

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

R. Scott Sprouse, Circuit Court Judge

BRIAN Z. MORTON,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RECEIVED
DEC 27 2018
S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO. 2018-001205

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was Petitioner's guilty plea involuntary because it was the product of plea counsel's coercive conduct in connection with Petitioner's statement to law enforcement?

STATEMENT

On October 31, 2013, an Aiken County grand jury indicted Petitioner for murder (2013-GS-20-1737), armed robbery (2103-GS-20-1738), and burglary in the first degree (2013-GS-20-1739). App. 203-204; App. 206-207; App. 209-210. On November 12, 2015, Petitioner entered guilty pleas to the charges in exchange for a negotiated sentence of thirty years on each charge to be served concurrently. App. 1; App. 4, ll. 11-18. The Honorable Doyet A. Early, III, accepted Petitioner's guilty plea and imposed the negotiated sentence of thirty years. App. 1; App. 60, ll. 3-11; App. 205; App. 208; App. 211. John William Weeks represented the state during the guilty plea. App. 1. David Hayes represented Petitioner. App. 1. Kevin Molony represented Petitioner's co-defendant, Leon Simmons, who entered a guilty plea simultaneously with Petitioner and received the same sentence. App. 1.

On November 19, 2015, plea counsel served a notice of appeal. App. 62-63. Pursuant to Rule 203(d)(1)(B)(iv), SCACR, plea counsel provided an explanation for the filing of the notice of appeal following a guilty plea. App. 65. According to plea counsel, he had no "good faith basis to believe that any issues [were] properly before the Court of Appeals." App. 65. Petitioner responded to plea counsel's explanation on January 17, 2016. App. 69-71. Subsequently, the Court of Appeals dismissed the notice of appeal. App. 72. Remittitur was issued on June 30, 2016. App. 73.

On March 14, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 74-104. On April 3, 2018, Petitioner filed an amended application through counsel, Kristy Goldberg. App. 113-115. The matter proceeded to an evidentiary hearing on May 7, 2018, before the Honorable R. Scott Sprouse. App. 116. Goldberg represented Petitioner, and Julie Coleman represented the state. App. 116. At the conclusion of the hearing, Judge Sprouse took

the matter under advisement. App. 186, ll. 15-16. By an order filed June 11, 2018, Judge Sprouse denied Petitioner relief from his convictions and sentences. App. 191-202.

On June 25, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was involuntary because it was the product of plea counsel's coercive conduct in connection with Petitioner's statement to law enforcement.

Relevant Facts

On May 18, 2013, several people entered the home of Shane Jones. App. 26, ll. 6-10. The people intended to rob the occupants. App. 30, ll. 9-14. Unfortunately, Jones struggled with one of the individuals over the gun. App. 16, l. 18. As a result, Jones was shot and ultimately died. App. 26, ll. 23-25. Shortly thereafter, Marquise East confessed to his involvement and implicated Petitioner. App. 28, ll. 6-14. When Petitioner was arrested, he denied any participation in the crimes. App. 26, ll. 1-2. In July 2015, the solicitor extended a plea offer to Petitioner: a negotiated thirty-year sentence on all charges. App. 32, l. 20- App. 33, l. 1; App. 172, ll. 3-10; App. 188-189. Petitioner rejected the offer. App. 128, ll. 8-11. On October 22, 2015, plea counsel presented Petitioner with a letter from Kevin Molony, the attorney of his co-defendant, Leon Simmons. App. 132, ll. 5-16; App. 190. In the letter, Simmons proposed that both young men give statements to police. App. 18, l. 15 – App. 140, l. 3; App. 190. Thereafter, on October 28, 2015, Petitioner gave a statement to police implicating himself in the crimes against Jones. App. 33, ll. 2-8; App. 171, ll. 18-21. Despite providing additional evidence against himself and informing the police of the identity of a fourth person involved in the crimes, Petitioner received no benefit for his cooperation as the state's offer remained the same. App. 29, ll. 17-25; App. 138, ll. 9-10; App. 140, ll. 6-8.

During the PCR hearing, Petitioner revealed that plea counsel coerced him into giving the incriminating statement by threatening him with a life sentence and promising “the murder would get dropped down to a manslaughter and the armed robber [would] get dropped down to a

strong arm and the burglary first would...get eliminated.” App. 133, ll. 2-7; App. 134, ll. 18-22; App. 135, ll. 6-23. Petitioner did as he was told by plea counsel and gave a statement consistent with statements given by others. App. 133, ll. 8-12. A week later, Petitioner was in court accepting the plea offer he had declined previously as plea counsel continued to threaten Petitioner with a life sentence if he did not enter the guilty plea. App. 137, l. 15- App. 138, l. 8.

