

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Barnwell County

Honorable Robert E. Hood, Circuit Court Judge

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AUG 07 2017

S.C. SUPREME COURT

JOSEPH O'NEIL SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002502

JOHNSON PETITION FOR WRIT OF CERTIORARI

Laura R. Baer
Appellate Defender

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Division of Appellate Defense
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INDEX

INDEX..... i

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

 I. The PCR court erred in finding that plea counsel rendered effective assistance of counsel where he misadvised Petitioner regarding the percentage of his sentence that he would be required to serve, rendering Petitioner’s guilty plea unknowing, unintelligent, and involuntary.....3

 II. The PCR court erred as a matter of law in determining that Petitioner could not meet his burden of proving prejudice as to any allegation because there was overwhelming evidence of guilt, where Petitioner attacked the voluntary and intelligent character of the plea such that he was required to show a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial, to meet the prejudice prong of Strickland.....8

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL.....10

ISSUES PRESENTED

I.

Whether the PCR court erred in finding that plea counsel rendered effective assistance of counsel where he misadvised Petitioner regarding the percentage of his sentence that he would be required to serve, rendering Petitioner's guilty plea unknowing, unintelligent, and involuntary?

II.

Whether the PCR court erred as a matter of law in determining that Petitioner could not meet his burden of proving prejudice as to any allegation because there was overwhelming evidence of guilt, where Petitioner attacked the voluntary and intelligent character of the plea such that he was required to show a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, to meet the prejudice prong of Strickland¹?

¹ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

STATEMENT OF THE CASE

On February 24, 2014, the Barnwell County Grand Jury indicted Petitioner Joseph Simmons for one count of criminal sexual conduct with a minor, second degree. App. 127. Simmons was accused of committing a sexual battery against his minor step-daughter beginning when she was twelve years old. App. 57, l. 19 – 58, l. 6.

On November 17, 2014, Simmons appeared before the Honorable Doyet A. Early, III and entered a guilty plea without negotiation or recommendation.² Simmons was represented by Glenn Walters and the State was represented by assistant solicitor Suzanna Ringler. Judge Early sentenced Simmons to ten years incarceration. App. 44; App. 51, l. 23 – 52, l. 4.

On May 5, 2015, Simmons filed an application for post-conviction relief. App. 1. On July 27, 2015, the State filed a return and motion for more definite statement due to the illegibility of much of the application. App. 23. On September 24, 2015, Simmons filed a motion for default judgment due to the untimeliness of the State's return. App. 28. On April 12, 2016, Simmons, through counsel, filed an amended application for post-conviction relief. App. 28. The State subsequently filed Simmons sentencing sheet and SCDC records, which were meant to accompany its original return. App. 43.

An evidentiary hearing was held before the Honorable Robert E. Hood on September 21, 2016. App. 48. Simmons was represented by Lance Boozer, and the State was represented by assistant attorney general Julie Coleman. App. 48. On December 2, 2016, Judge Hood filed an Order of Dismissal denying Simmons' PCR application. App. 117.

This appeal follows.

² Due to the unavailability of the guilty plea transcript, the guilty plea hearing was reconstructed at the outset of the PCR hearing, without objection. App. 53, l. 5 – 65, l. 25.

ARGUMENT

- I. The PCR court erred in finding that plea counsel rendered effective assistance of counsel where he misadvised Petitioner regarding the percentage of his sentence that he would be required to serve, rendering Petitioner's guilty plea unknowing, unintelligent, and involuntary.**

Simmons thought that he would serve fifty-percent of the imposed sentence and potentially less if he earned work credits in the institution. App. 89, l. 13 – 90, l. 2. Because second degree criminal sexual conduct with a minor carries a potential penalty of imprisonment for “not more than twenty years,” it was a Class C felony and a “no parole offense.” S.C. Code Ann. § 16-3-655(D)(3); S.C. Code Ann. § 16-1-20(A)(3); S.C. Code Ann. § 24-13-100. Thus, pursuant to S.C. Code Ann. § 24-13-150(A), Simmons was required to serve eighty-five percent of the sentence without the possibility of parole. Simmons faulted plea counsel, Glenn Walters, for failing to explain to him how much time he would actually be required to serve on the sentence imposed. App. 73, l. 6 – 75, l. 2. Though Simmons recalled the plea judge mentioning that it was “a violent 10, 85. percent,” since the plea was without negotiations such a statement would have logically been made only after acceptance of the guilty plea and during sentencing. Simmons testified that had he understood that he would have to serve over eight years in prison, he would have gone to trial rather than entering the open plea. App. 90, ll. 1-13; App. 97, ll. 1-5.

Plea counsel Walters testified that he “normally” tells a client that if the offense is violent, they will have to serve eighty-five percent of their sentence. He does not give them a precise calculation because of the various credits that can be earned within the South Carolina Department of Corrections. App. 102, ll. 8-17; App. 110, ll. 14-21. Walters did not recall whether the plea judge explained parole eligibility to Simmons, but said that in his experience Judge Early advises the defendant only whether they are pleading to a violent offense. App.

102, l. 18 – 103, l. 4. Notably, Walters had no specific recollection of any discussions that he had with Simmons about what the classification of the offense as “violent” would mean for sentencing. App. 110, ll. 9-14.

