

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jean H. Toal, Circuit Court Judge

DARIUS BARNWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002414

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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AUG 15 2018

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance when he guaranteed Petitioner's sentence would not exceed a certain amount if he pled guilty to five counts of trafficking cocaine, and where Petitioner, who relied on plea counsel's guarantee, received a longer sentence than plea counsel promised, after he pled guilty?

STATEMENT

During the April 2014 term, the Charleston County Grand Jury indicted Petitioner for five counts of trafficking cocaine. App. 84 – 103. On October 9, 2014, Petitioner pled guilty in front of the Honorable Roger M. Young, Sr. App. 1. Kelley Young represented the state. Id. Aaron Meyer represented Petitioner. Id.

Judge Young accepted Petitioner's plea as freely, voluntarily, and intelligently made. App. 5, ll. 22 – 23. Judge Young sentenced Petitioner to ten years' imprisonment for each charge. App. 11, ll. 16 – 18.

Petitioner did not file a direct appeal, but timely filed an application for post-conviction relief on June 29, 2015. App. 14 – 21. Petitioner's PCR application alleged plea ineffective assistance because he misadvised Petitioner about sentencing and that wrongful advice induced Petitioner to plead guilty involuntarily. Id. On January 21, 2016 the state made its Return. App. 22 – 26.

On September 15, 2016, in front of the Honorable Jean Toal, Petitioner's evidentiary hearing was held. App. 28. Rodney Davis represented Petitioner. Id. James Rutledge and Gabrielle Sulpizio represented the state. Id.

On September 29, 2016, the Honorable Jean Toal issued an Order of Dismissal that denied Petitioner's PCR application because she found Petitioner made the decision to plead guilty on his own accord and that Petitioner failed to present specific facts that plea counsel committed errors or omissions in his representation of Petitioner. App. 87 – 93.

This petition for Writ of Certiorari follows.

ARGUMENT

Plea counsel provided ineffective assistance when he guaranteed Petitioner's sentence would not exceed a certain amount if he pled guilty to five counts of trafficking cocaine, and where Petitioner, who relied on plea counsel's guarantee, received a longer sentence than plea counsel promised, after he pled guilty.

Relevant Facts

The state alleged the facts as follows. Petitioner's charges stem from controlled buys that took place over the period of a month. App. 5, l. 24 – 6, l. 5. A single confidential informant purchased cocaine from Petitioner over that month. *Id.* The informant called the same phone number each time to set up the drug buys with Petitioner. App. 6, ll. 12 – 15. After each call, the informant drove with law enforcement to buy cocaine from Petitioner. App. 6, ll. 14 – 21. The five incidents occurred from July 12, 2010 to August 27, 2010. App. 6, l. 23 – 7, l.

On September 15, 2016, Petitioner pled guilty based on assurances from plea counsel that if he pled guilty to five counts of trafficking cocaine Petitioner, “wouldn't get over a certain time [of incarceration].” App. 80, ll. 10 – 16. Plea counsel repeatedly implored Petitioner to plead guilty. He told Petitioner, “[J]ust come on, you can plea... If [Petitioner] plead, [Petitioner] wouldn't get over a certain amount of time,” and that plea counsel kept telling Petitioner, “you can do it, you can do it. Just sign the papers.” App. 81, ll. 10 – 17.

Judge Young accepted Petitioner's guilty plea and sentenced him to ten years' imprisonment for each count of trafficking cocaine. App. 5, ll. 22 – 23; App. 11, ll. 16 – 18. Petitioner did not file a direct appeal, but filed a timely application for post-conviction relief. App. 14 – 21.

On September 15, 2016 Petitioner's post-conviction relief hearing was held in front of the Honorable Judge Jean H. Toal. App. 28. Petitioner testified at his PCR hearing that his answers during the plea colloquy were not his own. App. 80, ll. 10 – 16. Petitioner did not stop Judge Young during the plea colloquy because his plea counsel kept telling Petitioner that he, "wouldn't get over a certain time," and he kept insisting Petitioner plead guilty. Id. Plea counsel said, "just do it," and Petitioner, "[J]ust went with what [plea counsel] said, so [Petitioner] just went to plead [guilty]." Id.

