

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

RENE MIGUEL RODRIGUEZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000410

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Appellate Defender

South Carolina Commission on Indigent Defense
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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where plea counsel provided ineffective assistance by advising Petitioner to reject a plea deal based on the belief that his co-defendant would not testify against him?

STATEMENT

On November 13, 2013, Petitioner pled guilty to trafficking cocaine, 28 grams or more (Indictment 2011-GS-23-5259) in front of the Honorable Letitia H. Verdin in Greenville County. Joyce L. Monts represented the State, and Petitioner was represented by Richard Warder.

Prior to entering his guilty plea, Petitioner proceeded to a jury trial on November 12, 2013. App. 1. A jury was qualified and selected, and opening statements were given. One witness testified in front of the jury and Petitioner's co-defendant, Saul Carranza, testified outside the jury's presence. The next day, Petitioner pled guilty. App. 84.

The facts as presented by the State are as follows: On February 3, 2011, officers with the Drug Enforcement Administration and the Greenville County Sheriff's office, working on an undercover drug operation, recorded Petitioner and Carranza in the process of selling cocaine to an undercover DEA officer. App. 87 line 20 – App. 89 line 24. Petitioner was arrested a few days following the botched sale. App. 89 lines 22 – 24. In the process, law enforcement seized approximately two kilograms of cocaine. App. 89 line 25 – App. 90 line 7.

Judge Verdin sentenced Petitioner to 18 years' imprisonment. App. 98 lines 15 – 21. Petitioner did not file an appeal.

Petitioner filed a timely application for post-conviction relief on November 3, 2014. App. 100. He alleged that he rejected a plea deal which contained a 12-year sentence based on the advice of counsel. App. 102. The State filed its Return on or about April 17, 2016. App. 107. An evidentiary hearing was conducted on December 18, 2015 before the Honorable Perry H. Graveley. App. 112. Carolina Horlbeck represented Petitioner, and Karen Ratigan represented the State. Petitioner and plea counsel testified during the hearing.

On January 14, 2016, Judge Gravely issued an Order denying Petitioner relief. App.

145. The Order was filed on January 21, 2016. This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance by advising Petitioner to reject a plea deal based on the belief that his co-defendant would not testify against him.

In the months leading up to his trial, Petitioner and his co-defendant, Carranza, spoke regarding Carranza's decision not to testify against Petitioner. App. 139 lines 2 – 6. Carranza pled guilty prior to Petitioner's trial, and the Court deferred sentencing. App. 123 lines 15 – 20; App. 140 lines 2 – 10. Petitioner was still under the impression that his co-defendant would not testify against him when he proceeded to trial. App. 123 lines 21 – 23; App. 125 lines 13 – 19. Carranza's testimony would have been unfavorable to Petitioner. App. 128 line 5 – App. 129 line 7. Nonetheless, because Petitioner believed that Carranza was not going to testify, Petitioner rejected a plea offer which contained a sentence of 12 years. App. 124 lines 10 – 14; App. 126 lines 12 – 14; App. 139 lines 7 – 10. Petitioner discussed the plea offer with counsel prior to rejecting it. App. 124 lines 18 – 20; App. 125 lines 6 – 9.

Counsel believed that Carranza's attorney encouraged him to testify at Petitioner's trial in order to obtain a favorable sentence. App. 140 lines 2 – 10. Following Carranza's testimony, Petitioner discussed the possibility of a second plea opportunity with counsel. App. 128 lines 1 – 4. Petitioner decided to plead guilty. App. 140 lines 11 – 15. The sentence imposed by Judge Verdin following Petitioner's guilty plea was 18 years. App. 98 lines 15 – 21.

Petitioner correctly asserted that counsel was ineffective, because he failed to advise Petitioner that Carranza was not prohibited from testifying at Petitioner's trial. 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 advise Petitioner of the possibility of Carranza testifying against him. There were no prohibitions preventing Carranza’s testimony, only a verbal agreement. Counsel recognized that Carranza likely testified in order to obtain a favorable sentence, but counsel did not advise Petitioner of the likelihood that Carranza would take the stand.

“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 testimony, the prejudice in his case manifests itself in the 18-year sentence which is one-and-a-half times longer than the original available plea

At Petitioner’s evidentiary hearing, counsel testified regarding his representation. App. 136. He recalled the 12-year plea offer that the State offered. App. 136 line 24 – App. 137

line 5. In his opinion, the weakness in the State's case was that there was limited evidence which showed the cocaine in Petitioner's possession. App. 137 line 6 – App. 138 line 15. The testimony of Carranza was necessary in order to implicate Petitioner. App. 138 line 11 – App. 139 line 1. However, counsel failed to advise Petitioner of the possibility that Carranza would testify in order to obtain a favorable and/or reduced sentence. Counsel denied outright telling Petitioner that Carranza would not testify. App. 139 lines 21 – 24.

Petitioner's rejection of the initial 12-year plea offer was based upon an agreement between defendants. Counsel should have advised Petitioner that Carranza would likely testify in order to mitigate his sentence, because the verbal agreement between defendants was not binding. Without that necessary and useful information, Petitioner rejected a plea with a favorable sentence and proceeded to trial. The sentence which resulted from his mid-trial guilty plea was six years longer than the originally offered plea. Petitioner claims that erroneous advice from plea counsel caused him to reject the 12-year plea. Had Petitioner been advised of the likely event that Carranza would testify, he may have pled guilty and received a lesser sentence.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D. Gilham", written over a horizontal line.

Taylor D. Gilham
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of October, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

RENE MIGUEL RODRIGUEZ,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000410

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rene M. Rodriguez 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 Perry H. Gravely, which was held on December 18, 2015, 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 Rene M. Rodriguez.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of October, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of 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 Karen Ratigan, 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 Rene M. Rodriguez, #357840, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 31st day of October, 2016.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of October, 2016.



(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025