STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

DYESHAWN FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002357

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was plea counsel ineffective in advising Petitioner he could face a sentence of life without parole if he were convicted at trial of attempted murder?

STATEMENT

In January of 2013, the Lancaster County Grand Jury indicted Petitioner, Dyeshawn Foster, for attempted murder, unlawful carrying of a pistol and possession of a firearm during the commission of a violent crime, indictments #2013-GS-29-48, 51, 52. In December of 2013, Petitioner appeared before the Honorable J. Ernest Kinard, Jr. and pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to the lesser included charge of assault and battery of a high and aggravated nature [ABHAN] and the two gun charges. Mark Grier represented Petitioner at the plea. Randall Newman represented the State. Judge Kinard sentenced Petitioner to eighteen (18) years for ABHAN, time served for the unlawful carry charge and five (5) years concurrent for the other firearm charge. A timely notice of intent to appeal was filed and the direct appeal perfected. On March 18, 2015, the South Carolina Court of Appeals dismissed the appeal after review pursuant to Anders v. California, 386 U.S.738 (1967).

On August 26, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 7, 2015. On January 12, 2016, an evidentiary PCR hearing was held before the Honorable Brian M. Gibbons. Nathan Sheldon represented Petitioner at the PCR hearing. J. Croom Hunter represented the State. In a written order filed February 22, 2016, Judge Gibbons denied relief and dismissed the application. A timely notice of intent to appeal was served on November 18, 2016.

On June 22, 2017, a petition was filed with the South Carolina Supreme Court pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988), arguing that the PCR judge erred in refusing to find that the Alford plea to the lesser included offense of assault and battery of a high and aggravated nature was rendered involuntary by the fact that Petitioner believed that if he went to trial and was convicted of attempted murder he could receive a life sentence. On

October 31, 2017, the case was transferred from the South Carolina Supreme Court to the South Carolina Court of Appeals pursuant to Rule 243(1), SCACR. On December 21, 2018, the South Carolina Court of Appeals denied the motion to be relieved as counsel and directed the parties to address the issue of whether plea counsel was ineffective in advising Petitioner he could face a sentence of life without parole if he were convicted at trial of attempted murder. This petition for writ of certiorari follows.

ARGUMENT

Plea counsel was ineffective in advising Petitioner he could face a sentence of life without parole if he were convicted at trial of attempted murder.

After the jury had been selected for a trial on the charge of attempted murder, Petitioner entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to the lesser included charge of ABHAN. (App. pp. 3-4). In exchange for the plea, the State dropped other pending charges. (App. p. 7, lines 8-21). The attempted murder indictment alleges that Petitioner attempted to kill Marqwevius Seegars by shooting him. (App. p. 23). Seegars arrived at Petitioner's grandmother's house and attempted to shoot Petitioner but instead shot another individual, Lamont Twitty. (App. p. 14, line 3-21; p. 46, lines 11-23). Then, a neighbor, Ms. Hood, told a 911 operator that she saw Petitioner shoot into the car where Seegars was seated. (App. p. 7, line 23 – p. 8, lines 1-2). Seegars was angry with Petitioner because of another incident that happened that morning with Matthew Reese. (App. p. 52, lines 4-14). Petitioner was also charged with attempted murder in regard to the incident with Reese.

During the PCR hearing Petitioner testified that plea counsel advised him that if he went to trial, he faced a sentence of thirty (30) years to life imprisonment. (App. p. 72, lines 7-21). Petitioner testified that if he had known that attempted murder did not carry a sentence of life without parole, he would not have entered a plea. (App. p. 72, lines 22-24). Petitioner confirmed that if he had known that attempted murder did not carry a life sentence, he would have proceeded with trial. (App. p. 74, line 22 – p. 75, line 1). Petitioner was specifically asked, "And as to the attempted murder you were under the impression from your lawyer that that charge carried 30 to life, weren't you?" (App. p. 79, lines 6-8). Petitioner answered, "Right." (App. p. 79, line 9). Petitioner's mother testified that plea counsel told her that if Petitioner did

not plead guilty, he could receive a sentence of twenty (20) or thirty (30) years in prison or life in prison. (App. p. 48, lines 3-21).

