

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

WILLIE J. PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000153

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where plea counsel failed to advise Petitioner of the possibility of his probation being revoked following a guilty plea, where Petitioner's sentence more than doubled based upon his probation revocation?

STATEMENT

Petitioner was indicted by a Spartanburg County grand jury during its March 2016 term of court. App. 81 – 88. He was indicted for trafficking in cocaine base, possession with intent to distribute cocaine base within one half mile of a school, possession with intent to distribute marijuana, and possession with intent to distribute marijuana within one half mile of a school.

Id.

He pleaded guilty before the Honorable. R. Keith Kelley on June 23, 2016. App. 1. James Hunter represented the State, and Stephen Wilson represented Petitioner. Andrea Manigault was present on behalf of South Carolina Department of Probation, Parole, and Pardon Services.

Petitioner pled guilty to the trafficking cocaine base as a first offense, even though it had been true billed as a second offense. App. 4 ll. 3 – 10; App. 6 ll. 9 – 17. The State recommended a three year sentence and a \$25,000 fine. Id. The remainder of Petitioner's charges were dismissed. App. 9 ll. 11 – 12.

Petitioner pled guilty, and the State offered the following facts as giving rise to the indictments: On or about June 19, 2015, law enforcement searched a home in Spartanburg County subject to a search warrant. App. 8 l. 22 – App. 9 l. 20. Petitioner was allegedly found in the bathtub. Marijuana was supposedly found in the shorts Petitioner claimed. Id. According to the State, Petitioner was interviewed and claimed ownership of a bedroom in the home. Id. Crack cocaine was allegedly found there. The State claimed Petitioner gave a written statement claiming the marijuana and crack cocaine. Id.

Petitioner's guilty plea was accepted. App. 10 ll. 1 – 4. Andrea Manigault indicated that Petitioner was on probation for the offense of possession with intent to distribute cocaine base,

first offense. App. 12 ll. 16 – 23. Petitioner’s five year sentence to that charge was suspended to eighteen months’ probation. App. 13 ll. 1 – 2. According to Manigault, one of the conditions of probation was random drug testing. Id. Manigault testified that Petitioner tested for positive for marijuana in September 2015. Id.

Judge Kelley sentenced Petitioner to three years’ incarceration based upon the plea for trafficking, and Petitioner’s probation was revoked in full and sentenced consecutively. App. 15 ll. 13 – 20.

Petitioner filed an application for post-conviction relief on or about September 26, 2016. App. 17 – 26. It contained allegations of ineffective assistance of counsel, including multiple claims that plea counsel failed to represent Petitioner with diligence. App. 22 – 24. Petitioner filed an amendment to his PCR application on or about December 7, 2016. App. 27. Other handwritten motions and letters were filed with the Spartanburg Clerk of Court. App. 28 – 32.

The State made its Return on or about February 21, 2017. App. 33 – 40. An evidentiary hearing was held before the Honorable Robin B. Stilwell on March 21, 2017. App. 41. Rodney W. Richey represented Petitioner, and Alicia A. Olive appeared on behalf of the State. Petitioner and his two attorneys, Andrea Price and Stephen S. Wilson, testified at the hearing.

An Order of Dismissal was filed on January 12, 2018. App. 71 – 80. Judge Stilwell found that Petitioner received effective assistance of counsel. App. 75.

This petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel failed to advise Petitioner of the possibility of his probation being revoked following a guilty plea, where Petitioner's sentence more than doubled based upon his probation revocation.

Relevant Facts

The possibility of probation revocation was not discussed at Petitioner's guilty plea until after Petitioner had pled guilty and after the court accepted his plea. The court inquired as to whether Petitioner was on probation. App. 5 ll. 20 – 22. The plea judge discussed post-conviction relief with Petitioner and provided him with a timeline for appeal. App. 7 l. 19 – App. 8 l. 20. However, there was no mention of the possibility of additional time above and beyond the three year recommended sentence.

