

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Richland County

Honorable Clifton Newman, Circuit Court Judge

MAURICE A. MCCREARY,

RECEIVED

PETITIONER DEC 12 2019

V.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000999

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R Seeger
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel where he induced Petitioner's guilty plea by assuring Petitioner the solicitor would not ask for consecutive sentences, and that Petitioner would receive a maximum sentence of thirty years' imprisonment where the solicitor requested consecutive sentences which the judge imposed in excess of thirty years' imprisonment?

STATEMENT

During the November 2012 term, the Richland County Grand Jury indicted Petitioner for five counts of attempted murder and one count of unlawful killing of a police dog. App. 156 – 175.

On January 6, 2014, Petitioner pled guilty before the Honorable Robert E. Hood. App. 1. Jennifer Davis and Mark Sawyer represented Petitioner. Id. Daniel Goldberg represented the state. Id.

Judge Hood accepted Petitioner's guilty plea as freely, voluntarily, knowingly, and intelligently made. App. 29, ll. 7 – 12. Although Petitioner was under the impression that the solicitor would not make a sentencing request at the guilty plea hearing, the solicitor explicitly asked the court three times to sentence Petitioner to consecutive sentences. App. 39, ll. 18 – 21; App. 41, ll. 3 – 7; App. 61, ll. 3 – 5. Judge Hood then sentenced Petitioner to thirty years' imprisonment for attempted murder and five years' imprisonment for killing of a police dog, to be run consecutively. App. 64, l. 20 – 65, l. 1.

Petitioner filed an application for post-conviction relief (PCR) alleging that his guilty plea was made involuntarily because plea counsel told him that if he plead guilty the solicitor would not ask the court to impose consecutive sentences. App. 70 – 76. The state filed its return on September 14, 2017. App. 77 – 84.

On December 12, 2017, Petitioner's PCR hearing was held before the Honorable Clifton Newman. App. 86. Leah B. Moody represented Petitioner. Id. Jessica E. Kinard represented the state. Id.

On May 6, 2019, Judge Newman filed an order of dismissal denying Petitioner relief. App. 146 – 155. Judge Newman found that plea counsel was not deficient because nothing in the record indicated that the state ever offered to remain silent at sentencing. App. 151 – 152.

This petition for a writ of certiorari follows.

ARGUMENT

Plea counsel provided ineffective assistance of counsel where he induced Petitioner's guilty plea by assuring Petitioner the solicitor would not ask for consecutive sentences, and that Petitioner would receive a maximum sentence of thirty years' imprisonment where the solicitor requested consecutive sentences which the judge imposed in excess of thirty years' imprisonment.

Relevant Facts

On December 16, 2011, police officers responded to a call at a "Johnson's Store" in Richland County. App. 15, l. 22 – 16, l. 3. Two individuals, Harp and Goodson, said they were robbed by an unknown individual with a handgun. App. 16, l. 13 – 17, l. 5. They alleged that the individual shot at them as they walked away after the robbery. App. 17, ll. 11 – 14.

The police used a dog to track the unknown individual. App. 18, l. 10 – 19, l. 1. The officers and dog searched the area and when they found the suspect, he allegedly shot at them and fled. Id.

The search continued and the dog found the suspect again, who fired more shots at the dog and at pursuing officers before continuing his flight. Id. A "significant break in time" occurred, many officers from the area came to the scene to search for the suspect. App. 24, ll. 16 – 25. The police dog suffered two gunshot wounds and died as a result. App. 23, l. 18 – 24, l. 4.

The police found Petitioner sleeping in the "laundry room" or "shed" at a nearby house. App. 25, ll. 7 – 18. He was found with a gun that allegedly matched the shell casings found at the scene. App. 25, ll. 19 – 23. Petitioner's clothes also matched the description given to police of the armed robber. App. 25, l. 24 – 26, l. 3.

During the guilty plea, the solicitor repeatedly asked the court to sentence Petitioner to “a consecutive sentence. App. 39, ll. 18 – 21; App. 61, ll. 3 – 5. He stated, “I would respectfully ask that you sentence him to consecutive time on these charges.” App. 41, ll. 3 – 7.

Petitioner testified at his PCR hearing that he pled guilty because plea counsel told him that the solicitor would not recommend consecutive sentences and that the maximum sentence he could receive if he pled guilty was thirty years’ imprisonment. App. 94, l. 17 – 95, l. 19; App. 96, l. 24 – 97, l. 9; App. 100, l. 17 – 101, l. 7. Petitioner stated he would not have pled guilty had he known that he could have received consecutive prison sentences that increased his maximum potential sentencing exposure beyond thirty years’ imprisonment. App. 98, l. 22 – 99, l. 14; App. 100, ll. 6 – 11; App. 102, ll. 1 – 8; App. 113, ll. 18 – 25.

