STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Dorchester County

Honorable Benjamin H. Culbertson, Circuit Court Judge

MICHAEL GLEN EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002536

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding that Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered where trial counsel's promise of a twenty year sentence to Petitioner's family induced the plea and Petitioner was ultimately sentenced to a total term of forty-five years?

STATEMENT OF THE CASE

On March 7, 2013, the Dorchester County Grand Jury returned indictments against Michael Evans for criminal sexual conduct in the first degree, kidnapping, and possession of a weapon during a violent crime. App. 111.

On April 9, 2014, Evans appeared before the Honorable Maité Murphy and entered guilty pleas to the indicted offenses. Evans was represented by Ash Chisolm, and the State was represented by senior assistant solicitor Don Sorenson. App. 1. Judge Murphy sentenced Evans to consecutive terms of thirty years for first degree criminal sexual conduct, ten years for kidnapping, and five years for the weapons offense, resulting a total sentence of forty-five years. App. 26 – 27.

Evans filed his application for post-conviction relief ("PCR") on January 30, 2015. App. 29. The State filed its return and motion to dismiss on October 2, 2015. App. 40. A conditional order of dismissal was filed on December 14, 2015. App. 46. Evans filed an amended PCR application, through counsel, on May 6, 2016. App. 50.

On May 19, 2016, an evidentiary hearing was held before the Honorable Benjamin Culbertson. Evans was represented by Rodney Davis, and the State was represented by assistant attorney general Clay Mitchell. App. 52. Evans and his trial attorney, Ash Chisolm, both testified at the PCR hearing. App. 53. At the conclusion of the hearing, Judge Culbertson found that Evans "was adequately represented by counsel, he entered his guilty pleas freely, voluntarily, knowingly, fully advised of all of his rights, the consequences of pleading guilty and the potential sentences" and asked the assistant attorney general to prepare an order denying relief. App. 99, ll. 16-23. On November 14, 2016, a formal order of dismissal was filed. App. 101. This appeal follows.

ARGUMENT

The PCR court erred in finding that Petitioner's guilty plea was knowingly, intelligently, and voluntarily entered where trial counsel's promise of a twenty year sentence to Petitioner's family induced the plea and Petitioner was ultimately sentenced to a total term of forty-five years.

Relevant Facts

Evans pled guilty to offenses related to a sexual assault committed against the seventeen year old victim, who was attacked as she was running on a wooded, public trail. DNA swabs of saliva residue taken from the victim's neck and chest matched Evans. Following release of composite sketches of the assailant, a friend of Evans reported that Evans was in the area on the date of the incident and told his friend that he wanted "to go out on the trial and look for girls." Evans allegedly confessed to digitally penetrating the victim. App. 7, l. 7 – 13, l. 14.

At the plea hearing, twenty-two year old Evans, who had only an eighth grade education, confirmed his understanding that there were no plea negotiations and that the judge could sentence him to "30 years on the CSC, 30 years on the kidnapping and five years on the possession of a weapon during the commission of a violent crime." App. 4, ll. 21-24; App. 15, l. 16 – 16, l. 14. Evans was treated for drug addiction and anger management problems as a teenager and was purportedly under the influence of drugs on the day of the incident. App. 5, ll. 9-18; App. 19, ll. 4-14. Testing indicated that he had borderline intellectual functioning, which was consistent with his enrollment in "resource classes" in school. Evans suffered an abusive childhood and was shuffled through the foster care system. Even so, his history included only petty crimes and marijuana use not – nothing violent. App. 17, l. 23 – 20, l. 4; App. 23, l. 24 – 24, l. 2. In light of that mitigating evidence, plea counsel requested a sentence "in the 15 to 20-year range." App. 20, ll. 5-8. Following the remarks from the victim, her parents, and the

solicitor, counsel clarified that any delay in the entry of the guilty plea was not the fault of Evans, but rather a result of a staffing change in the public defender's office and the only recent completion of discovery disclosures by the prosecution. App. 25, ll. 17-25.

At the PCR hearing, Evans testified that despite his repeated requests that Chisolm contact his family, it was not until one week prior to the trial that Chisolm finally spoke with Evans' mother. Evans' mother told Evans that Chisolm "had 20 years lined up" and was crying, which is why he entered the plea. App. 59, ll. 4-18. Evans "was all in for trial up to then." App. 59, ll. 18-19. Evans explained that the promise was not made to him, but to his family, that Evans would serve a twenty year sentence. Had he understood the true sentencing possibilities, he would have asked for a jury trial rather than pleading guilty. App. 67, l. 9 – 68, l. 1.

