

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

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MARK STEPHEN WINGO,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000991

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where plea counsel provided ineffective assistance of counsel by failing to object when law enforcement recommended the maximum sentence, where the prosecution agreed not to make any sentence recommendations?

STATEMENT

On March 27, 2015, Petitioner pled guilty to eight charges: three counts of contraband in prison, three counts of attempt to purchase pseudoephedrine, use of a vehicle without permission, and shoplifting, before the Honorable J. Mark Hayes II in Spartanburg County. James Farr represented the State, and Michael Brown represented Petitioner. Petitioner had been indicted for possession of cocaine, but Petitioner did not plead guilty to that charge. App. 6 l. 24 – App. 7 l. 2. A Spartanburg County Grand Jury had indicted Petitioner on these charges in March 2015. App. 60 - 75.

The facts presented at the guilty plea are as follows: Petitioner allegedly stole items “at the HD in Dorman” on December 26, 2014. App. 7 ll. 4 – 11. On March 18, 2015, Petitioner was arrested for unlawful use of a vehicle and taken to the detention center where a small quantity of methamphetamine was reportedly found. App. 7 ll. 12 – 19. During a bond reinstatement hearing on February 27, 2015, Petitioner purportedly sought to transfer contraband to his wife in the courtroom. App. 7 l. 20 – App. 8 l. 1. The attempt to purchase pseudoephedrine charges stemmed from the same day—November 10, 2014—when Petitioner attempted to purchase Sudafed from Walgreens and Target in Spartanburg County. App. 8 ll. 2 – 12. Petitioner’s using a vehicle without permission charge originated on March 14, 2015, where Petitioner allegedly took his sister’s vehicle. App. 8 ll. 12 – 20.

The prosecution did not attach a recommendation to any of the charges. App. 2 l. 4 – App. 3 l. 7. Brian Licurs, a Sergeant with the Spartanburg County jail, requested that Judge Hayes sentence Petitioner to the maximum allowable amount. App. 12 ll. 14 – 20.

Judge Hayes accepted Petitioner’s plea, revoked his probation, and sentenced him as follows: ten years on each of the contraband by prisoner charges, concurrent with each other and

concurrent with the thirty month sentences on each of the attempt to purchase pseudoephedrine charges, concurrent with each other and a one year sentence on the use of a vehicle without the owner's permission. App. 23 l. 20 – App. 24 l. 16. On the shoplifting charge, Judge Hayes sentenced Petitioner to ten years' incarceration suspended time served and five years' probation, to be served consecutive to the other charges. App. 24 ll. 16 – 21.

On February 18, 2026, Petitioner filed a timely application for post-conviction relief. App. 27. His application contained allegations of ineffective assistance of counsel, including that the State allowed a Spartanburg County officer to request maximum sentencing. App. 29. The State made its Return on or about October 13, 2016. App. 38.

An evidentiary hearing was conducted on February 1, 2017 before the Honorable Edward W. Miller. App. 44. Susannah C. Ross represented Petitioner, and Caitlin B. Hastings represented the State. Petitioner testified during the hearing.

On March 21, 2017, Judge Miller issued his order denying Petitioner relief. The Order was filed March 27, 2017.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance of counsel by failing to object when law enforcement recommended the maximum sentence, where the prosecution agreed not to make any sentence recommendations.

At the evidentiary hearing, Petitioner understandably expressed his frustration with the plea arrangement:

[A]fter ... we entered the ... plea, it was - - my understanding, there was going to be no recommendation and that's why I agreed to plea and waive grand jury [presentment] ... just to plead and to get things behind us. But after I plead, later, you know, they ... asked the judge to give me the maximum sentence, and that's not what we agreed on.

App. 48 ll. 2 – 10.

The prosecution called Licurs, who recommended the maximum sentence. App. 40 ll. 11 – 13. Because “the Sheriff’s Department is an arm of the State ... [Licurs] was a state actor when he asked for the maximum sentence” in Petitioner’s plea. App. 40 ll. 14 – 17. Counsel for Petitioner did not object to these remarks. App. 40 (tr. 5) ll. 18 – 21.

Following a short direct and cross examination of Petitioner, the PCR Court ruled that Petitioner’s application was going to be denied. App. 43 (8) ll. 9 – 14.

Petitioner correctly asserted that Counsel was ineffective, because he did not object when Sergeant Licurs requested the maximum sentence. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance

prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, Counsel failed to object when an officer of Spartanburg County suggested that the plea judge sentence Petitioner to the maximum, when the prosecution had agreed not to make any recommendations. Such conduct falls within the gamut of deficiency.


“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). As evident from Petitioner’s application for post-conviction relief, the prejudice in his case manifests itself in his plea which would not have been entered and Petitioner would have gone to trial if he would have known that the prosecution was going to recommend the maximum sentence. App 31; App. 35.

Plea counsel knew Petitioner for a long time. App. 14 ll. 14 – 20; App. 19 l. 25 – App. 20 l. 3. Plea counsel could have reminded the plea judge that there was no recommendation via a contemporaneous objection to Licurs’ remark. As it stands, however, Petitioner was not aware

that an officer of Spartanburg County was going to recommend the maximum sentence. Therefore, he received ineffective assistance of counsel and his plea was not knowingly entered.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.


Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of October, 2017.

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MARK STEPHEN WINGO,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Stephen Wingo 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 Edward W. Miller, which was held on February 1, 2017, 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 Mark Stephen Wingo.

Respectfully Submitted,



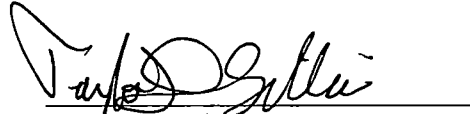
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of October, 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 Valerie Garcia Giovanoli, 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 Mark Stephen Wingo, #269107, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 9th day of October, 2017.

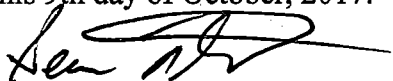


Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of October, 2017.



(L.S)

Notary Public for South Carolina

My Commission Expires: 10/30/2020