

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Marlboro County

Roger E. Henderson, Circuit Court Judge

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JUN 11 2013

GEORGE A. COUSINS,

PETITIONER,
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002630

PETITION FOR WRIT OF CERTIORARI

Victor R. Seeger
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

1. Whether plea counsel provided ineffective assistance of counsel when he guaranteed to Petitioner that if he pled guilty to involuntary manslaughter and possession of a weapon during the commission of a violent crime he would receive fifteen (15) years' imprisonment, and where Petitioner relied on plea counsel's guarantee, pled guilty, and received thirty (30) years' imprisonment for voluntary manslaughter and five (5) year sentence for possession of a weapon during the commission of a violent crime?

STATEMENT

During the January 2011 term, the Charleston County Grand Jury indicted Petitioner for murder and possession of a firearm during commission of a violent crime. App. 109 - 112. On May 24, 2012, in front of the Honorable Paul M. Burch, Petitioner pled guilty because plea counsel promised Petitioner he would only receive fifteen years' imprisonment if he pled guilty to voluntary manslaughter and possession of a firearm during commission of a violent crime. App. 1. Heather S. Weiss and Kelly W. Hall represented the state and Richard Jones represented Petitioner. Id.

The court accepted Petitioner's guilty plea and sentenced him to thirty years' imprisonment for voluntary manslaughter and five years' imprisonment for possession of a firearm during commission of a violent crime, to run concurrently. App. 9, ll. 21 – 23; App. 34, ll. 2 – 8.

Petitioner filed a motion for reconsideration and his hearing was held in front the Honorable Paul M. Burch on April 8, 2013. App. 36. Ashley McMahan represented the state and Stuart Axelrod represented Petitioner. Id. Judge Burch reconsidered Petitioner's sentence and lowered it from thirty years to twenty-seven years' imprisonment. App. 54.

Petitioner filed an application for post-conviction relief on May 7, 2014, which alleged that ineffective assistance of counsel and involuntary guilty plea. App. 44 – 48. The state filed its return on December 5, 2016. App. 53 – 58.

On July 18, 2017, Petitioner's PCR hearing was held in front of the Honorable Roger E. Henderson. App. 60. Lance S. Boozer represented Petitioner and Johnny E. James represented the state. Id. Judge Henderson filed an order of dismissal on November 16, 2017 which stated that plea counsel provided no deficiency and Petitioner suffered no prejudice. App. 100 – 108.

This petition follows.

ARGUMENT

Plea counsel provided ineffective assistance of counsel when he guaranteed to Petitioner that if he pled guilty to involuntary manslaughter and possession of a weapon during the commission of a violent crime he would receive fifteen (15) years' imprisonment, and where Petitioner relied on plea counsel's guarantee, plead guilty, and received thirty (30) years' imprisonment for voluntary manslaughter and five (5) year sentence for possession of a weapon during the commission of a violent crime.

Relevant Facts

The state alleged the facts as follows. That on July 18, 2010 in Marlboro County Petitioner had an argument with his girlfriend. As the argument escalated, Petitioner allegedly grabbed his pistol and shot Tammy Locklear Norris, the decedent, in the head. App. 10, ll. 17 – 23. Prior to this incident Petitioner had no criminal record. App. 41, ll. 23 – 24.

Under the impression that he would receive a fifteen-year sentence when he pled guilty, Petitioner entered a guilty plea on May 24, 2012. App. 1. Judge Burch accepted Petitioner's guilty plea as freely, voluntarily, and intelligently entered App. 9, ll. 21 – 23. Judge Burch sentenced Petitioner to thirty years' imprisonment for voluntary manslaughter and five years' imprisonment for possession of a weapon during the commission of a violent crime. App. 34, ll. 2 – 8.

Petitioner filed a motion to reconsider and Judge Burch lowered Petitioner's sentence from thirty years to twenty-seven years. App. 54.

Petitioner filed a PCR application that alleged ineffective assistance of counsel and involuntary guilty plea because plea counsel promised Petitioner he would receive fifteen years imprisonment when after he pled guilty he received thirty years imprisonment. App. 44 – 48.

At the PCR hearing, Petitioner testified that his plea counsel came to him and said he had, “a one-time deal,” and that if he pled guilty he, “would get fifteen years.” App. 70, ll. 1 – 15. It was Petitioner’s understanding that when he walked in on the day of the plea hearing, he was pleading guilty to get the “one-time deal” that plea counsel promised him. App. 70, l. 22 – 71, l. 9. Had plea counsel not induced Petitioner to plead guilty and instead prepared for trial, Petitioner would have insisted on going to trial. App. 71, ll. 14 – 20; App. 72, ll. 3 – 29. Petitioner, and plea counsel, were “shocked” by the thirty-year sentence. App. 71, ll. 21 – 23; App. 86, ll. 5 – 10.

