

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

DONALD R. DOLLARD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000194

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was Petitioner's guilty plea involuntary and unknowing because his plea was induced by plea counsel's promise that he would receive a ten-year sentence, but the judge sentenced him to twenty-five years imprisonment?

STATEMENT

On December 3, 2013, a group of men gathered at a store in Florence known for gambling. App. 34, ll. 1-8. Petitioner, Gregory Canty, and Nathaniel Nesmith arrived at the store. App. 34, ll. 9-11. Petitioner and Nesmith walked to the door while Canty stayed in the car. App. 34, ll. 11-13. As Petitioner and Nesmith entered the store, David Jenkins left. App. 35, ll. 4-5; App. 35, l. 10. Shortly thereafter, Jenkins returned with a gun, which he tried to fire. App. 35, ll. 12-15. After Jenkins' gun misfired, Nesmith started shooting, striking Jenkins. App. 35, ll. 16-18. Jenkins ultimately died as a result of the gunshot wound. App. 35, ll. 18-19. Petitioner and Nesmith got \$1,500 from one of the men in the store, and then left. App. 35, ll. 20-23.

Eventually, the police arrested Petitioner, charging him with murder, armed robbery, kidnapping, possession of a weapon during the commission of a violent crime, and conspiracy. App. 36, ll. 18-19; App. 37, ll. 16-18. Petitioner immediately cooperated with police. App. 36, ll. 20-21; App. 37, ll. 18-19. On June 15, 2014, the Florence County grand jury indicted Petitioner, Nesmith and Canty for murder, armed robbery, conspiracy, kidnapping, and possession of a weapon during the commission of a violent crime. App. 133-135. In January 2014, Steven DeBerry began representing Petitioner. App. 96, l. 23- App. 97, l. 16. During DeBerry's representation, Petitioner continued to cooperate with police. App. 101, ll. 7-9.

On October 21, 2014, Petitioner entered guilty pleas to armed robbery and accessory before the fact of voluntary manslaughter. App. 1; App. 23, ll. 13-20. Ed Clements represented the state, and DeBerry represented Petitioner. App. 1. The Honorable Benjamin H. Culbertson sentenced Petitioner to twenty-five years imprisonment on each charge. App. 45, ll. 5-7; App. 137-138. He ordered the sentences to be served concurrently. App. 45, ll. 7-8; App. 137-138.

Petitioner did not file a notice of appeal. App. 48. Shortly after the guilty plea, Petitioner wrote to DeBerry requesting an appeal. App. 76, ll. 1-7; App. 87, l. 22- App. 88, l. 14; App. 110, l. 15. – App. 111, l. 17. Upon receipt of this letter, DeBerry met with Petitioner at the Department of Corrections. App. 88, l. 18 – App. 89, l. 6; App. 111, ll. 9-17; App. 112, ll. 1-5; App. 113, l. 19- App. 114, l. 10.

On July 6, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 47-53. The matter proceeded to an evidentiary hearing on August 29, 2017, before the Honorable Thomas A. Russo. App. 59. Jonathan D. Waller represented Petitioner, and Lindsey A. McCallister represented the state. App. 59. At the conclusion of the hearing, Judge Russo denied Petitioner relief. App. 117, l. 19- App. 120, l. 17. By an order filed on January 29, 2018, Judge Russo denied Petitioner relief from his conviction and sentences. App. 122-132.

On February 6, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was involuntary and unknowing because his plea was induced by plea counsel's promise that he would receive a ten-year sentence, but the judge sentenced him to twenty-five years imprisonment.

Relevant Facts

In his PCR application, Petitioner explained that DeBerry promised he would receive a ten-year sentence. App. 49. At the PCR hearing, Petitioner testified that plea counsel told him that he would enter guilty pleas to both accessory before the fact and accessory after the fact. App. 66, l. 22 – App. 67, l. 7; App. 67, ll. 21-25; App. 70, ll. 12-16; App. 90, ll. 12-14. Further, plea counsel assured Petitioner he would receive a ten-year sentence. App. 67, ll. 3-7; App. 68, ll. 1-2. Specifically, plea counsel explained Petitioner would receive a five-year sentence on each accessory count. App. 67, ll. 5-6. However, Petitioner was sentenced to twenty-five years in prison for accessory before the fact of voluntary manslaughter and armed robbery. App. 45, ll. 5-7; App. 137-138. Petitioner agreed to plead guilty based upon plea counsel's promises about sentencing. App. 69, ll. 17-21.

