STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Horry County

Honorable Paul M. Burch, Circuit Court Judge

JOHN E. SESSIONS, III

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001821

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the PCR court erred in denying relief, where Petitioner received ineffective assistance from plea counsel, who failed to communicate with Petitioner adequately, where Petitioner was informed by counsel that his sentence would be characterized as one stemming from a non-violent offense, and where the sentence sheet reflected a non-violent offense?

STATEMENT

Petitioner was indicted by an Horry County grand jury for armed robbery, burglary in the first degree, kidnapping, possession of a weapon during the commission of a violent crime, and criminal conspiracy. App. 9 ll. 3 – 11; App. 102 – 103. Before the Honorable Edward B. Cottingham on March 5, 2014, Petitioner pleaded guilty to the armed robbery charge. Id. William I. Diggs represented Petitioner, and J. Scott Hucks served as the solicitor. The state dismissed the remaining charges at the plea. Id.

According to the state, Petitioner went into the home of Heidemarie Young, told her he was not going to hurt her, led her around the house looking for money, but did not take anything. App. 10 l. 5 – App. 11 l. 10. The state offered a plea deal wherein Petitioner would serve twelve years, and Petitioner accepted. App. 12 ll. 11 – 12. Although the plea judge never inquired whether Petitioner was promised anything in exchange for or as a part of the plea, Petitioner's plea was accepted. App. 16 l. 12 – App. 17 l. 19. Petitioner was sentenced to twelve years' incarceration. App. 17 ll. 10 – 19.

Petitioner filed a timely application for post-conviction relief on September 5, 2014. App. 19. It contained allegations of ineffective assistance of counsel, including the claim that "[Petitioner] was promised a non-violent sentence as it reflects on sentence sheets by counsel." App. 21. The state made its Return on or about February 9, 2015. App. 26 – 31.

An evidentiary hearing took place before the Honorable Paul M. Burch on May 12, 2016. App. 32. Petitioner and plea counsel testified at the hearing. The PCR court denied relief by

way of a written order filed September 21, 2018, more than two years after the evidentiary hearing.[1] App. 93

This petition follows.

[1] Plea counsel was disbarred the same month the Order of Dismissal was filed; he was previously suspended on September 23, 2014. Matter of Diggs, 418 S.C. 229, 230, 792 S.E.2d 219 (2016).

ARGUMENT

The PCR court erred in denying relief, where Petitioner received ineffective assistance from plea counsel, who failed to communicate with Petitioner adequately, where Petitioner was informed by counsel that his sentence would be characterized as one stemming from a non-violent offense, and where the sentence sheet reflected a non-violent offense.

Relevant facts

Every time Petitioner wrote plea counsel about his case, Petitioner's mail was returned unanswered. App. 42 ll. 10 – 14. Plea counsel neglected to show Petitioner evidence on a DVD in his case simply because Petitioner did not have access to a computer while in jail. App. 43 ll. 6 – 11; App. 44 l. 22 – App. 45 l. 4. Furthermore, Petitioner was unable to call plea counsel on the phone, because plea counsel's phone line was not secure. App. 44 ll. 17 – 21. Plea counsel confirmed that he stopped taking telephone calls from the jail. App. 79 ll. 1 – 9. Facing multiple communication roadblocks, Petitioner asked his aunt to reach out to plea counsel; these efforts similarly failed to achieve any sort of return communication. Petitioner's plea, therefore, was the product of ineffective assistance of counsel, especially considering he was not made aware of the state's evidence against him. App. 49 ll. 19 – 24.

The plea judge informed Petitioner that "in all probability" his confession would be given to a jury at trial. App. 15 ll. 11 – 17. Notably, however, Petitioner was not asked whether he was promised anything or threatened to plead guilty. Furthermore, he was repeatedly told, by the solicitor and plea judge alike, that a trial was imminent if he chose not to plead. App. 3 ll. 7 – 20; App. 15 ll. 6 – 9.

At the time of his plea, Petitioner was thirty-five years old, had no prior criminal background outside of magistrate's court, and had only made it to the seventh grade. App. 13 ll. 13 – 17. He could only read at a sixth grade level. App. 43 ll. 12 – 14. Plea counsel filed no motions of which Petitioner was made aware. App. 48 l. 19 – App. 49 l. 6. Nonetheless, Petitioner read the sentencing sheet which reflected his understanding, based upon a conversation with plea counsel, that the plea was for a nonviolent sentence. App. 50 l. 24 – App. 51 l. 5. However, when Petitioner arrived at Kirkland Correctional, his sentence was changed to twelve years, violent. App. 51 ll. 6 – 10. This affected his parole rights, length of sentence, work credits, and education credits. App. 51 ll. 9 – 18. The sentence sheet reflects that the sentence was crafted to follow a non-violent offense. App. 101. The PCR court candidly explained, however that "that line across there where it says, violent, nonviolent, serious, and all that means absolutely nothing to the Department of Corrections. They go by the CDR code." App. 52 ll. 6 – 11. Plea counsel failed to explain this to Petitioner. App. 52 ll. 15 – 18. Additionally, plea counsel never explained the difference between a negotiated sentence versus a recommended sentence by the state. App. 55 ll. 22 – 25.

In response, Petitioner indicated his lack of understanding in this area and opined that plea counsel should have explained the consequences of his plea and the nuances of the sentence sheet:

> I would have thought that those - - that serious of words and where they place the X on that paper would definitely make the sentence, you know, serious, nonviolent - - or nonviolent and violent, serious, most serious. Those are, you know, the classification of your crime.
> I understand the CDR code thing that they are using. But who I am, I don't have that - - I'm not privy to that knowledge. The CDR thing I'm not - - I'm not up on that.
>
> ...

