STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

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SEP 15 2017

S.C. SUPREME COURT

CLAUDE E. REED,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000563

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not objecting to the state bringing in as consideration for sentencing Petitioner Reed's juvenile record when the solicitor did not present the actual record but admitted that she was relying only on her memory from the time that she prosecuted the Petitioner in the 1990's?

STATEMENT

On April 24, 2010, Wynn English left her job at McLeod Hospital in Florence to go home for lunch. When she arrived home, she just opened her front door and went in without having to disable the security alarm as it had not been working properly. She immediately saw evidence that someone had been in her home as her television was wrapped sitting on a bench in the foyer. App. 13, ll. 16 – App. 14, ll. 7.

Petitioner Reed suddenly appeared and told her not to look at him and made her crawl on the floor. Ms. English declared that Reed told her that if she looked at him that "he would blow her F' ing head off." App. 14, ll. 7-13.

The intruder had found her safe and made her open it at which point he took $1400 marked for the mortgage. The intruder said that he had been through the house and had taken numerous items. Among the items taken was her son's rifle. App. 14, ll. 14 – App. 15, ll. 25. The intruder then left taking Ms. English's car which held the stolen items. App. 16, ll. 1 – App. 17, ll. 11.

As soon as the intruder left, Ms. English called 911, and the police responded quickly. Within seven minutes, Reed was seen. He had taken the rifle from the car and hid it under a house on Whaley Street. When he was spotted, Reed took the police on a chase which ended with Reed wrecking Ms. English's car. Many of the stolen items were still in the car. The envelope with the $1400 was found on Reed's person. Reed was arrested and charged. App. 17, ll. 9 – App. 18, ll. 25.

On September 6, 2012, the Florence County Grand Jury indicted Petitioner reed on the charges of failure to stop for a blue light (FTSBL), kidnapping, burglary first degree, armed

robbery (AR), grand larceny over $2000, resisting arrest, and the unlawful possession of a weapon. App. 98 – App. 100.

On March 14, 2013, Petitioner Reed appeared before the Honorable D. Craig Brown, and entered a guilty plea to FTSBL, burglary first degree, AR, and grand larceny more than $2000. The state nol-prossed the kidnapping, resisting arrest, and the unlawful possession of a weapon. Petitioner Reed was represented by Will Grove, and the state was represented by Patricia S. Parr. App. 1 – App. 3, ll. 22.

At the guilty plea, when the solicitor provided to the court Reed's criminal record, she named the crimes for which he had been convicted since 2003. After citing Reed's record, the solicitor said: "It's believed that he and a juvenile went in Judge Harwell's home and that was in 2010." App. 21, ll. 5-19.

When the judge asked if that was it, the solicitor said that Reed had some "stuff" as a juvenile. The judge stated that he wanted to know what that was too. The solicitor responded:

> And I actually prosecuted him in juvenile back in the '90's. They were like grand larceny, receiving stolen goods.

App. 21, ll. 19-25.

Later during the plea, the judge again asked if there was anything further regarding Reed's juvenile "stuff." The solicitor stated:

> I don't have it, Your Honor. I have to call. I'm just going from memory and it's been a long time.

App. 23, ll. 18 – 23.

Just prior to announcing the sentence, the judge stated:

> You have been in the criminal justice system since the 90's and going back to the late 90's, that's about 15 years. You have had the opportunity after opportunity to get on the right track.

App. 12 – 21.

The judge then sentenced Reed to three years for the FTSBL; five years on the grand larceny, thirty years on the AR; and thirty five years on the burglary first degree. App. 31, ll. 22 – App. 32, ll. 17.

Petitioner Reed filed a notice of appeal. However, the Court of Appeals dismissed the appeal on November 14, 2013 for failing to provide a sufficient explanation pursuant to Rule 203(d)(1)(B)(iv) of the Appellate Court rules. App. 96 – App. 97.

On March 13, 2014, Petitioner Reed filed an application for post-conviction relief (PCR). The state filed a return on November 10, 2014. An evidentiary hearing was held on August 10, 2016 before the Honorable William H. Seals. Petitioner Reed was represented by Jonathan D. Waller, and the state was represented by Johanna C. Valenzuela. App. 46.

At the PCR hearing, the state's attorney told the court that Reed had three claims where plea counsel was ineffective: (1) counsel failed to object to the state's use of Reed's juvenile record at his guilty plea; (2) counsel failed to object to the armed robbery charge when no weapon was involved; and (3) counsel failed to appeal Reed's guilty plea. App. 48, ll. 18 – App. 49, ll. 3. Reed's PCR counsel asked the court to vacate Reed's convictions or in the alternative to vacate the sentence and remand for resentencing. App. 49, ll. 12 – App. 50, ll. 5.

