ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Fairfield County

Paul M. Burch, Circuit Court Judge

RANDEVIOUS H. SIMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001318

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

INDEX

ISSUE PRESENTED

Did Petitioner enter an involuntary, unknowing, and unintelligent guilty plea because plea counsel provided ineffective assistance by assuring Petitioner that the facts giving rise to companion charges from a different county would not be considered by the judge in fashioning Petitioner's sentence, but the judge did consider the facts of the companion charges and indicated those facts influenced her decision to sentence Petitioner on the high end of the negotiated cap?

STATEMENT

On July 23, 2011, sixteen-year old Petitioner got into a car in his home county of Newberry with some of his relatives in order to get a ride to his uncle's house. App. 55, ll. 10-11; App. 56, ll. 1-4; App. 92, ll. 20-21. Unaware that his relatives were planning a robbery, Petitioner agreed to ride with them prior to being taken to his uncle's house. App. 56, ll. 4-8. The group went to Fairfield County where Petitioner learned the group planned to rob a drug dealer. App. 56, ll. 11-12. Petitioner was unarmed, but one of the individuals gave him a pistol. App. 56, ll. 15-19. The group was unable to find their intended target.

Leon Wright owned a store in Fairfield County. App. 36, ll. 11-19. Around 9:15 p.m. on July 23, 2011, Wright left his store to go home, which was located approximately two tenths of a mile from his store. App. 36, ll. 11-19. The following day, Wright's sister found him dead in his home. App. 37, ll. 3-6.

Eventually, Petitioner and the other individuals in the car were charged with Wright's death. The police theorized that when the individuals entered the house, Wright was standing near the bedroom door with an unloaded rifle. App. 37, ll. 19-24. A bullet was fired that ultimately struck and killed Wright. App. 37, l. 24 – App. 38, l. 8. The police determined Petitioner's co-defendant, Christopher Williams, fired the fatal shot. App. 41, ll. 10-15; App. 56, ll. 23-25. However, Petitioner admitted to police that he was armed with a .22 gun and that he fired a shot outside the home while running away. App. 41, ll. 16-23; App. 57, ll. 1-4. Although Wright had $14,000, the men did not get any money. App. 37, ll. 12-14; App. 41, ll. 23-25.

On October 4, 2011, a Fairfield County grand jury indicted Petitioner for murder (2011-GS-20-409), attempted armed robbery (2011-GS-20-411), burglary in the first degree (2011-GS-20-412). Tyree Lee was appointed represent Petitioner on these charges. App. 91, ll. 23-25; App.

108, ll. 18-20. About a month after his arrest, Petitioner was released on bond on the Fairfield County charges. App. 55, ll. 12-13; App. 92, ll. 9-13.

On October 22, 2013, J.W. Bookman, a drug dealer, was approached by three men, one of whom was later identified as Petitioner, who were armed and demanding money. App. 34, ll. 11-18; App. 35, ll. 1-3; App. 117, ll. 17-20. Bookman handed over $800. App. 34, l. 19. Thereafter, the men took Bookman inside his residence. App. 34, l. 19. When a struggle ensues, the men run out of the house. App. 34, ll. 20-22. Bookman chased the men, and one of them fired back at him, but did not hit him. App. 34, ll. 22-25.

On October 26, 2014, Petitioner was the passenger in a car stopped at a public safety checkpoint in Newberry County. App. 35, ll. 7-13. The officers conducting the checkpoint allegedly smelled marijuana in the car. App. 35, l. 15. Upon checking the people in the car, the police identified Petitioner as having an outstanding warrant for the robbery in Newberry County. App. 35, ll. 16-18. During a search of the car, the police found a .380 pistol. App. 35, ll. 22-23. Petitioner claimed ownership of the gun. App. 35, ll. 23-24.

On January 5, 2015, a Newberry County grand jury indicted Petitioner for armed robbery (2015-GS-36-0026) and unlawful carrying of a handgun (2015-GS-36-0029). On May 1, 2015, a Newberry County grand jury indicted Petitioner for possession of contraband in a county jail (2015-GS-36-187). App. 139-140; App. 142-143; App. 145-146; App. 148-149; App. 151-152; App. 154-155. Charles Verner was appointed to represent Petitioner on the Newberry County charges. App. 94, ll. 11-12; App. 100, ll. 17-20. Verner met with Petitioner once. App. 101, ll. 4-8. Later, when he was asked about the meeting, Verner did not recall it, but he indicated that he "would have read the incident report and the witness statements and what not to" Petitioner. App. 101, ll. 7-17. When Verner learned of the Fairfield County charges, he informed Petitioner that

the state was "not going to do anything with [him] in Newberry until [he got] the murder charge disposed of, and depending on how things [went] with that murder charge, [he felt] pretty sure that the Newberry charges [would] run in to the sentence." App. 101, ll. 19-24.