In regard to the sentence of life without parole, plea counsel discussed the attempted murder charge involving Reese and then testified, "So my point being I had a conversation saying with him about LWOP, and I believe we had a conversation with the family and with Mr. Foster, my recollection is, that were he to be convicted on one and then, you know, he could potentially be LWOP'd on a second violent crime." (App. p. 52, lines 14-18). PCR counsel argued that the plea was rendered involuntary by the fact that Petitioner erroneously believed that he could receive a sentence of life without parole if he went to trial for attempted murder. (App. p. 80, line 18 – p. 81, lines 1-18). PCR counsel argued:

> So to say you need to plead because you are facing a life sentence is simply not true, and is by definition so coercive that you take nay voluntariness out of the plea that could have happened. Because when you're at the courthouse ready to go to trial – it's clear that all he wanted to do was go to trial, they had picked a jury on this case – and then say, "Well, this 911 tape that we just played or is just being played that your family heard is going to convict you and you're going to get life," it is so ineffective to say that when it is not true that the plea becomes so tainted and coercive at that point that I believe the Court has no choice but to grant a new trial for him.

(App. p. 81, lines 6-18).

In the order of dismissal the PCR judge wrote:

> The record before this Court clearly shows that Applicant was fully informed of the consequences of entering his guilty plea. The record shows Applicant's plea was not coerced, and it was Applicant's decision to plead guilty. Additionally, this Court finds Applicant's testimony not credible. Applicant was advised that by pleading guilty he gave up his right to challenge the evidence the State had against him, as well as his right to put up any affirmative defenses. Applicant has failed to present any valid reason why he should be allowed to depart from his valid plea of guilty. Accordingly, this Court finds Applicant's plea was knowingly, intelligently, and voluntarily entered.

(App. p. 91). The PCR judge erred. Petitioner did not enter a guilty plea but instead entered a plea pursuant to Alford to the lesser included offense of ABHAN because he believed he could receive a life sentence if convicted of attempted murder. Plea counsel confirmed that Petitioner denied shooting Seegars. (App. p. 58, lines 19-22). Plea counsel was ineffective in advising Petitioner he could face a sentence of life without parole if he were convicted at trial of attempted murder. Petitioner would only face a life sentence if he was convicted of both attempted murder charges and a judge determined that the two charges were not so closely connected that they should be treated as one offense. The plea was rendered involuntary by the fact that Petitioner believed that if he went to trial and was convicted of attempted murder, he could be sentenced to life imprisonment. If convicted of the attempted murder of Seegars, Petitioner faced a maximum sentence of thirty years.

S.C. Code Ann. § 16-3-29 provides, "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years." Attempted murder does not carry a life sentence but is a most serious offense pursuant to S.C. Code §17-25-45(C)(1). S.C. Code §17-25-45(A) provides:

> Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has either:
>
> (1) one or more prior convictions for:
> (a) a most serious offense; or
> (b) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section; or
>
> (2) two or more prior convictions for:
> (a) a serious offense; or

(b) a federal or out-of-state conviction for an offense that would be classified as a serious offense under this section.

Counsel failed to clarify that Petitioner could only receive a life sentence if convicted of a subsequent most serious offense. Plea counsel was ineffective in advising Petitioner he could face a sentence of life without parole if he were convicted at trial of attempted murder.

Additionally, plea counsel failed to explain to Petitioner that even if convicted of both attempted murder charges, a judge could find that the two offenses should be treated as one offense and Petitioner would not be subject to a sentence of life without parole. S.C. Code §17-25-50 provides, "In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses." The plea was rendered involuntary by plea counsel's erroneous advice about Petitioner's exposure to a sentence of life without parole.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by

counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

"The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. "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

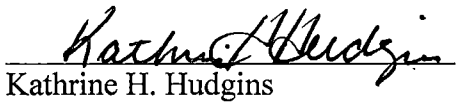
counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

Plea counsel was ineffective in advising Petitioner he could face a sentence of life without parole if he were convicted at trial of attempted murder. Plea counsel was ineffective in failing to fully explain that Petitioner could only be sentenced to life without parole if he was convicted of a subsequent most serious offense. Plea counsel was additionally ineffective in failing to explain that even if convicted of both the attempted murder charge involving Seegars and then the charge involving Reese, the Reese conviction should not count as a subsequent most serious offense pursuant to S.C. Code §17-25-50, because the two charges are so closely connected that they should be treated as one offense. There is a reasonable probability that if Petitioner knew that he could not receive a sentence of life without parole for the attempted murder charge, he would not have pled guilty and would have insisted on a trial.

In Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 486 (1991), the South Carolina Supreme Court first found counsel's sentencing advice defective and then wrote, "Thus, the second part of the test has been met. We find that because trial counsel's improper sentencing advice induced petitioner's guilty plea, this case must be reversed. See, Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (new trial granted where incorrect parole eligibility advice induced plea)." Plea counsel's improper sentencing advice induced Petitioner's guilty plea and the case must be reversed.

CONCLUSION

Based on the above argument, this Court should reverse the finding of the PCR court, grant post-conviction relief and remand for a trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of January, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari 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 Petition for Writ of Certiorari has been served on Dyeshawn Foster, #358161, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 18th day of January, 2019.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of January, 2019.

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