Plea counsel spoke briefly about probation after the court accepted Petitioner's plea, but before sentencing:

As far as his probation, it's my understanding that every time he has tested negative. He's paid all his fees with that probation, as I understand it. And it's my understanding his probation is probably supposed to end I think in August of September. ... And if something has to be done with the probation, I would like for you to consider anything that is revoked that it run concurrent.

App. 11 l. 18 – App. 12 l. 4.

The plea court, after hearing from the probation agent, asked Petitioner whether he understood that his plea was “a violation of probation in addition to the positive drug test.” App. 13 ll. 3 – 5. Soon thereafter, Petitioner inquired as to whether he could ask the probation agent a question. App. 13 ll. 9 – 15. The plea court informed Petitioner that probation was no longer an option and sentenced him consecutively. App. 15 ll. 10 – 20.

Petitioner began investigating his matter after he received a total of eight years' incarceration instead of the three years subject to the recommendation. App. 47 ll. 19 – 23.

Petitioner indicated that his intent was go to trial. App. 48 ll. 3 – 4.

Regarding the probation revocation, Petitioner testified during cross-examination at the evidentiary hearing about his understanding at the guilty plea:

Q: You testified that you pleaded guilty because you were told that you were [going to] get three years?

A: Yes, ma'am, that's why... I pled guilty, I was advised that I could get 3 years, no more, no less.

Q: Okay, and you did get 3 years.

A: No, I got 8.

Q: Because your guilty plea was a violation of your probation, right?

A: Yeah, that's what they told me but my probation wasn't even talked about and I told you that my probation officer told me I ain't have to worry about that, my probation office ... know[s] I told him all [of] that.

App. 55 l. 17 – App. 56 l. 3. Petitioner continued:

All I can tell you right [now is] there is at the end of when he's 'bout to ... hit his [gavel], that's when he asked about my probat - - she asked about it toward the end even though that the transcript said he asked about it [at] the beginnin' but at the beginning he never said anything 'bout no probation, he said sumtin' 'bout probation at the end of court.

App. 56 ll. 9 – 15. Petitioner indicated he was unaware that he could have withdrawn his guilty plea at that time. App. 56 ll. 16 – 23.

Andrea Price represented Petitioner prior to his guilty plea. App. 49 ll. 21 – 23. Stephen Wilson, who served as plea counsel, was retained to represent Petitioner after Price. App. 1 ll. 9 – 12. He testified that Petitioner had been on probation for approximately one month when the charges giving rise to his plea occurred. App. 62 l. 18 – App. 63 l. 4. Plea counsel indicated that

he advised Petitioner that “in [his] opinion, [Petitioner] would most likely face a much harsher sentence.” Id. Plea counsel suggested that the guilty plea would result in Petitioner being presented for revocation. App. 63 ll. 11 – 25.

The Order of Dismissal found plea counsel credible in this respect and denied relief. App. 78.

Discussion

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).


First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, Petitioner indicated that he was uninformed about the possibility of probation revocation. Counsel failed to advise him of the possibility of a sentence longer than the three years which had been negotiated.

“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”

Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The prejudice in Petitioner’s case manifested itself in the full sentence of eight years which surprised Petitioner and constituted a harsher sentence than he believed was possible based upon the lack of advice from plea counsel.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him and the revocation of probation, and remand the case for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Willie J. Palmer 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 Robin B. Stilwell, which was held on March 21, 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 Willie J. Palmer.

Respectfully Submitted,



Taylor D Gilliam


Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 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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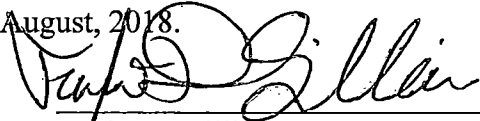
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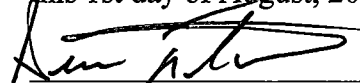
CERTIFICATE OF SERVICE

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 Jordan Cox, 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 Willie J. Palmer, #316284, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 1st day of August, 2018.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of August, 2018.



(L.S)

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