

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to York County

Honorable Letitia H. Verdin, Circuit Court Judge

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ROBERT SHAVER,

RESPONDENT **S.C. SUPREME COURT**

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2017-000701

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there any evidence to support the PCR judge's finding that Respondent Shaver satisfied his burden of proving that the original plea counsel was ineffective for failing to offer reasonable and sound advice regarding the original plea into drug court?

1. Is there any evidence to support the PCR judge's finding that Respondent Shaver satisfied his burden of proving that counsel who represented Shaver at sentencing, after termination from drug court, was ineffective for failing to formally file a motion to reconsider sentence and failing to present any further information in support of the motion?

2. Is there any evidence to support the PCR judge's finding that Respondent Shaver met his burden of proving that counsel who represented Shaver at sentencing, after termination from drug court, was ineffective in failing to order the transcript from the plea hearing?

STATEMENT OF THE CASE

In January of 2011, the York County Grand Jury indicted Respondent Shaver for distribution of Oxycontin and distribution of morphine, indictments #2011-GS-46-00211, 00212. On March 31, 2011, Respondent appeared before the Honorable John C. Hayes, III and pled guilty to the two distribution charges. Phil Smith represented Respondent at the plea. The original sentencing sheets reflect that sentencing was deferred so that Respondent could attend drug court. (App. p. 10, 15). The transcript from this original plea is not available. It appears from the later sentencing hearing transcript that Respondent also pled guilty to a possession of marijuana charge but that charge is not included in the application for post-conviction relief.

On November 29, 2012, after termination from drug court, Respondent appeared before Judge Hayes for sentencing. James W. Hancock represented Respondent at the sentencing hearing. Judge Hayes sentenced Respondent to fifteen years on each of the distribution charges and one year on the marijuana charge. Judge Hayes, however, indicated that he would entertain any motion for reconsideration if made. (App. p. 7, lines 5-9). Counsel for Respondent, Mr. Hancock, moved for reconsideration. (App. p. 7, lines 10-14). The judge deferred hearing the motion to reconsider in order to allow counsel time to prepare for the motion. (App. p. 7, lines 15-21). The deferred hearing on the motion to reconsider sentence was never held and counsel failed to file a formal motion to reconsider sentence and failed to present any further information in support of the motion to reconsider sentence. It appears that Judge Hayes never ruled on the motion to reconsider sentence. Mr. Hancock passed away prior to the first PCR hearing.

On June 7, 2013, Respondent filed an application for post-conviction relief [PCR]. The State filed a return in October of 2013. On April 13, 2015, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. After the hearing Judge Kinard instructed both

attorneys to prepare proposed orders. Judge Kinard, however, passed away prior to ruling. The Honorable Brian M. Gibbons ordered a new hearing. On August 1, 2016, an evidentiary hearing was held before the Honorable Letitia Verdin. Nathan J. Sheldon represented Respondent at the hearing. Justin Hunter represented the State. In a written order signed September 22, 2016, Judge Verdin granted relief. The State filed a motion to reconsider on October 11, 2016. The motion was denied on February 22, 2017. The State appealed and filed a petition for writ of certiorari on June 30, 2017. This return follows.

ARGUMENTS

1. There is evidence to support the PCR judge's finding that Respondent Shaver satisfied his burden of proving that the original plea counsel was ineffective for failing to offer reasonable and sound advice regarding the original plea into drug court.

Plea counsel was ineffective for not advising Respondent that if he failed to successfully complete drug court, he faced the maximum sentence of fifteen years on both distribution charges. The guilty plea was rendered involuntary as a result of counsel's deficient performance. While inadequate sentencing advice from plea counsel can be cured by the colloquy at the guilty plea hearing, Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000), in this case there is no transcript from the plea hearing. The original sentencing sheets, deferring sentencing to allow Respondent to attend drug court, list the sentencing range from zero to fifteen years, indicate that the sentence is negotiated but do not reflect what particular sentence was negotiated. (App. p. 10, 15).

During the PCR hearing plea counsel testified that the practice in York County was for the State and the defense to agree on a negotiated sentence prior to acceptance into drug court. (App. p. 48, lines 1-5). If the defendant was later terminated from drug court, the judge could impose the agreed upon sentence or, in some cases, reduce the initial sentence imposed at the time of the plea. (App. p. 56, line 23 – p. 57, lines 1-6). Plea counsel admitted that he did not have any specific notes indicating that the negotiated sentence was fifteen years. (App. p. 48, lines 5-7; 11-16; p. 49, lines 19-25). Although plea counsel testified that it was his practice to advise about the consequences of not successfully completing drug court, and it was the plea judge's practice to review any negotiations with the defendant during the plea colloquy, counsel admitted that the fifteen year sentence was not entered on the original sentencing sheets. (App.

p. 49, lines 19 -25; p. 48, lines 11-16; p. 50, lines 23-25). Plea counsel admitted that when a defendant is sentenced to drug court, the deferred sentence is typically listed on the sentencing sheet. (App. p. 53, lines 14-25). Plea counsel admitted that a plea affidavit outlining any negotiations was not prepared in Respondent's case. (App. p. 53, lines 1-7).

