STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger M. Young, Sr., Circuit Court Judge

JOHN CLEVELAND, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001369

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

In violation of Petitioner's right to the effective assistance of counsel, did trial counsel err by failing to insist that the sentencing judge reconsider Petitioner's sentence where the trial judge no longer had jurisdiction to reconsider the sentence based on established case law and where the trial judge imposed a sentence to punish Petitioner for not appearing at his trial?

STATEMENT

In 1987, Petitioner was indicted and convicted for criminal sexual conduct with a minor in the second degree. App. 22, ll. 17-18; App. 23, l. 13; App. 49, ll. 19-24. At the time, there was no requirement that Petitioner register as a sex offender. App. 22, ll. 19-22; App. 13-18. However, when Petitioner was released from prison in 2001 following a non-sex offense conviction, the sex offender registry had been enacted pursuant to statute and required individuals with convictions such as Petitioner's to register. App. 23, ll. 13-23; see also State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002).

On January 13, 2015, a Charleston County indicted Petitioner for failure to register as a sex offender, third offense. App. 227-228. The state, represented by Ted Corvey and Scott Maynor, called the case to trial before the Honorable William Jeffrey Young and a jury on October 13-15, 2015. App. 1. Robert Gailliard represented Petitioner. App. 1. On the first day of trial, the parties selected a jury and argued pre-trial motions. App. 4, l. 12 – App. 32, l. 16.

Specifically, trial counsel moved to dismiss the charge against Petitioner based upon "the sweetheart exception." App. 22, ll. 11-15. Trial counsel explained the offense for which Petitioner had been convicted that required him to register as a sex offender occurred in 1986. App. 22, ll. 16-17. Trial counsel noted that Petitioner received a sentence pursuant to the Youthful Offender Act. App. 22, ll. 17-18. According to defense counsel, the alleged victim was at least older than fourteen, and possibly sixteen years of age. App. 25, ll. 10-17. The state argued that for the sweetheart exception to be applicable, "the victim has to be within a certain age range. The victim in this case was 12." App. 25, ll. 5-8; App. 26, ll. 4-8; App. 30, ll. 8-13. Further, the state asserted that because there was "no sweetheart exception" in existence at the time that the registry statute became applicable to Petitioner in 1994, then he could not take

advantage of the exception provided under the current statute. App. 26, l. 21 -App. 27, l. 5; App. 29, l. 23 – App. 30, l. 7.

Additionally, trial counsel explained that Petitioner had not received "any kind of registry form" or had been "told that he had to register based upon the 1987 conviction under the Youthful Offender Act." App. 22, l. 23 – App. 23, l. 4; App. 27, ll. 18-25. The state responded that evidence was available to show Petitioner "acknowledged several aspects of the registry." App. 23, ll. 19-23. Additionally, the state proclaimed that Petitioner had "been intermittently registering with the Sheriff's Office." App. 24, ll. 1-5.

Finally, trial counsel argued that application of the statutory requirement for registration violated equal protection. App. 30, l. 18 – App. 31, l. 8. Counsel argued the statute and how it was implemented only required individuals, who were convicted of a qualifying offense prior to the enactment of the registration statute, to register if those individuals were convicted of a subsequent offense, even non-sex related offenses. App. 30, l. 18 – App. 31, l. 8. In other words, there were two sets of individuals – ones who were convicted of a qualifying offense, but did not get into additional legal trouble, and ones were convicted of a qualifying offense, and did get into additional legal trouble. App. 30, l. 18 – App. 31, l. 8. Only the latter was required to register. App. 30, l. 18 – App. 31, l. 8.

At the conclusion of the pre-trial hearing, the trial judge took the motions under advisement. App. 28, ll. 19-20; App. 31, ll. 9-10. The following day, Petitioner was not present for his trial. App. 32, l. 19 – App. 34, l. 2. The transcript does not show a ruling by the trial judge on defense counsel's motions, but it must be assumed the motions were denied because the trial went forward.

The jury found Petitioner guilty as charged. App. 115, ll. 17-22. The trial judge sealed the sentence due to Petitioner's absence. App. 118, l. 13 – App. 119, l. 17. The only argument made on Petitioner's behalf was trial counsel's request to "go towards the three years rather than the five." App. 118, ll. 18-20.

