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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Thomas A. Russo, Circuit Court Judge

ORIGINAL

TAMARCUS LONG,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-000768

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel failed to advise Petitioner that he would have to serve at least eighty-five percent of his sentence before being eligible for parole, and where Petitioner was prejudiced by counsel's deficient performance because he would not have pled guilty if counsel had properly advised him concerning his parole eligibility?

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Petitioner in June 2016 for possession with intent to distribute marijuana and possession with intent to distribute marijuana within one half mile of a school or park, and in December 2016 for distribution of marijuana and distribution of marijuana within one half mile of a school or park. App. 90-97. On June 8, 2017, Petitioner pled guilty as indicted before the Honorable R. Keith Kelly. App. 1. Assistant Solicitor Grady Anthony represented the state, and John Reckenbeil represented Petitioner. App. 1.

Pursuant to the state's sentence recommendation, Petitioner was sentenced to twelve years imprisonment for possession with intent to distribute marijuana, twelve years concurrent for distribution of marijuana, and ten years concurrent for each of the proximity charges. App. 14, ll. 8-16.

On April 12, 2018, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 16-22. The state filed a return to this application on August 3, 2018. App. 23-29. An evidentiary hearing was held on March 4, 2019 before the Honorable Thomas A. Russo. App. 30. Assistant Attorney General Jacob Isenberg represented the state, and Rodney Richey represented Petitioner. App. 30.

Petitioner testified at the hearing that plea counsel never told him before he pled guilty that he would have to serve at least eighty-five percent of his sentence before being eligible for community supervision or parole. App. 42, l. 8 – 43, l. 5. Petitioner asserted he would not have pled guilty as indicted if his counsel had properly advised him on parole eligibility. App. 49, l. 19 – 50, l. 6.

John Reckenbeil, Petitioner's plea counsel, testified that he advised Petitioner before he pled guilty that he would have to serve at least eighty-five percent of his sentence before being

eligible for parole. App. 51, ll. 12-21. Reckenbeil explained that years earlier he received a “cheat sheet” from the solicitor’s office in Spartanburg that identified which offenses required a defendant to serve eighty-five percent of his sentence before being eligible for parole. He asserted, “And it’s got the drug distribution third underlined, which would mean it’s an 85 percenter. And so there’s no question. I’ve used this like the Gospel. I would of told my client [Petitioner] that it’s 85 percent.” App. 63, ll. 6-16.

Reckenbeil testified that the state served Petitioner with notice of its intent to seek life without parole based on Petitioner’s two prior convictions for possession with intent to distribute marijuana within one half mile of a school or park. App. 52, ll. 22-24. Because Reckenbeil did not believe Petitioner had any “credible defense” to the charges and Petitioner was facing life without parole, he advised Petitioner to plead guilty. App. 54, l. 13 – 58, l. 16; App. 59, l. 16 – 60, l. 9; App. 61, ll. 4-10. In his opinion, it would have been a “massive risk” for Petitioner to reject the state’s offer and proceed to trial. App. 54, l. 24 – 55, l. 8; App. 64, ll. 2-23.

By order filed May 3, 2019, the PCR judge denied Petitioner relief. App. 79-89. The judge found plea counsel “credibly testified he customarily provides clients with a sentencing explanation sheet, which includes the mandatory 85% minimum incarceration for third offense sentences” and that “he provided this sentencing explanation sheet to [Petitioner] before the plea hearing.” App. 87. The judge also found credible counsel’s testimony that he “verbally explained the sentence details to [Petitioner], including the 85% minimum incarceration requirement before eligibility for release.” App. 87. Consequently, the judge concluded Petitioner failed to prove counsel was deficient. App. 87.

Because Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made due to plea counsel’s failure to advise Petitioner that he would have to serve at least eighty-five

percent of his sentence before being eligible for parole, and since Petitioner was prejudiced by counsel's deficient performance because he would not have pled guilty if counsel had properly advised him on his parole eligibility, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel failed to advise Petitioner that he would have to serve at least eighty-five percent of his sentence before being eligible for parole, and where Petitioner was prejudiced by counsel's deficient performance because he would not have pled guilty if counsel had properly advised him concerning his parole eligibility.

Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to plea counsel's failure to properly advise Petitioner that he would have to serve at least eighty-five percent of his sentence before being eligible for parole or community supervision. Petitioner was prejudiced by counsel's deficient performance because he testified he would not have pled guilty if he would have known he was going to have to serve at least eighty-five percent of his sentence. Because the offenses were classified as nonviolent, Petitioner assumed he would be eligible for parole earlier and counsel did nothing to clarify this misunderstanding before Petitioner pled guilty.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). 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 on as having produced a just result." Id. at 686; 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.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "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." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); See 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)).

"Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). "The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers." Pittman, 337 S.C. at 599, 524 S.E.2d at 624 (citing Boykin, 395 U.S. 238). Additionally, "a defendant entering a guilty plea 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." Id. (citing Boykin, 395 U.S. 238).

“[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing.” Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)) (alteration in original). “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) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Petitioner did not knowingly, intelligently, and voluntarily plead guilty due to plea counsel’s deficient performance. Petitioner only pled guilty because counsel failed to advise him concerning parole eligibility. Specifically, counsel never told Petitioner he would have to serve eighty-five percent of his sentence before being eligible for release. Petitioner assumed because the offenses were classified as nonviolent that he would be eligible for parole before serving eighty-five percent of his sentence. Counsel did nothing to clarify Petitioner’s misunderstanding.

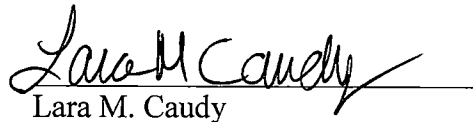
Petitioner was prejudiced by counsel’s deficient performance because he testified he would not have pled guilty if he would have known he had to serve eighty-five percent of his twelve year sentence before being eligible for parole or community supervision. See Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (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.”).

Because Petitioner did not knowingly, intelligently, and voluntarily plead guilty, this Court should reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully Submitted,

A handwritten signature in black ink, reading "Lara M. Caudy", written over a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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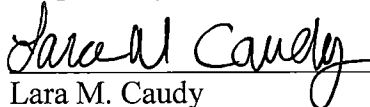
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tamarcus Detrelle Long states:

1. She is an 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, which was held on March 4, 2019 before the Honorable Thomas A. Russo, and, in her opinion, seeking certiorari from the order of dismissal is without merit.
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 Tamarcus Detrelle Long.

Respectfully Submitted,



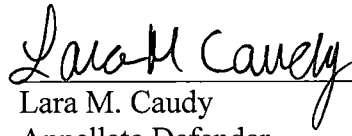
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of December, 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."


Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent
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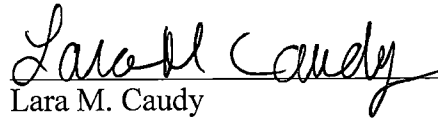
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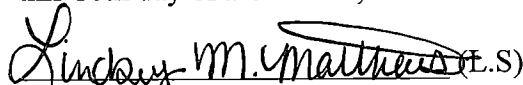
CERTIFICATE OF SERVICE

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 have 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 Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served upon Tamarcus Detrelle Long, #305486, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 16th day of December, 2019.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of December, 2019.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.