Plea counsel, DeBerry, claimed there was not “any question in [his] mind whether [Petitioner] understood what he was pleading to.” App. 99, l. 25- App. 100, l. 1. Additionally, DeBerry claimed Petitioner understood” he was going to get at least ten years from a mandatory minimum and it was up to 30.” App. 100, ll. 3-6. However, DeBerry admitted he told Petitioner that the solicitor “offered to ask the judge or to make the judge aware that he didn't think [Petitioner] should get the same sentence as his co-defendant,” who pled guilty earlier that day and received a thirty-year sentence. App. 100, ll. 6-13.

Thus, DeBerry claimed he told Petitioner the solicitor “recommended that he get less the 30 years, but that the rest of it was up to the judge.” App. 100, ll. 13-16. Further, DeBerry denied promising Petitioner he “would only receive ten years.” App. 103, ll. 18-20. Specifically, DeBerry claimed he “would have told [Petitioner] before the plea... that he was pleading to accessory before the fact of – to voluntary manslaughter which that crime carries... 20 to 30 and the armed robbery is mandatory minimum of ten to 30 and so he could not have gotten less than ten that day.” App. 103, ll. 20-25.

In the order denying relief, Judge Russo found Petitioner failed to meet his burden of proof. App. 128. Judge Russo found Petitioner’s testimony not credible, but he found DeBerry’s testimony credible. App. 128. He found plea counsel’s “assertion [Petitioner] understood the charges he was pleading guilty to, the possible range of sentences, and the concept of accomplice liability” was credible. App. 128.

Finally, the judge found that “even if [Petitioner] believed he had been promised a ten-year sentence, the plea court questioned [Petitioner] at length regarding the possible sentence, and [Petitioner] indicated he understood.” App. 128. Thus, the PCR judge found “even if [Petitioner] believed he would receive a ten-year sentence prior to the plea, that belief was corrected by the thorough colloquy conducted by the plea court.” App. 129. The PCR court was further persuaded by the portion of the guilty plea transcript during which Petitioner told the plea judge that no promises had been made to him to induce him to plead guilty. App. 129.

Thus, Judge Russo found, DeBerry provided effective assistance when advising Petitioner regarding the plea negotiations, the guilty plea proceedings, and the potential sentencing ranges, and that Petitioner’s decision to plead guilty was made freely and voluntarily. App. 128.

Discussion

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also 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.

In the context of a guilty plea, a petitioner must show that counsel was ineffective and that there is a reasonable probability but for counsel's errors, he would not have pled guilty. 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). "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill, 474 U.S. at 56. "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012). "Before deciding

whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.” Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (internal quotations omitted).

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 held that a defendant must “be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A guilty plea is rendered involuntary, unknowing, and unintelligent when a defendant pleads guilty to a crime without knowing the direct consequences of the guilty plea. Hazel, 275 SC at 394, 271 S.E.2d at 603.

This Court has held errors in sentencing advice entitle defendants to relief. Recently, this Court reversed a PCR court's failure to grant relief where a PCR applicant received and relied upon incorrect sentencing advice when entering his guilty plea. Robinson v. State, 422 S.C. 78, 88-89, 810 S.E.2d 32, 38 (2018). It was undisputed that Robinson's counsel advised Robinson that if he were to enter a guilty plea, he would be sentenced under the old law, which provided for a sentencing range of zero to thirty years, but that if he went to trial, then he would be sentenced under the new law, which provided for a sentencing range of twenty-five years to life, if he were found guilty. Id. at 82, 810 S.E.2d at 34-35. This Court held counsel's advice was not within the range of competence demanded of attorneys in criminal cases because "his advice that the state had the ability to prosecute [Robinson] under the [new] law was clearly incorrect" as it would violate the ex post facto clauses of the state and federal constitutions. Id. at 86, 810 S.E.2d at 36-37.

Examining prejudice, this Court held the record was "clear that [Robinson] placed particular emphasis on his potential sentencing exposure in deciding whether to plead guilty." Id. at 87, 810 S.E.2d at 37. Robinson "testified at the PCR hearing that he pled guilty *only* because he wanted to avoid the risk of receiving a life sentence under the amended law." Id. (emphasis in original). Accordingly, this Court held Robinson "demonstrated a reasonable probability that he would have rejected the plea offer and proceeded to trial but for plea counsel's incorrect advice." Id. at 88, 810 S.E.2d at 37.

In Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 152-153 (1991), this Court held a defendant's guilty plea was not intelligently and voluntarily made in light of erroneous advice given by counsel. Defense counsel advised the defendant that he would be sentenced to life without parole if he were convicted of both armed robbery counts, which was in error. Id. at 375, 401 S.E.2d at 152. The truth was that if he were convicted "he *may* face a sentence of seventy-five years"

without parole, but could face a sentence as short as ten years.” Id. at 376, 401 S.E.2d at 152-153 (emphasis in original). This Court found trial counsel’s incorrect advice was not within the range of competence demanded of attorneys in criminal cases. Id. at 376, 401 S.E.2d at 152. This Court further found that the defendant suffered prejudice where he testified he would not have pled guilty absent the erroneous advice, the real distinction between the penalty he faced and the advice given, and his steadfast maintenance of his innocence. Id. at 376, 401 S.E.2d at 153.

Similarly, this Court held a defendant was entitled to a new trial based upon erroneous sentencing advice of defense counsel in Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). According to the testimony presented during the post-conviction relief hearing, defense counsel advised the defendant that he faced one hundred years on the four indictments. However, this Court determined the defendant actually faced a seven to twenty-five year sentence on one count and a twenty-five year sentence on the other count as the indictments contained overlapping and greater and lesser charges. Id. at 542-543, 402 S.E.2d at 485. Due to this erroneous advice, this Court concluded that counsel provided deficient advice, satisfying the first prong of the test. Turning to the second prong, this Court concluded the defendant suffered prejudice in light of his testimony that he would not have entered a guilty plea if defense counsel had not misinformed him. Id. at 543, 402 S.E.2d at 485-486.

In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court granted the defendant post-conviction relief where defense counsel provided incorrect advice concerning parole eligibility. Defense counsel advised the defendant that he would be eligible for parole after service of ten years if he pled guilty to common law murder. Id. at 457, 377 S.E.2d at 339. Defense counsel explained to the defendant that statutory murder permitted parole after twenty years, but common law murder permitted parole after ten years. Id. As a result of this erroneous advice, the defendant entered a

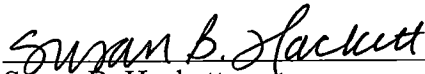
guilty plea. Id. at 457-458, 377 S.E.2d at 339. This Court held counsel's advice was erroneous and fell below the level of competence expected of attorneys in criminal cases because there was no distinction between statutory and common law murder. Id. at 458, 377 S.E.2d at 339.

Moving to the second prong, this Court concluded Hinson suffered prejudice where the he testified his plea was induced by the erroneous advice, and defense counsel admitted he could not recall the advice given, but the co-defendant's counsel recalled the erroneous advice. Id. In Hinson, the evidence was "uncontroverted that Hinson entered his plea in expectation of receiving the lesser period for parole eligibility." Hinson, 297 S.C. at 458, 377 S.E.2d at 339.

Plea counsel's advice to Petitioner that he would receive a ten-year sentence was deficient performance where the judge sentenced Petitioner to twenty-five years in prison. The deficient performance prejudiced Petitioner because he relied upon the advice when accepting the state's plea offer and entering the guilty plea.

CONCLUSION

Petitioner respectfully request this court grant the petition for writ of certiorari, reverse the PCR judge, vacate Petitioner's guilty plea, and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of December, 2018.

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DONALD R. DOLLARD,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald R. Dollard 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 Thomas A. Russo, which was held on August 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 Donald R. Dollard.

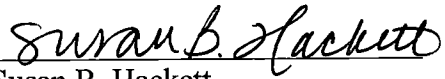
Respectfully Submitted,


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of December, 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."


Susan B. Hackett
Appellate Defender

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ATTORNEY FOR PETITIONER

This 17th day of December, 2018.

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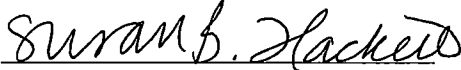
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 has been served upon Samuel Key, 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 Donald R. Dollard, #361803, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 17th day of December, 2018.



Susan B. Hackett

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027