STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Jocelyn J. Newman, Circuit Court Judge

ELIJAH HUDSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000045

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was Petitioner's guilty plea unknowingly and involuntarily entered where plea counsel coerced him into pleading guilty by falsely informing him that his parents intended to testify against him on the eve of trial?

STATEMENT OF THE CASE

Petitioner was charged with two counts of criminal sexual conduct with a minor (CSCM) in the first degree and one count of assault with intent to commit CSCM in the first degree. App. 4, ll. 22-23; App. 6, ll. 5-10. His trial on the charges was scheduled to start on March 16, 2015, before the Honorable James R. Barber, III. App. 1. However, on the morning of trial, the state, represented by Kathryn Luck Campbell, Meghan L. Walker, and Joanna A. McDuffie, offered to reduce the charges to offenses in the second degree and agree to a negotiated sentencing range of ten to twenty years in exchange for Petitioner's guilty plea. App. 6, l. 20 App. 7, l. 1; App. 7, ll. 3-14; App. 7, l. 23 – App. 8, l. 1. Petitioner accepted the state's offer and appeared before Judge Barber to enter his guilty plea. App. 1. Alicia D. Goode and Tracy E. Pinnock represented Petitioner. App. 1. Judge Baber sentenced Petitioner to nineteen years imprisonment on each charge. App. 35, 1. 17 – App. 36, 1. 5; App. 142; App. 145; Supp. App. 3. He ordered the sentences to be served concurrently. App. 36, 1. 6; App. 142; App. 145; Supp. App. 3.

Petitioner filed a notice of appeal. App. 39; App. 40-41; App. 55; App. 66, ll. 4-8; App. 137. The Court of Appeals dismissed the notice of appeal based upon a lack of a sufficient explanation for the filing. App. 137.

On January 25, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 38-53. The matter proceeded to an evidentiary hearing on March 29, 2017, before the Honorable Jocelyn Newman. App. 62. David K. Allen represented Petitioner, and Jessica Kinard represented the state. App. 62. By an order filed on December 19, 2017, Judge Newman denied Petitioner relief from his convictions and sentences. App. 136-139.

On January 11, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was unknowingly and involuntarily entered because plea counsel coerced him into pleading guilty by falsely informing him that his parents intended to testify against him on the eve of trial.

Relevant facts

During the entire time plea counsel represented Petitioner, Petitioner insisted upon a trial. App. 84, ll. 1-2. On the Friday before the trial was scheduled to begin, Judge Barber called plea counsel, asking about a potential guilty plea by Petitioner. App. 91, ll. 19-24. When plea counsel met with Petitioner to discuss Judge Barber's inquiry, Petitioner informed plea counsel he would enter a guilty plea only if he received a probationary sentence. App. 91, ll. 24-25.

Petitioner's mother and father were charged with accessory before the fact to CSCM in the first degree and unlawful neglect of a child. App. 80, ll. 7-16. Their charges were related to Petitioner's charges. App. 80, ll. 7-16.[1] On the day that Petitioner's trial was set to start, plea counsel learned Petitioner's parents had entered guilty pleas and planned to testify against Petitioner. App. 81, ll. 3-17. According to plea counsel, the sentencing for his parents was deferred until after Petitioner's trial. App. 81, ll. 16-17. Around the time that plea counsel learned of the guilty pleas, the state extended a plea offer to Petitioner. App. 82, ll. 11-22.; App. 84, ll. 13-17. The state agreed to reduce the charges from first degree offenses to second degree offenses in exchange for Petitioner's guilty plea. App. 84, ll. 15-16. After some additional negotiating, the state and plea counsel agreed to a sentencing "range of the ten to twenty." App. 84, l. 16 – App. 85, l. 2. During these negotiations, plea counsel advised Petitioner that his

[1] Petitioner lived with his mother and father, who had custody of Minor, their grandchild. App. 5, l. 25 – App. 6, l. 4; App. 17, ll. 15-19; App. 18, ll. 12-15; App. 19, ll. 2-8. Petitioner was Minor's uncle. App. 17, l. 1.

parents "would be called as a state's witness." App. 85, ll. 6-10. "[A]t that point," Petitioner "decided that...a plea was probably in his best interest." App. 85, ll. 10-13.

During the guilty plea, the state revealed the weaknesses in its case against Petitioner. Concerning the alleged December 2011 incident, the state explained that although DSS conducted an investigation regarding the allegation, there was no referral to law enforcement. App. 16, l. 21 – App. 17, l. 25. Additionally, the complaining witness, Minor, did not allege abuse during "forensic counseling" related to this allegation. App. 18, ll. 2-4. Despite these admitted "problems," the state resurrected the 2011 allegations when Minor made new allegations in 2014. App. 18, ll. 5-8.