Respondent admitted that he rejected a plea offer for a cap of five years because he wanted to enter drug court. (App. p. 38, lines 1-17). Respondent, however, testified that he was not aware that he would be sentenced to fifteen years if he did not successfully complete drug court. (App. p. 39, lines 2-17). Respondent testified that he would not have wanted to risk the fifteen year exposure and did not understand why he was sentenced to fifteen years, after termination from drug court, when the original offer, without drug court, was for a cap of five years. (App. p. 40, lines 1-3). When asked if he was told what would happen if he did not complete drug court Respondent testified, "I [sic] told I would go to jail, but I wasn't told how much time." (App. p. 44, lines 4-7). The risk of the maximum sentence of fifteen years was not worth the benefit of entering drug court.

In the order granting relief the PCR judge found that plea counsel was ineffective and wrote, "Mr. Smith failed to produce any evidence that he informed the applicant that the active five year plea would balloon to a fifteen year suspended sentence if he agreed to Drug Court. Mr. Smith's file contains nothing documenting a fifteen year suspended sentence prior to the imposition of the sentence." (App. p. 69) Earlier in the order granting relief the PCR judge wrote, "It appears that Mr. Smith [plea counsel] did not communicate the possible punishment of Applicant's plea into drug court and had he done so the outcome would have been substantially different in favor of the defendant. This is bolstered by the lack of communications regarding the original fifteen year sentence in trial counsel's file." (App. p. 68).

In regard to prejudice the PCR judge wrote:

Applicant testified that he would not have taken the plea offer had he known that the suspended sentence was fifteen years. Absent a transcript, this Court has no way to know for sure that the sentence was fifteen years, but even if the Court assumes it was, it is likely that the defendant would have believed that the suspended sentence would be similar to the five years active sentence he was originally offered. The applicant testified to the same. Again, there is no evidence in counsel's file that the fifteen year suspended offer was relayed to applicant prior to sentencing.

(App. p. 70). There is evidence to support the PCR judge's finding as to both deficient performance and prejudice.

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge "if there is any evidence of probative value sufficient to support them." Dempsey, 363 S.C. at 368, 610 S.E.2d at 814. "If no probative evidence exists to support the findings, the Court will reverse." Id. at 368–69, 610 S.E.2d at 814.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

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. Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The two-part test adopted in *Strickland* also “applies to challenges to guilty pleas based on ineffective assistance of counsel.” Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). “Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements.” Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

“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). In Missouri v. Frye, 566 U.S. 134, 147, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012), the United States Supreme Court discussed prejudice with regard to plea offers and wrote:

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) (“[A]ny amount of [additional] jail time has Sixth Amendment significance”).

“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 plea allowing Respondent to enter drug court did not represent a voluntary and intelligent choice among the alternative courses of action open to Respondent when Respondent was unaware that he would be sentenced to the maximum fifteen years if he did not complete drug court.

Plea counsel was ineffective in failing to provide Respondent with a full understanding of the consequences of the plea. The plea was not entered knowingly and intelligently as a result of plea counsel’s deficient performance. There is a reasonable probability that if Respondent had known that failure to complete drug court would result in a fifteen year sentence, Respondent would not have entered the plea allowing him to enter drug court. There is a reasonable probability that a different plea, similar to the offer of a cap five years would have been entered without the prosecution cancelling it or the judge refusing to accept the plea. Based on the deferential “any evidence” standard of review, this Court must uphold the findings of the PCR court.

2. There is evidence to support the PCR judge's finding that Respondent Shaver satisfied his burden of proving that counsel who represented Shaver at sentencing, after termination from drug court, was ineffective for failing to formally file a motion to reconsider sentence and failing to present any further information in support of the motion.

The same judge who accepted the original plea allowing Respondent to enter drug court sentenced Respondent when he failed to complete drug court. After the judge sentenced Respondent to fifteen years he stated, "But I'm going to entertain, if he wishes to make it, a motion by your attorney to reconsider that sentence and give him time to do anything he wants to to [sic] argue that motion for reconsideration, if he makes that motion." (App. p. 7, lines 5-9). Counsel responded, "And I so make the motion for a reconsideration in that manner before the Court. I know it has to be done before the close of term." (App. p. 7, lines 10-12). The judge then stated, "You've done it on the record so I am going to take the reconsider – impose a sentence, but I'm going to take the reconsideration motion on all three of these under consideration and I'll defer hearing that giving Mr. Hancock some time to do what he thinks may be of value in presenting that argument." (App. p. 7, lines 15-20). Counsel replied, "And I will do so, sir." (App. p. 7, line 21). The deferred hearing on the motion to reconsider sentence was never held. Counsel failed to file a formal motion to reconsider sentence and failed to present any further information in support of the motion to reconsider sentence. It appears that Judge Hayes never ruled on the motion to reconsider sentence. Mr. Hancock passed away prior to the first PCR hearing.

