

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Laurens County

R. Scott Sprouse, Circuit Court Judge
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KIRK WILLIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002508
—————

PETITION FOR WRIT OF CERTIORARI
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ISSUE PRESENTED

In violation of Petitioner's Sixth and Fourteenth Amendment rights, did plea counsel provide ineffective assistance when he advised Petitioner he would be required to serve only six months of a five-year prison sentence where Petitioner was required to serve almost double the amount of time that plea counsel advised, which rendered Petitioner's guilty plea involuntary, unknowing, and unintelligent?

STATEMENT OF THE CASE

On October 30, 2015, a Laurens County grand jury indicted Petitioner for two counts of criminal domestic violence, third offense, two counts of attempted murder, and one count of possession of a weapon during a violent crime. App. 119-128. The charges stemmed from an incident involving Petitioner's wife on August 7, 2014. App. 5, ll. 6-21. Additionally, the South Carolina Department of Probation, Parole, and Pardon Services issued an arrest warrant for Petitioner, alleging he violated the terms of his probation. App. 100.

Initially, Chelsea McNeill represented Petitioner. App. 74, ll. 9-10. However, on October 1, 2014, Bryan Able was appointed to represent Petitioner. App. 74, ll. 5-11. Then, on October 13, 2015, the Honorable Donald B. Hocker relieved Able at Petitioner's request. App. 83, ll. 16-18. Shortly thereafter, Aaron Taylor was appointed as Petitioner's counsel. App. 89, ll. 7-15.

Plea negotiations

Plea counsel requested a "time served sentence" in exchange for Petitioner's guilty plea, but the solicitor rejected this offer due to Petitioner's prior record. App. 92, ll. 20-22. The solicitor offered to recommend a five-year sentence if Petitioner pled guilty to assault and battery in the first degree, a lesser-included offense of attempted murder. App. 3, ll. 4-10; App. 93, ll. 1-2. The solicitor also argued to dismiss the other charges. App. 9, ll. 13-16. Finally, the state agreed Petitioner's five-year sentence would be served concurrently with any time he served as part of the probation revocation. App. 9, ll. 17-18. Petitioner accepted the state's offer with the understanding that he would get credit for the time he spent awaiting disposition on the pending charges as well as credit for the time he had served concerning the charge for which he had received a probationary sentence. App. 11, ll. 12-20; App. 12, ll. 3-18.

Guilty plea hearing

On November 3, 2015, Petitioner appeared before the Honorable Frank R. Addy, Jr. to enter a guilty plea pursuant to the terms of the plea agreement he entered into with the state. App. 1. Taylor represented Petitioner, and Warren Mowry represented the state. App. 1. Judge Addy accepted Petitioner's guilty plea and sentenced Petitioner according to the terms of the agreement. App. 10, ll. 1-5; App. 13, ll. 10-17; App. 129. Additionally, Judge Addy revoked Petitioner's probation in full and ordered the sentences to be served concurrently. App. 13, ll. 12-15; App. 129.

Post-conviction relief proceedings

On September 9, 2016, Petitioner filed a post-conviction relief (PCR) application. App. 15-22. On March 13, 2017, Petitioner filed his amended PCR application through counsel, Ashley A. McMahan. App. 28-29. On October 11, 2017, Petitioner and his counsel, McMahan, appeared before R. Scott Sprouse for an evidentiary hearing on his PCR application. App. 30. Justin Hunter represented the state. App. 30.

During the PCR hearing, Petitioner explained that Taylor told Petitioner he would be required to serve only six months in prison. App. 68, l. 23 – App. 69, l. 19. However, Petitioner served almost double. App. 68, l. 23 – App. 69, l. 19. Taylor explained that for a non-violent offense, Petitioner would be required to serve a total of thirty months of his five-year sentence. App. 68, l. 23 – App. 69, l. 19. In light of Petitioner receiving credit for 556 days of time served, he would only be required to serve six additional months. App. 68, l. 23 – App. 69, l. 19. For the final six months, according to Taylor, Petitioner would get a furlough. App. 68, l. 23 – App. 69, l. 19. While Petitioner received a furlough for his final six months, he was required to serve eleven months in prison, not the six months promised by Taylor. App. 69, ll. 2-4.

At the PCR hearing, Taylor explained that he did not remember if he told Petitioner “exactly how much [time] he would have to do.” App. 95, ll. 2-10. Taylor did “not want to say that [he] did or didn’t” because he did not remember. App. 95, ll. 2-6. He could not “confirm or deny” that he advised Petitioner he would serve only six months in prison. App. 95, ll. 8-9.

