STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Dillon County

Honorable G. Thomas Cooper, Circuit Court Judge

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AUG 02 2017

S.C. SUPREME COURT

ANTHONY COOK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002359

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for allowing Petitioner to plead guilty to a violent burglary second offense when the indictment alleges a non-violent burglary second offense?

STATEMENT

In June of 2010, the Dillon County Grand Jury indicted Petitioner for grand larceny and burglary second degree, non-violent, indictments #2010-GS-17-465, 468. In August of 2013, the Dillon County Grand Jury indicted Petitioner for burglary second, non-violent, receiving stolen goods and criminal conspiracy, indictments #2010-GS-17-469, 2013-GS-17-597, 600. On September 4, 2013, Petitioner appeared before the Honorable R. Ferrell Cothran and pled guilty. B. Scott Suggs represented Petitioner at the plea. William Shipp Daniel, III, prosecuted the case. Judge Cothran sentenced Petitioner to eight (8) years for burglary, indictment #2010-GS-17-468, twelve (12) years concurrent for the other burglary, indictment #2010-GS-17-469, thirty (30) days concurrent for receiving stolen goods, four (4) years concurrent for criminal conspiracy and two (2) years consecutive for grand larceny. Petitioner did not appeal his sentence or conviction.

On May 21, 2014, Petitioner filed an application for post-conviction relief [PCR]. On November 21, 2014, the State filed a return. On December 17, 2015, Petitioner filed a first amendment to the PCR application. On December 23, 2015, Petitioner filed a second amendment to the PCR application. On July 19, 2016, an evidentiary hearing was held before the Honorable G. Thomas Cooper. Lance S. Boozer represented Petitioner at the PCR hearing. Justin J. Hunter represented the State. In a written order signed November 3, 2016, Judge Cooper denied relief and dismissed the application. A timely notice of intent to appeal was served on November 21, 2016. This appeal follows.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for allowing Petitioner to plead guilty to a violent burglary second offense when the indictment alleges a non-violent burglary second offense.

Petitioner was indicted for two counts of burglary second degree, non-violent, indictments #2010-GS-10-17-468, 469. (App. pp. 61-64). During the guilty plea, however, the prosecutor stated, "Thank Your Honor. Before you is Anthony Cook on 5 indictments. 2010-GS-17-469, burglary in the second degree violent. 2010-GS-17-468 burglary in the second degree nonviolent." (App. p. 2, lines 3-7). Both burglary indictments specifically note on the front and back that the burglaries are non-violent and both include the CDR code for non-violent burglary, 80. (App. pp. 61-64). Indictment #2010-GS-17-469 alleges that, "Anthony Cook did in Dillon County on or about March 2, 2010, enter without consent and with the intent to commit a crime therein, the Dillon School District Maintenance Shop, located at 1628 Hwy 301 South, in violation of Section 16-11-0312, S.C. Code of Laws, 1976, as amended." (App. p. 64).

S.C. Code §16-11-312 provides:

A) A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein.

(B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:

(1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with a deadly weapon or explosive; or
(b) Causes physical injury to any person who is not a participant in the crime; or
(c) Uses or threatens the use of a dangerous instrument; or
(d) Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) The burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or

(3) The entering or remaining occurs in the nighttime.

(C)(1) Burglary in the second degree pursuant to subsection (A) is a felony punishable by imprisonment for not more than ten years.

(2) Burglary in the second degree pursuant to subsection (B) is a felony punishable by imprisonment for not more than fifteen years, provided, that no person convicted of burglary in the second degree pursuant to subsection (B) shall be eligible for parole except upon service of not less than one-third of the term of the sentence.

Burglary second degree under §16-11-312(B) is listed as a violent offense in S.C. Code §16-1-60. Burglary second degree under §16-11-312(A) is not listed as a violent offense in §16-1-60 and is classified as non-violent pursuant to §16-1-70. Both of the burglary second degree indictments simply allege a violation of §16-11-312 without reference to section (A) or (B). Indictment #2010-GS-17-468 alleges a dwelling while indictment #2010-GS-17-469 alleges the school district maintenance shop. None of the aggravating elements required for §16-11-312(B) are alleged in the indictment involving the maintenance shop, #2010-GS-17-469. During the guilty plea colloquy the State did not allege any of the aggravating elements required for §16-11-312(B). (App. p. 7, line 20 – p. 8, 9, 10, 11, lines 1-10). S.C. Code §16-11-313 provides, "A person is guilty of burglary in the third degree if the person enters a building without consent and with intent to commit a crime therein."