Had plea counsel discussed his trial strategy or his plan to deal with state's witnesses and evidence, Petitioner would have insisted on going to trial. App. 71, ll. 16 – 21. If plea counsel had reviewed the video evidence and his strategy on how to handle that at trial, Petitioner would have insisted on going to trial. App. 72, ll. 4 – 9.

Plea counsel testified at Petitioner's PCR hearing as well. App. 43, l. 24. Plea counsel testified repeatedly that he had no independent recollection of his representation of Petitioner. App. 45, ll. 15 – 16. He did not remember how or when he showed Petitioner his Rule 5 materials. App. 46, l. 21 – 47, l. 5. Plea counsel could not recollect what discussions he had with Petitioner about their strategy to combat the state's video evidence. App. 50, l. 25 – 51, l. 3. Plea counsel did not remember how many times he met with Petitioner. App. 55, ll. 14 – 19. Plea counsel upon cross-examination reiterated how little he remembered Petitioner's case, "I want to emphasize I have very little independent recollection of this time or this case. App. 56, ll. 19 – 21.

Even though plea counsel testified that he could not independently recollect anything about Petitioner's case, he testified that he did not force Petitioner to plead guilty. App. 57, ll. 9 – 14; App. 59, ll. 17 – 23. However, he admitted that he was also concerned with how

emphatically he persuaded Petitioner to plead guilty, “I hope I wasn’t overly forceful in describing my concerns about taking it to trial. I try not to be that way, but I certainly could have come off that way without knowing about it.” Id.

Judge Toal found that the “evidence is very, very overwhelming in the colloquy that was had with [Petitioner] at the time of his entering the plea.” App. 82, l. 17 – 83, l. 3. Therefore, Judge Toal found, that plea counsel did not induce Petitioner to plead guilty involuntarily. App. 92 – 93.

That was an error, and that error prejudiced Petitioner.

Discussion

Petitioner pled guilty because plea counsel promised him his sentence would not go over a “certain amount of time” and he would not have pled guilty had he known he could receive up to ten years’ imprisonment. App. 80, ll. 10 – 16; *See Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991) *See also Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989).

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 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

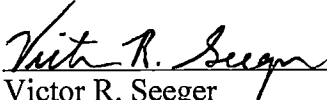
defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

"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 about the length of Petitioner's potential prison sentence should he plead guilty. Had plea counsel discussed any of his trial strategy or how the defense could attack the state's case, Petitioner would have insisted on going to trial. App. 71, ll. 16 – 21; App. 72, ll. 4 – 9. Petitioner testified that he. "was forced... to plead." App. 78, ll. 12 – 14. Petitioner only pled guilty because plea counsel promised him a lower sentence and repeatedly insisted that Petitioner plead guilty. App. 80, ll. 10 – 16. Therefore, the PCR court erred when it denied Petitioner's PCR application because Petitioner's plea was involuntarily made.

CONCLUSION

For the foregoing reasons, 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 15th day of August, 2018.

STATE OF SOUTH CAROLINA
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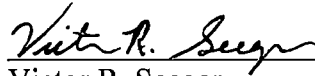
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Darius Barnwell 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 15, 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 Darius Barnwell.

Respectfully Submitted,

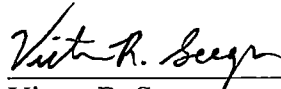


Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th 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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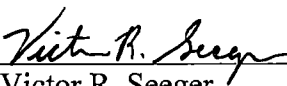
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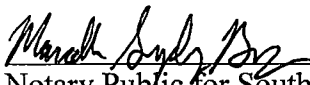
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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, 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 Darius Barnwell, #316725, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 15th day of August, 2018.



Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028