On May 18, 2015, Lee emailed Verner to let him know that Petitioner was on an upcoming trial docket in Fairfield County. App. 102, ll. 17-19; App. 109, l. 24 – App. 110, l. 2. Further, Lee explained that a plea offer had been extended and Lee "was inclined to run the Newberry charges in with the plea deal." App. 102, ll. 19-23. Although Verner understood Lee was negotiating on Petitioner's behalf concerning the Fairfield and Newberry charges, Verner did not share the discovery with Lee. App. 103, ll. 21-23. Verner believed the Newberry solicitor had taken the case file to Fairfield County and that Lee was going to go over the Newberry charges with Petitioner if needed. App. 103, l. 25 – App. 104, l. 3.

Lee explained that he strongly encouraged Petitioner to accept the plea offer so that he could avoid the Fairfield County charges acting as a first strike to the Newberry County charges, which would have exposed Petitioner to a potential life without parole sentence. App. 110, ll. 2-25. According to Lee, if Petitioner were to enter guilty pleas to all charges at the same time, then all would count as a single strike. App. 111, ll. 1-2.

Lee did not have "a great deal" of conversation with Petitioner regarding the underlying facts of the Newberry offenses. App. 111, ll. 18-22; App. 118, ll. 20-24. Lee did not have "a full set of the Newberry discovery." App. 112, ll. 8-9. Lee reviewed the incident reports, which was all he had. App. 112, ll. 9-10; App. 115, ll. 19-23; App. 118, l. 25. During their limited discussion of the Newberry County charges, Petitioner told Lee he believed the state would not be able to prove his guilt beyond a reasonable doubt. App. 111, ll. 22-24; App. 117, ll. 10-16. Lee advised

Petitioner to enter the guilty plea to avoid having his Fairfield County charges be considered a strike. App. 111, l. 25 – App. 112, l. 3.

Petitioner accepted the state's plea offer, which provided for (1) the murder charge to be reduced to voluntary manslaughter, (2) a negotiated cap of thirty years for burglary in the first degree, and (3) for all sentences to be served concurrently. App. 17, ll. 9-23; App. 95, l. 15 – App. 96, l. 6; App. 118, ll. 1-7. On June 15, 2015, Petitioner appeared in Fairfield County before the Honorable Diane Goodstein to enter guilty pleas to the charged offenses. App. 1. Riley Maxwell represented the state, and Tyree Lee represented Petitioner. App. 1. During the hearing, Petitioner waived venue regarding the Newberry County charges so that both sets of charges could be resolved simultaneously. App. 13, l. 1 – App. 14, l. 20. During the guilty plea, it was revealed that Petitioner's co-defendant, Christoper Williams, who was eighteen-years old at the time of the shooting, fired the fatal shot. App. 54, ll. 16-20. Williams entered a guilty plea to murder on August 9, 2012. App. 54, ll. 18-20. Williams received a thirty-year sentence. App. 54, ll. 20-21.

During the sentencing portion of the hearing, Judge Goodstein explained that what concerned her the most about Petitioner was that while he was out on bond, he was involved in additional crimes in Newberry County. App. 62, ll. 19-21. The Newberry incident was "so troubling" because Petitioner was "armed again and someone else was robbed." App. 62, ll. 21-22. Thereafter, Judge Goodstein sentenced Petitioner to thirty years imprisonment for voluntary manslaughter and burglary first degree, fifteen years imprisonment for attempted armed robbery and common law robbery, and one-year imprisonment for unlawful carrying of a handgun and the contraband. App. 63, ll. 5-23; App. 64, ll. 2-4. She ordered the sentences to be served concurrently. App. 63, ll. 23-24; App. 141; App. 144; App. 147; App. 150, App. 153, App. 156.

On July 12, 2016, Petitioner filed an application for post-conviction relief (PCR). App. 66-72. The state responded by way of a return and partial motion to dismiss. App. 73-80. Thereafter, Petitioner filed an amended PCR application through counsel, Ashley McMahan. App. 81-83. The matter proceeded to an evidentiary hearing on January 22, 2019, before the Honorable Paul M. Burch. App. 84. Samuel Key represented the state, and Nathan J. Sheldon represented Petitioner. App. 84. During the hearing, Sheldon made clear that Petitioner was pursuing relief "based off the lack of understanding of the impact the Newberry charges had on the Fairfield sentence." App. 88, ll. 17-21; App. 89, ll. 3-6. By an order filed June 18, 2019, Judge Burch denied Petitioner relief from his convictions and sentences. App. 129-138.

