STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County

Honorable Frank R. Addy, Circuit Court Judge

JED D. WHEELER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001073

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred by finding petitioner was effectively represented where the record shows petitioner justifiably believed, given both the confusion at the guilty plea hearing and defense counsel's statements about it being a "non-violent" crime that he was pleading to an offense that carried the possibility of parole after sixty-five percent of the sentence, and not a "no parole offense"?

STATEMENT

Petitioner was indicted by the Greenville County Grand Jury for the offense of bank robbery pursuant to S.C. Code § 16-11-380(A). App. 75 – 76. He appeared on September 1, 2016, before the Honorable Perry H. Gravely. Randall Lee Chambers represented petitioner. This was a joint guilty plea also involving Defendant Charles E. Ankrum, who was represented by John Erwin, Jr. App. 1.

The clerk noted that petitioner was pleading guilty to bank robbery as indicted and that Ankrum was pleading guilty to burglary in the first degree and burglary in the second degree after waiving indictment. App. 3, ll. 4-10. The judge told petitioner and Ankrum, "Mr. Ankrum, your charge is indicated as violent and serious, and Mr. Wheeler, yours is considered serious. You realize that this designation could -- has an effect on the percentage of your sentence that you would actually serve. . . ." Both petitioner and Ankrum said they understood. App. 10, l. 17 – 11, l. 5.

The solicitor told the judge that petitioner went into the Regions Bank in Simpsonville and demanded money. Subsequently he presented a stolen fifty-dollar bill at a gas station to order beer. App. 20, l. 24 – 21, l. 18.

After the judge sentenced petitioner to ten years imprisonment, petitioner, seeking confirmation, asked: "Is it non-violent?" Defense counsel Chambers confirmed that it was "non-violent," and the judge added, "but it is serious." App. 22, ll. 23-25.

Petitioner filed an application for post-conviction relief on August 17, 2017. App. 25 – 31. Petitioner alleged he was ineffectively represented on his plea agreement and that the Department of Corrections did not correctly calculate his sentence as non-violent and/or that the

plea court failed to "follow the negotiated plea agreement." App. 27. The state filed a return and motion to dismiss dated January 17, 2018. App. 33 – 38.

An evidentiary hearing was convened on February 20, 2018, before the Honorable Frank R. Addy, Jr. Susannah Ross represented petitioner. Assistant Attorney General Deshawn Mitchell represented the state. App. 39.

Petitioner testified that his allegation of ineffective assistance of counsel revolved around the fact that he entered a guilty plea for a "ten-year non-violent sentence." Petitioner said he was led to believe this non-violent designation meant that he would have to serve sixty-five percent of his sentence. He had calculated that to be five years and six months. Petitioner said he did not know at the time of his guilty plea that this was a "no parole crime," meaning he would have to serve eighty-five percent of his sentence. App. 45, ll. 8-17. Petitioner related that he talked to others at the county jail, and he was told if his crime was non-violent that he would do sixty-five percent of the sentence imposed. App. 45, l. 21 – 46, l. 3.

Petitioner specifically pointed the PCR court to the transcript at the end of his guilty plea proceeding where Defense Counsel Chambers confirmed this was a non-violent crime. App. 46, ll. 6-14. Petitioner stated he was never advised by counsel that he was pleading guilty to a "no parole" crime, meaning that he would have to serve eighty-five percent of the actual ten year negotiated sentence. App. 48, ll. 2-8.

Defense counsel Chambers testified he "very well may not have" advised petitioner that this was a no parole crime, and that he would have to serve eighty-five percent of his ten-year sentence. Chambers said he *did remember* discussing that this was a non-violent offense with petitioner. Chambers said he did not specifically remember ever talking to petitioner about whether this was a "no parole" sentence. App. 55, l. 3 – 56, l. 18.

The PCR judge then stated, "the central question is this case relates to the 85 percent non-parole nature of this offense." App. 58, l. 20 – 59, l. 5. PCR counsel Ross argued that the PCR transcript showed the uncertainty surrounding the collateral consequence of parole eligibility, and petitioner was honestly but erroneously led to believe this was a plea that allowed him to be parole eligible. App. 59, l. 11 – 60, l. 5. The PCR hearing concluded with petitioner testifying he would not have pled guilty if he knew he was pleading to a no parole, eighty-five percent service crime. App. 61, l. 6 – 62, l. 14.

Assistant Attorney General Mitchell argued that there was overwhelming evidence of appellant's guilt, given his confession to the police, so there was no prejudice, and defense counsel should therefore not be held ineffective. App. 60, l. 9 – 61, l. 4.