Petitioner Reed testified at the PCR hearing that he only pled guilty because he was scared. He did not know that he was going to trial. He explained that the day he was to go to court, the guards came and put him in street clothes when meant to Reed that he was going to trial. He and his attorney had never discussed a trial. App. 54, ll. 1 – App.55, ll. 23; App. 58, ll. 1 – 9. Reed stated that he had been in trouble before but never anything serious like this. He thought that pleading guilty would be the best way to get a "lenient sentence." Also his attorney

told him that if he went to trial, the solicitor was going to "fry him." He was scared of a trial. App. 58, ll. 9 – 23.

Reed then testified that he told his attorney that he thought it was wrong for the solicitor to bring in his juvenile criminal record and that the solicitor "lied" about his juvenile charges. His attorney told him that he did not know. He asked his attorney to file a motion to find out if it was legal for the solicitor to bring up his juvenile record. Reed explained that the solicitor also brought up a charge that he was never convicted of but it was very serious in the community. App. 59, ll. 1 – App. 61, ll. 13.

Will Grove, plea counsel, testified at the hearing that he believed that Reed had some reservations about pleading to the armed robbery and burglary first degree when counsel thought those charges were not Reed's intention. The only gun involved was the son's rifle that he took during the burglary. App. 73, ll. 1 – 17.

Plea counsel admitted that he was "caught by surprise" when the solicitor brought in Reed's juvenile record. He admitted that he did not "make any objections to it." He said that Reed told him that the solicitor had gotten it wrong. However, counsel said; "I wasn't armed with any information to the contrary." However, he did not think that the juvenile record would have made any difference on the outcome given the facts of the case. App. 74, ll. 12 – App. 75, ll. 8.

On cross examination, plea counsel noted that Reed's NCIC record that was in his discovery began in 2003 or 2004 when Reed would have been twenty-one. His record began when he was an adult; it did not contain anything about his juvenile convictions. App. 76, ll. 1 – App. 77, ll. 2. Counsel also admitted that he should have objected when the solicitor brought up

the 2010 home invasion of Judge Harwell's home when there was nothing on Reed's record about that. App. 77, ll. 3 – 18.

The PCR judge found that Reed did not prove that plea counsel failed to render reasonably effective assistance under the prevailing norms. App. 93. Reed also failed to prove that he suffered any prejudice by counsel's performance. App. 94. The judge cited Hayden v. State, 283 S.C. 121, 322 S.E.2d 14, 15 (1984), that a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited as to either the kind of information he may consider, or the source from which it may come." The judge also found that Reed did not present any evidence that the juvenile record was incorrect. App. 93.

The judge denied Reed's PCR application and dismissed it with prejudice. App. 95. Reed's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not objecting to the state bringing in as consideration for sentencing Petitioner Reed's juvenile record when the solicitor did not present the actual record but admitted that she was relying only on her memory from the time that she prosecuted the Petitioner in the 1990's.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". Strickland v. Washington, 466 U.S.668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the

right to trial by jury Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certain certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege". State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

The PCR court erred in failing to find plea counsel ineffective for not objecting to the solicitor bringing in Reed's alleged juvenile record. The solicitor did not produce the actual record but only what she thought was the record which Reed said was inaccurate. The solicitor as an officer of the court was under an obligation to present accurate information tot eh court. Instead, she admitted that she was relying on her memory from the 90's which was at least fifteen years earlier.

The record is clear that the sentencing judge considered the juvenile record in sentencing. The plea judge told Reed at the guilty plea hearing that Reed had been in the criminal justice system since the late 90's which had to be the juvenile record as Reed was twenty-nine at the time of the guilty plea in 2013. App. 24, ll. 23; App. 101. This meant that he would have been only nineteen in 2003 when his adult criminal record began. The plea judge also stated what he had considered in forming the sentence. He stated:

> A minimal sentence, Mr. Reed, in this situation based upon your criminal history and the fifteen years you have been in the criminal justice system would not be justified here. I think that this is the appropriate sentence based upon the facts and circumstances and the conduct that I've heard in this courtroom here today.

The judge did consider the juvenile information provided by the solicitor which was not reliable.

CONCLUSION

Based on the above, certiorari should be granted, petitioner's conviction and sentence reversed, and the case remanded.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Claude E. Reed states:

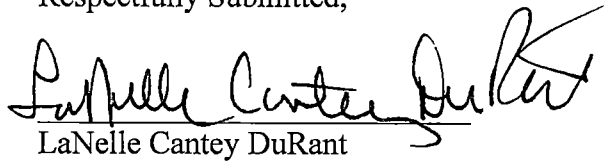
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's trial before Judge William H. Seals, which was held on August 10, 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 Claude E. Reed.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th 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."

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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 Lindsey McCallister, 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 Claude E. Reed, #305676, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 15th day of September, 2017.

LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of September, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.