Chisolm testified that he advised Evans: "This is a case where we can go to trial and I don't know how much you ultimately will be risking," such that he should "consider a guilty plea and hope that we get some consideration by . . . accepting responsibility for the actions and not forcing the victim to testify at a trial, basically throw [yourself] at the mercy of the Court." App. 80, l. 22 – 81, l. 4. Chisolm denied promising the imposition of a twenty year sentence said that he told Evans that there was no offer in the case. App. 87, ll. 9-11; App. 87, ll. 20-24. He said:

> I probably told him that I would ask the Court to consider a 20 year sentence, which I think ultimately I did, which is what I would have told his mother. I did have a chance to meet with his mother, his brother and uncle and a grandmother, I also talked to his mother on the phone. And that's what I would have told them, is that I can ask for that type of sentence but certainly not that that's what was being offered.

App. 87, ll. 12-19.

Though the sentencing advice was not specifically addressed in the Order of Dismissal, Judge Culbertson found that Evans' plea was knowing and voluntary and that Evans "understood the charges, penalties, and the waiver of his rights." App. 105 – 107. The Court further found

"[a]s a matter of general impression," that Evans' testimony was "not credible" and that trial counsel's testimony was "credible and persuasive." App. 104.

Discussion

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). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). 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).

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. "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). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

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). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("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.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31(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. 52 at 59. In other words,

> 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)); see also Hill, 474 U.S. at 59 (footnote omitted).

Reversal is required where counsel provides erroneous sentencing advice that induces the client's guilty plea. Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 486 (1991). In order to enter a voluntary guilty plea, "a defendant must know the direct consequences of his plea, including the actual value of any commitments made to him." Hammond v. United States, 528 F.2d 15, 19 (4th Cir. 1975).

In Hammond, the defendant was misinformed about the consequences if he were to be convicted after a trial. 528 F.2d at 17. Hammond believed that he was trading a maximum possible sentence of ninety or ninety-five years for a sentence of twenty-five years, when in fact the maximum possible sentence was fifty-five years. Id. The Court found that Hammond's lawyer misadvised him regarding the factual bases on which he was required to decide whether

to plead guilty, constituting ineffective assistance of counsel and resulting in a lack of voluntariness in the plea. Id. at 18.

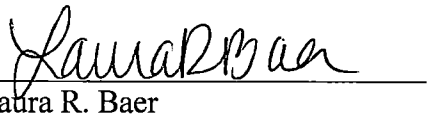
In Alexander v. State, the defendant pled guilty to one count of trafficking ten or more grams of cocaine and received a sentence of fifteen years. 303 S.C. at 541, 402 S.E.2d at 484. This Court found that Alexander's counsel was deficient in advising him that if he went to trial he faced a potential penalty of one-hundred years incarceration. Id. at 542, 402 S.E.2d at 485. The indictments contained overlapping and greater and lesser charges, such that counsel should have concluded that the maximum sentencing exposure would have been seven to twenty-five years incarceration and a fifty-thousand dollar fine for the fifty grams of cocaine found in the automobile and twenty-five years incarceration and a fifty-thousand dollar fine for the one hundred fifty grams of cocaine found in the motel room. Id. at 542-43; 402 S.E.2d at 485. Petitioner further testified that "had trial counsel not misinformed him that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty." Id. at 543; 402 S.E.2d at 485. Thus, this Court found that Petitioner's uncontradicted testimony on this point satisfied the "prejudice" requirement of Strickland and Hill.

Similar to Hammond and Alexander, the present case involves plea counsel's misadvice to Petitioner and his family regarding a pertinent factor to the plea determination. Counsel led Evans to believe that his guilty plea would result in a maximum sentence of twenty years. In fact, Evans faced a maximum potential sentence of sixty-five years if sentenced to consecutive, maximum terms for each offense. While the trial judge indicated at the plea hearing the maximum potential sentences for each offense, there was no mention of the ability to run the sentences consecutively for a total of sixty-five years. See App. 15, l. 16 – 16, l. 14. He was ultimately sentenced to a term of forty-five years. App. 26 – 27. Evans did not understand his

actual sentencing exposure and testified that, had he understood that he was not limited to the twenty years promised to his family, he would not have pled guilty. App. 67, l. 9 – 68, l. 1. This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing 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)). Having proven both deficient performance and prejudice, Evans is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Petitioner Michael Evans respectfully requests that this Court grant his petition for writ of certiorari and order further briefing on the issue raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of September, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Glen Evans 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 Benjamin H. Culbertson, which was held on May 19, 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 an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Michael Glen Evans.

Respectfully Submitted,

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of September, 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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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 Ruston Neely, 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 Michael Glen Evans, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 5th day of September, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of September, 2017.

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