STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

CHAD P. STALNAKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000184

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where Petitioner received ineffective assistance of counsel when he pleaded guilty to two offenses mid-trial, where trial-turned-plea counsel advised him that he would be eligible for parole for his assault and battery of a high and aggravated nature and possession of a weapon charges, where counsel advised him that he would have to serve between fifty-five and sixty-five percent of the sentence, and where Petitioner is serving eighty-five percent of his sentence and is not eligible for parole?

STATEMENT

Petitioner was indicted by a Charleston County grand jury on September 2, 2014 for attempted murder and possession of a weapon during the commission of a violent crime. App. 544 – 547. He proceeded to trial before the Honorable W. Jeffrey Young on September 12, 2016. App. 1. Daniel W. Cooper and David Osborne appeared on behalf of the state, and William Runyon and Stan Jaskiewicz represented Petitioner.

The state rested after presenting the testimony of seven witnesses. App. 265 ll. 1 – 2. The facts as alleged by the prosecution revolved around Petitioner's alleged assault on Desmond Casey on May 18, 2014. App. 193 l. 12 – App. 201 l. 21. After Petitioner's motion for a directed verdict was denied, he pleaded guilty to assault and battery of a high and aggravated nature as well as the weapon charge. App. 280 ll. 1 – 23; App. 285 l. 24 – App. 286 l. 8. The plea was made without recommendation from the state. App. 283 ll. 16 – 19. Judge Young found a substantial factual basis for the plea and concluded that it was entered into freely, voluntarily, knowingly, and intelligently. App. 286 ll. 9 – 13. Notably, however, there was a not a discussion about violent offenses and the percentage of time Petitioner would be required to serve. Judge Young sentenced Petitioner to ten years on the assault and battery of a high and aggravated nature charge and five years on the possession of a weapon charge, consecutive. App. 296 ll. 6 – 12.

Petitioner filed a timely application for post-conviction relief on January 18, 2017. App. 301 – 339. It contained multiple allegations of ineffective assistance of counsel. Id. The state filed a Return and Partial Motion to Dismiss on or about July 6, 2017. App. 340 – 347. An evidentiary hearing was held on July 23, 2018 before the Honorable Deadra L. Jefferson. App. 348. James Falk represented Petitioner, and Kelly Oppenheimer appeared on behalf of the state.

Petitioner, his father, and both members of his trial counsel team testified at the hearing. Judge Jefferson denied relief at the hearing and signed an Order of Dismissal on or about November 7, 2018. App. 475 ll. 5 – 10; App. 478 – 512.

PCR counsel filed a Motion to Reconsider, Alter, or Amend under Rule 59(e), SCRCP on November 20, 2018. App. 513 – 519. The state filed a return to the motion on or about November 27, 2018. App. 520 – 527. The PCR court denied the motion by way of a written order on January 8, 2019. App. 528 – 533. An Amended Order denying the motion was filed on January 15, 2019. App. 534 – 540.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where Petitioner received ineffective assistance of counsel when he pleaded guilty to two offenses mid-trial, where trial-turned-plea counsel advised him that he would be eligible for parole for his assault and battery of a high and aggravated nature and possession of a weapon charges, where counsel advised him that he would have to serve between fifty-five and sixty-five percent of the sentence, and where Petitioner is serving eighty-five percent of his sentence and is not eligible for parole.

Relevant facts

At the outset of trial, counsel and Petitioner anticipated establishing the defense of a third party. App. 396 l. 23 – App. 397 l. 18. The defense's theory of the case was that Petitioner jumped off his porch and attacked Desmond Casey in defense of his girlfriend. Id. However, when Petitioner's girlfriend, Daniella Jimenez, took the stand at his trial, she could not recall many of the details from the night in question. App. 158 l. 12 – App. 161 l. 24. She remembered talking to a neighbor on the porch and then waking up in the hospital. App. 163 ll. 7 – 12. She did remember anything regarding Casey's presence on the street or in Petitioner's yard. App. 163 ll. 13 – 14. Although she sustained a cut on her finger that required two stitches, she could not recall how it happened. App. 161 l. 1 – App. 163 l. 19. She repeatedly asserted that she could not remember talking to anyone after she and Petitioner took a pedicab home around 1:30 on the morning of May 18, 2014. App. 164 ll. 11 – 24. She described her memory loss as a blackout following heavy alcohol usage. App. 166 ll. 13 – 23. Thus, the only way

Petitioner would have been able to establish the defense of a third party would have been for him to testify. App. 416 ll. 6 – 22; App. 420 l. 8 – App. 421 l. 6.

