STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Edgefield County

Honorable Walton J. McLeod, IV, Circuit Court Judge

RECEIVED
JUL 10 2019
S.C. SUPREME COURT

DAVID WALTER COON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002224

JOHNSON PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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The PCR court erred in ruling that Petitioner's plea was not involuntary where Petitioner was led to believe by a law enforcement official and his attorney that the only way his co-defendant daughter would be spared a twenty-five year sentence was if Petitioner "accepted responsibility" for the charges and where his daughter ultimately received a five year sentence 4

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ISSUE PRESENTED

Whether the PCR court erred in ruling that Petitioner's plea was not involuntary where Petitioner was led to believe by a law enforcement official and his attorney that the only way his co-defendant daughter would be spared a twenty-five year sentence was if Petitioner "accepted responsibility" for the charges and where his daughter ultimately received a five year sentence?

STATEMENT

During the April 2016 Grand Jury Term of Edgefield County Petitioner was indicted for one count of Receiving Stolen Goods, value less than two thousand dollars; two counts of Receiving Stolen Goods, value more than two thousand dollars but less than ten thousand dollars; three counts of Possession of an Unlawful Firearm; one count of Possession with Intent to Distribute a Schedule IV Controlled Substance; one count of Possession with Intent to Distribute Marijuana, and one count of Trafficking Methamphetamine.

Petitioner was also indicted for two additional counts of Receiving Stolen Goods, value more than two thousand dollars but less than ten thousand dollars by the Edgefield Grand Jury during the January 2017 term. App. 469-490.

On January 10, 2017 Petitioner proceeded to trial on all charges in front of the Honorable John C. Hayes III, and a jury. App. 1. Ervin J. Maye and Douglas W. Fender, II appeared on behalf of the state, and Erik J. Drylie represented Petitioner. Id. After two and a half days of trial the state rested its case and petitioner entered a guilty plea. App. 332; 350-351.

Judge Hayes accepted the plea and sentenced Petitioner to concurrent terms of imprisonment for twenty-five years for trafficking methamphetamine, three years on each receiving stolen goods count, ten years on each possession of unlawful firearm count and five years on possession with intent to distribute marijuana. App. 351; 356-357.

On or about March 20, 2017, Petitioner filed a pro se Notice of Appeal which was ultimately dismissed as being untimely. App. 427; 445. On or about May 12, 2017, Petitioner filed a PCR application. App. 36-375. The State filed its Return and Partial Motion to Dismiss on or about July 13, 2017. App. 376-383. Petitioner, through counsel Kristy Goldberg, filed an

amended PCR application alleging, inter alia, that counsel was ineffective for coercing Petitioner to enter an involuntary guilty plea. App. 384-387.

An evidentiary hearing took place before the Honorable Walton J. McLeod, IV on November 7, 2018. App. 388. Kristy Goldberg represented Petitioner, and Kelly Oppenheimer appeared on behalf of the State. Id. Petitioner and plea counsel, Erik Drylie, testified at the hearing.

Judge McLeod's Order granting the partial relief of vacating a sentence for Receiving Stolen Goods, value less than two thousand dollars, because the sentence exceed the statutory maximum was filed on December 10, 2018. App. 448-468. All other claims, to include that the plea was involuntary, were dismissed with prejudice.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in ruling that Petitioner's plea was not involuntary where Petitioner was led to believe by a law enforcement official and his attorney that the only way his co-defendant daughter would be spared a twenty-five year sentence was if Petitioner "accepted responsibility" for the charges and where his daughter ultimately received a five year sentence.

A defendant can enter a guilty plea that is the result of the coercive actions of others and be entitled to relief. In such cases the coercive nature of the plea renders it involuntary as a matter of law. *See*, Beaver v. State, 271 S.C. 381, 247 S.E.2d 448 (1978) (holding that the trial judge's statements that defendant would receive the maximum sentence should he continue his trial was unduly coercive and therefore defendant's plea was involuntary as a matter of law). *See also*, Gustine v. State, 325 S.C. 123, 480 S.E.2d 444 (1997). Petitioner is in that very situation in this case.