On July 18, 2016, Petitioner appeared in front of the Honorable Deadra Jefferson for the unsealing of his sentence. App. 121. Shirene Hansotia of the Public Defender's Office represented Petitioner. App. 122. Judge Jefferson revealed that the trial judge sentenced Petitioner to five years imprisonment. App. 124, ll. 10-18; App. 229. When Hansotia tried to argue and requested that Petitioner have an opportunity to address the court, Judge Jefferson interjected: "There is nothing I can do. The only purpose of this court is to impose sentence when someone has been tried in their absence. I have no authority to change Judge Young's sentence. You will have to file an appeal." App. 125, ll. 8-12.

On July 20, 2016, Hansotia filed a motion for reconsideration. App. 127. With the motion, she included "case law in support of the argument that the judge that unseals and publishes the sentence has jurisdiction to amend or reconsider the sentence." App. 127-144. Nevertheless, on September 16, 2016, Petitioner, along with Hansotia, appeared before the trial judge regarding Petitioner's motion for reconsideration of his sentence. App. 145. During the hearing, the trial judge questioned Petitioner on his absence from trial. App. 150, l. 12 – App. 154, l. 2. At the conclusion of the hearing, the trial judge informed Petitioner that the judge "did everything right that day, the state did everything right," but that Petitioner "did everything wrong" and there was "a penalty for that." App. 154, ll. 6-9. Thus, the trial judge denied the motion to reconsider his sentence. App. 154, l. 9.

Petitioner filed a notice of appeal. Appellate counsel, Wanda H. Carter, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 156-166. The issue on appeal challenged the trial judge's decision to try Petitioner in his absence. App. 156-166. On October 11, 2017, the Court of Appeals dismissed the appeal. App. 167-168; State v. Cleveland, 2017-UP-369 (S.C. Ct. App. filed Oct. 11, 2017). Remittitur was sent on October 30, 2017. App. 169.

Thereafter on December 27, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 170-176. The matter proceeded to an evidentiary hearing on May 24, 2018, before the Honorable Roger M. Young, Sr. App. 182. Kelly Oppenheimer represented the state, and Christopher Murphy represented Petitioner. App. 182. Trial counsel claimed he was "shocked" to learn at the trial that the alleged victim of the criminal sexual conduct charge "was not 16 or above." App. 200, ll. 14-15. By an order filed July 3, 2018, the PCR judge denied Petitioner relief from his conviction and sentence. App. 215-226. Petitioner filed a notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

In violation of Petitioner's right to the effective assistance of counsel, trial counsel erred by failing to insist that the sentencing judge reconsider Petitioner's sentence where the trial judge no longer had jurisdiction to reconsider the sentence based on established case law and where the trial judge imposed a sentence to punish Petitioner for not appearing at his trial.

Relevant facts

Trial counsel, who was retained, did not represent Petitioner when his sentence was unsealed. App. 145; App. 192, ll. 2-5; App. 197, ll. 14-16; App. 199, ll. 15-17; . Shirene Hansotia, a member of the Charleston County Public Defender Office, was assigned to represent Petitioner at the unsealing of his sentence. App. 207, ll. 11-13. It was unclear why trial counsel refused to represent Petitioner at the unsealing of the sentence. App. 207, ll. 14-19. Essentially, trial counsel "didn't want to be involved with the case anymore." App. 209, ll. 18-21. During the PCR hearing, Hansotia recalled she attempted to argue to reconsider Petitioner's sentence when it was unsealed. App. 208, ll. 1-2. However, the sentencing judge refused to allow Hansotia or Petitioner to present any argument or request related to the sentence. App. 208, ll. 2-4. According to the sentencing judge, there was "nothing" she could do. App. 125, l. 8. She declared that the "only purpose" of her court was "to impose sentence when someone ha[d] been tried in [his] absence." App. 125, ll. 9-11. The sentencing judge declared that she "no authority to change" the trial judge's sentence. App. 125, ll. 11-12.

