

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Daniel D. Hall, Circuit Court Judge

JAMES DAVID SHERFIELD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000431

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did the PCR court err in finding that Petitioner did not prove prejudice, where plea counsel did not obtain Petitioner's probation revocation report which showed that Petitioner had never failed a drug test while on probation, where the plea judge asked Petitioner whether he would have failed a drug test at the plea, where Petitioner had a history of mental illness and answered yes because he believed his medications would have caused him to fail the test, and where plea counsel admitted that Petitioner's sentence was harsh?

- II. Did the PCR court err in finding that Petitioner did not receive ineffective assistance of counsel, where plea counsel failed to file a notice of appeal from the guilty plea or motion to reconsider the sentence he admitted was harsh, where Petitioner advised plea counsel that the sentence was predicated upon the misconception that Petitioner had recently used drugs?

STATEMENT

Following full cooperation with the South Carolina Department of Social Services and a recommendation by the State that Petitioner receive a sentence concurrent with his probation revocation, Petitioner instead received a ten year sentence suspended to probation for five years following the service of seven years on the charge of unlawful neglect towards a child. App. 10 ll. 18 – 24.

Represented by Randall Lee Chambers, Petitioner waived indictment and pleaded guilty before the Honorable C. Victor Pyle, Jr. on May 12, 2016 in Greenville County before receiving this sentence. App. 1; App. 84 – 85. Brittany Danielle Scott and Hunter Christopher Blouin represented the State. The State alleged that Petitioner exposed a six-month child to marijuana in October 2014. App. 5 l. 23 – App. 6 l. 10; App. 84 – 85. The child allegedly tested positive for marijuana and Petitioner supposedly admitted to being a marijuana smoker. *Id.* Petitioner was already on probation following sentencing on April 8, 2014 wherein he received a seven year sentence suspended on forty-one days time served to thirty month probation for unlawful neglect. App. 6 ll. 20 – 24. Plea counsel suggested that the reason Petitioner had two charges for the same offense was that because more than one child was present in the home. App. 8 l. 17 – App. 9 l. 25.

Judge Pyle accepted Petitioner's plea "as being voluntarily made and as having a sufficient factual basis" even though Petitioner was never asked whether he agreed with the State's version of the facts. App. 5 l. 23 – App. 8 l. 15. Petitioner was sentenced to a period of ten years' incarceration provided upon the service of seven years, the balance would be suspended, coupled with probation for five years. App. 10 ll. 18 – 22.

On September 14, 2016, Petitioner filed an application for post-conviction relief. App. 13 – 24. Complete with handwritten attachments, it contained allegations of ineffective assistance of counsel, including claims that plea counsel failed to file a notice of appeal, that his guilty plea was invalid, and general ineffectiveness accusations. Id.

The State made its Return on or about January 12, 2017. App. 25 – 33. An evidentiary hearing took place before the Honorable Daniel Hall on June 29, 2017. App. 34. Susannah Ross represented Petitioner, and DeShawn Mitchell appeared on behalf of the State. Petitioner, his wife, and plea counsel testified at the hearing.

The PCR judge denied the application at the conclusion of the hearing, and an Order of Dismissal was issued on February 13, 2018. App. 57 ll. 16 – 18; App. 74 – 83. The Order of Dismissal found that Petitioner failed to carry his burden as to each claim.

This Petition follows.

ARGUMENT

I. The PCR court erred in finding that Petitioner did not prove prejudice, where plea counsel did not obtain Petitioner's probation revocation report which showed that Petitioner had never failed a drug test while on probation, where the plea judge asked Petitioner whether he would have failed a drug test at the plea, where Petitioner had a history of mental illness and answered yes because he believed his medications would have caused him to fail the test, and where plea counsel admitted that Petitioner's sentence was harsh.

Relevant Facts

At the evidentiary hearing, Petitioner denied that he would have failed a drug test at the time of the plea. App. 38 ll. 21 – 23. He suggested that confusion regarding the question, coupled with a lack of information regarding the medications he was on at the time and whether they would have shown up on the test, resulted in him answering in the affirmative at the guilty plea. App. 38 l. 24 – App. 39 l. 8. According to his medical records which were made an exhibit at the evidentiary hearing, Petitioner was taking Hydroxyzine and Escitalopram Oxalate. App. 59. Nonetheless, plea counsel did not interject at the plea and advise the court that Petitioner was only taking mental health medications. App. 7 ll. 13 – 20.