On August 5, 2019, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Petitioner entered an involuntary, unknowing, and unintelligent guilty plea because plea counsel provided ineffective assistance by assuring Petitioner that the facts giving rise to companion charges from a different county would not be considered by the judge in fashioning Petitioner's sentence, but the judge did consider the facts of the companion charges and indicated those facts influenced her decision to sentence Petitioner on the high end of the negotiated cap.

Relevant facts

Petitioner explained that during the plea negotiation process, he was assured that the Newberry charges would not be "brought up" during the guilty plea hearing before Judge Goodstein. App. 96, ll. 13-16. While he knew he was pleading guilty to those charges, he believed the facts underlying the Newberry County charges would not be used to influence the judge's sentencing decision. App. 96, ll. 17-20; App. 98, ll. 2-6; App. 98, l. 22 – App. 99, l. 3. However, the facts of the Newberry cases were discussed extensively by the solicitor during the guilty plea, and the judge's remarks revealed her decision to sentence Petitioner to the maximum sentence under the negotiated cap was largely influenced by the facts of the Newberry charges. App. 96, l. 20 – App. 97, l. 1; App. 99, ll. 4-7. Petitioner indicated that if he had known the facts giving rise to the Newberry County charges would be mentioned by the state and used to influence the judge's sentencing decision, he would not have entered guilty pleas to those charges. App. 99, ll. 20-23. Petitioner would have insisted on a trial for those charges. App. 99, ll. 20-23.

Contrary to Petitioner's contentions, Lee was "pretty sure [he] explained to [Petitioner] that the judge would take [the Newberry charges] into consideration; that that might increase what he was going to get if he just pled to the one." App. 113, ll. 3-4. Further, Lee claimed he told Petitioner the Newberry charges "might increase what he was going to get if he just pled to the

one." App. 113, ll. 4-6. Based on what Judge Goodstein said during the plea hearing, Lee believed the Newberry charges "factored into" her giving Petitioner the maximum sentence allowed under the negotiation. App. 114, ll. 3-4.

Following the PCR hearing, Judge Burch found "Lee credibly testified he approached Verner about dealing with the Fairfield County and Newberry County charges together because [Petitioner] pleading to all charges at the same time meant [Petitioner] was only subject to one strike appearing on his record." App. 136-137. Additionally, Judge Burch found "Lee credibly testified he devised this approach to keep [Petitioner] from being exposed to LWOP." App. 137. Judge Burch also found Verner told Petitioner the Fairfield County charges "were much more serious than the Newberry County charges." App. 137.

Judge Burch found "reasonable both Lee and Verner's representation" of Petitioner. App. 137. According to Judge Burch, Petitioner "knew the exposure he faced if he proceeded to trial on the charges, which is why he chose to plead guilty so the charges would run concurrent as negotiated." App. 137. Judge Burch found Petitioner "failed to show any prejudice resulted from either Lee or Verner's allegedly deficient representation." App. 135. He found Petitioner's testimony was "not credible" that "he was told the Newberry County charges would not be brought up during the plea hearing." App. 136. Thus, Judge Burch found "Lee and Verner were not ineffective." App. 137.

Discussion

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A

reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also 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.

In the context of a guilty plea, a petitioner must show that counsel was ineffective and that there is a reasonable probability but for counsel's errors, he would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); 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).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969); see also Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975).

In order for a defendant to knowingly and voluntarily plead guilty, the defendant must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). The judge must question the defendant about the possible punishment that could be imposed. Id. at 434-435. This Court has held that a defendant 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." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999)(citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A guilty plea is rendered involuntary, unknowing, and unintelligent when a defendant pleads guilty to a crime without knowing the direct consequences of the guilty plea. Hazel, 275 SC at 394, 271 S.E.2d at 603.

This Court has held errors in sentencing advice entitle defendants to relief. In Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 152-153 (1991), this Court held a defendant's guilty plea was not intelligently and voluntarily made in light of erroneous advice given by counsel. Defense counsel advised the defendant that he would be sentenced to life without parole if he were convicted of both armed robbery counts, which was in error. Id. at 375, 401 S.E.2d at 152. The truth was that if he were convicted "he *may* face a sentence of seventy-five years without parole, but could face a sentence as short as ten years." Id. at 376, 401 S.E.2d at 152-153 (emphasis in original). This Court found trial counsel's incorrect advice was not within the range of competence demanded of attorneys in criminal cases. Id. at 376, 401 S.E.2d at 152. This Court further found that the defendant suffered prejudice where he testified, he would not have pled guilty absent the erroneous advice, the real distinction between the penalty he faced and the advice given, and his steadfast maintenance of his innocence. Id. at 376, 401 S.E.2d at 153.

