742, 758 (1970). Additionally, the South Carolina Supreme Court has held that the difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009).

However, “the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” *Holden v. State*, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Furthermore, courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Thus, the applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

In *Hill v. Lockhart*, 474 U.S. 52 (1985), the United States Supreme Court adopted the two-part standard in *Strickland v. Washington*, 466 U.S. 668 (1984), and applied the *Strickland* standard

to guilty plea challenges based on ineffective assistance of counsel. To prove ineffective assistance of counsel from a guilty plea, the defendant must show: (1) “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases” and (2) that “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” *Id.* 474 U.S. at 57-59.

Deficient Performance

In this case, plea counsel’s advice was not within the range of competence demanded of attorneys in criminal cases since plea counsel misadvised Petitioner about his parole eligibility date. App. 41, l. 3 – 43, l. 12; *see Frasier v. State*, 351 S.C. 385, 570 S.E.2d 172 (2002) (finding that a defendant need not be informed of the collateral consequences of his sentence such as parole eligibility; however, if an attorney undertakes to advise a defendant of the collateral consequences of his sentences, then the advice must be accurate.); *see also Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding that generally, constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant’s decision to plead guilty.); *Ray v. State*, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991); *Hinson v. State*, 297 S.C. 456, 457, 377 S.E.2d 338, 339 (1989).

As to plea counsel’s error, Petitioner testified that plea counsel told him he would serve seven years and six months in prison; however, in reality, Petitioner is not eligible for parole. App. 66, l. 1 – 68, l. 16. Petitioner’s testimony was corroborated plea counsel’s testimony at the evidentiary hearing, in that she did not specifically recall explaining to Petitioner that he would serve all thirty years of his sentence incarcerated. App. 74, ll. 4 – 14.

Additionally, although plea counsel maintained that her usual practice was to review the

sentencing terms and parole eligibility with clients, there is nothing in the record to proving she did so in this instance. Regardless, once plea counsel gave Petitioner advice as to the collateral consequences of his sentence, plea counsel had a duty to ensure the advice was accurate and that Petitioner adequately understood all of the consequences of pleading guilty. *See Frasier*, 351 S.C. 385, 570 S.E.2d 172; *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (provides that a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given.).

Therefore, based on the testimony presented at the evidentiary hearing, plea counsel's advice regarding the collateral consequences of Petitioner's sentence was at best, extremely confusing, and constituted constitutionally defective performance. *See Hill*, 474 U.S. 56; *see also Boykin v. Alabama*, 395 U.S. 238 (1969) (provides that to find a guilty plea is voluntarily and knowingly entered into, the record must establish the accused had a full understanding of the consequences of his plea and the charges against him.); *see also Holden*, 393 S.C. at 572-74, 713 S.E.2d 612-15; *Berry*, 381 S.C. at 635, 675 S.E.2d at 427.

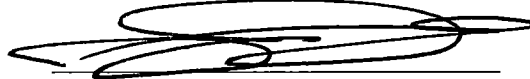
Prejudice

Furthermore, Petitioner was prejudiced by plea counsel's erroneous advice because it was the basis for the guilty plea. Specifically, Petitioner testified at the evidentiary hearing that had he known he had to all thirty years of his sentence incarcerated, he "would have gone to trial because the State's case was weak and based on unreliable eye witness identification. App. 41, l. 3 – 43, l. 12.

Accordingly, based on Petitioner's testimony that he "would have went to trial," "there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pleaded guilty and would have insisted on going to trial." *See Hill*, 474 U.S. 56.

CONCLUSION

Based on the foregoing reasons, Ryan Irby's petition for writ of certiorari should be granted in order to allow full briefing on the issue.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ryan Irby states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge George C. James, which was held on June 15, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Ryan Irby.

Respectfully Submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of May, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



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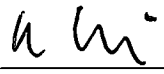
CERTIFICATE OF SERVICE

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 DeShawn H. Mitchell, 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 Ryan Irby, #298917, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 17th day of May, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of May, 2017.



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