Petitioner never missed a probation report, never failed a drug test for his probation agent, and had not been drinking at the time of his plea. App. 40 l. 25 – App. 41 l. 16. Plea counsel, as will be discussed below, neglected to advise the court that Petitioner never failed a drug test. Id.

Plea counsel reviewed his file before the evidentiary hearing but forgot to bring it with him. App. 48 ll. 7 – 18. Referring to the absent file, counsel testified that he met with Petitioner for more than three minutes before the plea. App. 48 l. 19 – App. 49 l. 11. He offered some context on “jail cases” like Petitioner’s and explained that he is “supposed to go see them within 48 hours of being appointed.” However, “[s]ometimes [he] do[es], sometimes [he] can’t.” Id.

Plea counsel admitted on direct examination that Petitioner had advised him that he was taking medication and that “he had some issues with memory loss.” App. 50 ll. 6 – 8. Plea counsel, while remarking upon the high rate of mental illness amongst criminal defendants, also inexplicably opined that Petitioner was of sound mind because he had had a criminal record, thereby belying the sentiment that an individual could cease to be competent or cognizant over time:

And the other thing is, he had a record, so he’d clearly been to court before. So, I mean, there was nothing in my interaction with him that would ever have indicated that he didn’t understand what we were talking about, that he didn’t understand the process. And, again, I mean, he has mental health issues, but then so do most of the people who come in here. So I didn’t have any concerns about it.

App. 50 l. 19 – App. 51 l. 1. Nonetheless, plea counsel was aware that Petitioner was receiving disability checks and was aware of Petitioner’s mental illness. App. 51 ll. 10 – 20.

Although plea counsel expressed his opinion that Petitioner’s sentence was overly harsh three times at the evidentiary hearing, he never filed a motion to reconsider the sentence, ostensibly because he believed it would have been denied. App. 53 l. 24; App. 55 ll. 1 – 5; App. 57 l. 3

Plea counsel admitted that he did not have a copy of Petitioner’s revocation report. App. 54 ll. 7 – 13. Additionally, he never spoke with Petitioner’s probation agent. App. 55 ll. 6 – 9. When asked whether he knew if Petitioner had never tested positive with his probation agent,

plea counsel bluntly admitted that he was not aware of who Petitioner's probation agent was. App. 55 ll. 10 – 12. As a result, counsel did not have the report "to be able to rebut the fact that [Petitioner] said he would test positive when he had been drug tested on probation." App. 55 ll. 20 – 23.

Discussion

The plea court's sentence was vindictive and based upon a miscommunication—namely, that Petitioner would fail a drug test at the time of the plea. Because plea counsel did not effectively represent Petitioner and obtain his probation report, Petitioner received ineffective representation and was prejudiced by a harsh sentence based upon a misunderstanding of the plea judge.

Petitioner correctly asserted that trial counsel was ineffective, because counsel was unable to rebut his client's contention that he would not pass a drug test near the conclusion of his guilty plea. 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, supra). In this regard, trial counsel admitted that he neither obtained the report nor

became aware of Petitioner's probation agent. Such conduct falls within the gamut of deficiency; the plea judge, within seconds of hearing Petitioner's response to the drug test question, sentenced Petitioner harshly. App. 10 ll. 10 – 24.

“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).

In this regard, there is a strong likelihood that the judge would have sentenced Petitioner differently. The applicable statute, S.C. Code Ann. § 63-5-70, sets forth the maximum sentence of ten years for this charge. Although the ultimate sentence was suspended following seven years' service, Petitioner is potentially subject to the entire ten years.

The Order of Dismissal sets forth: “To be entitled to relief, Applicant must prove that the alleged excessive sentence was the result of partiality, prejudice, oppression, or corrupt motive, or that the sentence constitutes cruel and unusual punishment.” App. 80 (citations omitted). The sentence in this case was based on flawed information which stood uncorrected because plea counsel did not have the probation report and manifested itself in a prejudicial sentence.

The Order of Dismissal also contains an error: “Applicant testified on cross-examination that he had no mental health issues.” App. 79. At the outset of his testimony, Petitioner informed the PCR court that he has been mentally disabled since he was nineteen years old. App. 37 ll. 18 – 25. The cross-examination of Petitioner's lasted less than four pages and

contained no such admission. In fact, the opposite took place: Petitioner answered unequivocally in the affirmative:

Q: Have you ever been diagnosed with any type of mental illness?