At the evidentiary hearing, trial counsel Runyon characterized Jimenez's testimony as false:

> She professed to have no recollection of anything and she was crucial to this whole incident. And she just didn't want to be involved.
>
> And she was just hanging him out to dry ... and so he was going to have to testify. And Mr. Stalnaker was extremely emotional about this whole situation.

App. 399 l. 9 – App. 400 l. 11.

Following the surprising testimony of Jimenez, Petitioner elected to take a plea. However, according to counsel Runyon, Petitioner never received a full explanation of the sentence he would receive as a result of the plea or the consequences which would accompany it:

> There was no conversation of what he would get because he could get ... the weapon charge stacked on top. And of course, we didn't have any - - I have to say this.
>
> Judge Young never said this is my usual practice or this is what I'm going to do or this is what I have done in the past. He just said here's the deal. He said I will take a plea.
>
> The only chambers conversation we had is he indicated he would take the plea. If the State offered that and we took it he wasn't going to deny the plea.

App. 400 ll. 12 – 25. Counsel Runyon did not recall explaining to Petitioner whether the plea would qualify as a serious offense and result in him serving eighty-five percent of his sentence. App. 401 ll. 1 – 9. Counsel Runyon denied discussing with Petitioner the percentage of his sentence he would have to serve. App. 401 l. 15 – App. 402 l. 7.

Like counsel, the trial-turned-plea judge never explained whether this was a serious offense such that Petitioner would be required to serve eighty-five percent of the sentence. App. 402 l. 24 – App. 403 l. 20.

Petitioner plainly set forth what he was advised by counsel:

> I was told that I could plead guilty to assault and battery of a high and aggravated nature and … I asked my lawyers several times what that would mean.
>
> And they pronounced it as meaning that I would do about 55 percent of the time served, that it would be non-violent, parole eligible, and work release eligibility.

App. 357 ll. 8 – 19. Present during this discussion were Petitioner's girlfriend at the time, his father, and his mother. App. 357 l. 23 – App. 358 l. 2. Counsel Runyon confirmed that Petitioner's parents joined him in plea discussions "when it became clear that [Petitioner] was probably going to take the plea … because they needed to be part of the conversation." App. 402 ll. 18 – 23. Petitioner's father included in his testimony relevant and specific details that established his credibility regarding these conversations:

> Q: Where were you - - did you have a discussion with Mr. Runyon and Mr. Jaskiewicz?
>
> A: Yes. I was asking them questions while the plea deal was going on and they were answering my questions.
>
> Q: Where were you standing?
>
> A: Right behind them. Right where like my wife is they were just on the other side of the barricade there; the wall there [indicates].
>
> Q: So you were learning - - they were leaning over the bar?
>
> A: Yes, we were all standing.
>
> Q: And so you had a conversation with him?
>
> A: Yes.
>
> Q: And they told you he would be parole eligible?
>
> A: Yes.

App. 452 l. 24 – App. 453 l. 24. When Petitioner's sentence was calculated following the acceptance of the plea, confusion arose when it appeared he was going to have to serve eighty-

five percent. Id. Petitioner's father addressed this with counsel Runyon, who indicated "he was going to talk to the records people" about the percentage of time served as well as the parole eligibility. Id.

Petitioner reiterated that counsel informed him that his sentence would be classified as non-violent, such that he would serve fifty-five percent "or possibly could be worked down even further with certain programs or good time and good behavior." App. 360 ll. 3 – 10. His understanding was that the two offenses would be classified as non-violent and therefore require him only to serve fifty-five percent of the sentence. App. 377 ll. 5 – 8. Petitioner echoed the testimony of counsel Runyon and stated that the plea court never discussed whether this would be a serious offense. App. 365 l. 21 – App. 366 l. 3.

Petitioner's father was informed by his son's legal team that Petitioner would be parole eligible. App. 453 ll. 7 – 13. He similarly indicated that he was told by the attorneys that Petitioner would serve between fifty-five and sixty-five percent of his sentence, not the eighty-five percent actually assigned. App. 453 ll. 14 – 16. After Mr. Stalnaker brought this to counsel's attention post-sentencing, Runyon claimed the discrepancy was a clerical error and offered to take care of it. App. 449 l. 12 – App. 453l. 21. Counsel Runyon recalled that conversation. App. 407 l. 14 – App. 408 l. 14.

Similar to the discussions of percentage of time Petitioner would be required to serve, he was also misadvised by counsel Runyon regarding parole eligibility:

> Q: Just regarding his pleading, did you have a specific conversation with him about what his parole eligibility would be?
>
> A: No. I can't recall a specific conversation about when his parole eligibility would be. I'm certain that someone would probably say can I be paroled ... but I don't recall that having come up; and particularly not in a situation where you might have a consecutive sentence.

Q: But you said somebody might have asked could he be. Did he ask whether or not he could be paroled?

