STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Chester County

Brooks P. Goldsmith, Circuit Court Judge

CARL SEAGER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2018-001805

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was Petitioner's plea involuntary due to plea counsel's ineffective assistance where Petitioner did not seem to understand his guilty plea due to a reasonable probability of incompetency and plea counsel should have requested a competency evaluation?

STATEMENT

On August 20, 2013, a Chester County Grand Jury indicted Petitioner for first-degree criminal sexual conduct. App. 55–56. On February 10, 2015, Petitioner appeared before the Honorable Benjamin Culbertson. App. 1. April Porter represented Petitioner. App. 1. Karen Fryar represented the State. App. 1. The judge accepted Petitioner's plea. App. 20, lines 3–5. He sentenced Petitioner to twenty years' imprisonment. App. 20, lines 8–10.

Petitioner then filed an application for post-conviction relief (PCR) on September 23, 2016, more than a year after his guilty plea. App. 22–28. The Honorable Brooks P. Goldsmith presided over an evidentiary hearing on July 18, 2018. App. 35. DeShawn Mitchell represented the State, and Nathan Sheldon represented Petitioner. App. 35. By an order filed on September 7, 2018, Judge Goldsmith denied Petitioner relief from his conviction and sentence. App. 48–54. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's plea was involuntary due to plea counsel's ineffective assistance where Petitioner did not fully understand his guilty plea due to a reasonable probability of incompetency and plea counsel should have requested a competency evaluation.

Relevant Facts

At the plea hearing, the plea judge began questioning Petitioner about his rights to a jury trial. At one point, the judge stopped his questioning and commented, "He keeps looking over at his attorney[;] let's stand down and let him talk to his attorney a bit more because I'm not so sure he knows what he's doing. Okay. He keeps looking to you for answers and I need to make sure that he's doing this voluntarily, so let's take a short break and find out." App. 6, lines 11–17. After a brief break, the judge started over with his questions. App. 7, lines 1–8.

When the judge asked, "Are you pleading guilty to this crime because you committed this crime?" Petitioner answered, "I didn't do it, but . . . ." App. 12, lines 9–11. When the judge told Petitioner he could not accept the guilty plea if he said he did not do it, Petitioner stated several times that he did commit the crime, claiming that he was upset and nervous and that was why he initially said he did not commit the crime. App. 12, line 9–App. 13, line 7. After the State reviewed its version of the facts for the plea judge, the judge engaged in the following with Petitioner:

> The Court: All right. Mr. Seager, you understand what they're saying you did in this case?
>
> [Petitioner]: Yes, Your Honor.
>
> The Court: Is that what happened?
>
> [Petitioner]: Yes, Your Honor.

App. 15, lines 1–5.

During mitigation, plea counsel presented to the court that Petitioner had been involved in a severe automobile accident years ago that caused deficiencies with his ability to read and write and think clearly. However, she did not believe that interfered with his ability to understand the plea proceedings. App. 16, line 22–App. 17, line 3. Plea counsel further stated that she had no difficulty communicating with Petitioner in preparation for the case. App. 17, lines 11–17. When pressed by the plea judge as to his competency, plea counsel stated that he understood the charges against him and was able to, and did, assist in his defense. App. 17, lines 18–23.

During the PCR hearing, the State began by explaining why Petitioner's PCR application was untimely. App. 38, lines 1–23. PCR counsel, Nathan Sheldon, agreed with the State that no exception to the filing rule applied and conceded that Petitioner's application was untimely. App. 39, lines 2–8. Both parties agreed that Petitioner's only issue properly before the court was whether he was entitled to a belated appeal. App. 38, lines 20–23; App. 39, lines 6–8.

PCR counsel called plea counsel and asked her whether she had advised Petitioner of his right to appeal, which she did not. App. 40, lines 8–16. Further, she testified that she did not file a notice of appeal on his behalf and did not believe there were any issues of merit to appeal. App. 40, lines 17–23. She testified that had there been any meritorious issues, she would have advised him of his right to appeal and filed an appeal. App. 40, lines 24–25. The State then clarified that Petitioner did not ask for an appeal and that plea counsel saw no legal or factual basis to warrant an appeal. App. 41, lines 11–20.

PCR counsel then called Petitioner to the stand, and he testified that plea counsel did not explain to him that he had a right to appeal his guilty plea. App. 42, lines 18–25. He testified that if plea counsel had explained that right to him, he would have asked her to appeal. App. 43,

lines 1–5. PCR counsel asked, "And were you—at the time you were sentenced there was some—there's some evidence in the transcript that you didn't even really understand what was going on at that time, is that right?" to which Petitioner agreed. App. 43, lines 6–10. PCR counsel asked whether plea counsel had explained to him that he had a right to appeal when she pulled him aside during the plea to explain everything, to which he replied that he did not recall that. App. 43, lines 11–16. Petitioner stated that he did not know he had to ask her to appeal and definitely did not know he only had ten days to appeal. App. 43, lines 17– 23. He claimed that had he known, he would have asked her to appeal. App. 43, line 24–App. 44, line 1.

