

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Berkeley County

Honorable Jean H. Toal, Circuit Court Judge

BRANDON JENKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002366

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R. Seeger
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INDEX

INDEX i

ISSUE PRESENTED.....1

STATEMENT2

ARGUMENT

Plea counsel provided ineffective assistance of counsel when he guaranteed Petitioner that if he pled guilty to voluntary manslaughter he would receive less than twenty years imprisonment, and where Petitioner, who relied on plea counsel’s guarantee, received a twenty-four years imprisonment after he pled guilty to voluntary manslaughter3

Relevant Facts.....3

Discussion.....5

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL10

ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel when he guaranteed Petitioner that if he pled guilty to voluntary manslaughter he would receive less than twenty years imprisonment, and where Petitioner, who relied on plea counsel's guarantee, received a twenty-four years imprisonment after he pled guilty to voluntary manslaughter?

STATEMENT

During the September 2011 term, the Berkeley County Grand Jury indicted Petitioner for Murder and Attempted Armed Robbery. App. 87 – 90. On June 16, 2014, in front of the Honorable R. Markley Dennis, Petitioner, under the impression he would receive less than twenty years imprisonment, pled guilty to the lesser included offense of voluntary manslaughter. App. 1. As a result of the negotiated plea, Petitioner’s attempted armed robbery charge was dismissed. App. 2, ll. 20 – 21. Brian Alfaro represented the state. App. 1. Chad Shelton represented Petitioner. Id. The court accepted Petitioner’s guilty plea and sentenced him to twenty-four years’ imprisonment for voluntary manslaughter. App. 15, ll. 15 – 23; App. 29, ll. 17 – 23.

Petitioner filed an application for post-conviction relief on May 13, 2015, which alleged ineffective assistance of counsel and involuntary guilty plea. App. 31 – 41. The state filed its return on March 30, 2016, and an evidentiary hearing was held on September 16, 2016. App. 42 – 46; App. 48.

Petitioner’s PCR hearing was held in front of the Honorable Jean H. Toal. App. 48. Lance S. Boozer represented Petitioner. Id. J. Rutledge Johnson and Jack Frost represented the state. Id. Judge Toal filed an order of dismissal on October 10, 2017 that stated Petitioner failed to carry his burden of proving counsel’s deficient performance or how he was prejudiced by it. App. 78 – 86.

This petition follows.

ARGUMENT

Plea counsel provided ineffective assistance of counsel when he guaranteed Petitioner that if he pled guilty to voluntary manslaughter he would receive less than twenty years imprisonment, and where Petitioner, who relied on plea counsel's guarantee, received a twenty-four years imprisonment after he pled guilty to voluntary manslaughter.

Relevant Facts

The state alleged the facts as follows. That on September 26, 2011, police responded to a shooting in the St. Stephens area of Berkeley County. App. 9, ll. 13 – 17. Police found the decedent, Brittany Aigoro, on the front porch. App. 9, ll. 18 – 20. Another individual, Kendrick Shire, was admitted to MUSC for treatment of a gunshot wound to his side. App. 10, ll. 1 – 6.

The state alleged that Petitioner, along with multiple other codefendants, planned to rob Kendrick Shire. App. 10, ll. 7 – 12. Two female codefendants, the decedent and another woman, went inside the home to visit with Kendrick Shire. App. 10, ll. 13 – 25. They left the door unlocked to allow Petitioner and the rest of the group to enter the house and complete the robbery. Id.

It was unclear what triggered the shooting. App. 11, ll. 13 – 15. The decedent died from gunshot wounds suffered inside the home; and, Kendrick Shire was struck one time but survived. App. 12, ll. 1 – 5.

Defense counsel advised Petitioner to plead guilty to voluntary manslaughter, and he told Petitioner that he would receive less than twenty years' imprisonment. App. 60, l. 25 – 61, l. 2. Moreover, Defense counsel instructed Petitioner on how to answer the judge's questions during the plea hearing colloquy. App. 59, ll. 18 – 24. Petitioner relied on plea counsel's advice and pled guilty to voluntary manslaughter. App. 1. Judge Dennis accepted Petitioner's plea as freely,

knowingly, and voluntarily made, and sentenced Petitioner to twenty-four years imprisonment. App. 15, ll. 15 – 23; App. 29, ll. 17 – 23.

During the colloquy at the guilty plea hearing, Judge Dennis asked Petitioner if he understood that for voluntary manslaughter he could be sentenced to up to thirty years' imprisonment and Petitioner responded, "Yes, your honor." App. 4, ll. 21 – 24. Judge Dennis also asked Petitioner if there were any promises, other than the ones contained in the negotiated sentence, that have been made to him, and he responded, "No, your honor." App. 7, ll. 1 – 4. However, Petitioner was never asked if his plea attorney coached him on how to answer during the plea hearing colloquy.

Petitioner filed an application for post-conviction relief on May 13, 2015, which alleged ineffective assistance of counsel and involuntary guilty plea. App. 31 – 41. Petitioner's PCR hearing was held in front of the Honorable Jean H. Toal. App. 48. Lance S. Boozer represented Petitioner and J. Rutledge Johnson and Jack Frost represented the state. Id.

