

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

MAY 17 2019

MCIVER R. FEAGIN, JR.

S.C. SUPREME COURT
RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2018-001331

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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QUESTION PRESENTED

Did the post-conviction relief judge correctly find that both the State and the Defense intended for Respondent to be sentenced under the new burglary second non-violent statute providing for a maximum ten-year sentence and counsel who represented Respondent at the probation revocation hearing was ineffective for failing to object when the judge revoked fifteen years exceeding of the statutory maximum?

PETITIONER'S QUESTION PRESENTED

Did the post-conviction relief court err as a matter of law in finding probation revocation counsel was ineffective for failing to argue, at Feagin's probation revocation hearing, his original sentence was unlawful so the full sentence should not be revoked, where the original sentence had become the law of the case and, in any event, second-degree burglary (non-violent) existed in the pre-Omnibus code as section 16-11-312(A), and therefore, Feagin's fifteen-year sentence was correct?

STATEMENT OF THE CASE

On June 3, 2010, the Florence County Grand Jury indicted Respondent, McIver R. Feagin, Jr., for burglary first degree, indictment #2010-GS-21-681. On September 20, 2010, Respondent appeared before the Honorable Thomas A. Russo, and entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to burglary second non-violent. W. Vickery Meetze represented Respondent at the plea. Patricia S. Parr represented the State. Although the State recommended a cap of five years, Judge Russo refused to follow the recommendation and sentenced Respondent to fifteen (15) years in prison, suspended upon the service of 279 days with five years of probation. (App. p. 117; p. 12, lines 11-19). Judge Russo retained jurisdiction of the case. (App. p. 12, lines 24-25). There was no objection by plea counsel that the fifteen-year sentence exceeded the ten year maximum provided by the burglary second non-violent statute in effect at the time of the plea.

On December 10, 2012, Respondent appeared before Judge Russo for a probation violation hearing. Judge Russo revoked the full fifteen-year sentence. William E. Grove represented Respondent at the revocation hearing. There was no objection by probation counsel that the fifteen-year sentence exceeded the ten year maximum provided by the burglary second non-violent statute in effect at the time of the plea. A timely notice of intent to appeal was filed and the direct appeal perfected with the filing of a brief pursuant to Anders v. California, 378 U.S. 738 (1967). On December 17, 2014, the South Carolina Court of Appeals dismissed the appeal. State v. Feagin, Op. No. 2014-UP-460 (filed December 17, 2014).

On January 8, 2015, Respondent filed an application for post-conviction relief [PCR]. The State filed a return on January 17, 2017. On November 17, 2017, an evidentiary hearing was held before the Honorable Michael G. Nettles. Jonathan D. Waller represented Respondent

at the PCR hearing. Lindsey A. McCallister represented the State. In an order filed December 4, 2017, Judge Nettles granted post-conviction relief. On December 18, 2017, the State filed a motion to alter or amend pursuant Rule 59(e). On January 3, 2018, Respondent filed a response. On January 8, 2018, the State filed a reply. On July 5, 2018, Judge Nettles denied the State's motion to alter or amend. A timely notice of intent to appeal was filed on July 23, 2018. The State filed a petition for writ of certiorari on February 15, 2019. This return to petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief judge correctly found that both the State and the Defense intended for Respondent to be sentenced under the new burglary second non-violent statute providing for a maximum ten-year sentence and counsel who represented Respondent at the probation revocation hearing was ineffective for failing to object when the judge revoked fifteen years, exceeding of the statutory maximum.

On June 3, 2010, the Florence County Grand Jury indicted Respondent for burglary first degree for an incident that took place on December 16, 2009. (App. pp. 112-113). In September of 2010, Respondent appeared before the Honorable Thomas A. Russo, and entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to burglary second non-violent. Although the State recommended a cap of five years, Judge Russo sentenced Respondent to fifteen (15) years in prison, suspended upon the service of 279 days with five years of probation. (App. p. 117; p. 12, lines 11-19).

On the date alleged in the indictment, December 16, 2009, burglary second degree under both subsections (A) and (B) carried a maximum sentence of fifteen (15) years. With the passage of the Omnibus Crime Reduction and Sentencing Reform Act [the Act] on June 2, 2010, however, the legislature reduced the sentence for burglary in the second degree non-violent pursuant to subsection (A) to ten (10) years. S.C. Code §16-11-312(C). The fifteen year maximum for burglary second violent pursuant to subsection (B) remained the same. The Act included a savings clause.¹ At the time of the plea in September of 2010, there was no objection

¹ 2010 S.C. Acts No. 273, § 65. Section 66 of the Act, titled, “Time effective,” further provides, “Cases and appeals arising or pending under the law as it existed prior to the effective date of this [A]ct are saved.” 2010 S.C. Acts No. 273, § 66.

by plea counsel that the fifteen-sentence exceeded the ten-year maximum provided by the burglary second non-violent statute in effect at the time of the plea.

