STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Perry H. Gravely, Circuit Court Judge

JAMES D. LLOYD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002051

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did the PCR court err in requiring Petitioner to show his sentence was not within the statutory limits in order to show prejudice due to plea counsel's deficient performance?

II. Was Petitioner's guilty plea involuntary and unknowing because his plea was induced by plea counsel's assurance that the state was not seeking any prison time, which Petitioner interpreted to mean he would receive a probationary sentence, but the judge sentenced him to imprisonment?

STATEMENT

On March 13, 2017, Petitioner entered a guilty plea to burglary in the third degree. App. 10, ll. 4-5. He was sentenced to five years incarceration suspended upon the service of two years on probation. App. 10, ll. 5-6. On May 24, 2017, Petitioner reported to his probation agent. App. 9, ll. 11-12. When he "was subjected to a drug test," "[h]e was found to be wearing a synthetic urine device attempting to defeat the drug test." App. 9, ll. 12-14.

On July 26, 2017, the South Carolina Department of Probation Pardon and Parole Services (SCDPPPS) went to a home on Paula Court to serve an arrest warrant. App. 8, ll. 21-24. While serving the warrant, a probation agent "found a container that contained Oxycodone." App. 8, ll. 24-25. Based upon this finding, the agent obtained a search warrant for the rest of the home. App. 9, l. 1. In the home, SCDPPPS found "several precursors to manufacturing methamphetamine ..., blister packs of pseudoephedrine, [and] coffee filters." App. 9, ll. 2-4. In a car parked outside, SCDPPPS found "an active one-pot." App. 9, ll. 5-6. Additionally, SCDPPPS "found several acid generators and two cans of starter fluid used in manufacturing methamphetamine." App. 9, ll. 7-9.

On September 12, 2017, a Lexington County grand jury indicted Petitioner for possession of an adulterant to defeat drug test (2017-GS-20-3083) and possession with intent to distribute methamphetamine (2017-GS-32-3087). App. 75-76; App. 78-79. On December 5, 2017, Petitioner appeared before the Honorable Grace Gilchrist Knie. App. 1. Casey Rankin represented the state, and David Mauldin represented Petitioner. App. 1. While Petitioner entered a guilty plea as indicted to the adulterant charge, he entered a guilty plea to conspiracy to manufacture methamphetamine for which he waived presentment to the grand jury. App. 4, ll. 5-8. On that date, Petitioner also admitted he willfully violated the terms and conditions of his

probation. App. 10, ll. 15-19. Judge Knie sentenced Petitioner to seven and a half years for the methamphetamine charge. App. 13, ll. 12-18; App. 80. She suspended the sentence upon the service of two years imprisonment followed by two years on probation. App. 13, ll. 18-19; App. 80. Additionally, she sentenced Petitioner to three years imprisonment, which she suspended upon the service of two years imprisonment followed by two years on probation for the adulterant charge. App. 13, l. 23 – App. 14, l. 4; App. 77. Finally, she revoked two years on his probation case and terminated the remainder of the probationary sentence. App. 14, ll. 5-9. All sentences were to be served concurrently. App. 13, l. 24; App. 14, ll. 7-9; App. 77; App. 80.

On January 31, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 17-23. Through counsel, Petitioner subsequently filed an amended PCR application. App. 31-32. The matter proceeded to a hearing before the Honorable Perry H. Gravely on August 1, 2018. App. 33. Kelly Oppenheimer represented the state, and Ashley McMahan represented Petitioner. App. 33. By an order filed on October 29, 2018, Judge Gravely denied Petitioner relief from his convictions and sentences. App. 62-74. On November 16, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

I. The PCR court erred in requiring Petitioner to show his sentence was not within the statutory limits in order to show prejudice due to plea counsel's deficient performance.

Relevant facts

In his order, Judge Gravely correctly cited Strickland v. Washington, 466 U.S. 668 (1984) as establishing the proper analysis for claims of ineffective assistance of counsel. App. 68-69. Specifically, Judge Gravely explained that pursuant to Strickland, a PCR applicant "must prove counsel's performance was deficient" and prejudicial. App. 69. Concerning prejudice, Judge Gravely noted that "[i]n order to satisfy the prejudice prong of this test following a guilty plea, the applicant 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" App. 69 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Despite referring to this familiar standard, Judge Gravely held Petitioner to a much higher standard – showing his sentence was outside the statutory limits.

Judge Gravely found Petitioner "failed to establish any deficiency on the part of counsel." App. 70. In his order, he characterized Petitioner's testimony as follows on this point: Petitioner "testified counsel told him the state was not asking for [Petitioner] to serve any time and was not pushing for time." App. 65; see also App. 70. Further, Judge Gravely explained that Petitioner testified that based on counsel's advice, Petitioner "thought he would be going home to his family." App. 65; see also App. 70. Judge Gravely determined counsel's testimony that "though he told [Petitioner] he believed he would have to serve one to two years in prison, he explicitly informed [Petitinoer] sentencing was within the plea court's discretion." App. 70. After considering the testimony, Judge Gravely found Petitioner's testimony was "not credible" and

found "counsel's testimony with respect to this allegation very credible." App. 70. As a result, Judge Gravely found Petitioner did not establish deficiency by counsel.