A: I don't recall. I honestly don't recall. But if you want to know the honest truth he probably did. I don't recall what the question was and I don't recall what my answer was.

Q: Okay.

A: But he probably did.

App. 422 ll. 3 – 19. Counsel Jaskiewicz indicated that he did not play a role in advising Petitioner about any consequences of the plea. App. 420 ll. 2 – 25. According to counsel Jaskiewicz, counsel Runyon was the member of Petitioner's legal team who spoke with Petitioner about such things. Id.

Discussion

Petitioner's attorneys provided ineffective assistance of counsel when they misadvised him about the nature of his sentence following the impromptu guilty plea. He was misadvised that his sentence would be parole eligible; it was not. He was told by his retained attorneys that he would only be required to serve between fifty-five and sixty-five percent of his sentence; that was untrue.

"The benchmark for judging any claim of ineffectiveness must be 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." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688, 104 S.Ct. at 2064. Concerning prejudice, "a

defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

The difference, "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a 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) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59, 106 S.Ct. at 370. "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-12 (2011).

In Missouri v. Frye, 566 U.S. 134, 132 S.Ct. 1399 (2012), the United States Supreme Court noted that the, "Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment

interrogations, postindictment line ups, and the entry of a guilty plea." Id. at 141, 132 S.Ct. at 1405 (citations and internal quotation omitted). The Court further emphasized that "*[i]n today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.*" Id. (emphasis added). Accordingly, "[a]nything less [than effective counsel during plea negotiations]... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted).

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland, 466 U.S. at 685, 104 S.Ct. at 2063 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275, 63 S.Ct. 236, 240 (1942)). Additionally, a guilty plea that was entered by one fully aware of the direct consequences "must stand *unless* induced by . . . misrepresentation." Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 1472 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

In Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 L.Ed.2d 284, the United States Supreme Court held that counsel engaged in deficient performance by failing to advise the defendant that his guilty plea made him subject to automatic deportation. The Court held "counsel could have easily determined that [Padilla's] plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana offenses." Id. at 368-69, 130 S.Ct. 1473. This Court recently adopted that rationale in Taylor v. State, 422 S.C. 222, 810 S.E.2d 862

(2018). Taylor's counsel's provided deficient advise regarding the consequences of the plea, namely that Taylor *could* face deportation rather than the mandatory result that he be deported. Id. at 227, 810 S.E.2d at 864.

As noted in the Order of Dismissal in the matter at hand, assault and battery of a high and aggravated nature is classified as a violent crime. App. 504 – 505. See also S.C. Code Ann. 16-1-60. Assault and battery of a high and aggravated nature carries a maximum sentence of twenty years and is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(1); S.C. Code Ann. 16-3-29. Because assault and battery of a high and aggravated nature contains a maximum sentence of twenty years, it is a "no parole offense." S.C. Code Ann. § 24-13-100.

Therefore, trial counsel could have easily determined that the offense was not eligible for parole and advised Petitioner accordingly. At the evidentiary hearing, instead of noting the relatively simple method of determining whether an offense is parole eligible, both trial counsel and the PCR court indicated that such matters were left up to the Department of Corrections. There is no evidence in the record to support the PCR court's conclusion that Petitioner was fully and accurately advised about the consequences of his plea.

Similar to counsel Runyon, the plea counsel in Taylor "shie[d] away from unequivocal statements as to his advising Petitioner... and, instead, focused on counsel's 'defense protocol' and the steps counsel typically takes in evaluating a client's criminal charges and formulating defenses." 422 S.C. at 227-28, 810 S.E.2d at 864. The generic plea colloquy did not remedy the deficient advice. Id. at 229, 810 S.E.2d at 865. The Order of Dismissal in Petitioner's case relied on the trial/plea record to conclude that Petitioner was "[c]learly ... aware of the potential sentences he faced." App. 505. This statement fails to account for the allegation presented,

which was that counsel misadvised Petitioner regarding the consequences of his plea, including the percentage he would be required to serve as well as the parole eligibility.

For purposes of an ineffective assistance of counsel claim, counsel has a critical obligation to advise the client of the advantages and disadvantage of a plea agreement. In Coats v. State, the defendant alleged he was improperly advised that he would be parole eligible. 352 S.C. 500, 575 S.E.2d 557 (2003). This Court remanded for an evidentiary hearing on the merits of the claim regarding counsel's mistaken advice and noted that Coats' understanding about his parole eligibility "may have affected the validity of the underlying plea." Id. at 503, 575 S.E.2d at 558. Similarly, Petitioner's misunderstanding of his parole eligibility in the matter *sub judice* was manufactured by the erroneous advice of counsel. The information he was provided by his attorneys affected his decision to plead guilty. The PCR court erred in dismissing Petitioner's claims. PCR counsel summarized the relevant testimony and missteps by counsel:

