STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

NEHEMIAH J. EVANS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000517

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's advice that he would receive a nonviolent sentence if he pled guilty, and where Petitioner was prejudiced because he ultimately pled guilty to murder, which is classified as violent, meaning Petitioner is not eligible for parole and has to serve his thirty year sentence day for day, and, most importantly, because Petitioner would not have pled guilty but for counsel's erroneous advice?

STATEMENT OF THE CASE

Sandy Lee Locklear thought her husband had a million dollar life insurance policy. Desiring the insurance proceeds, Locklear was willing to pay fifty thousand dollars to have her husband executed. App. 9, ll. 4-9. She approached Petitioner, who owned a landscaping business and maintained Locklear's yard, about her plan. Petitioner allegedly said "he couldn't pull the trigger." However, he agreed to "set her up with Odom Bryant." App. 9, ll. 1-10; App. 20, ll. 5-12.

Around four o'clock in the morning on August 19, 2012, Locklear called 911 and reported that two men had broken into her husband's house, killed her husband and stepson, and repeatedly raped her. App. 8, ll. 3-16; App. 19, ll. 3-17. As the investigation progressed, Locklear's "story began to fall apart." App. 8, ll. 14-16; App. 19, l. 18. Locklear ultimately identified Petitioner and Odom Bryant as being involved. App. 8, l. 20 – 9, l. 1; App. 19, ll. 21-24.

Law enforcement obtained text messages exchanged between Locklear and Bryant around three o'clock in the morning that day indicating that Locklear would leave the door open for Bryant. App. 10, ll. 3-5; App. 19, ll. 18-21. When questioned, Petitioner allegedly admitted he rode with Locklear and Bryant to the decedent's residence and that Locklear entered the house first and left the door opened or unlocked. App. 9, ll. 1-13. The state's theory was that "Odom Bryant just went in and pulled the trigger" killing both Locklear's husband and her stepson "execution style." App. 9, ll. 13-15; App. 20, l. 22 – 21, l. 1. Both Locklear and Bryant told law enforcement that Petitioner never had a gun. App. 9, ll. 19-21.

Locklear was ultimately convicted of both murders after a jury trial and sentenced to two consecutive life sentences. Bryant was also convicted after a jury trial and sentenced to life without parole. App. 10, ll. 6-12.

A Horry County Grand Jury indicted Petitioner on January 31, 2013 for two counts of murder. App. 100-103. On February 25, 2015, after both Locklear and Bryant had been convicted, Petitioner pled guilty as indicted before the Honorable Larry B. Hyman. App. 1. Assistant Solicitor Brad Richardson represented the state, and Kenneth Massey represented Petitioner. App. 1. For whatever reason, sentencing was deferred until March 16, 2015. App. 13. Judge Hyman ultimately sentenced Petitioner to thirty years pursuant to a negotiated sentence agreement. App. 21, ll. 16-20.

It appears the state refused to allow Petitioner to plead guilty to anything but murder because he refused to testify against Locklear and Bryant during their respective jury trials. App. 57, ll. 4-14. However, the solicitor was willing to recommend the mandatory minimum sentence given Petitioner's limited role in the murders. App. 15, l. 17 – 16, l. 6.

During the guilty plea proceeding, the judge asked Petitioner whether his counsel had discussed with him the possible penalty for murder. Petitioner said he had and that counsel told him the penalty was thirty years. App. 4, ll. 4-9. However, the judge never advised Petitioner of the sentencing range for murder, including the fact that it carried up to life imprisonment, nor did he inform Petitioner that murder was classified as a most serious and violent offense, what those classifications meant, and that he would be required to serve his sentence day for day. The judge also never inquired whether counsel had advised Petitioner regarding these classifications.

On November 2, 2015, Petitioner filed an application for post-conviction relief raising the claim argued in this petition. App. 24-30. The state filed a return to this application on

December 6, 2016. App. 31-35. An evidentiary hearing was convened on November 29, 2017 before the Honorable William H. Seals, Jr. App. 36. Assistant Attorney General Johnny James represented the state, and Steven Fowler represented Petitioner. App. 36.

Petitioner testified at the evidentiary hearing that plea counsel told him the solicitor knew he was not the "trigger man." Because of his limited role in the murders, counsel advised Petitioner that he would be able to plead to an offense less than murder and would receive a nonviolent sentence. App. 50, l. 17 – 51, l. 9. Petitioner asserted, "I was told specifically [by plea counsel] it was going to be nonviolent." App. 52, ll. 14-18; App. 61, ll. 5-18. It was not until Petitioner was transferred to the Department of Corrections after he pled guilty that he learned he would be required to serve a thirty year sentence day for day and that he had pled to a violent offense. App. 51, ll. 10-13; App. 61, ll. 5-18. Petitioner testified that if had known he was not going to receive a nonviolent sentence, he would not have pled guilty. App. 51, l. 14 – 52, l. 2.