"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 v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Six Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effect assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 147, 1480-81 (2010) (internal quotations omitted).

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result,'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688). In Lockhart the court clarified that the result of the proceeding difference requires the defendant to show that there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial.

A bedrock principle of our jurisprudence is that a defendant's actions, whether it be making a statement, waving right to counsel, or entering a guilty plea, must be voluntarily. If an action is made under coercive circumstances it cannot be considering voluntary. In State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (1992), the Court of Appeals held that the defendant's statement was inadmissible because it was made in response to threats that defendant's wife would be arrested, and his children taken by the Department of Social Services. This threat to the defendant's family "amounted to an exertion of improper influence rendering Corns's statement involuntary." Id. at 327. The concept in Corns can be directly applied in the present case. The threat to Petitioner's

daughter of a lengthy prison sentence by a law enforcement official, and repeated by Petitioner's own lawyer, created an impermissibly coercive environment which rendered his plea involuntary.

The present case can be distinguished from Wade v. State, 308 S.C. 552, 419 S.E.2d 781 (1992). In Wade, Petitioner's family members faced interrelated charges and potential charges arising from the instances of criminal sexual conduct that Petitioner was charged with. In particular he asserted his mother had been threatened with charges and jail time, but she later stated she was never told of that possibility and charges were never filed against her. Unlike Wade, here Petitioner's daughter was arrested and facing the exact same charges that Petitioner is currently incarcerated on. App. 399 ll. 25 – App. 400 ll. 1-5. Petitioner testified at the evidentiary hearing that he pled guilty to the charges because a member of law enforcement involved in the case and trial counsel had told him that his daughter would likely receive a twenty-five year sentence if he did not plead guilty. App. 400 ll. 6-25 - App. 401 ll. 1-19.

While there was no express agreement, such as leniency for the daughter if Petitioner took responsibility, it was communicated to Petitioner that the state was most interested in obtaining convictions against Petitioner and his co-Defendant Timothy Wheeler. App. 423 ll. 1-7. The state thought Petitioner and Wheeler were the two individuals behind the drugs and stolen guns at the center of the prosecution. Id. Also, conversations occurred between trial counsel and Petitioner about whether a plea in which Petitioner "took responsibility" would benefit his daughter in regards to a lesser prison sentence. App. 423 ll. 10-15.

Further, Petitioner had challenged the validity of the search warrant that was the basis for his charges and when he entered the plea he lost the right to pursue that issue on appeal, something Petitioner testified to at the PCR hearing that he very much wished to pursue. App. 398 ll. 3-13; App. 402 ll. 1-14. In addition, the state had rested its case and the parties were preparing to send the

matter to the jury when Petitioner entered his plea. App. 332 ll. 15-16; App. 339 ll. 9-13. He gained no benefit from entering a guilty plea, outside of the fact that he thought it would ensure his daughter did not go to prison for twenty-five years, and in fact lost the right to appeal the search warrant issue or argue for lesser included offenses, such as a lower trafficking amount or Possession with Intent to Distribute Methamphetamine[1], to be submitted for jury consideration. At that point in the proceedings in made no sense for Petitioner to enter a guilty plea as he would have been better served allowing the jury to decide the case as a plea did not minimize his sentence exposure of twenty-five to thirty years, and it waived his right to appellate review. This all supports Petitioner's assertion that while he understood the consequences of entering a plea he did not do so freely as the impetus of entering the plea was to save his daughter.

The court's order of dismissal focuses on the plea colloquy and Petitioner's conversations with counsel about the case and his rights. App. 466-467. It notes that Petitioner indicated he had not been coerced into entering a plea, that he fully understood his rights and what he was waiving by entering the plea. Id. However, the Court failed to consider the considerable impact that the daughter's looming substantial prison sentence had on Petitioner's decision-making process. It is not uncommon that a parent would act in a manner contrary to their best interest if it served the interest of their child, which is exactly what occurred in this case. When a plea is entered under such highly unusual circumstances as those of this case it should be deemed involuntary.