At the PCR hearing, plea counsel testified that he did not promise petitioner a fifteen-year sentence if he entered a plea to voluntary manslaughter. App. 85, ll. 1 – 5. However, Stuart Axelrod, Petitioner’s attorney for his reconsideration hearing, also testified at the PCR hearing. App. 92, l. 8. Axelrod stated that he met with plea counsel in the moments before Petitioner’s reconsideration hearing. App. 94, ll. 13 – 15. Axelrod asked plea counsel if he had promised Petitioner a fifteen year sentence if Petitioner pled guilty, and plea counsel confirmed that he did promise Petitioner that. App. 94, ll. 15 – 17. Axelrod testified his initial thought after his conversation with plea counsel was, “[Petitioner] is telling me the truth.” App. 94, l. 18. Axelrod then went into Burch’s chambers, he told Judge Burch and the assistant attorney general present that plea counsel promised Petitioner would get fifteen years’ imprisonment if he pled guilty. App. 94, ll. 21 – 22.

During direct examination, PCR counsel asked Axelrod if his request for a reduction of Petitioner’s sentence at the reconsideration hearing was arbitrary and Axelrod responded, “No.” In other words, plea counsel asked for a reduction of Petitioner’s sentence to fifteen years because he truly believed Petitioner was promised fifteen years by plea counsel. Axelrod also read back the colloquy from the reconsideration hearing where he specifically asks the judge to lower

Petitioner's sentence to fifteen years. App. 94, l. 1 – 95, l. 23. Axelrod stated that he does not, “have a dog in this fight,” and asked for fifteen years is because Axelrod believed Petitioner was promised that sentence, by his plea counsel, if he pled guilty. App. 95, ll. 12 – 23.

After Axelrod's testimony at the PCR hearing, the state recalled plea counsel to testify. App. 96, l. 18. Plea counsel said he never told anyone that he promised Petitioner a fifteen year sentence if he pled guilty. App. 97, ll. 15 – 24. Plea counsel explained that Axelrod must have misunderstood what he was saying when they met before the reconsideration hearing. App. 96, l. 21 – 97, l. 6.

In an order filed on November 16, 2017, Judge Burch found that the plea colloquy cured any misunderstanding that Petitioner had about sentencing and that Axelrod misunderstood the conversation with plea counsel. App. 107. Therefore, Judge Burch concluded, plea counsel did not provide ineffective assistance of counsel and denied Petitioner's PCR application. Id.

That denial was an error and that error prejudiced Petitioner.

Discussion

“The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel's performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.” Id. at 687-688, 104 S.Ct. at 2064. Concerning prejudice, “a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.”

Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694, 104 S.Ct. at 2068.

The difference, “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a 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) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59, 106 S.Ct. at 370. “[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

In Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399 (2012), the United States Supreme Court noted that the, “Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea.” Id. at 141, 132 S.Ct. at 1405

(citations and internal quotation omitted). The Court further emphasized that “[i]n today’s criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Id.* (emphasis added). Accordingly, “[a]nything less [than effective counsel during plea negotiations]... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” *Id.* at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted)).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685, 104 S.Ct. at 2063 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275, 63 S.Ct. 236, 240 (1942)). Additionally, a guilty plea that was entered by one fully aware of the direct consequences “must stand *unless* induced by . . . misrepresentation.” Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

In the instant case Petitioner’s guilty plea was induced by misrepresentation and, but for that misrepresentation, Petitioner would not have pled guilty and insisted on going to trial. App. 71, ll. 10 – 20. Petitioner pled guilty to voluntary manslaughter and possession of a weapon during the commission of a violent crime because plea counsel promised him that he would receive fifteen years’ imprisonment if he pled guilty. App. 70, ll. 1 – 5.

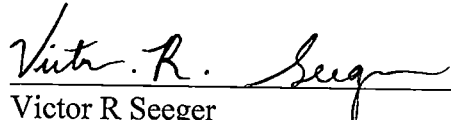
Plea counsel and Petitioner both have an interest in the determination as to whether plea counsel provided ineffective assistance of counsel and the prejudice to Petitioner that resulted. Thus, it is dubious to take either side’s position as objective. However, Stuart Axelrod who has no benefit in the outcome of this matter, gave particularly powerful testimony at PCR. Axelrod, the truly

objective voice in this matter, stated that he spoke directly to plea counsel and plea counsel admitted to Axelrod that he promised Petitioner a fifteen-year sentence if Petitioner pled guilty. App. 94, ll. 13 – 18. Axelrod had no trouble recollecting the conversation and even testified about his initial surprise when plea counsel confirmed Petitioner’s allegation. App. 94, ll. 17 – 18.

Therefore, plea counsel provided ineffective assistance of counsel when he wrongfully promised Petitioner that he would receive fifteen years’ imprisonment if he pled guilty to voluntary manslaughter and possession of a firearm during the commission of a violent crime. That ineffective assistance prejudiced Petitioner because he received thirty years’ imprisonment after he pled guilty, and he would not have pled guilty but for the promise of a fifteen year sentence made by plea counsel. App. 71, ll. 17 – 20.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.


Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Marlboro County

Roger E. Henderson, Circuit Court Judge
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GEORGE A. COUSINS,

PETITIONER,

V.

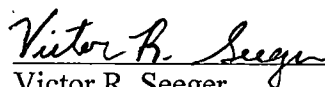
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002630
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CERTIFICATE OF SERVICE
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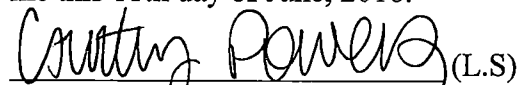
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny James, Jr. Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on George A. Cousins, #350976, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of June, 2018.



Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before
me this 11th day of June, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.