An order of dismissal was filed on May 18, 2018. App. 64 – 70. The order found that plea counsel testified he did not recall informing petitioner that this was a "no-parole offense." The order stated that Judge Gravely also did not inform petitioner of this fact or that he would have to serve eighty-five percent of his sentence. The judge wrote: "This Court finds that the better and preferred practice is for the plea court and counsel to specifically inform a defendant of the fact that they will have to serve eighty-five percent of the sentence imposed. In this case, this Court finds Applicant was not informed of the 'no-parole' nature of his sentence." App. 68 – 69. However, the order stated, petitioner had suffered no prejudice because there was overwhelming evidence of his guilt. App. 69.

PCR counsel Ross then filed a motion to alter or amend the judgment on May 29, 2018. She alleged the PCR court's no prejudice conclusion because of overwhelming evidence of guilt analysis was no longer good law following this Court's opinion in Frierson v. State, 423 S.C. 257, 815 S.E.2d 433 (2018), which was issued fifteen days after the order of dismissal. App. 71.

The PCR court then issued an order denying applicant's motion for reconsideration dated May 30, 2018. App. 72 – 73. This order stated, "Applicant's point concerning the Frierson holding is well-taken. However, even if this Court erred by engaging in such an analysis, Applicant is not automatically entitled to relief." App. 72. The order then stated that "it is a settled principle of law that counsel need not specifically advise a client concerning parole eligibility." However, it is only when advice on parole eligibility is erroneous that relief should be granted, *citing* Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243, SCACR.

ARGUMENT

The PCR court erred by finding petitioner was effectively represented where the record shows petitioner justifiably believed, given both the confusion at the guilty plea hearing and defense counsel's statements about it being a "non-violent" crime that he was pleading to an offense that carried the possibility of parole after sixty-five percent of the sentence, and not a "no parole offense".

Petitioner was ineffectively represented because he pled guilty where he was led to believe that the ten-year sentence he was to receive for bank robbery pursuant to S.C. Code § 16-11-380(A) was a parolable offense, which meant that he would be eligible for parole after sixty-five percent service of his sentence. In fact, this was a no-parole sentence requiring petitioner to serve eighty-five percent of his sentence as seen below.

S.C. Code § 16-11-380(A) on entering a bank with the intent to steal is a Class A felony. It is therefore a no-parole offense pursuant to S.C. Code § 24-13-100. See Strickler, South Carolina Criminal Offenses and Penalties (2011 ed.) at 50.

Petitioner in this case was legitimately under the impression that he was pleading to a parolable offense. It seemed that whether the crime was violent or non-violent would carry the day at the guilty plea proceeding as far as parole eligibility. Bank robbery pursuant to S.C. Code § 16-11-380(A), is *not* listed as a violent crime in S.C. Code § 16-1-60. However, S.C. Code § 24-13-100 provides a Class A felony in South Carolina is a "no-parole offense." Again, S.C. Code § 16-11-380(A) is a Class A felony. Strickler, South Carolina Criminal Offenses and Penalties (2011 ed.) at 50.

Defense counsel said that he remembered telling petitioner the crime was "non-violent." Defense counsel did not remember discussing whether the crime was a "no parole offense."

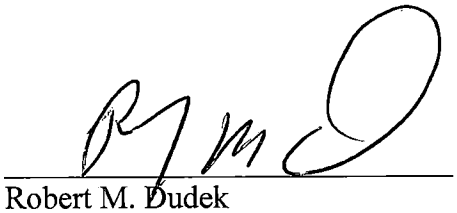
It is clear petitioner genuinely believed he was pleading guilty to a "parole eligible offense" because it was non-violent. Petitioner thought he would serve sixty-five percent of his sentence, which he specifically calculated as five years and six months of the ten-year sentence. App. 45, ll. 8-16.

The PCR court erred by allowing defense counsel's lack of memory of his advice on parole eligibility to be dispositive. This record shows that petitioner believed that counsel's advice was that he would be parole eligible when he pled guilty in this case because he was pleading guilty to a non-violent offense.

Consequently, petitioner's guilty plea should be vacated since it was based on erroneous or incomplete advice that counsel should have known was misleading or had the great potential to be misleading. See Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002), wherein the Court said that erroneous parole eligibility advice entitles a defendant to have his guilty plea vacated. The confusion regarding whether petitioner was parole eligible at his guilty plea proceeding pertaining to the status of his crime as "violent" or "serious" supports petitioner's testimony that he was advised and led to believe he was pleading guilty to a parolable sentence. Petitioner's guilty plea should therefore be vacated.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be granted to allow full briefing on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of January, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jed Douglas Wheeler states:

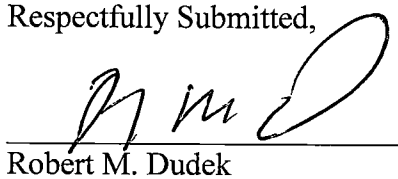
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Frank R. Addy, which was held on February 20, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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 him as counsel for Jed Douglas Wheeler.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of January, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."

Robert M. Dudek
Chief 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 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 Jed Douglas Wheeler, #369693, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 9th day of January, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of January, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.