

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Marlboro County

Honorable G. Thomas Cooper, Circuit Court Judge

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APR 30 2018

JUSTIN HENDERSON,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001822

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err in holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered in light of Petitioner's testimony that counsel never explained the applicable maximum or minimum sentences, and where plea counsel also failed to explain that Petitioner's sentence would not be effective retroactively?

STATEMENT

Petitioner was indicted by a Marlboro County Grand Jury for murder and possession of a weapon during the commission of a violent crime during its April 2013 term of court. App. 130 – 133. On December 3, 2013, Petitioner pled guilty before the Honorable Edward B. Cottingham. App. 1. Mary Thomas Lee served as the Assistant Solicitor, and Brandon Steen represented Petitioner. Petitioner pled guilty to voluntary manslaughter and possession of a weapon during the commission of a violent crime following negotiations by the parties. App. 4 ll. 18 – 22.

The facts presented by the Assistant Solicitor were as follows:

On January 6, 2013, Petitioner stabbed Jamie White, a fellow inmate at Evans Correctional Institution. White was taken to the Marlboro Hospital where he was pronounced dead. Corrections officials received information that inmates were making shanks at Evans Correctional. App. 6 l. 4 – App. 7 l. 8.

Judge Cottingham accepted Petitioner's guilty plea. App. 14 ll. 13 – 19. He sentenced Petitioner to twenty years on the murder charge and five years on the possession of a weapon charge. Id. Those sentences were crafted to run consecutive to one another. App. 8 ll. 8 – 19,

On June 11, 2014, Petitioner filed an application for post-conviction relief. App. 16 – 25. It contained allegations of ineffective assistance of counsel and that his guilty plea was involuntary. App. 23. The State filed its Return on or about June 17, 2015. App. 26 – 30.

An evidentiary hearing was conducted on January 11, 2017 before the Honorable G. Thomas Cooper. App. 32. Lance S. Boozer represented Petitioner, and Valerie Giovanoli appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.

An Order of Dismissal was issued on August 24, 2017 and filed on August 29, 2017. App. 116 – 129. The PCR judge dismissed Petitioner’s application based upon a finding that Petitioner failed to prove prejudice, that his plea was voluntary, and that plea counsel provided effective representation. App. 233 – 128.

This Petition follows.

ARGUMENT

The PCR Court erred in holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered in light of Petitioner's testimony that counsel never explained the applicable maximum or minimum sentences, and where plea counsel also failed to explain that Petitioner's sentence would not be effective retroactively.

Background

At the evidentiary hearing, Petitioner recalled four meetings with plea counsel following his indictment for murder. App. 58 ll. 6 – 17. Plea counsel never informed him of the minimum or maximum sentences that were possible. App. 74 l. 20 – App. 75 l. 2.

Petitioner testified that he was unaware that the sentence that he was going to receive as a result of his guilty plea would not run concurrently with his prior sentence. App. 49 l. 23 – App. 50 l. 12. He similarly believed, following conversations with plea counsel, that his conviction for possession of a weapon during the commission of a violent crime would be a non-violent offense. *Id.*; App. 83 ll. 3 – 14.

Petitioner understood his guilty plea to entail the lesser-included offense of voluntary manslaughter which would run concurrent with his prior sentence for armed robbery. App. 10 ll. 11 – 18; App. 62 l. 15 – App. 63 l. 9. He believed that “concurrent mean[t] running with” his existing sentences such that the South Carolina Department of Corrections would remove eight years from his twenty year sentence for voluntary manslaughter because he had already served eight years for his armed robbery charge. *Id.* In other words, he believed his sentence would be applied retroactively. App. 74 ll. 3 – 24.

Before the plea negotiations, Petitioner wanted to go to trial. App. 58 ll. 6 – 11. Had he become aware that he would be required to serve the entirety of his twenty-five year sentence, he would not have taken the plea. App. 63 ll. 6 – 9; App. 96 l. 23 – App. 97 l. 5.

Petitioner was receiving threats in December 2013 and felt forced to plead guilty. App. 66 l. 16 – App. 67 l. 12. In the days leading up to his guilty plea, Petitioner and plea counsel never discussed trial strategy. App. 67 ll. 13 – 23.

Discussion

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other

grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). Appellate courts give great deference to the 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). When reviewing a PCR court’s decision, a reviewing court “is concerned only with whether any evidence of probative value exists to support the decision.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Petitioner was unaware of the nature of his plea. A difference of eight years—the benefit Petitioner believed he was entitled to receive—is a substantial one. However, the resulting sentence remained a mystery to Petitioner until it was too late for him to withdraw the plea. Therefore, he was left with an involuntary guilty plea which he seeks to overturn.

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 Giam
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marlboro County

Honorable G. Thomas Cooper, Circuit Court Judge

JUSTIN HENDERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

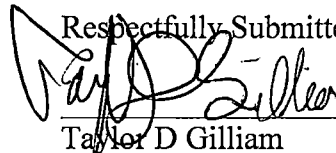
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Justin Henderson 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 G. Thomas Cooper, which was held on January 11, 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 Justin Henderson.

Respectfully Submitted,




Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2018.

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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This 30th day of April, 2018.

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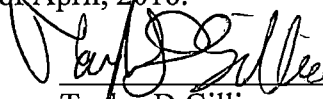
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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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 Johnny Ellis James, Jr., 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 Justin Henderson, #296885, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of April, 2018.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of April, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: 10/30/2022