Similarly, this Court held a defendant was entitled to a new trial based upon erroneous sentencing advice of defense counsel in Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991). According to the testimony presented during the post-conviction relief hearing, defense counsel advised the defendant that he faced one hundred years on the four indictments. However, this Court determined the defendant actually faced a seven to twenty-five-year sentence on one count and a twenty-five-year sentence on the other count as the indictments contained overlapping and greater and lesser charges. Id. at 542-543, 402 S.E.2d at 485. Due to this erroneous advice, this Court concluded that counsel provided deficient advice, satisfying the first prong of the test. Turning to the second prong, this Court concluded the defendant suffered prejudice in light of his testimony that he would not have entered a guilty plea if defense counsel had not misinformed him. Id. at 543, 402 S.E.2d at 485-486.

In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), this Court granted the defendant post-conviction relief where defense counsel provided incorrect advice concerning parole eligibility. Defense counsel advised the defendant that he would be eligible for parole after service of ten years if he pled guilty to common law murder. Id. at 457, 377 S.E.2d at 339. Defense counsel explained to the defendant that statutory murder permitted parole after twenty years, but common law murder permitted parole after ten years. Id. As a result of this erroneous advice, the defendant entered a guilty plea. Id. at 457-458, 377 S.E.2d at 339. This Court held counsel's advice was erroneous and fell below the level of competence expected of attorneys in criminal cases because there was no distinction between statutory and common law murder. Id. at 458, 377 S.E.2d at 339.

Moving to the second prong, this Court concluded Hinson suffered prejudice where the he testified his plea was induced by the erroneous advice, and defense counsel admitted he could not recall the advice given, but the co-defendant's counsel recalled the erroneous advice. Id. In Hinson,

the evidence was "uncontroverted that Hinson entered his plea in expectation of receiving the lesser period for parole eligibility." Hinson, 297 S.C. at 458, 377 S.E.2d at 339.

Plea counsel provided ineffective assistance by assuring Petitioner that the facts giving rise to the Newberry County charges would not be considered by the plea judge in fashioning her sentence. When the plea judge imposed the maximum sentence permitted under the negotiation, she indicated she was influenced greatly by the facts underlying the Newberry County charges. In fact, she stated that the Newberry charges were of great concern to her. Pursuant to the terms of the negotiated guilty plea, Petitioner faced a sentence between fifteen and thirty years. At the time of the most serious offenses – the Fairfield County charges – Petitioner was a mere sixteen years old. It was undisputed that he was not the triggerman – he did not fire the fatal shot.

While Petitioner's testimony that he was assured the facts of the Newberry case would not be considered by the judge seems incredulous at first blush, Petitioner's belief was not unreasonable in light of the other facts presented. Petitioner's lawyer on the Newberry charges was not present for the guilty plea. Petitioner's lawyer on the Newberry charges only met with him once. Petitioner's lawyer on the Newberry charges only reviewed the incident report and indictments with him. There was no in-depth review of the case, and there was no independent investigation. In fact, Petitioner's lawyer on the Newberry charges merely advised him that he needed to handle the Fairfield charges before he could move forward with the Newberry case. Likewise, Petitioner's lawyer on the Fairfield charges did not review the discovery materials for the Newberry case. He never had the defense file, and relied totally on what was presented by the Newberry solicitor at the Fairfield guilty plea. It was not unreasonable for Petitioner to believe that the facts of the Newberry case would not be discussed during the guilty plea because the facts had never been discussed with him.

In light of his young age and lesser culpability, Petitioner's expectation of receiving a sentence on the low end of the negotiation was entirely reasonable. This was especially true in light of the fact that no one ever provided Petitioner with a full explanation of the Newberry charges by reviewing discovery or conducting an independent investigation. Thus, Petitioner's testimony that plea counsel advised him that the facts underlying the Newberry charges would not be considered by the judge regarding sentencing was in line with how the Newberry charges had been treated by all involved except the judge – as an afterthought, as extraneous information, as unimportant. However, the judge treated the Newberry charges as very consequential and relied upon those charges in deciding to sentence Petitioner to thirty years in prison.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and does not order further briefing, Petitioner respectfully requests this Court reverse the PCR court, hold plea counsel provided ineffective assistance, and grant Petitioner a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Fairfield County

Paul M. Burch, Circuit Court Judge

RANDEVIOUS H. SIMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Randevious Hi-Keem Sims 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 before Judge Paul M. Burch, which was held on January 22, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

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

Therefore, counsel requests that the Court relieve her as counsel for Randevious Hi-Keem Sims.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of February, 2020.

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."

Susan B. Hackett
Appellate Defender

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ATTORNEY FOR PETITIONER

This 10th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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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 Samuel Key, 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 Randevious Hi-Keem Sims, #364413, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 10th day of February, 2020.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of February, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028