At the conclusion of the hearing, Judge Sprouse took the matter under advisement. App. 97, ll. 24-25. By an order filed on November 27, 2017, Judge Sprouse denied Petitioner relief from his conviction and sentence. App. 101-118. In his order denying relief, Judge Sprouse found Petitioner failed to prove plea counsel was deficient. App. 116. Judge Addy found Petitioner “acknowledged during the plea hearing that he understood the charge carried up to ten years and the state was making a recommendation of five years.” App. 116. Further, according to Judge Sprouse, Petitioner “acknowledged that no one had promised him anything in order to plead guilty other than the state’s five year recommendation.” App. 116. In light of Petitioner not raising any “concerns to the plea judge,” Judge Sprouse found Petitioner “was well informed of the amount of time he was facing and the recommendation from the state.” App. 116.

Finally, the PCR judge found Petitioner “failed to show that he suffered prejudice.” App. 116. According to the judge, “[e]ven if Mr. Taylor did give [Petitioner] a prediction of when [Petitioner] would be eligible for parole, the plea-judge conducted a proper colloquy concerning the amount of time [Petitioner] was facing.” App. 116. Judge Addy also relied upon his finding that Petitioner “failed to show that he would have rather gone to trial.” App. 117.

On December 3, 2017, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

In violation of Petitioner's Sixth and Fourteenth Amendment rights, Plea counsel provided ineffective assistance when he advised Petitioner he would be required to serve only six months of a five-year prison sentence where Petitioner was required to serve almost double the amount of time that plea counsel advised, which rendered Petitioner's guilty plea involuntary, unknowing, and unintelligent.

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). 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.

In the context of a guilty plea, a petitioner must show that counsel was ineffective and that there is a reasonable probability but for counsel's errors, he would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994).

“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, 474 U.S. at 56. “Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” Lafler v. Cooper, 566 U.S. 156, 162 (2012). “Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.” Padilla v. Kentucky, 559 U.S. 356, 364 (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 365 (quoting Strickland, 466 U.S. at 689).

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); see also Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). 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 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).

In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435. This Court has

held that a defendant must “be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A guilty plea is rendered involuntary, unknowing, and unintelligent when a defendant pleads guilty to a crime without knowing the direct consequences of the guilty plea. Hazel, 275 SC at 394, 271 S.E.2d at 603.

This Court has held errors in sentencing advice entitle defendants to relief. Recently, this Court reversed a PCR court’s failure to grant relief where a PCR applicant received and relied upon incorrect sentencing advice when entering his guilty plea. Robinson v. State, 422 S.C. 78, 88-89, 810 S.E.2d 32, 38 (2018). It was undisputed that Robinson’s counsel advised Robinson that if he were to enter a guilty plea, he would be sentenced under the old law, which provided for a sentencing range of zero to thirty years, but that if he went to trial, then he would be sentenced under the new law, which provided for a sentencing range of twenty-five years to life, if he were found guilty. Id. at 82, 810 S.E.2d at 34-35. This Court held counsel’s advice was not within the range of competence demanded of attorneys in criminal cases because “his advice that the state had the ability to prosecute [Robinson] under the [new] law was clearly incorrect” as it would violate the ex post facto clauses of the state and federal constitutions. Id. at 86, 810 S.E.2d at 36-37.

Examining prejudice, this Court held the record was “clear that [Robinson] placed particular emphasis on his potential sentencing exposure in deciding whether to plead guilty.” Id. at 87, 810 S.E.2d at 37. Robinson “testified at the PCR hearing that he pled guilty *only* because he wanted to avoid the risk of receiving a life sentence under the amended law.” Id. (emphasis in original). Accordingly, this Court held Robinson “demonstrated a reasonable probability that he would have

rejected the plea offer and proceeded to trial but for plea counsel's incorrect advice." Id. at 88, 810 S.E.2d at 37.

In Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 152-153 (1991), this Court held a defendant's guilty plea was not intelligently and voluntarily made in light of erroneous advice given by counsel. Defense counsel advised the defendant that he would be sentenced to life without parole if he were convicted of both armed robbery counts, which was in error. Id. at 375, 401 S.E.2d at 152. The truth was that if he were convicted "he *may* face a sentence of seventy-five years without parole, but could face a sentence as short as ten years." Id. at 376, 401 S.E.2d at 152-153 (emphasis in original). This Court found trial counsel's incorrect advice was not within the range of competence demanded of attorneys in criminal cases. Id. at 376, 401 S.E.2d at 152. This Court further found that the defendant suffered prejudice where he testified he would not have pled guilty absent the erroneous advice, the real distinction between the penalty he faced and the advice given, and his steadfast maintenance of his innocence. Id. at 376, 401 S.E.2d at 153.

