

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

GERALD SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2010-164866

BRIEF OF PETITIONER

RECEIVED

MAR 19 2013

SC Court of Appeals

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ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to object to the solicitor's asking for the maxim sentence at petitioner's guilty plea when it was in violation of a negotiated plea agreement?

STATEMENT

On October 25, 2005, petitioner appeared before the Honorable Reginald Lloyd in Richland County and pled guilty to voluntary manslaughter. A twenty-four (24) year sentence was imposed. April Sampson, Esquire represented petitioner.

Petitioner appealed his conviction and the appeal was dismissed by the Court of Appeals on April 11, 2008, after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Smith, Op. No. 2008-UP-226.

Petitioner filed an application for post-conviction relief on October 28, 2008. An evidentiary hearing was held on December 8, 2009, before the Honorable L. Casey Manning. Petitioner was present and was represented by Tricia Blanchette, Esquire. Respondent was represented by Brian T. Petrano, Assistant Attorney General. Petitioner and his brother, Douglas R. Smith, testified at the hearing. April Sampson also testified at the hearing.

On May 4, 2010, Judge Manning issued an order denying and dismissing petitioner's application for post-conviction relief. A subsequent Rule 59(e) motion was denied on June 10, 2010.

A petition for writ of certiorari was filed with the court on February 4, 2011. Respondent filed a return dated March 21, 2011. This court subsequently granted the petition and directed the parties to submit briefs.

This brief of petitioner follows.

ARGUMENT

Plea counsel was ineffective in failing to object to the solicitor's asking for the maximum sentence at petitioner's guilty plea when it was in violation of a negotiated plea agreement.

Petitioner was originally charged with murder. A co-defendant, Areheart, was also involved. Plea counsel testified that she reached a negotiated agreement with the solicitor where the murder charge would be reduced to manslaughter in exchange for petitioner testifying against the co-defendant. In addition, at petitioner's guilty plea the State would be silent as to sentencing. (App. p. 156, lines 1-22).

On November 15, 2004, petitioner appeared before the Honorable Clifton Newman and pled guilty to voluntary manslaughter. Sentencing was deferred until after petitioner's help with the Areheart case. On October 13, 2005, petitioner appeared before the Honorable Reginald Lloyd for sentencing. The solicitor explained the plea agreement to Judge Lloyd but left out the part about the State being silent as to sentencing. The solicitor stated she did not believe petitioner was forthcoming enough to help with the Areheart case so they could not proceed to try Areheart for murder. She did acknowledge, however, that petitioner did have a memory impairment due to a drug addiction to Oxycodone. The solicitor went on to describe the crime in detail along with crime scene photos. (App. p. 57, line 19 – p. 62, line 13). She then asked Judge Lloyd to sentence petitioner to the maximum. (App. p. 64, lines 22-23).

Plea counsel disagreed with the State's presentation and noted that petitioner had always been willing to testify. She said petitioner's memory problems and addictions make it where he cannot be entirely consistent when he is asked questions. (App. p. 65, line 1 – p. 66, line 13). She noted that the state let Areheart plead guilty to accessory after the fact with a 10 year sentence and 65% parole eligibility. (App. p. 68, lines 15-22).

Judge Lloyd initially sentenced petitioner to 27 years. (App. p. 71, lines 19-20). On reconsideration, the sentence was changed to 24 years. (App. p. 85, lines 23-24).

At no time did plea counsel ever object to the solicitor asking for the maximum sentence and advise the plea court that the negotiated sentence called for the State to be silent at sentencing.¹ Petitioner stated at the evidentiary hearing that the solicitor knew from day one when the negotiating started that he had memory problems. (App. p. 143, lines 12-20). He was in total shock with the solicitor requested the maximum sentence rather than remaining silent as agreed. (App. p. 144, lines 4-11). If he had known this was going to happen, he would not have pled guilt but would have proceeded to trial. (App. p. 148, line 8 – p. 149, line 4).

Plea counsel testified that she told the solicitor when she wanted to negotiate that petitioner had memory problems and had given four different statements. The solicitor knew this because she had the different statements.² (App. p. 159, line 17 – p. 160, line 12). Counsel said in past cases before Judge Lloyd he had given defendants as little as 10 years when the homicide involved a drug dealer. (App. p. 167, lines 8-25). The victim in this case was a drug dealer.

Plea counsel testified that it was a mistake on her part not to object and advise the court that the State had agreed to and was supposed to remain silent. (App. p. 170, lines 19-23; app. p. 173, lines 9-11; app. p. 174, lines 5-7).

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2)

¹ The complete plea agreement should have been put on the record. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

² The solicitor also chose not to use petitioner as a witness against Areheart because Areheart's attorney filed a motion to disqualify petitioner as a witness. (App. p. 60, lines 6-15).

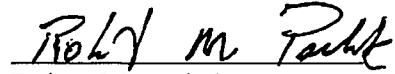
that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E. 2d 312 (1995).

In this case, counsel had admitted her error. She also admitted that she obtained ten (10) year sentences for her clients on cases of this type previously. In Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000), the Court held a defense attorney ineffective for failing to object when the solicitor recommended that the trial judge impose the maximum sentence in violation of a negotiated plea agreement. In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), another defense attorney was held ineffective in failing to withdraw a guilty plea after the State reneged on a plea bargain. Counsel in this case should likewise be held ineffective.

CONCLUSION

Petitioner's guilty plea should be vacated.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of February, 2013

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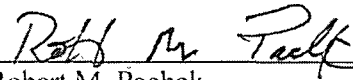
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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

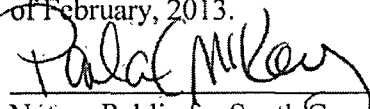
I certify that a true copy of the brief of petitioner, in this case has been served on Robert D. Corney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of February, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of February, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022