When examining prejudice, Judge Gravely failed to apply the proper analysis. Although he found Petitioner "wholly failed to establish any prejudice as a result of this alleged deficiency," the judge based this finding upon the jurisprudence permitting judges to impose sentences within the statutory range, and not pursuant to the jurisprudence governing claims of ineffective assistance of counsel. App. 70. According to Judge Gravely, "[t]o be entitled to relief, the applicant must prove the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment per se." App. 70. After citing the relevant statutes under which Petitioner was sentence and noting that Petitioner's sentences fell within the "statutory range prescribed," Judge Gravely determined Petitioner had failed to show prejudice due to any deficiency on plea counsel's part. App. 70. Essentially, Judge Gravely concluded that because the sentence Petitioner received was within the statutorily permissible range and there was no proof it was the result of judicial misconduct, then Petitioner failed to establish prejudice. App. 70. This was error.

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.

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. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); 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). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

Judge Gravely erred by requiring that Petitioner show he received an illegal sentence, or one that was the product of partiality, prejudice oppression or corrupt motive, in order to show prejudice resulting from plea counsel's deficient performance. Quite simply, Judge Gravely placed too high a burden upon Petitioner. The bar set by Judge Gravely was one that almost no PCR applicant could meet. Judge Gravely committed an error of law by failing to apply the familiar line of cases requiring only that a PCR applicant show a reasonable probability that he would not have pled guilty, but for plea counsel's errors.

II. Petitioner's guilty plea was involuntary and unknowing because his plea was induced by plea counsel's assurance that the state was not seeking any prison time, which Petitioner interpreted to mean he would receive a probationary sentence, but the judge sentenced him to imprisonment.

Relevant facts

Petitioner incorporates by reference the relevant facts in Issue I, supra. During the PCR hearing, Petitioner explained that plea counsel "said the solicitor wasn't really asking for no time." App. 38, l. 1; see also App. 42, l. 19 – App. 43, l. 2; App. 47, ll. 23-24. Petitioner "thought" based on "the way they explained it to [him, he] was gonna get more probation." App. 38, ll. 3-4. Based upon plea counsel's advice Petitioner thought he "was gonna be able to go home to [his] family." App. 38, ll. 4-5. During their meeting, plea counsel told Petitioner he "could get this time but ... the solicitor[] wasn't asking for no time." App. 38, ll. 19-22. Petitioner believed he would receive a probationary sentence. App. 42, ll. 1-2. Petitioner made clear that he would not have entered a guilty plea if he had known he would go to prison. App. 49, ll. 10-12.

Plea counsel admitted he told Petitioner "the state was not taking a position regarding sentencing." App. 53, ll. 3-4. He further told Petitioner he "would ask the judge for continued probation." App. 53, ll. 4-5. However, during the guilty plea, plea counsel made no request for a particular sentence. App. 11, l. 2 – App. 12, l. 25. According to plea counsel, when he represents someone who is on probation and the person has a new charge, he "practically always tell[s] them it's not a good thing that you're on probation. The judge may give you a little piece of time depending on the case." App. 53, ll. 6-9; see also App. 58, ll. 2-7. For individuals, like Petitioner, suffering from drug addiction or who have drug related crimes, plea counsel "tell[s]

them that they could get anywhere between like a year or two years but it's in the judge's discretion and they could sentence them to anything up to what the maximum for the crime is." App. 53, ll. 10-14; see also App. 58, ll. 2-7.

Discussion

"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. "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (internal quotations omitted).

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, 243-244 (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 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 434-435. 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 SC at 394, 271 S.E.2d at 603.

This Court has held errors in sentencing advice entitle defendants to relief. Recently, this Court reversed a PCR court's failure to grant relief where a PCR applicant received and relied upon incorrect sentencing advice when entering his guilty plea. Robinson v. State, 422 S.C. 78, 88-89, 810 S.E.2d 32, 38 (2018). It was undisputed that Robinson's counsel advised Robinson that if he were to enter a guilty plea, he would be sentenced under the old law, which provided for a sentencing range of zero to thirty years, but that if he went to trial, then he would be sentenced under the new law, which provided for a sentencing range of twenty-five years to life, if he were found guilty. Id. at 82, 810 S.E.2d at 34-35. This Court held counsel's advice was not within the range of competence demanded of attorneys in criminal cases because "his advice that the state had the ability to prosecute [Robinson] under the [new] law was clearly incorrect" as it would violate the ex post facto clauses of the state and federal constitutions. Id. at 86, 810 S.E.2d at 36-37.

Examining prejudice, this Court held the record was "clear that [Robinson] placed particular emphasis on his potential sentencing exposure in deciding whether to plead guilty." Id. at 87, 810 S.E.2d at 37. Robinson "testified at the PCR hearing that he pled guilty *only* because he wanted to avoid the risk of receiving a life sentence under the amended law." Id. (emphasis in original).