According to the state, Minor claimed that on March 7, 2014, Petitioner, her uncle, forced her to perform oral sex on him. App. 21, ll. 6-13. Minor spit what was in her mouth into a Ziploc bag and took it to school. App. 21, ll. 6-18. Although the state claimed Minor did this because she wanted "evidence," Minor did not show the "evidence" to anyone at school. App. 21, ll. 9-18; App. 24, ll. 16-17 (principal explaining she dug through trash for the bag); App. 72, l. 20 – App. 73, l. 11. In fact, another student saw Minor with the Ziploc bag on the bus and reported her to an adult at the school. App. 72, l. 20 – App. 73, l. 11. The school officials contacted law enforcement. App. 21, ll. 19-22. The police notified Minor's grandparents, who were on vacation in Maryland. App. 21, ll. 23-25. They did not return home immediately. App. 21, ll. 23-25.

A new form of DNA testing called "Rapid DNA" was performed on the substance in the Ziploc bag. App. 22, ll. 1-2; App. 79, ll. 3-14. The testing revealed a mixture of DNA from Appellant and his niece, Minor. App. 22, ll. 1-3. What the state neglected to tell the plea judge was that Minor tested positive for gonorrhea in her throat and anus. App. 74, ll. 18-19.

However, Petitioner, who was tested immediately upon arrest, was negative for gonorrhea. App. 74, ll. 22-25. Additionally, the state neglected to tell the plea judge that Minor accused numerous people of sexual abuse, including "some cousins" or "some other brothers." App. 76, ll. 15-20.

After Petitioner entered his guilty plea and received his sentence, he returned to the jail where he spoke to his father by phone. App. 110, ll. 20-23. It was then Petitioner learned his parents were not going to testify against him. App. 110. ll. 18-24.

The PCR judge acknowledged that Petitioner "testified that plea counsel coerced him to enter a guilty plea by suggesting that if he did not, his parents would testify against him at trial." App. 137. Concerning this allegation of ineffective assistance, the PCR judge ruled generally that Petitioner failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." App. 139 (citation omitted). Although plea counsel's testimony failed to address Petitioner's specific allegation that plea counsel falsely represented to him that his parents would testify against him, the PCR judge relied upon "weigh[ing] the credibility of the testifying witnesses" and "consider[ing] the admissions and explanations offered" to deny Petitioner relief. App. 139. The PCR judge could not "find that plea counsel was not 'a reasonably competent attorney' or that her advice was not 'within the range of competence demanded of attorneys in criminal cases.'" App. 139. Having found "no professional errors" by plea counsel, the PCR court could find "no prejudice." App. 139.

Discussion

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. Lafler v. Cooper,

566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 133, 141 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010); 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). "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 (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. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. 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.

The two-pronged test adopted in Strickland "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State,

384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). "[I]n the context of determining the voluntariness of a guilty plea that is entered upon the advice of counsel," the deficiency prong of the Strickland test requires "an inquiry into whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Alexander, 303 S.C. at 542, 402 S.E.2d at 485. "The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

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 found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant

would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. Hinson found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991)(reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing).

In Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), the defendant pled guilty based upon the expectation that the solicitor would neither recommend nor oppose a sentence of probation. Id. at 53, 374 S.E.2d at 684. At the plea, a different solicitor represented the State and vigorously opposed probation. Id. This Court found plea counsel's failure to move to withdraw the sentence constituted ineffective assistance of counsel and reversed. Id. at 54-55, 374 S.E.2d at 684-85.

In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), this Court found plea counsel was ineffective for erroneously advising the defendant that he faced a sentence of life without parole. Id. at 375, 401 S.E.2d at 152. The state argued that since the defendant faced a possible seventy-five-year sentence, he could not have been prejudiced by the erroneous advice. Id. at 376, 401 S.E.2d at 152-53. The Ray Court dismissed the state's reliance on a "possible" maximum sentence because had the defendant proceeded to trial, he could have faced a much shorter sentence. Id.

Everyone agreed that Petitioner desired a trial. He adamantly refused to enter a guilty plea until plea counsel informed him on the eve of trial that his parents were going to testify against him. This information tipped the scale for Petitioner. However, this information proved to be false. Had plea counsel not falsely informed Petitioner that his parents intended to testify against him, Petitioner never would have entered a guilty plea. Plea counsel rendered deficient performance by informing Petitioner that his parents were going to testify against him when his

parents had no such intentions. According to Petitioner, his father told him after his guilty plea that he and Petitioner's mother were not going to testify against him. Plea counsel's deficient advice rendered Petitioner's guilty plea involuntary and unknowing. Petitioner based his decision to plead guilty on plea counsel's warning that the state intended to call his parents as witnesses at his trial. Petitioner would have never entered a guilty plea, but for this erroneous and deficient advice. Instead, Petitioner would have gone to trial. Therefore, plea counsel provided ineffective assistance of counsel rendering Petitioner's guilty plea involuntarily and unknowingly entered.

CONCLUSION

Petitioner respectfully requests this Court reverse the PCR court, hold plea counsel provided ineffective assistance rendering his guilty plea involuntary and unknowing, and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 2018.

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Counsel for Elijah Hudson states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing before Judge Jocelyn J. Newman, which was held on March 29, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Elijah Hudson.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of August, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix have been served on Elijah Hudson, #363316, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of August, 2018.

Susan B. Hackett
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: July 3, 2023