In the order granting relief the PCR judge wrote, “As previously stated, because Applicant was allowed to plead to the lesser included offense of Burglary – 2nd Degree (Non-Violent), under CDR Code #0080 it is clear that the State intended for the plea to occur pursuant to the newly enacted penalty. As such, this Court finds that Applicant was sentenced in excess of the maximum penalty authorized by statute.” (App. p. 88). In further support of the fact that the State intended sentencing under the new law with the reduced maximum penalty is the fact that the true billed indictment was returned on June 3, 2010, one day after the passage of the Act. (App. pp. 112-113). Additionally, the State recommended a cap of five years. (App. p. 117). The fifteen-year sentence notation on the sentencing sheet appears to have been altered. (App. p. 117). The plea was entered on September 20, 2010, but sentencing was withheld until the next day so that witnesses could be present. (App. p. 3, lines 1-17). The sentencing transcript from September 21, 2010 is included in the appendix but the transcript from the plea hearing on September 20, 2010, is no longer available. The PCR judge correctly found that the State intended for Respondent to be sentenced under the new law providing a maximum penalty of ten years.

When Judge Russo revoked the full fifteen-year sentence at the probation revocation hearing in 2012, probation counsel failed to object because the sentence exceeded the statutory maximum. During the PCR hearing when probation counsel was asked if he knew Respondent was on probation for burglary second non-violent, counsel answered, “I don’t think so. If I saw burglary second degree and 15 years, I think I would have assumed that he had pled to a burglary second violent.” (App. p. 68, lines 2-5). Probation counsel admitted that he did not review the

sentencing sheet or Form 9 prior to the revocation hearing and if the information about the charge being non-violent was in the Form 1106, he missed it. (App. p. 68, lines 11-15). When asked on cross-examination if the probation revocation was the proper forum to challenge the sentence probation counsel answered, “No. There was – the opportunity to appeal the sentence had long lapsed by that time. It may have been incumbent on me to bring it to the judge’s attention so that the judge could factor that into what an appropriate sentence might be, but in terms of challenging the underlying charge or the underlying sentence, no, that’s not the appropriate forum.” (App. p. 71, lines 13-18). Probation counsel should have used the hearing to challenge a **revocation** in excess of the ten year statutory maximum.

In the order of dismissal the PCR judge noted that probation counsel failed “to conduct even a minimum investigation into the offense for which Applicant was being supervised by probation.” (App. p. 89). The PCR judge correctly found that probation counsel was ineffective writing:

Though this Court agrees with the State that the probation revocation hearing was not the appropriate forum to challenge the original sentence itself, (See Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065)), this Court also finds that Counsel’s representation of Applicant fell below the standard of “reasonableness under prevailing professional norms” when he failed to object to the 15 year probation revocation sentence as greater than the 10 years that Applicant could have potentially been sentenced on the violations of probation.

(App. p. 89). The PCR judge also correctly found that Respondent was prejudiced by counsel’s deficient performance writing, “Applicant furthermore has met his burden of a showing of prejudice given the fact that Applicant is incarcerated in the Department of Corrections serving a sentence five (5) years greater than is allowed by statute,” (App. pp. 89-90).

Petitioner's reliance on State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002) is misplaced as the challenge in Lee was to the structure of the sentence, not that the sentence exceeded the statutory maximum. The challenge in the present case to a revocation in excess of the ten year statutory maximum was properly raised in post-conviction relief as there was no challenge at the sentencing hearing or the probation revocation hearing. See State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (noting our supreme court "has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review").

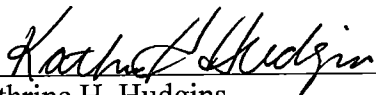
A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel 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.

Probation counsel was ineffective for failing to challenge the fifteen-year revocation as an illegal sentence. As a matter of law, if Respondent had entered a plea to burglary first degree, as indicted, he could have been sentenced under the old law.² The State in the present case, however, allowed Respondent to enter a plea to burglary second non-violent and the PCR judge found, as a matter of fact, that the parties intended for Respondent to be sentenced pursuant to the new law. The finding is supported by the record. Probation counsel's complete failure to determine and question why Respondent was sentenced to fifteen years for a non-violent burglary second was not reasonable under prevailing professional norms. Respondent was prejudiced by the deficient performance as he was sentenced beyond the statutory maximum ten years.

² State v. Dawson, 402 S.C. 160, 740 S.E.2d 501(2013).

CONCLUSION

Based on the above argument, the grant of relief by the PCR judge should be affirmed and the petition for writ of certiorari should be denied



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County

Honorable Michael G. Nettles, Circuit Court Judge

MCIVER R. FEAGIN, JR.

RESPONDENT


V.

STATE OF SOUTH CAROLINA,

PETITIONER

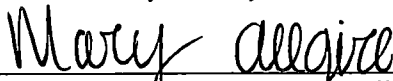
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and McIver R. Feagin, #266756, at Anderson County Detention Center, 305 Camson Road, Anderson, SC 29625, this 17th day of May, 2019.



Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR RESPONDENT
this 17th day of May, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027