Plea counsel testified that it was “essentially a straight up plea.” App. 117, l. 18 – 118, l. 17. She stated that the solicitor told her, “he would still only be asking for, you know, around 25 – 35 years.” Id. Plea counsel purported that Petitioner may have been “confused” as to his sentencing exposure, but that she informed him of the plea negotiations with the solicitor and that “there was no formal recommendation in terms of the plea offer.” App. 118, ll. 14 – 17.

However, plea counsel explained that she thought the solicitor’s comments during the plea hearing “made the judge think they were asking for 155 years (a maximum sentence).” App. 129, ll. 2 – 12. Although the solicitor told plea counsel that he would request 25 – 35 years, she did not expect him to simply request consecutive sentences. App. 121, l. 10 – 122, l. 10.

Plea counsel filed a motion to withdraw and a motion to reconsider Petitioner’s sentence because the solicitor’s comments were, “not what [she] anticipated him asking for,” and could have wrongfully elongated Petitioner’s sentence. App. 128, l. 11 – 129, l. 1. Plea counsel believed that “there was at least an argument [that Petitioner had] detrimental reliance,” because

the solicitor's sentencing request at the guilty plea could be interpreted as requesting that Petitioner be sentenced to up to 155 years' imprisonment. App. 130, l. 18 – 132, l. 7.

PCR counsel explained to the PCR court that Petitioner did not understand, "what he was giving up... and the amount of time he was exposed to," before pleading guilty. App. 138, l. 18 – 140, l. 10. She stated that Petitioner thought his guilty plea result in a thirty-year sentence for all of his pending charges. Id.

Discussion

Petitioner testified that his guilty plea was induced by plea counsel's erroneous advice that he would not receive more than thirty years' imprisonment if he pled guilty because the solicitor would not recommend a sentence over thirty years' imprisonment during the guilty plea hearing. App. 94, l. 17 – 95, l. 5; App. 113, ll. 23 – 25. That was a false promise, and Petitioner relied on that promise when he pled guilty. App. 100, l. 6 – 101, l. 7. As a result of following plea counsel's erroneous advice, Petitioner was sentenced to a term of imprisonment five years longer than he anticipated. Id.

Petitioner testified that as we went into the plea hearing he thought the maximum sentence he could receive was thirty years' imprisonment, had Petitioner known his potential sentencing exposure was 155 years' imprisonment he would have proceeded to trial. App. 102, l. 1 – 103, l. 6. Therefore, plea counsel provided ineffective assistance and that ineffective assistance prejudiced Petitioner.

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. “[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).

“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, 466 U.S. at 686. 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. 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.

In Missouri v. Frye, 566 U.S. 134 (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 (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).

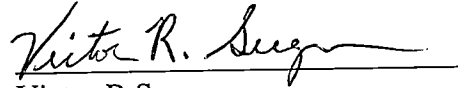
“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275 (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 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

In the instant case Petitioner’s guilty plea was induced by plea counsel’s erroneous sentencing advice. App. 94, l. 17 – 95, l. 5. Due to assurances from plea counsel, Petitioner believed that the solicitor would stand silent at the guilty plea hearing and his maximum sentencing exposure would be thirty years’ imprisonment. Id.; App. 113, ll. 23 – 25; see Alexander v. State, 303 S.C 539, 543, 402 S.E.2d 484, 485 – 486 (1991).

Contrary to those erroneous assurances, the solicitor *did not* stand silent during sentencing and Petitioner *did* receive a sentence five years longer than the thirty years' imprisonment that plea counsel assured he would receive. App. 64, l. 20 – 65, l. 1; App. 100, l. 17 – 101, l. 7. The solicitor repeatedly requested that the plea court sentence Petitioner to consecutive sentences. App. 39, ll. 18 – 21; App. 41, ll. 3 – 7; App. 61, ll. 3 – 5. Petitioner was then sentenced to consecutive sentences that amounted to thirty-five years' imprisonment. App. 64, l. 20 – 65, l. 1. Accordingly, plea counsel's ineffective assistance prejudiced Petitioner because he would not have pled guilty but for plea counsel's erroneous sentencing assurances. App. 102, ll. 1 – 8.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests this Court grant certiorari to allow for full briefing on this issue.

A handwritten signature in cursive script, reading "Victor R. Seeger", written over a horizontal line.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of December, 2019.

STATE OF SOUTH CAROLINA
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MAURICE A. MCCREARY,

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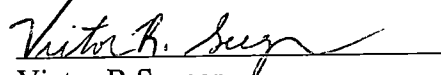
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Maurice A. McCreary states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Clifton Newman, which was held on December 12, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He 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 him as counsel for Maurice A. McCreary.

Respectfully Submitted,

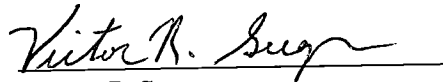


Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of December, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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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Appellate Defender

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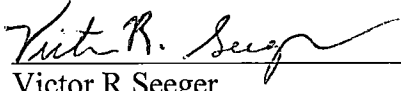
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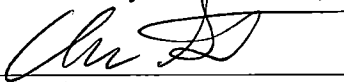
CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Maurice A. McCreary, #345340, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of December, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029