

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

JAN 14 2019

S.C. SUPREME COURT

DARNELL KHAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001282

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
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT

Petitioner’s guilty plea was freely, knowingly, and voluntarily entered where the solicitor requested the maximum sentence of the negotiated sentence twenty to thirty-year range, where plea counsel failed to object to the solicitor’s request, and where Petitioner was under the impression the solicitor would not request the maximum sentence of thirty years’ imprisonment.....4

Relevant Facts4

Discussion6

CONCLUSION10

PETITION TO BE RELIEVED AS COUNSEL11

ISSUE PRESENTED

Whether Petitioner's guilty plea was freely, knowingly, and voluntarily entered where the solicitor requested the maximum sentence of the negotiated sentence twenty to thirty year range, where plea counsel failed to object to the solicitor's request, and where Petitioner was under the impression the solicitor would not request the maximum sentence of thirty years' imprisonment?

STATEMENT

During the June 2011 term, the Richland County Grand Jury indicted Petitioner for attempted armed robbery, first degree burglary, and murder. App. 84 – 89.

On May 22, 2014, Petitioner pled guilty to the lesser included offense of voluntary manslaughter, first degree burglary, and attempted armed robbery, in front of the Honorable Brooks P. Goldsmith. App. 1. Mark Sawyer represented Petitioner. Id. Dan Goldberg represented the state. Id.

Judge Goldsmith found Petitioner made his guilty plea freely and voluntarily. App. 10, ll. 14 – 19. Judge Goldsmith deferred sentencing. App. 10, l. 19.

In a sentencing hearing on February 10, 2015, before the Honorable Allison R. Lee, Petitioner explained that he and the state negotiated an agreement to a sentencing range between twenty and thirty years' imprisonment. App. 13; App. 17, ll. 5, ll. 7 – 14. William Hodge represented Petitioner. App. 13. Dan Goldberg represented the state. Id.

Judge Lee sentenced Petitioner to twenty-five years' imprisonment for voluntary manslaughter, twenty years' imprisonment for attempted armed robbery, and twenty years' imprisonment for burglary in the first degree. App. 33, l. 13 – 34, l. 1.

Petitioner filed an application for post-conviction relief (PCR) on October 14, 2015. App. 36 – 40. Petitioner alleged that his guilty plea was involuntary and that his motion to relieve counsel was wrongfully denied. App. 37. On April 25, 2016, the state filed its Return. App. 41 – 46.

On July 21, 2017, Petitioner's PCR hearing was held in front of the Honorable G. Thomas Cooper. App. 48. Jonathon Waller represented Petitioner. Id. Jessica Kinard represented the state. Id.

Judge Cooper filed an order of dismissal on June 5, 2018. App. 76 – 83. Judge Cooper found that the state did not breach its plea agreement with Petitioner when the deputy solicitor requested a sentence at the top of the negotiated range. App. 82.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was freely, knowingly, and voluntarily entered where the solicitor requested the maximum sentence of the negotiated sentence twenty to thirty-year range, where plea counsel failed to object to the solicitor's request, and where Petitioner was under the impression the solicitor would not request the maximum sentence of thirty years' imprisonment.

Relevant Facts

The state alleged the facts as follows. On January 27, 2009, Petitioner and two other men attempted to kick in the back door of Jeremy Jamal Scott's residence. App. 5, l. 22 – 6, l. 4. As that was happening, a shot was fired from a handgun from one of the intruders. App. 6, ll. 4 – 7. The bullet struck Mr. James Willie Smith and he died as a result of the injury. App. 6, ll. 7 – 9.

In late 2010, a witness came forward who provided investigators with Petitioner's name as a suspect. App. 6, ll. 13 – 17. As a result of "statements... taken from multiple witnesses," two co-defendants, Starkey and Carlos, were apprehended. App. 6, ll. 17 – 23. Co-defendant Starkey gave a statement to police that implicated Petitioner as being involved in the incident. Id.

Petitioner waived his rights and gave a statement to police admitting his involvement in the robbery as well as firing the one shot into the house before fleeing. App. 6, l. 23 – 7, l. 3. Petitioner was interviewed again in 2011 and gave another statement regarding his involvement in the incident. He told officers that during the incident, he had in his possession a nine-millimeter pistol, the same caliber that killed Smith. App. 7, ll. 3 – 10. Petitioner also implicated his co-defendants in the incident. Id.

At the sentencing hearing on February 10, 2015, the deputy solicitor Dan Goldberg requested that the court sentence Petitioner to the thirty years' imprisonment. App. 26, ll. 12 – 15.

Petitioner testified at his PCR hearing that the solicitor strayed from the negotiated plea by requesting Petitioner be imprisoned for thirty years. App. 55, ll. 1 – 6. Petitioner stated that the solicitor requesting the maximum was not part of the negotiated plea. App. 55, ll. 7 – 8. Petitioner also stated he tried to relieve his plea counsel. App. 56, ll. 17 – 19.