In the first amendment to the PCR application Petitioner alleges that "Counsel failed to object to lack of factual basis for guilty plea." (App. p. 85). In the second amendment to the PCR application Petitioner alleges that, "Counsel failed to object to Applicant being sentenced as a violent offender rather than non-violent offender when the indictment was for a non-violent offense." (App. p. 87). There was not a factual basis presented for a guilty plea to burglary

second degree violent. Petitioner was sentenced as a violent offender when he was indicted for burglary second non-violent.

During the PCR hearing Petitioner testified that retained counsel failed to review the indictments with him. (App. p. 140, lines 10-18). Petitioner testified, "If I would have reviewed it with him he should have explained to me that I was not indicted for a violent second-degree burglary. That I was indicted for a nonviolent burglary. But he never did that cause if he would have don't it then I would have never plead guilty right then and there. I would have said, 'Hold. I'm not charged with this.'" (App. p. 140, line 20 – p. 141, line 1).

When asked whether indictment #2010-GS-17-469 was for a violent burglary second, plea counsel answered, "As far as I know it was a burglary second in a school building, but it was – it had a statutory aggravated circumstance that occurred in the nighttime." (App. p. 158, lines 18-23). An allegation that the school maintenance shop was burglarized at night is not alleged in the indictment and not mentioned during the plea colloquy. Plea counsel acknowledged that indictment #2010-GS-17-469 was for a non-violent burglary and testified that he did not know if the indictment had been amended to violent burglary. (App. p. 168, line 1 – p. 169, lines 1-24).

In the order of dismissal the PCR judge wrote:

> Applicant alleged that Counsel should have objected to indictment 2010-GS-17-469 and Applicant being sentenced to violent second degree burglary instead of nonviolent second degree burglary. This Court finds Counsel's testimony credible that he explained the indictments and the supporting facts to Applicant. This Court finds that Counsel's performance was not deficient. This Court agrees with Counsel that indictment 2010-GS-17-469 may have been amended to the violent provision because the corresponding sentencing sheet lists the indictment as violent second degree burglary and the solicitor, Counsel, and plea judge explained to Applicant during the plea hearing that the indictment was violent. Counsel, the solicitor, and the plea judge explained in detail that Applicant was pleading to the violent subsection and the consequences of pleading accordingly. At no point during the plea hearing during the many mentions of the violent

> subsection did Applicant give any indication that he did not understand that he was pleading to a violent offense. This Court finds that Applicant understood the offense he was pleading to and being sentenced for and Counsel's performance was not deficient. Additionally, this Court finds that Applicant did not suffer prejudice has he has failed to show that would not have pled guilty but rather have gone to trial but for Counsel's actions. Accordingly, this allegation must be dismissed.

(App. p. 191). The PCR judge erred.

There is no evidence in the record that the indictment was amended from a nonviolent to a violent burglary. While the sentencing sheet appears to have been altered to reflect a violent burglary, the sentencing sheet also reflects that the charge is "as indicted" and Petitioner did not waive grand jury presentment. (App. p. 71). Petitioner was erroneously advised during the guilty plea that the indictment was for burglary second degree violent. The indictment notes that it is non-violent and contains the non-violent CDR code. There are no allegations of aggravation listed in the indictment. The State failed to present allegations of aggravation during the guilty plea colloquy. The indictment and the evidence presented at the guilty plea allege that Petitioner burglarized a building, the school maintenance shop, without circumstances of aggravation. The allegations form the basis for burglary third degree not burglary second degree and not burglary second degree violent. Petitioner pled guilty to a charge to which he was not indicted and had not waived grand jury presentment. Petitioner testified that if he had known he was indicted for burglary second degree non-violent, he would not have pled guilty to burglary second degree violent. (App. p. 140, line 20 – p. 141, line 1).