A: Yes, sir.

Q: And what's that?

A: Short-term memory loss.

Q: So the doctor has construed that to be a mental illness?

A: Yes, sir. I've been disabled since 19.

Q: So do you get any type of benefits or something from the government?

A: Yes, sir.

App. 41 l. 25 – App. 42 l. 10. Petitioner's wife, during direct examination, indicated that ever since she has known Petitioner, "he's been getting a disability check [and] he's been taking the mental health medication." App. 45 ll. 8 – 20. She answered in the affirmative when asked whether Petitioner ever forgot or misunderstood things. Id. She outright agreed with the assertion that Petitioner did not understand the question about being under the influence at the conclusion of his guilty plea. Id.

Similar to the plea judge's harsh sentence being predicated on a miscommunication, the PCR judge's dismissal of Petitioner's post-conviction relief application could have been based upon a flawed understanding of the testimony. At the minimum, the Order of Dismissal contains a glaring error.

II. The PCR court erred in finding that Petitioner did not receive ineffective assistance of counsel, where plea counsel failed to file a notice of appeal from the guilty plea or motion to reconsider the sentence he admitted was harsh, where Petitioner advised plea counsel that the sentence was predicated upon the misconception that Petitioner had recently used drugs.

Petitioner attempted to communicate to his attorney that he believed his mental health medications would have possibly caused him to fail the drug test, which was why he answered in the affirmative at the plea. App. 40 ll. 13 – 18. Plea counsel admitted that there were not many meetings between the two prior to the plea.

In Roe v. Flores-Ortega, the United States Supreme Court considered the interplay between the right to an appeal and counsel's duties to consult with a client:

In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?

528 U.S. 470, 478, 120 S. Ct. 1029, 1035, 145 L. Ed. 2d 985 (2000). The Court held that counsel has a constitutionally imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. 528

U.S. 470, 480, 120 S.Ct. 1029, 1036, 145 L.Ed.2d 985 (2000). “[W]hen counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” *Id.* at 484, 120 S.Ct. 1029. The defendant need not show that his hypothetical appeal might have had merit, only that but for counsel’s deficient conduct, the defendant would have appealed. *Id.* at 486, 120 S.Ct. 1029.

Based upon the understanding that Petitioner had, specifically that he believed he was going to receive time concurrent with his revocation in accordance with the State’s recommendation, it should have been clear to plea counsel that Petitioner would have wanted to appeal. When asked why he did not move to reconsider the sentence, plea counsel testified that Petitioner did not ask him to. It is unclear whether Petitioner was aware such a filing existed.

The miscommunication problems in this matter were not isolated to those between the plea judge and Petitioner. Petitioner was unable to speak with plea counsel except immediately before his plea. App. 37 ll. 18 – 25. Petitioner and counsel met once, for a few minutes, immediately before the plea. App. 38 ll. 15 – 18. It naturally follows that not much communication took place afterwards. Plea counsel should have inquired about an appeal or motion to reconsider the sentence, especially considering his repeated admissions that it was harsh.

Plea counsel had, at a minimum, two chances to remedy the misunderstanding surrounding the drug test—he could have informed the plea court contemporaneously or filed a notice of appeal or motion to reconsider—but he did neither. The resulting sentence prejudiced Petitioner and motivated him into filing an application for post-conviction relief. He received ineffective assistance of counsel and is entitled to a new trial.

CONCLUSION

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

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of August, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Daniel D. Hall, Circuit Court Judge

JAMES DAVID SHERFIELD,

PETITIONER

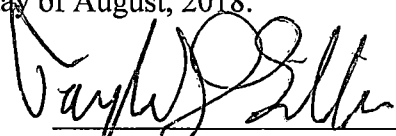
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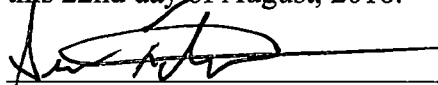
CERTIFICATE OF SERVICE

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 DeShawn H. Mitchell, 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 James David Sherfield, #368150, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 22nd day of August, 2018.



Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 22nd day of August, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: *October 30, 2022.*