PCR counsel then argued that Petitioner was not advised he could appeal and asked that he be allowed to file a belated appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). App. 45, lines 8–22. The State argued the standard for a plea is different from that for a trial and in this case, the lawyer would have had to certify to the Court of Appeals if she filed a notice of appeal that it has merit. Because plea counsel testified she did not see a legal or factual basis for an appeal, the State's position was that Petitioner was not entitled to a belated appeal. App. 45, line 24–App. 46, line 10.

The PCR judge filed an Order of Dismissal denying relief. App. 48–54. The PCR judge found the application had to be summarily dismissed, with the exception of the failure to file an appeal under *White v. State*, for failure to comply with filing procedures. App. 51. Because Petitioner did not file his application until more than a year after his guilty plea, it was out of time. App. 51.

The PCR judge also found no deficiency on the part of plea counsel or prejudice therefore because Petitioner did not ask her to file an appeal. App. 53. Moreover, finding an appeal from a guilty plea must be accompanied by a written explanation showing an issue that

can be reviewed, the judge concluded no meritorious issues existed in Petitioner's case. App. 53. Thus, he found no basis for a belated direct appeal. App. 53.

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, 117–18, 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 687–88.

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. *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); *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985).

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,

243–44 (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 by 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 434–35, 405 S.E.2d at 392. 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 S.C. at 394, 271 S.E.2d at 603.

"When a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong *Strickland* analysis still applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice. Specifically, when establishing *Strickland* prejudice in the context of plea counsel's failure to request a mental competency evaluation, "the [applicant] need only show a 'reasonable probability' that he was . . .

incompetent at the time of the plea." *Ramirez v. State*, 419 S.C. 14, 21, 795 S.E.2d 841, 844–45 (2017) (citing *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)); *see also Matthews v. State*, 358 S.C. 456, 458–60, 596 S.E.2d 49, 50–51 (2004) (expanding the reasonable probability standard as the burden for proving both the deficiency of counsel and the prejudice prongs).

As Petitioner explained at the PCR hearing, he really did not understand what was going on. App. 43, lines 6–10. Furthermore, even though plea counsel was told to explain everything to him, she did not explain to him that he had to ask her in order to appeal the guilty plea, nor did she explain that he only had ten days to appeal. App. 43, lines 11–23. Due to Petitioner's limited understanding of the plea proceedings, plea counsel should have requested a competency evaluation.

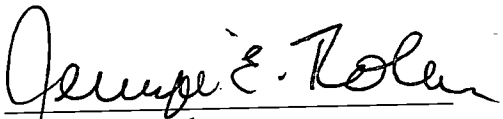
At the beginning of the plea proceeding, the plea judge asked if Petitioner had received a competency evaluation and whether plea counsel felt he needed one, to which plea counsel responded to both in the negative. App. 4, lines 8–13. Later, the judge stopped to allow Petitioner more time to talk to his plea counsel after he was concerned that Petitioner kept looking to plea counsel before answering questions. App. 6, lines 11–22. The judge stated, "I'm not so sure he knows what he's doing." App. 6, lines 13–14.

The judge's apprehension about Petitioner's understanding the proceedings combined with plea counsel's explanation in mitigation that Petitioner experienced a severe automobile accident that caused deficiencies in his ability to read, write, and think were enough to establish a reasonable probability that he was incompetent at the time of the plea. Plea counsel's failure to request a competency evaluation was deficient performance. That deficiency was also prejudicial based on the standard cited above in *Ramirez* and *Matthews* because the record shows there was a reasonable probability he was incompetent at the time of the plea.

Moreover, because the only issue is Petitioner's competency, the PCR judge should have tolled the statute of limitations so that his allegations could be heard and ruled upon. As this Court noted in *Ferguson v. State*, 382 S.C. 615, 619–20, 677 S.E.2d 600, 602 (2009), when an applicant is prevented from filing for PCR by reason of his mental incompetency, he does not receive his one full bite at the apple. This Court held that "in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute should be tolled." *Id.* at 619, 677 S.E.2d at 602.

CONCLUSION

Petitioner respectfully requests this Court grant the petition and order full briefing on the issue presented.



Jennifer E. Roberts
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of January, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carl Seager states:

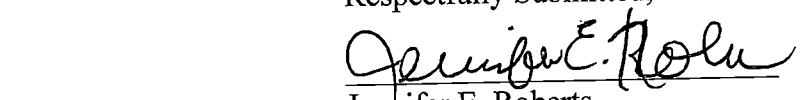
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's guilty plea hearing before the Honorable Benjamin Culbertson on February 10, 2015, and the PCR hearing before the Honorable Brooks P. Goldsmith on July 18, 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 Carl Seager.

Respectfully Submitted,



Jennifer E. Roberts
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of January, 2019.

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 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 Carl Seager, #362969, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 22nd day of January, 2019.

Jennifer E. Roberts
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 22nd day of January, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.