Petitioner's fear of his daughter receiving a lengthy sentence was the only reason he entered a plea. Petitioner has demonstrated that counsel's comments regarding the likelihood of a lengthy sentence for his daughter, along with the statements from law enforcement and the state,

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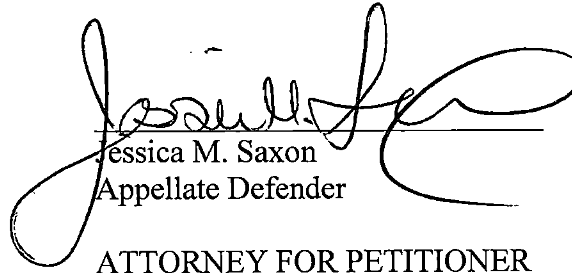
[1]There is evidence from the record that Petitioner's co-defendant was the owner/trafficker of the seven hundred plus grams of methamphetamine discovered at the incident location and that Petitioner was only involved with lesser amounts of the narcotic. S.C. Code § 44-53-375(C)(1)-(4).

created a coercive environment. Allowing Petitioner to move forward with a guilty plea under such coercive circumstances constitutes ineffective assistance of counsel. Petitioner would not have pled guilty and would have allowed the jury to deliberate and reach a verdict if he had not been unduly coerced. Hill v. Lockhart, 474 U.S. 52, 56 (1985). His guilty plea therefore, should be vacated.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of July, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Walter Coon states:

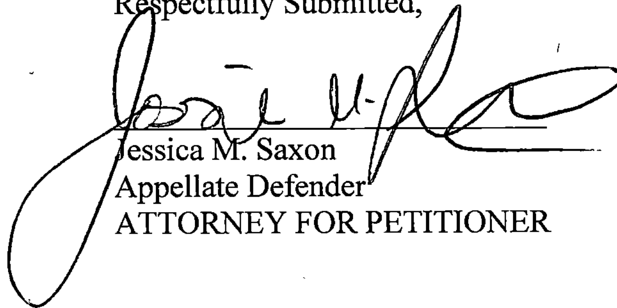
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Walton J. McLeod, IV, which was held on November 7, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for David Walter Coon.

Respectfully Submitted,

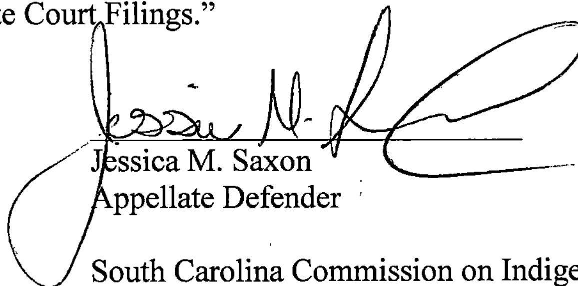


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of July, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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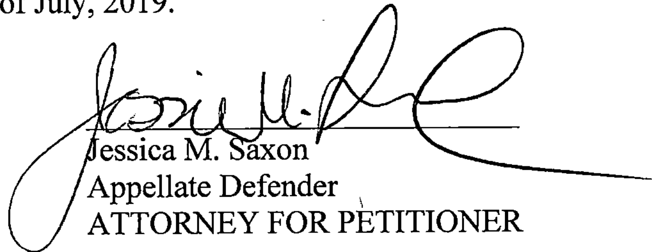
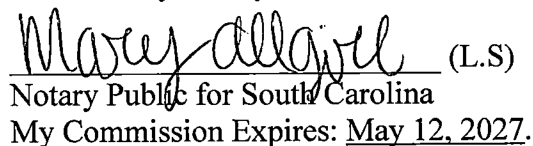
CERTIFICATE OF SERVICE

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 Taylor Z. Smith, 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 David Walter Coon, #371019, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 10th day of July, 2019.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of July, 2019.


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