

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

JAN 04 2018

JAMES JUNIOR LITTLE,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000840

PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding petitioner knowingly and voluntarily entered a plea because plea counsel mistakenly gave petitioner the impression he would receive a time-served sentence and allowed him to plead guilty without discovering the intent of the victim's family to request a maximum sentence, and the trial judge sentenced him to ten years' imprisonment for leaving the scene of an accident where it was undisputed petitioner's car never made contact with the bicyclist?

STATEMENT

On February 20, 2014, an Horry County grand jury indicted petitioner for leaving the scene of an accident resulting in death. App. 88. On November 12, 2014, petitioner pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), before the Honorable Larry Hyman. App. 1. Monica Wooten represented the State. App. 1. Edward Chrisco represented petitioner. App. 1. Judge Hyman sentenced petitioner to ten years' imprisonment. App. 19, ll. 12 – 19.

On October 20, 2015, petitioner filed a PCR application. App. 21. On February 7, 2017, a hearing was held before the Honorable Michael G. Nettles. App. 38. James K. Falk represented petitioner. App. 38. J. Rutledge Johnson, assisted by a law student, represented the State. App. 38. On March 6, 2017, Judge Nettles denied petitioner's PCR application. App. 76. This petition follows.

ARGUMENT

The PCR court erred in finding petitioner knowingly and voluntarily entered a plea because plea counsel mistakenly gave petitioner the impression he would receive a time-served sentence and allowed him to plead guilty without discovering the intent of the victim's family to request a maximum sentence and the trial judge sentenced him to ten years' imprisonment for leaving the scene of an accident where it was undisputed petitioner's car never made contact with the bicyclist.

The State charged petitioner with leaving the scene of an accident where a death occurred and petitioner pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). App. 88. App. 10, ll. 14 – 21. The decedent was an accomplished cyclist riding a bicycle and wearing a helmet. App. 13, l. 12 – 14, l. 15. Petitioner was on his way to work and turned on to Ocean Boulevard in Myrtle Beach. App. 7, l. 13 – 9, l. 22. At the plea, the solicitor admitted that “the only traffic violation was a failure to yield.” App. 16, ll. 5 – 9.

It was undisputed petitioner's car never made contact with the decedent's bicycle. App. 9, ll. 7 – 22. Eyewitnesses stated when petitioner turned on to Ocean Boulevard, the decedent lost control of his bicycle, struck the curb, flipped and landed on his neck and back. App. 8, ll. 1 – 10. The decedent died approximately two days after the accident. App. 8, ll. 1 – 10. Nothing indicated petitioner had been drinking. App. 16, ll. 5 – 9. Petitioner left the scene and drove to work. App. 8, ll. 11 – 22. Petitioner told Judge Hyman at the plea that had he “known or even thought that the gentleman had gotten hurt, I would have stopped.” App. 18, ll. 21 – 25.

The decedent's family appeared at the plea with their attorney from Greensboro, North Carolina. App. 12, l. 14 – 15, l. 9. The family's attorney introduced the decedent's son, who was a very accomplished man in state and municipal government in North Carolina. App. 12, ll.

17 – 24. The decedent’s son asked Judge Hyman to impose “the max sentence allowable by law.” App. 14, ll. 19 – 22. Judge Hyman noted “some circumstances that would mitigate” the incident, but after considering petitioner’s “horrible” record, imposed a ten-year sentence. App. 19, ll. 12 – 16.

At the PCR hearing, petitioner explained that “you don’t expect anyone that fall off a bicycle barely moving” to die and that he did not hit the decedent, just “went around him.” App. 48, ll. 1 – 12. Plea counsel told him his case was unwinnable and a jury would find him guilty. App. 46, l. 25 – 47, l. 2. Plea counsel also led petitioner to believe that his communications with the decedent’s family indicated they were interested only in restitution and a time-served sentence. App. 50, l. 11 – 51, l. 12. Petitioner spent seventeen months in jail before he pled. App. 51, l. 24 – 52, l. 1. Plea counsel told petitioner he was getting a “good deal.” App. 51, ll. 18 – 20.

No “deal” existed as the solicitor explained at the beginning of the plea that, “The State’s offer at this time is a straight-up plea. . . .” App. 2, ll. 4 – 11. Plea counsel denied ever mentioning a time-served sentence to petitioner. App. 69, ll. 3 – 8. Petitioner told him he wasn’t guilty, but did not want a trial. App. 69, ll. 3 – 8. Plea counsel replied “there’s no purgatory” and petitioner needed to make a decision. App. 69, ll. 3 – 8.

The PCR court credited plea counsel’s testimony as credible and petitioner’s testimony as not credible. App. 82. The PCR court also found that their testimony was contradictory. App. 82. Petitioner argued that “he was certainly led to believe that the victims were not agitated to the point that when they testified in court and that it was realistic he would get a time served sentence.” App. 72, ll. 13 – 21. Petitioner only pled guilty based on these erroneous representations by plea counsel. App. 72, l. 22 – 73, l. 2.

The PCR court erred in denying petitioner's PCR application. Despite the adverse credibility finding, the court neglected an important portion of plea counsel's testimony. Plea counsel admitted that on the day of the plea he "didn't even know that the victim was even there that day until we did the plea and an attorney stepped up, I think, from Greensboro representing the family." App. 67, ll. 11 – 16. Plea counsel's testimony is an admission that he allowed petitioner to plead guilty without knowing the victim's position on sentencing. Without this crucial information, petitioner could not make a knowing and voluntary plea.

Plea counsel's negligent failure to discover the victim's family's position on sentencing and failure to advise petitioner is tantamount to giving erroneous advice on sentencing exposure. "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 v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted). The Supreme Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland." Id. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

This Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. Hinson found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d

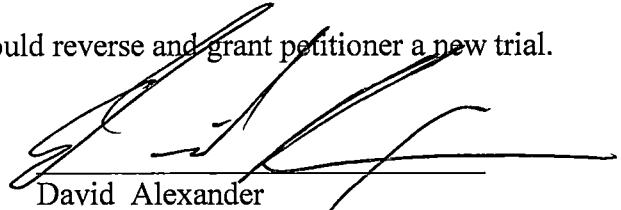
484 (1991) (reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing).

In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). In Jordan, the defendant pled guilty based upon the expectation that the solicitor would neither recommend nor oppose a sentence of probation. Id. at 53, 374 S.E.2d at 684. At the plea, a different solicitor represented the State and vigorously opposed probation. Id. The Supreme Court found plea counsel's failure to move to withdraw the sentence constituted ineffective assistance of counsel and reversed. Id. at 54-55, 374 S.E.2d at 684-85.

Just like in Hinson, Alexander, and Jordan, plea counsel's failure to advise petitioner about a key factor affecting his potential sentence rendered this plea unknowing and involuntary. Petitioner could not make an intelligent choice about whether to plead guilty without this crucial information. As the plea judge acknowledged, the facts of this case contained mitigating elements—namely that petitioner never made contact with the decedent's bicycle. Petitioner only entered an Alford plea. Petitioner's expectation of a time-served sentence was reasonable absent knowledge of the position the victim's family would take at the hearing. Had petitioner known about the victim's family's intention to ask for the maximum sentence and that they were represented by their own attorney, he would have exercised his right to a jury trial. This Court should reverse and grant petitioner a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse and grant petitioner a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable Michael G. Nettles, Circuit Court Judge

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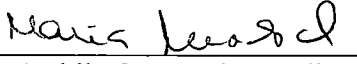
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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on James Junior Little, #255863, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 4th day of January, 2018.


—————
David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of January, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023