> My attorney never once told me that, your CDR code is going to determine whether or not you're - - he says, this is what it is, it's a 12-year nonviolent sentence, you want to take it.

App. 52 l. 21 – App. 53 l. 10. Petitioner reiterated that plea counsel never informed him of the meaningless nature of the checkmark boxes on the sentence sheet. App. 54 ll. 9 – 16. Petitioner averred that had counsel informed him of the nature of the classification systems, it would have changed his decision to plead. App. 54 ll. 13 – 16.

Plea counsel, who had been practicing law thirty-three years when he was assigned Petitioner's case, inexplicably appeared at the evidentiary hearing without the file from his representation. App. 65 l. 16 – App. 66 l. 5; App. 75 l. 18 – App. 76 l. 3. When asked whether he discussed collateral consequences such as classifications and parole eligibility, plea counsel stated in no uncertain terms that he did not cover all of them:

> We did- - what my standard practice was was to talk about what the sentence was going to be and generally what parole eligibility would be available in certain situations.
>
> **But I did not get into other collateral consequences of what went on in the jail or in the prison system itself usually**, simply because it was - - in my mind, it was unpredictable. And so beyond that, I didn't get into a lot of discussion about what would happen in the prison sentence.

App. 67 ll. 11 – 22. (emphasis added).

Notably, plea counsel testified at the evidentiary hearing that he did not obtain "any information from Mr. Sessions that indicated he was innocent," seemingly suggesting that he was convinced of Petitioner's guilt at the outset. App. 70 l. 18 – App. 71 l. 12. Counsel did not recall discussing with Petitioner his chances at trial. App. 71 ll. 13 – 20. Interestingly, counsel could likewise not recall whether there was any written correspondence between himself and the solicitor. App. 77 l. 7 – App. 78 l. 24. Plea counsel came across as defensive, concerned about an ambush, when discussing the plea offer:

Q: Well, I guess my question was there was no - - was there any written correspondence between you and Hucks on the plea offer?

A: Not that I recall. But there were multiple conversations about it.

Q: But no written transcript?

A: Not that I recall. I mean, it could turn up if I say no, then you produce something, you know, that could happen because I don't recall.

App. 78 ll. 2 – 10. Without the file, plea counsel was unable to provide dates or any additional information about conversations with Petitioner. App. 78 ll. 11 – 24; App. 79 ll. 14 – 25. Plea counsel's inability to recall notwithstanding, he remembered that he never told Petitioner "that he was going to get a nonviolent sentence in this case." App. 84 l. 22 – App. 85 l. 7. That answer came in response to a question of whether he ever went over with Petitioner the distinction between a nonviolent and violent sentence, not whether he promised any particular result.

Discussion

A PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider

the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

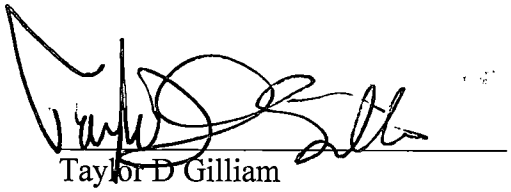
In Sprouse v. State, this Court held that specific performance was required as the most efficient option in a plea "because it eliminate[d] the need for a new trial or new plea hearings, and also grants the parties nothing more and nothing less than the benefit for which they originally bargained." 355 S.C. 335, 341, 585 S.E.2d 278, 281 (2003). Candidly, that is what Petitioner expected in this case: a nonviolent sentence as agreed upon by the parties, reflected in the sentence sheet, and as advised by plea counsel. At the evidentiary hearing, plea counsel was unable to answer whether attempted robbery, arguably the proper charge based on Petitioner's alleged actions, was violent or nonviolent even though he had been practicing for thirty-three years. App. 85 l. 8 – App. 86 l. 2. The plain meaning of the sentence sheet, as indicated by the checked box, was that Petitioner's sentence was agreed to by all parties to be the result of a nonviolent charge.

This matter can be distinguished from Smith v. State, cited by the state at the evidentiary hearing in closing remarks. 329 S.C. 280, 494 S.E.2d 626 (1997). This Court in Smith addressed the voluntary nature of a plea following counsel's failure to inform him of the consequences of a violent crime conviction. Id. at 286, 494 S.E.2d at 629. The concluding paragraph held that because Smith did receive information that was sufficient and correct, he had no basis for relief. Id. at 286, 494 S.E.2d at 629-30. However, in Petitioner's case, the sentence sheet marked nonviolent shows that Petitioner believed he was pleading guilty and receiving a parole-eligible sentence. This was based upon the advice of counsel and reflected in the signed sentence sheet. He intended to plead guilty to a nonviolent offense following the advice of counsel and seemingly with the blessing of the solicitor and the plea judge.

Petitioner received representation that was both unsatisfactory and deficient. App. 57 ll. 20 – 24. The resulting prejudice can be gleaned from the difference in a nonviolent and violent sentence as the South Carolina Department of Corrections. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989).

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing on the issue raise herein.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Paul M. Burch, Circuit Court Judge

JOHN E. SESSIONS, III

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 Johnny Ellis James, Jr., 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 John Edward Sessions, #359143, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 17th day of June, 2019.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 17th day of June, 2019.

ATTORNEY FOR PETITIONER

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