Kenneth Massey, Petitioner's plea counsel, testified that he advised Petitioner that he was pleading guilty to murder, that "it would be for 30 years," and that murder is a violent and most serious offense. App. 81, l. 24 – 82, l. 5. Moreover, Massey maintained he told Petitioner he would have to serve the thirty year sentence day for day. App. 82, ll. 6-8. Even with this knowledge, Massey claimed Petitioner chose to plead guilty. App. 82, ll. 13-14.

The PCR court ultimately denied Petitioner relief. The court found neither plea counsel nor "any attorney would tell a client that *murder* is a non-violent offense." App. 93 (emphasis in original). Moreover, the court found credible counsel's testimony that he did not advise Petitioner he would receive a nonviolent sentence. App. 93-94. Consequently, the court concluded there was "no deficiency on the part of counsel, nor prejudice therefrom." App. 93.

Because Petitioner's guilty plea was not freely, voluntarily, and intelligently made due to the erroneous advice of counsel concerning the nonviolent classification of his conviction, and since Petitioner was prejudiced where he asserted he would not have pled guilty but for this erroneous advice, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's advice that he would receive a nonviolent sentence if he pled guilty, and where Petitioner was prejudiced because he ultimately pled guilty to murder, which is classified as violent, meaning Petitioner is not eligible for parole and has to serve his thirty year sentence day for day, and, most importantly, because Petitioner would not have pled guilty but for counsel's erroneous advice.

Plea counsel erroneously advised Petitioner that he would receive a nonviolent sentence if he pled guilty. The nonviolent classification is significant because it affects one's parole eligibility, among other matters. It was only after Petitioner was transferred to the Department of Corrections that he learned he had pled guilty to a violent offense and would be required to serve his thirty year sentence day for day. Petitioner was prejudiced by counsel's erroneous advice because he would not have pled guilty if he would have known he was pleading to an offense classified as violent.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

"A guilty plea may not be accepted unless it is voluntarily and understandingly made." Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). "In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of his plea and of the charges against him." Id. (citing Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995)).

"Normally, parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea." Griffin v. Martin, 278 S.C. 620, 621, 300 S.E.2d 482, 482-483 (1983) (citing Bell v. North Carolina, 576 F.2d 564 (4th Cir. 1978)). "However, if the defendant's attorney undertakes to advise the defendant about parole eligibility and gives erroneous advice, then the plea may be collaterally attacked." Smith, 329 S.C. at 283, 494 S.E.2d at 628 (citing Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989)).

In Smith, this Court noted, "There are a number of consequences if [a] defendant is convicted of a violent crime. Among these are his preclusion from the pretrial intervention program, the supervised furlough program, and the Shock Incarceration Program. Other consequences include tougher standards for parole, limitations on furlough and work release, and unavailability of educational credits." Smith, 329 S.C. at 284-285, 494 S.E.2d at 628-629 (internal footnotes omitted). However, the Court concluded that none of these consequences were of greater significance than parole eligibility and, because the Court had previously deemed parole eligibility to be a collateral consequence, then the above consequences were collateral as well. Id. at 285, 494 S.E.2d at 629.

Despite the fact that the consequences of being convicted of a violent crime are considered collateral, if an attorney undertakes to advise a defendant about the violent or nonviolent nature of an offense and gives erroneous advice, the defendant may later collaterally attack the plea. See Smith, 329 S.C. at 283, 494 S.E.2d at 628. Here, plea counsel erroneously advised Petitioner that he would receive a nonviolent sentence if he pled guilty. This constitutes deficient performance. A reasonably competent criminal defense attorney would never have advised Petitioner that murder was classified as nonviolent.

Petitioner was prejudiced because he relied on this erroneous advice when he waived his right to a jury trial and pled guilty. Petitioner asserted at the evidentiary hearing that he would not have pled guilty but for counsel's advice that he was pleading to a nonviolent offense. Consequently, Petitioner was prejudiced by counsel's deficient performance.

Petitioner respectfully requests this Court reverse the ruling of the PCR court, vacate his convictions and sentence, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of August, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nehemiah J. Evans 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 records and transcript of Petitioner's post-conviction relief hearing, which was held on November 29, 2017 before the Honorable William H. Seals, and, in her opinion, seeking certiorari from the order of dismissal is without merit.

3. She 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 her as counsel for Nehemiah J. Evans.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th 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."

Lara M. Caudy
Appellate Defender

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ATTORNEY FOR PETITIONER

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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 have been served upon Johnny Ellis James, Jr., 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 upon Nehemiah J. Evans, #295171, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 24th day of August, 2018.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of August, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.