Sentencing counsel failed to inform the sentencing court that the solicitor requesting a thirty-year sentence was in contravention of Petitioner's negotiated agreement. App. 58, l. 25 – 59, l. 9. Due to sentencing counsel's failure to object to the solicitor requesting a thirty-year sentence, Petitioner was sentenced to a longer period of imprisonment than he would have been had sentencing counsel objected.

Sentencing counsel, Hodge, testified at the PCR hearing as well. App. 59, l. 21. Hodge stated that the solicitor was always going intended to ask for a thirty-year sentence for Petitioner and that Hodge was going to argue for a twenty-year sentence. App. 62, ll. 5 – 14. Hodge testified that he was not a party to the original plea agreement. App. 62, l. 24 – 63, l. 6. Therefore, Hodge claimed he was not aware if solicitor's request for a thirty-year imprisonment sentence breached the plea agreement. Id. He also stated there was no written plea agreement in this case. Id.

Plea counsel Sawyer, testified at the PCR hearing. App. 65, l. 24. Sawyer stated that he believed Petitioner understood the plea agreement and the potential sentence he could receive. App. 66, ll. 8 – 21. Sawyer did not remember how the sentencing recommendation got to twenty to thirty years' imprisonment. App. 67, ll. 8 – 22. Sawyer testified that Petitioner never wanted to go to trial. App. 68, ll. 17 – 20. It was Sawyer's recollection that, "there was never any explicit talk about whether or not [the solicitor] would be able to make a recommendation." App. 69, ll. 7

– 9. He stated that he always knew that the solicitor was going to ask for the maximum sentence. App. 68, l. 25 – 69, l. 5.

However, during cross examination, PCR counsel and Sawyer had the following exchange that contradicted his prior assertion:

Q: Mr. Sawyer, if the solicitor said, the State and the Defense have entered into negotiations of 20 to 30 years with the actual number to be left to the discretion of the Court, where does that mention anything about they're going to recommend 30 years?

A: Again, I don't look at it necessarily as a recommendation. I didn't know what [the solicitor] was going to ask for. My understanding and what I told [Petitioner] was that this is the range you could be sentenced in.

App. 70, l. 15 – 71, l. 2. Sawyer admits he did not know what the solicitor was going to ask for and that he never informed Petitioner that the solicitor could, or would, request the maximum sentence. Id.

In the order of dismissal, the PCR court found state did not breach its plea agreement with Petitioner when the deputy solicitor requested a sentence at the top of the negotiated range. App. 82.

Discussion

Petitioner pled guilty because he was under the impression that plea counsel had negotiated a plea agreement where the solicitor would not recommend a sentence and would allow the sentencing court in its discretion to determine Petitioner's punishment. App. 55, ll. 1 – 6; see Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000).

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 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.” Lockhart, supra. 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 v. Washington, 466 U.S. 668, 686 (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.

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.

“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 misrepresentation about the nature of Petitioner’s plea agreement. Plea counsel contradicted himself at the PCR hearing when he testified to both knowing and not knowing that the solicitor

would request the maximum sentence. App. 68, l. 25 – 69, l. 5; App. 70, l. 15 – 71, l. 2. Petitioner was under the impression that he had a negotiated agreement whereby the solicitor would not request a sentence. Id. Moreover, he was under the impression that sentencing would be left to the discretion of the court as there was nothing in the plea agreement that noted the solicitor was going to request a sentence. Id.

Sentencing counsel also failed to bring to the sentencing court's attention that the negotiated agreement between Petitioner and the state required the state to not make a sentencing recommendation. App. 59, ll. 2 – 10; see Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). Sentencing counsel also failed to object to the solicitor's request for a thirty-year prison sentence. Id. Petitioner only pled guilty because plea counsel had Petitioner under the impression that his guilty plea was a negotiated agreement and not an open plea where the solicitor would be able to argue for the harshest possible punishment. App. 55, ll. 1 – 13. Therefore, the PCR court erred when it denied Petitioner's PCR application because Petitioner's plea was involuntarily entered under these circumstances.

CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari should be issued to allow full briefing on this issue.

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

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

DARNELL KHAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

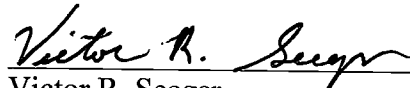
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Darnell Khan 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 G. Thomas Cooper, which was held on July 21, 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 Darnell Khan.

Respectfully Submitted,



Victor R. Seeger

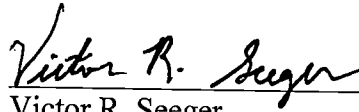
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of January, 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."



Victor R. Seeger
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 14th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

DARNELL KHAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

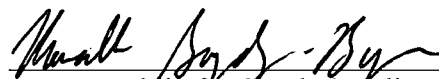
CERTIFICATE OF SERVICE

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 Darnell Khan, #330148, at Tallahatchie County Correctional Facility, 415 U.S. Highway 49 North, Tutwiler, MS 38963, this 14th day of January, 2019.



Victor R Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 14th day of January, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028