

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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ORIGINAL
S.C. SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

DEVANTE SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000150

PETITION FOR WRIT OF CERTIORARI

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Trial counsel erred in giving sentencing misadvice regarding parole eligibility by assuring petitioner that he would become parole eligible after serving 20% to 25% of his sentences pursuant to his ABHAN and distribution of crack cocaine guilty pleas because ABHAN is a no-parole offense that carries an 85% service time before parole eligibility is triggered.....3

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ISSUE PRESENTED

Trial counsel erred in giving sentencing misadvice regarding parole eligibility by assuring petitioner that he would become parole eligible after serving 20% to 25% of his sentences pursuant to his ABHAN and distribution of crack cocaine guilty pleas because ABHAN is a no-parole offense that carries an 85% service time before parole eligibility is triggered.

STATEMENT

Petitioner Devonte Simmons pled guilty to assault and battery of a high and aggravated nature and distribution of crack cocaine (first offense) during the February 2015 term of the Horry County General Sessions Court before Judge Larry B. Hyman. Petitioner was sentenced to an aggregate ten-year prison term per the solicitor's recommendation. Petitioner was present at the plea proceedings and represented by James C. Galmore, and Assistant Solicitor Michael Travis Hyman appeared on behalf of the state. App 1-12. Petitioner did not appeal his convictions or sentences.

On February 4, 2016, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 14-20. The respondent filed a Return and Partial Motion to Dismiss on June 23, 2017. App. 21-27.

A PCR hearing was commenced on September 21, 2017, at the Horry County Courthouse before Judge William H. Seals, Junior. App. 29-43. Petitioner was present at the PCR hearing and represented by Daniel E. Selwa, and Assistant Attorney General Johnny E. James appeared on behalf of the state. On January 5, 2018, Judge Seals issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 46-52.

Petitioner appealed Judge Seals' Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in giving sentencing misadvice regarding parole eligibility by assuring petitioner that he would become parole eligible after serving 20% to 25% of his sentences pursuant to his ABHAN and distribution of crack cocaine guilty pleas because ABHAN is a no-parole offense that carries an 85% service time before parole eligibility is triggered.

The solicitor apprised the plea judge of the events that led to the charges levied against him. In May 2014, a confidential informant purchased \$100.00 worth of crack cocaine from petitioner; and in June 2014, petitioner shot a man named Moses Lee Scott. App. 7, l. 12 – p. 8 l. 20. The plea judge accepted the solicitor’s sentencing recommendation for a ten-year prison term. Note also that the plea judge did not advise petitioner of the maximum and minimum penalties attached to the offenses to which he plead guilty or the parole consequences thereof.

During the PCR hearing, petitioner testified that counsel’s letter to him stated that the state’s offer was for a “ten (10) year parole eligible plea,” and that counsel advised that he would serve only 20% to 25% before becoming parole eligible, but that when he arrived as SCDC, he was informed that he had to serve “a minimum of 85 percent” before becoming parole eligible. App. 33, l. 6, - p. 37, l. 20.

At the PCR hearing, trial counsel admitted that he misadvised petitioner in a letter sent stating that a ten-year parole eligible sentence was available in the case. See letter at App. 45.

Counsel admitted the error as follows:

A. The letter is basically not very clear as to whether the plea offer would’ve been to assault and battery first degree. The letter does talk about a 10-year parole eligible plea, which would mean the assault and battery first degree as opposed to the high and aggravated nature. But, [applicant] pled to the more serious charge.

Q: Which was the assault and battery high and aggravated nature, correct?

A: Yes, sir.

Q: Okay. And that is not the same parole eligibility as what you'd expressed there, correct?

A: That's correct. The assault and battery high and aggravated nature is truth-in-sentencing, no-parolable offense, you have to serve 85 percent of the sentence before a person is eligible for parole.

App. 39, l. 25 – p. 40, l. 15.

Trial counsel added, however, that his habit was to inform his clients that they would serve day for day of each sentence received. App. 41, lines 9-15. However, counsel admitted that he could not recall if he gave his day to day service spiel to petitioner. App. 41, lines 9-15.

The PCR judge ruled that counsel's advice regarding the ten-year parole eligible plea was erroneous advice, but that there was no prejudice shown because counsel stated that he always advised clients that they should expect to serve every day of their sentence. App. 49-51.

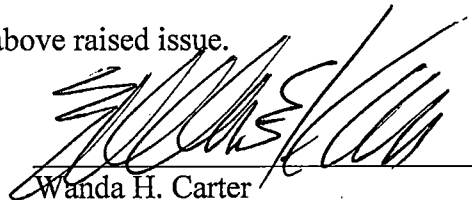
As a rule, if misinformation is given to a defendant regarding parole eligibility and the defendant relies in the same, then post-conviction relief is allowed. Frasier v. State, 351 S.C. 385, 570 S.E. 2d 172 (2002).; Coats v. State, 352 S.C. 500, 545 S.E. 2d 557 (2003). Clearly, counsel's parole eligibility advice given to petitioner was erroneous advice; and clearly, petitioner relied on counsel's misadvice in deciding to plead guilty as evidenced by his dismay upon finding out about the 85% serve time attached to his ABHAN conviction and the subsequent reaction by the filing of his PCR action. In no way could counsel's blanket assertion that he advises his clients to expect to serve their sentences day for day nullify or diminish

counsel's erroneous advice to petitioner, who relied on the erroneous advice and pled guilty to his detriment based on the same. Hence, the resulting prejudice.

S.C. Code Ann. Section 24-13-150 (2010) requires an inmate who has been convicted of a no-parole offense to serve 85% of his sentence before becoming parole eligible. ABHAN is an 85% service time (Class C) crime. See S.C. Section 16-3-600 (B). See also S.C. Code Ann. Section 24-13-100 and S.C. Code Ann. Section 16-1-20. Undoubtedly, counsel's misadvice in this case constituted ineffective assistance of counsel in violation of the Sixth Amendment and Hill v. Lockhart, 474 U.S. 52 (1985); and but for counsel's misadvice in question, a reasonable probability exists that petitioner would not have accepted the negotiated sentencing recommendation plea offer in the case.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

DEVANTE SIMMONS,

PETITIONER

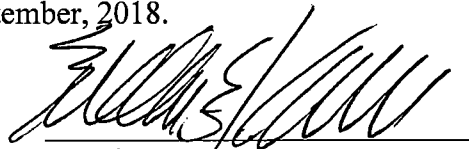
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STATE OF SOUTH CAROLINA,

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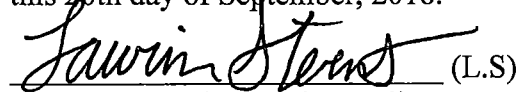
CERTIFICATE OF SERVICE

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 Johnny Ellis James, Jr., 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 Devante Simmons, #363222, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 20th day of September, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 20th day of September, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.