S.C. Const. art. I, § 11 provides:

> No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. The General Assembly may provide for the waiver of an indictment by the accused. Nothing contained in this Constitution is deemed to

limit or prohibit the establishment by the General Assembly of a state grand jury with the authority to return indictments irrespective of the county where the crime has been committed and that other authority, including procedure, as the General Assembly may provide.

S.C. Code §17-19-10 provides:

No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in the following cases:

(1) when a prosecution by information is expressly authorized by statute;
(2) in proceedings before a police court or magistrate; and
(3) in proceedings before courts martial.

In State v. Smalls, 364 S.C. 343, 346–47, 613 S.E.2d 754, 756 (2005), the South Carolina Supreme Court wrote:

Although an indictment does not confer subject matter jurisdiction, due process requires that a criminal defendant be properly served with a valid indictment. The indictment is a notice document that is required by our state constitution and statutes. Evans, 611 S.E.2d at 517. "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, *i.e.*, to appraise him of the elements of the offense and to allow him to decide whether to pled guilty or stand trial." Evans, 611 S.E.2d at 517. Accordingly, challenges to the sufficiency of an indictment must be raised before a jury is sworn. Gentry, 363 S.C. at 101, 610 S.E.2d at 499.

If the challenge is raised before the jury is sworn, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 (citing State v. Wilkes, 353 S.C. 462, 465, 578 S.E.2d 717, 719 (2003)).

In Smalls the defendant was indicted by a grand jury for lynching second degree but waived grand jury presentment, signed a sentencing sheet and pled guilty to the charge of assault and battery of a high and aggravated nature [ABHAN]. The defendant in Smalls, which was decided after the Court issued the opinion in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), argued that the trial court lacked subject-matter jurisdiction to accept the guilty plea to

ABHAN. In light of the decision in Gentry, the Court found that the trial court had subject matter jurisdiction to accept the guilty plea to ABHAN. The Court found that proper notice was given of the charge to which the defendant was pleading guilty by his signing a sentencing sheet indicating that he wished to waive grand jury presentment and plead to ABHAN. In contrast, in the present case, Petitioner did not indicate on the sentencing sheet that he wished to waive of grand jury presentment and plead guilty to burglary second violent.

In the present case Petitioner pled guilty to and was sentenced for burglary second degree violent, a charge for which he was not indicted and did not waive grand jury presentment. Additionally, the body of the indictment and the guilty plea colloquy do not provide a factual basis for burglary second, violent or non-violent. Plea counsel was ineffective in failing to object to the indictment and allowing Petitioner to plead guilty and be sentenced for a charge for which he was not indicted and did not waive grand jury presentment. If plea counsel had objected to the sufficiency of the indictment, the judge would have found that the indictment failed to state the offense with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon and fails to apprise the defendant of the elements of the offense that is intended to be charged. The indictment does not provide notice that Petitioner was charged with a violent offense. The indictment does not provide notice of the elements of burglary second degree.

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

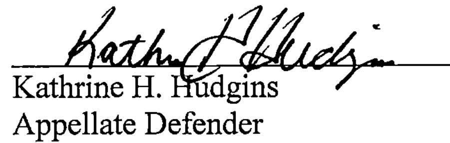
of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

"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 failing to object to the indictment for burglary second non-violent when the indictment and the plea colloquy only established a factual basis for burglary third degree, not burglary second degree non-violent. Additionally, plea counsel was ineffective in allowing Petitioner to plead guilty to burglary second degree violent, a charge for which Petitioner was not indicted and did not waive grand jury presentment. There is a reasonable probability that, but for counsel's errors, Petitioner would not have pled guilty to burglary second degree violent.

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 2nd day of August, 2017.

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Honorable G. Thomas Cooper, Circuit Court Judge

ANTHONY COOK,

PETITIONER

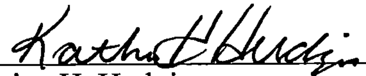
V.

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 Johnny Ellis James, Jr., 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 Anthony Cook, #328485, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 2nd day of August, 2017.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 2nd day of August, 2017.

(L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027