Similarly, this Court held a defendant was entitled to a new trial based upon erroneous sentencing advice of defense counsel in Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). According to the testimony presented during the post-conviction relief hearing, defense counsel advised the defendant that he faced one hundred years on the four indictments. However, this Court determined the defendant actually faced a seven to twenty-five year sentence on one count and a twenty-five year sentence on the other count as the indictments contained overlapping and greater and lesser charges. Id. at 542-543, 402 S.E.2d at 485. Due to this erroneous advice, this Court concluded that counsel provided deficient advice, satisfying the first prong of the test. Turning to the second prong, this Court concluded the defendant suffered prejudice in light of his testimony

that he would not have entered a guilty plea if defense counsel had not misinformed him. Id. at 543, 402 S.E.2d at 485-486.

In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court granted the defendant post-conviction relief where defense counsel provided incorrect advice concerning parole eligibility. Defense counsel advised the defendant that he would be eligible for parole after service of ten years if he pled guilty to common law murder. Id. at 457, 377 S.E.2d at 339. Defense counsel explained to the defendant that statutory murder permitted parole after twenty years, but common law murder permitted parole after ten years. Id. As a result of this erroneous advice, the defendant entered a guilty plea. Id. at 457-458, 377 S.E.2d at 339. This Court held counsel's advice was erroneous and fell below the level of competence expected of attorneys in criminal cases because there was no distinction between statutory and common law murder. Id. at 458, 377 S.E.2d at 339.

Moving to the second prong, this Court concluded Hinson suffered prejudice where the he testified his plea was induced by the erroneous advice, and defense counsel admitted he could not recall the advice given, but the co-defendant's counsel recalled the erroneous advice. Id. In Hinson, the evidence was "uncontroverted that Hinson entered his plea in expectation of receiving the lesser period for parole eligibility." Hinson, 297 S.C. at 458, 377 S.E.2d at 339.

During the guilty plea hearing, plea counsel argued strenuously for Petitioner to receive credit for 104 days of time served in addition to 452 days for a total of 556 days. App. 11, ll. 12-15. Plea counsel argued that Petitioner should receive credit for 452 days that he served in jail awaiting disposition of the pending charges. App. 11, ll. 12-15. In addition, plea counsel requested the judge give Petitioner credit for an additional 104 days, which was the amount of time Petitioner served on the offense for which he had received probation. App. 11, ll. 14-15. Counsel explained Petitioner's receipt of the credit for time served was a term of the plea

agreement necessary to “making this deal go through.” App 11, ll. 18-20. Later, counsel reiterated that Petitioner receiving credit for the time he served on the probationary sentence “was kind of part of the way [they] got this over the finish line.” App. 12, ll. 6-12.

Thus, counsel’s statements during the guilty plea showed the importance of the length of the sentence he would be required to serve to Petitioner’s understanding of the plea deal. More specifically, Petitioner’s guilty plea was based upon his understanding that the time he would spend in prison on the five-year sentence was reduced by the amount of time for which he would get credit coupled with the amount of time he would be required to serve on a sentence for a non-violent offense.

Plea counsel’s advice to Petitioner that he would serve only six months in prison was deficient performance where the undisputed evidence showed Petitioner was required to serve almost double what plea counsel advised. The deficient performance prejudiced Petitioner because he relied upon the advice when accepting the state’s plea offer. Plea counsel’s argument regarding “credit for time served” at the guilty plea hearing made clear that Petitioner was induced to enter a guilty plea because he believed he would be required to serve only six additional months in prison.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event, this Court grants the petition, but dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, find plea counsel rendered ineffective assistance, vacate Petitioner's guilty plea and sentence, and remand for a new trial.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County

R. Scott Sprouse, Circuit Court Judge

KIRK WILLIS,

PETITIONER

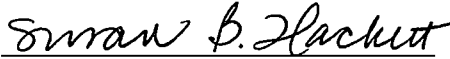
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

CERTIFICATE OF SERVICE

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 Janell Gregory 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 Kirk Willis at 120 E Bluford Street, Clinton, SC 29325, this 12th day of July, 2018.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of July, 2018.

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