The PCR court denied relief on this allegation, stating in its summary of testimony presented that plea counsel “recalled that he did explain parole eligibility to Applicant.” App. 121. The court made the following findings of facts and conclusions of law:

Applicant claims his plea was given involuntarily because Plea Counsel failed to advise him on parole eligibility and did not fully advise him of the facts before his plea. This Court finds that the record reflects that Applicant was fully advised of the rights he was giving up by pleading guilty. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This Court finds very credible Plea Counsel's testimony that he advised Applicant of all facts and risks of pleading guilty, including parole eligibility.

App. 126. Thus, the PCR court found that Simmons’ plea was entered freely, voluntarily, and intelligently. App. 127.

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 (1984). 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). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969); Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). Thus, in the context of a guilty plea, the PCR court must determine whether 1) counsel’s advice was within the range of competence demanded of attorneys in criminal cases—i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261

(2006) (citing Hill v. Lockhart, 474 U.S. 52, 56–58, 106 S.Ct. 366 (1985)). An applicant’s undisputed testimony that he would not have pled guilty to the charges but for trial counsel’s advice is sufficient to prove that defendant would not have pled guilty. Jackson v. State, 342 S.C. 95, 97–98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485–86 (1991).

Here, the PCR court’s finding that plea counsel advised Applicant regarding parole eligibility is not supported by the evidence. In Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739 (2010), this Court reversed the denial of post-conviction relief where trial counsel “testified that he normally discusses an appeal with defendants after trials, but he was not sure whether he did so with Petitioner.” This Court noted that the testimony that counsel “probably” spoke with the applicant about an appeal is not the same as affirmatively stating they spoke about an appeal. 390 S.C. at 271 n. 2, 701 S.E.2d at 739 n. 2. Like Simuel, plea counsel in the present case testified that he had no specific recollection of his specific conversation with Simmons but was instead discussing his “normal practice.” App. 102, ll. 8-17; App. 110, ll. 9-21.

In Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979), the Fourth Circuit Court of Appeals held:

[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, **when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel.** When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation.

(emphasis added). In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court found that counsel was ineffective where Hinson entered his plea in reliance upon his attorney’s erroneous advice that he would be parole eligible in ten years rather than twenty years. In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), this Court found counsel ineffective where she

advised Ray that he *would* be sentenced to life without parole when in reality, he *may* have received a sentence of seventy-five years without parole and *could* have received as little as ten years and it was uncontroverted that Ray would not have pled guilty absent that advice. In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), this Court again found that counsel was ineffective, where he misinformed his client that he would face a potential life sentence if he proceeded to trial and Alexander testified that he would not have pled guilty but for the erroneous sentencing advice. Here, Simmons testified that he entered his plea with the belief that he would only be required to serve a maximum of fifty-percent of his sentence. App. 89, l. 13 – 90, l. 2. Plea counsel failed to correct this erroneous understanding, which induced Simmons' plea. His failure to do so rendered Simmons' plea unknowing, unintelligent, and involuntary. Simmons was consequently entitled to post-conviction relief.

II. The PCR court erred as a matter of law in determining that Petitioner could not meet his burden of proving prejudice as to any allegation because there was overwhelming evidence of guilt, where Petitioner attacked the voluntary and intelligent character of the plea such that he was required to show a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, to meet the prejudice prong of Strickland.


Though the PCR court utilized the proper prejudice standard in its discussion of the individual allegations raised, it erroneously further determined that Simmons could not meet his burden to show that he was prejudiced by any alleged deficiencies because there was overwhelming evidence of his guilt. App. 125. Notably, the three cases cited in the PCR court's order all related to post-conviction relief actions following trials, not guilty pleas. See App. 125 (Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991); and Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994). In Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009), this Court held that no prejudice occurs, despite *trial counsel's* deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt.

On the other hand, "[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)). Thus, in the context of a guilty plea, the prejudice prong of Strickland "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). While the strength of the State's evidence may be considered by the PCR court in determining the credibility

of the applicant's averment that he or she would have proceeded to trial, it is not a separate basis for denying post-conviction relief from an otherwise involuntary guilty plea.

CONCLUSION

Based on the foregoing, Petitioner Joseph O'Neil Simmons respectfully requests that this Court grant his petition for writ of certiorari and allow further briefing on the issues raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of August, 2017.

STATE OF SOUTH CAROLINA

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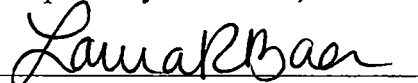
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph O'Neil Simmons 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 evidentiary hearing before Judge Robert E. Hood, which was held on September 21, 2016, 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 two arguable legal issues which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Joseph O'Neil Simmons.

Respectfully Submitted,



Laura R. Baer

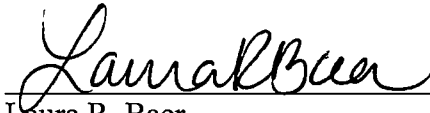
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of August, 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.”



Laura R. Baer
Appellate Defender

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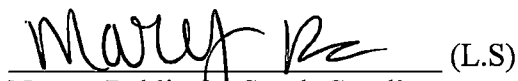
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CERTIFICATE OF SERVICE
—————

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 Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Joseph O'Neil Simmons, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 7th day of August, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of August, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027