Earlier during the sentencing hearing counsel made reference to a motion for a downward departure and asked for additional time to investigate. (App. p. 5, lines 11-21). The sentencing judge, however, treated the motion as a motion to reconsider sentence and told Respondent he would entertain such motion. (App. p. 7, lines 5-9). Counsel, however, never followed up on the

motion to reconsider sentence. The sentencing judge never ruled on the motion to reconsider sentence.

In the order granting relief the PCR judge wrote, “He specifically asked for permission to file a motion reconsidering the sentence, was granted an extension of time to do so, and never actually did so. Mr. Hancock’s actions constitute reversible error and prejudice.” (App. p. 69). As to prejudice, the PCR judge wrote, “Furthermore, it is equally reasonable to conclude that applicant was prejudiced by Mr. Hancock’s failure to file a reconsideration of the original sentence. The trial court went out of its way to allow him to do so. He received a maximum sentence on the charge. Yet, somehow, this motion was never filed and the reconsideration of the sentence was never heard. This Court concludes the Applicant has met his burden of proving counsel failed to render reasonably effective assistance.” (App. p. 70).

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Counsel was ineffective in failing to formally file the motion to reconsider sentence and failing to present information in support of the motion. There is a reasonable probability that,

but for counsel's deficient performance, Respondent would have received a reduction in sentence. Respondent is not required to show that the motion to reconsider would have been granted, as a matter of law. The standard is reasonable probability. Respondent meets the standard for relief. Plea counsel testified that he believed that the sentencing judge had the authority to reduce the sentence. (App. p. 56, line 23 – p. 57, lines 1-6). The sentencing judge believed that he had the authority to reduce the original sentence as he allowed Respondent more time in which to file and supplement the motion to reconsider sentence. Respondent hired Mr. Hancock to represent him at the sentencing hearing. Mr. Hancock advised that he would try and obtain a sentence of less than the maximum sentence of fifteen years. (App. p. 40, line 17 – p. 41, lines 1-23). There is evidence to support the PCR judge's finding that sentencing counsel was ineffective for failing to formally move for reconsideration and present information in support of the motion. Based on the deferential "any evidence" standard of review, this Court must uphold the findings of the PCR court. Sentencing counsel was ineffective and Respondent was prejudiced by the deficient performance.

3. There is evidence to support the PCR judge's finding that Respondent Shaver met his burden of proving that counsel who represented Shaver at sentencing, after termination from drug court, was ineffective in failing to order the transcript from the plea hearing.

The record in the present case fails to reflect the terms of the plea agreement allowing Respondent to enter drug court. The transcript from the initial plea is not available. As discussed above in issue one, plea counsel's notes do not reflect a negotiated sentence of fifteen years. The original sentencing sheets do not reflect that the judge sentenced Respondent to a fifteen year sentence deferred upon completion of drug court. The only reference to the fifteen year sentence is made by the prosecutor at the beginning of the sentencing hearing. (App. p. 4,

line 24 – p. 5, line 1). Mr. Hancock accepted the representation of the prosecutor without verifying the terms of the prior negotiation. Based on the irregularity in the sentencing sheets, as discussed above, and the absence of specific notes in prior counsel’s file in regard to the fifteen year sentence, there was a question in regard to the terms of the negotiation.

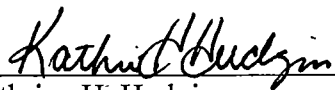
While counsel’s failure to order the transcript from the plea hearing was not specifically raised at the PCR hearing, the uncertainty about the negotiated sentence was part of the finding of ineffective assistance of counsel for both the plea attorney and the sentencing attorney. In the order granting relief, included in the section finding that the sentencing attorney was deficient, the PCR judge wrote, “There is also nothing in the record that indicates Mr. Hancock ordered a transcript from the original guilty plea into drug court. As a result, Mr. Hancock was left with accepting the fifteen year sentence as being accurate. Mr. Hancock’s failure to order a transcript to confirm the fifteen year sentence constitutes reversible error and prejudice.” (App. p. 69).

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Sentencing counsel was ineffective in failing to confirm the terms of the plea agreement. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. The terms of the plea negotiation were not conveyed to Respondent by plea counsel, as discussed in issue one. Because there was a question as to the terms of the plea agreement, counsel should have ordered a copy of the plea transcript.

CONCLUSION

Based on the above arguments, this Court should deny the petition for writ of certiorari and uphold the grant of relief by the PCR judge.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of November, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County

Honorable Letitia H. Verdin, Circuit Court Judge

ROBERT SHAVER,

RESPONDENT

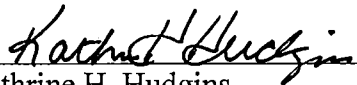
V.

STATE OF SOUTH CAROLINA,

PETITIONER


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Robert Eugene Shaver, #234875, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 15th day of November, 2017.



Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR RESPONDENT
this 15th day of November, 2017.



Notary Public for South Carolina (L.S)
My Commission Expires: July 5, 2017.