The guilty plea hearing and the PCR hearing revealed the tumultuous relationship between Petitioner and plea counsel. Petitioner informed the plea judge he was not satisfied with plea counsel’s representation. App. 15, ll. 1-9. Petitioner explained plea counsel had portrayed a “fake image” and had been “hypocritical.” App. 15, ll. 10-23. When the plea judge offered Petitioner the opportunity to withdraw his guilty plea, Petitioner expressed his reasoning for entering the guilty plea – fear of a life sentence. App. 17, ll. 3-6. Despite Petitioner’s unequivocal displeasure with plea counsel, the plea judge accepted Petitioner’s guilty plea. App. 25, ll. 2-10. Petitioner’s dissatisfaction with plea counsel was evident in his multiple motions to relieve counsel prior to the guilty plea hearing. App. 39, ll. 11-13; App. 127, ll. 1-22; App. 168, l. 22- App. 169, l. 13. Plea counsel denied promising Petitioner that the charges would be dropped and/or reduced in exchange for his cooperation. App. 174, ll. 16-25. Plea counsel candidly admitted he told Petitioner that if he did not accept the guilty plea offer, then he would be sentenced to “[m]ore than 30, potentially life.” App. 175, ll. 15-17. He also admitted he told Petitioner that “the chances were higher if he were to cooperate with the state” that the state would reduce the murder charge to a manslaughter. App. 183, ll. 5-13. Plea counsel asked the state for a guilty plea offer to voluntary manslaughter, but the state refused. App. 184, ll. 3-10.

The PCR judge found Petitioner “failed to present any credible evidence that he was coerced or tricked into giving a statement to law enforcement or pleading guilty.” App. 199.

According to the PCR judge, “[t]he record and plea counsel’s testimony clearly show [Petitioner] was not threatened, forced, or coerced to give a statement or to plead guilty.” App. 200. Additionally, the court found “very credible plea counsel’s testimony that he thoroughly discussed the evidence, the statement, and his option to plead guilty or go to trial with [Petitioner] and he was prepared to argue a defense if [Petitioner] chose to proceed to trial, which he did not wish to do.” App. 200. The PCR judge acknowledged that Petitioner voiced his displeasure with plea counsel during the guilty plea, but the PCR judge was convinced by Petitioner’s statements to the plea judge that no one had threatened him or promised him anything to get him to plead guilty. App. 200. As a result, the PCR judge found Petitioner “failed to prove he was coerced into pleading guilty and would have gone to trial otherwise.” App. 201

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea-bargaining process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); Missouri v. Frye, 566 U.S. 133, 141 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), *overruled on other grounds by* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). “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 (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. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688. 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.

The two-pronged test adopted in Strickland “applies to challenges to guilty pleas based on ineffective assistance of counsel.” Hill v. Lockhart, 474 U.S. 52, 58 (1985). “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). “[I]n the context of determining the voluntariness of a guilty plea that is entered upon the advice of counsel,” the deficiency prong of the Strickland test requires “an inquiry into whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Alexander, 303 S.C. at 542, 402 S.E.2d at 485. “The defendant’s undisputed testimony that he would not have pled guilty to the charges but for trial counsel’s advice is sufficient to prove that defendant would not have pled guilty.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).


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.

It was undisputed that Petitioner wanted to exercise his right to a jury trial since the moment of his arrest. The state had very little evidence against Petitioner. Prior to Petitioner providing an incriminating statement to police, the state's case relied almost entirely upon statements by Petitioner's co-defendants. Such statements are notoriously unreliable. See State v. Henson, 407 S.C. 154, 167, 754 S.E.2d 508, 515 (2014) (explaining that co-conspirators have an incentive to downplay their involvement and shift blame onto others). Despite Petitioner's insistence on a jury trial, Petitioner relented to plea counsel's coercive conduct and entered a guilty plea. Plea counsel convinced Petitioner to plead guilty by promising to get Petitioner's charges reduced and/or dismissed in exchange for Petitioner providing an incriminating statement to law enforcement. Further, plea counsel colluded with Simmons's counsel to enter

guilty pleas. Petitioner repeatedly expressed his dissatisfaction with plea counsel, but all attempts to relieve counsel, even at the guilty plea hearing, were rebuffed. As the evidence indicated, Petitioner's guilty plea was the result of coercive conduct by plea counsel.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner requests this Court reverse the PCR court, hold plea counsel rendered ineffective assistance, and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of December, 2018.

STATE OF SOUTH CAROLINA

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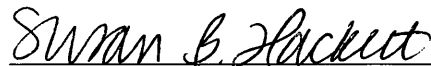
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brian Z. Morton 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 R. Scott Sprouse, which was held on May 7, 2018, 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 Brian Z. Morton.

Respectfully Submitted,



Susan B. Hackett


Appellate Defender

ATTORNEY FOR PETITIONER

This 27th 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."


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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 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 Brian Z. Morton, #366047, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 27th day of December, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 27th day of December, 2018.

Scott Lovett (L.S)
Notary Public for South Carolina

My Commission Expires: September 27, 2028