Based upon the sentencing judge's refusal to entertain any arguments or motions about the sentence, Hansotia and Petitioner appeared before the trial judge to request re-sentencing. App. 208, ll. 6-7; App. 145. Oddly, however, Hansotia argued in the motion "that the judge that unseals and publishes the sentence has jurisdiction to amend or reconsider the sentence." App.

127. Further, Hansotia provided case law to support her position on this point. App. 128-144. The trial judge denied the motion to reconsider, stating that there was a "penalty" for Petitioner not appearing at his trial. App. 154, ll. 6-9. In short, the trial judge punished Petitioner by sentencing him to the maximum for not appearing at his trial.

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.

Rule 29(a) of the South Carolina Rules of Criminal Procedure provides for the filing of post-trial motions. The Rule further provides "the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term." Concerning the procedure to follow, the Rule requires the motion to be heard in the circuit where the trial or hearing was held except by consent of the parties." Rule 29(a), SCRCrimP. South Carolina case law also permits "a trial judge to alter, amend or modify a sentence after the same has

been imposed." State v. Smith, 276 S.C. 494, 497, 280 S.E.2d 200, 201 (1981). However, the judge "is without authority to alter, amend or modify a sentence imposed by him (1) after the expiration of the term of court at which the sentence was imposed or (2) within the same term of court unless the state is afforded due notice." Id. Further, it is axiomatic that "[a] sealed sentence does not become the judgment of the court until it is opened and read to the defendant." Id.

In Smith, this Court held "the authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion." Id. at 498, 280 S.E.2d at 202. The question in Petitioner's case was who was the sentencing judge – Judge Young who imposed the sentence or Judge Jefferson who unsealed the sentence and published it. In State v. Thompson, 355 S.C. 255, 259, 584 S.E.131, 133 (Ct. App. 2003), the Court of Appeals interpreted Smith, supra, to mean that the "circuit judge opening the sealed sentence is under the law the sentencing judge." See also, State v. Jackson, 290 S.C. 435, 437, 351 S.E.2d 167, 167 (1986) (reiterating for the benefit of the trial bench "that when a sealed sentence is opened and read, the judge has the authority to consider a motion for reduction of sentence").

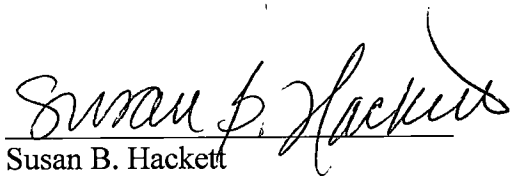
Judge Jefferson – the sentencing judge – erred in refusing to consider Petitioner's motion for reconsideration of his sentence based upon a flawed understanding of her authority to consider the motion. The case law clearly indicates Judge Jefferson was the sentencing judge and had the authority to reconsider the sentence. Counsel's failure to pursue her motion to reconsider sentence in front of the sentencing judge as required by law was deficient performance. Counsel's failure was prejudicial to Petitioner because the trial judge imposed a "penalty" on Petitioner for not appearing at his trial.

"It is well established that, although the Sixth Amendment of the United States Constitution guarantees the right of an accused to be present at every stage of his trial, this right may be waived,

and a defendant may be tried in his absence." State v. Ravenell, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010). To the extent there is a "penalty" for a defendant not appearing for trial, it is a trial in his absence. The judge may not penalize a person through sentencing for waiving his constitutional right to appear at trial. A trial judge abuses his discretion in sentencing when he considers the fact that a defendant exercised his constitutional right to a jury trial. State v. Hazel, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995); Davis v. State, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999) (finding defense counsel provided ineffective assistance by failing to object to a sentence where the judge indicated the sentence was influenced by the defendant's decision to exercise his right to trial). Likewise, a judge may not punish a person through sentencing when the person decided to waive a constitutional right. Here, Petitioner waived his right to be present at trial. The consequence of the waiver was a trial in his absence. Nevertheless, the trial judge used that waiver to punish Petitioner by sentencing him to the most severe punishment possible.

CONCLUSION

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



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Cleveland 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 Roger M. Young, Sr., which was held on May 24, 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 John Cleveland.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of March, 2019.

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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 Benjamin Limbaugh, 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 John Cleveland, at 175 Jerry Rankin Road, York, SC 29312, this 27th day of March, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 27th day of March, 2019.

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