> My client testified that when he pled guilty that he did not know that he would not be parole eligible. He did not know that he would have to serve 85 percent of the sentence.
>
> ...
>
> And it's typical that most Circuit Court judges are going to tell them that you understand this is a no-parole offense and that this is a strike offense. There was none of that conversation ... done in this case. There was no reason to think that my client ... would have had any understanding of the consequences of this plea under these facts in this case. My client, the only reason why he pled guilty was because he would sort of kind of would have agreed to a five-year sentencing deal and thought that's about what he would get in this case; had he gotten ten years or more and pled and then only served 55 percent. There is no part of this record that he was advised that this was an 85 percent charge.

App. 456 l. 23 – App. 459 l. 8.

In response, the PCR court inquired about the sentence sheet and whether Petitioner had signed it. App. 459 ll. 9 – 11. PCR counsel responded that "there was no testimony that this was

gone over with him." App. 459 ll. 17 – 19. The PCR court then stated, in contravention to the testimony presented, that counsel probably had discussed with him the repercussions of pleading guilty:

> I think **you can assume** that they went over the sentence sheets with him before he signed them. Based on what I've observed I don't think it would have been palatable to him to sign something without it being explained to him.

App. 459 ll. 20 – 24 (emphasis added). Similarly, the PCR court incorrectly concluded that because attorneys do not generally make promises regarding sentencing, it did not occur in this case:

> [N]obody has a crystal ball. That portion or any calculation of sentence is within the sole regulatory authority of the Department of Corrections. And I don't know any lawyer that makes promises or guarantees to a client as to how something is going to be calculated. So I do not find that testimony to be persuasive.

App. 466 ll. 15 – 20. The testimony of Petitioner, his father, and counsel Runyon notwithstanding, the PCR court inexplicably concluded that Petitioner's father was not present for plea discussions:

> And there is no indication that [Petitioner's father] was a part of the confidential conversations that would have taken place between he and his son and I would not expect that to happen because it would be vitiate privilege and it would not make sense.

App. 466 ll. 21 – 25. The testimony before the PCR court was replete with mentions of Petitioner's father participating in plea discussions. App. 357 l. 8 – App. 359 l. 8; App. 402 ll. 8 – 23; App. 452 l. 24 – App. 453 l. 24.

Additionally, the above remarks misapprehend the claims of ineffective assistance of counsel. Petitioner set forth, repeatedly, credible allegations that counsel failed to advise him of the consequences of his plea, including the percentage of time he would have to serve as well as parole eligibility. These concepts are not amorphous or incalculable. To the contrary, the

statutory scheme in South Carolina describes how various offenses will be served in the South Carolina Department of Corrections. Nonetheless, the PCR court mischaracterized Petitioner's assertion in order to rule against it:

> The record does not support and I find credible both Mr. Runyon and Mr. Jaskiewicz's testimony that they would not have made any representations regarding calculation of sentence or any guarantees to him.
>
> I don't know any defense lawyer that does that because first of all you can't guarantee what a Judge is going to do especially when there is no recommendation or negotiation. And you certainly can't guarantee what an administrative body that being the Department of Corrections is going to do.

App. 469 ll. 6 – 15.

Attorneys can determine whether an offense is parole eligible and whether a client will be required to serve sixty-five percent of a sentence, eighty-five percent, or day-for-day. Of course, an attorney cannot guarantee that an individual would be granted parole, but it was within trial counsel's right to advise Petitioner whether the offense was at a minimum even eligible for parole.

Individuals serving a sentence for parolable offenses accrue twenty days per month of good time credit. S.C. Code Ann. § 24-13-210. For offenses ineligible for parole, only three days per month of good time credit can be earned. Id. For earned work and education credits, parolable offenders can obtain a maximum of 180 days per year. Offenses ineligible for parole are only authorized a maximum of seventy-two days per year. S.C. Code Ann. § 24-13-230. Petitioner is severely prejudiced by how long he will remain incarcerated as a result of the deficient advice of counsel.

As noted by PCR counsel, this was not a typical guilty plea. In the middle of trial, after preparing Petitioner to testify, the situation morphed into a plea. The assault and battery of a high and aggravated nature was a lesser-included offense of the attempted murder indictment.

As such, Petitioner was likely unaware of the consequences of the plea. He should have been accurately advised of the consequences of his plea; that was not done here. He received ineffective assistance of counsel, and the PCR court erred in denying relief.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant certiorari, reverse the charges against him, and remand the case for a new trial.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

CHAD P. STALNAKER,

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 Benjamin Limbaugh, 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 Chad P. Stalnaker, #369754, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of September, 2019.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 5th day of September, 2019.

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