At PCR, Petitioner testified that plea counsel promised him that he would not receive more than twenty years' imprisonment if he pled guilty to voluntary manslaughter. App. 54, ll. 4 – 15. PCR counsel asked, "Did you actually want to go to court and enter a guilty plea?" To which Petitioner responded, "Not really, I didn't." App. 57, ll. 21 – 23. Petitioner only pled guilty because plea counsel, "had [Petitioner] feeling like there was no hope. That's how I felt... And he's, like, if you go to trial, we're going to lose. This is going to happen... *So I went with what he wanted me to do.*" App. 58, ll. 1 – 15. (emphasis added)

Petitioner testified that plea counsel told him what to say at the plea hearing because, "I told him I didn't understand. I didn't understand what was going on, so he sit down and explain it to me what to say, how to say it and that's how I took it." App. 59, ll. 14 – 17. Petitioner

further explained that plea counsel coached his statements at the plea colloquy because plea counsel told when Petitioner to say, “yes, sir; no, sir,” during the plea colloquy. App. 59, ll. 18 – 24. Petitioner explained that because he was only following plea counsel’s instructions, his answers during the plea colloquy did not reflect what he truly thought. App. 59, l. 25 – 60, l. 1.

Petitioner also testified that he only pled guilty because of plea counsel’s assurance that he, “was going to recommend that if I get 15 to 30, I won’t get no more than twenty years.” App. 60, l. 25 – 61, l. 2.

At PCR, plea counsel testified that he did not force Petitioner to plead guilty and never promised him a length of time for his sentence. App. 67, l. 25 – 68, l. 1; App. 74, ll. 18 – 20. During cross examination plea counsel explained that, “I did say that I was hoping for – that it wouldn’t go over the 23... I really, in my heart, believed he deserved less than the codefendant, and I would argue that to the judge, so I believe he deserved the 15.” App. 70, ll. 13 – 21.

Judge Toal filed an order of dismissal on October 10, 2017 that stated Petitioner failed to carry his burden of proving counsel’s deficient performance or that he was prejudiced thereby. App. 78 – 86.

Discussion

Petitioner testified that plea counsel promised him he would receive twenty years’ imprisonment or less if he pled guilty. App. 54, ll. 4 - 15. That was a false promise, and Petitioner relied on that promise when he pled guilty. App. 60, l. 25 – 61, l. 2. As a result of following plea counsel’s erroneous advice, Petitioner was sentenced to a term substantially longer than the sentence that plea counsel promised. App. 29, ll. 17 – 23. Therefore, plea counsel provided ineffective assistance and that ineffective assistance prejudiced Petitioner.

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).

“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.

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)).

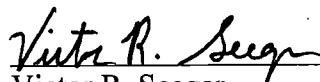
"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland, 466 U.S. at 685, 104 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 plea counsel's misrepresentation. Judge Dennis told Petitioner during the plea colloquy that the sentence could range from fifteen to thirty years and Petitioner said he understood. App. 4, ll. 3 – 6. Judge Dennis also informed Petitioner that the court relied on the veracity of Petitioner's answers during the colloquy. App. 8, l. 19 – 9, l. 3. However, during the plea colloquy, Petitioner was never asked if his attorney coached him on how to answer at the colloquy. Petitioner contended that plea counsel did instruct him on how to answer the judge's questions at the plea hearing colloquy and that his answers were not his own. App. 59, ll. 18 – 24. Therefore, Petitioner's answers at the colloquy did not accurately reflect his understanding regarding the consequences of pleading guilty and did not cure the erroneous assurance of a twenty year sentence by plea counsel.

Plea counsel provided ineffective assistance when he promised Petitioner that if he pled guilty to voluntary manslaughter he would only receive twenty years' imprisonment. Petitioner would not have pled but for plea counsel's erroneous assurance regarding the length of his prison sentence, and that ineffective assistance prejudiced Petitioner because after he pled guilty to voluntary manslaughter he received twenty-four years' imprisonment. App. 60, l. 25 – 61, l. 2; App. 29, ll. 17 – 23.

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 23rd day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Jean H. Toal, Circuit Court Judge

BRANDON JENKINS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon Jenkins 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 post-conviction relief hearing before Judge Jean H. Toal, which was held on September 16, 2016, 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 Brandon Jenkins.

Respectfully Submitted,



Victor R. Seeger

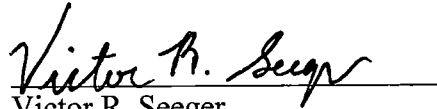
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 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."



Victor R. Seeger
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ATTORNEY FOR PETITIONER

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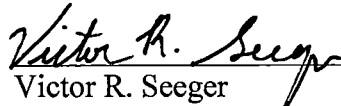
V.

STATE OF SOUTH CAROLINA,

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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 Rasheeda Cleveland, 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 Brandon Jenkins, #360373, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 23rd day of July, 2018.



Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of July, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023