Accordingly, this Court held Robinson "demonstrated a reasonable probability that he would have rejected the plea offer and proceeded to trial but for plea counsel's incorrect advice." Id. at 88, 810 S.E.2d at 37.

In Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 152-153 (1991), this Court held a defendant's guilty plea was not intelligently and voluntarily made in light of erroneous advice given by counsel. Defense counsel advised the defendant that he would be sentenced to life without parole if he were convicted of both armed robbery counts, which was in error. Id. at 375, 401 S.E.2d at 152. The truth was that if he were convicted "he *may* face a sentence of seventy-five years without parole, but could face a sentence as short as ten years." Id. at 376, 401 S.E.2d at 152-153 (emphasis in original). This Court found trial counsel's incorrect advice was not within the range of competence demanded of attorneys in criminal cases. Id. at 376, 401 S.E.2d at 152. This Court further found that the defendant suffered prejudice where he testified he would not have pled guilty absent the erroneous advice, the real distinction between the penalty he faced and the advice given, and his steadfast maintenance of his innocence. Id. at 376, 401 S.E.2d at 153.

Similarly, this Court held a defendant was entitled to a new trial based upon erroneous sentencing advice of defense counsel in Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). According to the testimony presented during the post-conviction relief hearing, defense counsel advised the defendant that he faced one hundred years on the four indictments. However, this Court determined the defendant actually faced a seven to twenty-five year sentence on one count and a twenty-five year sentence on the other count as the indictments contained overlapping and greater and lesser charges. Id. at 542-543, 402 S.E.2d at 485. Due to this erroneous advice, this Court concluded that counsel provided deficient advice, satisfying the first prong of the test. Turning to the second prong, this Court concluded the defendant suffered prejudice in light of his testimony

that he would not have entered a guilty plea if defense counsel had not misinformed him. Id. at 543, 402 S.E.2d at 485-486.

In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court granted the defendant post-conviction relief where defense counsel provided incorrect advice concerning parole eligibility. Defense counsel advised the defendant that he would be eligible for parole after service of ten years if he pled guilty to common law murder. Id. at 457, 377 S.E.2d at 339. Defense counsel explained to the defendant that statutory murder permitted parole after twenty years, but common law murder permitted parole after ten years. Id. As a result of this erroneous advice, the defendant entered a guilty plea. Id. at 457-458, 377 S.E.2d at 339. This Court held counsel's advice was erroneous and fell below the level of competence expected of attorneys in criminal cases because there was no distinction between statutory and common law murder. Id. at 458, 377 S.E.2d at 339.

Moving to the second prong, this Court concluded Hinson suffered prejudice where the he testified his plea was induced by the erroneous advice, and defense counsel admitted he could not recall the advice given, but the co-defendant's counsel recalled the erroneous advice. Id. In Hinson, the evidence was "uncontroverted that Hinson entered his plea in expectation of receiving the lesser period for parole eligibility." Hinson, 297 S.C. at 458, 377 S.E.2d at 339.

It was undisputed that plea counsel advised Petitioner that the state was not taking a position on what sentence Petitioner should receive. The record of the guilty plea showed the state did not take a position on sentencing. Petitioner explained that he understood plea counsel's advice that the state would not request a prison time to mean that Petitioner would receive a probationary sentence. On the other hand, plea counsel indicated that he "practically always" tells his clients who are on probation that when they are arrested on different charges, they will likely be sentenced to a year or two years. Further, plea counsel claimed he told

Petitioner he would request Petitioner be continued on probation, but plea counsel failed to do so, according to the guilty plea hearing transcript. Petitioner believed he would receive a probationary sentence based upon plea counsel's undisputed advice that the state would not take a position on sentencing, plea counsel's unfulfilled promise to ask for continued probation, and plea counsel's failure to testify at the PCR hearing that he told Petitioner that he would likely receive "a year or two" in prison, and could only testify as to what he "practically always" tells individuals in like circumstances.

Petitioner emphatically testified that he would not have entered a guilty plea but for plea counsel's erroneous advice. Although the PCR judge noted Petitioner's testimony accordingly, the PCR judge made no credibility findings regarding Petitioner's testimony on this point. Cf. App. 65 with App. 70. Petitioner received a sentence of seven and a half years suspended upon the service of two years in prison and two years on probation. The difference in the amount of time Petitioner expected to receive and what he did receive is substantial and supports Petitioner's position that he would not have entered a guilty plea, but for plea counsel's erroneous advice. Applying the correct legal analysis, which the PCR court failed to do, reveals plea counsel provided prejudicial deficient performance.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari on the issues presented and order full briefing. If this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, hold plea counsel provided ineffective assistance, and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of May, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Perry H. Gravely, Circuit Court Judge

JAMES D. LLOYD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on James D. Lloyd, at 212- A Ballpark Road, Gaston, SC 29053, this 23rd day of May, 2019.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 2019.

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