

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable William H. Seals, Circuit Court Judge

KENNETH ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001378

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Apr 13 2020

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ISSUE PRESENTED

Did the PCR judge err in finding that plea counsel was not ineffective where he did not deny telling Petitioner that he expected Petitioner to receive a sentence between twenty and twenty-five-years imprisonment where Petitioner in fact received a sentence of forty-five years, since this grossly incorrect sentencing advice constituted ineffective assistance of counsel?

STATEMENT

Petitioner was indicted in February of 2007 by the Marion County grand jury for murder, homicide by child abuse, and criminal sexual conduct with a minor in the first degree. App. 118 – 119. On November 26, 2007, Petitioner pled guilty to homicide by child abuse before the Honorable D. Garrison Hill. App. 1 – 14. The remaining charges against Petitioner were dismissed. Petitioner was represented by Ralph Wilson at his guilty plea. The state was represented by Jack Lawson. App. 1.

The judge accepted Petitioner's guilty plea and sentenced him to forty-five years imprisonment. App. 13, l. 23 – 14, l. 2; app. 28, l. 25 – 31, l. 7. Petitioner's conviction was affirmed on direct appeal pursuant to Anders v. California, 386 U.S. 736 (1967). State v. Robinson, Op. No. 2009-UP-578 (S.C. Ct. App. Filed December 3, 2009).

Petitioner filed his PCR application on August 5, 2010. App. 33 – 51. The state filed its return on February 5, 2018. App. 57 – 62. An evidentiary hearing was held on June 26, 2019 before the Honorable William H. Seals, Jr. App. 63. Petitioner was represented by Jonathan Waller and the state was represented by Samuel Key. App. 63. Testifying at the hearing were Petitioner and his plea counsel, Ralph Wilson. App. 64. The PCR judge denied Petitioner's application for relief. App. 101 – 117.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that plea counsel was not ineffective because he did not deny telling Petitioner that he expected Petitioner to receive a sentence between twenty and twenty-five-years imprisonment because Petitioner in fact received a sentence of forty-five years, since this grossly incorrect sentencing advice constituted ineffective assistance of counsel.

Relevant Facts

Petitioner initially intended to plead guilty under North Carolina v. Alford¹ and had been told by his plea counsel he was facing twenty to twenty-five-years imprisonment. App. 75, ll. 1 – 11. However, the plea judge refused to accept Petitioner’s Alford plea. App. 6, ll. 3 – 13. After the judge refused to accept his Alford plea, Petitioner spoke with counsel about how to proceed. Petitioner maintained that counsel told him that pleading guilty as opposed to guilty under North Carolina v. Alford, would not make a difference in any way. App. 77, ll. 7 – 12. Because of counsel’s assertion that pleading guilty would not make any difference to the outcome of Petitioner’s case, Petitioner continued forward with the guilty plea under the belief that he was facing twenty to twenty-five-years imprisonment. App. 78, l. 1 – 81, l. 1.

Petitioner’s plea counsel testified at the PCR hearing that he did not recall telling Petitioner he was facing twenty to twenty-five-years imprisonment, but he also testified that he could not deny saying it because he did not remember one way or another. App. 87, ll. 20 – 25. Counsel recalled: “If he were pleading to homicide by child abuse, maybe I would say the judge might give him 20 or 25, but . . . judges sometimes are unpredictable about what they do.” App. 87, l. 25 – 88, l. 3. Counsel denied promising that Petitioner would receive a sentence in that

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

range but acknowledged he may have told Petitioner that he expected Petitioner to receive a sentence in that range. App. 87, ll. 7 – 17.

Ultimately, Petitioner was sentenced to forty-five years imprisonment. Petitioner testified that he would have gone to trial if he could have gotten less than forty-five years. App. 70, ll. 23 – 25.

Discussion

In order to prove ineffective assistance of counsel, Petitioner must show 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.” Strickland v. Washington, 466 U.S. 668, 686 (1984); 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.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient,” meaning that it 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) citing Strickland, 466 U.S. at 688. “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) citing Strickland, 466 U.S. at 668.

The same two-part inquiry developed in Strickland also applies to claims of ineffective assistance of counsel which arise in the context of guilty pleas. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). “If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases.” Tollett

v. Henderson, 411 U.S. 258, 266 (1973) (internal quotations omitted). In order to show that plea counsel was ineffective, the defendant must show that he would not have pled guilty but for counsel's deficient performance. Griffin v. State, 361 S.C. 173, 176–77, 604 S.E.2d 394, 396 (2004). “In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

In this case, Petitioner was induced by plea counsel into pleading guilty by counsel's assurances that he would be sentenced in the range of twenty to twenty-five years. Even though counsel maintained at the PCR hearing that he never “promised” Petitioner that he would be sentenced in that range, Petitioner made clear in his testimony that he placed significant weight on counsel's opinions regarding his case. When asked whether Petitioner discussed going to trial with counsel, he recalled: “I’m listening to him because he’s the lawyer. He went to school for law, so he[’s] suppose[d] to know what’s best for me. I’m not a lawyer.” App. 71, ll. 17 – 21.

In explaining his understanding of what was going to take place at his guilty plea, Petitioner stated that he believed he was going to be sentenced in the range of twenty to twenty-five years because that was what counsel had told him. “He’s the lawyer. I’m going off his experience.” App. 75, ll. 1 – 11. Furthermore, after the judge refused to accept Petitioner's plea pursuant to North Carolina v. Alford, Petitioner had an off-the-record discussion with counsel who assured him that nothing would change if Petitioner simply pled guilty. In Petitioner's mind, this meant that he would still be facing a sentence of twenty to twenty-five years. App. 78, ll. 1 – 12. Although Petitioner said that he never told counsel he wanted to go to trial, the reason he gave for not telling counsel he wanted a trial was because of counsel's advice that he plead guilty. App. 81, ll. 2 – 10.

Counsel acknowledged that the original plan was for Petitioner to plead guilty pursuant to Alford. Counsel had suggested to Petitioner that he enter an Alford plea because of Petitioner's reluctance to admit his guilt. App. 90, l. 10 – 91, l. 12. Plea counsel further admitted that when the judge refused to accept Petitioner's Alford plea, he did tell Petitioner that changing the plea to guilty would not change anything other than Petitioner would have to admit guilt on the record. App. 92, l. 15 – 93, l. 1. Although counsel claimed he did not advise Petitioner to plead guilty, he acknowledged that he told Petitioner he would lose at trial and receive a “substantially greater sentence.” App. 88, ll. 18 – 25; app. 92, ll. 1 – 6.

In Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997), this Court found that the defendant's plea was not rendered involuntary despite his PCR testimony that his attorney had induced him to plead guilty by telling him that he would receive a reduced sentence. In Wolfe, this Court found that any misunderstanding regarding the possible sentences on the defendant's part was cured by the plea judge asking the defendant whether he understood that no promises had been made and no sentencing recommendations were binding on the judge. The defendant indicated that he understood this. Additionally, this Court found significant that Wolfe's plea counsel affirmatively stated on the record that he informed Wolfe that he hoped for a reduced sentence at the plea but there was no guarantee of that. Id. at 165, 485 S.E.2d at 370.

Here, Petitioner's counsel made no such affirmative statements on the record and the judge's plea colloquy with Petitioner only included informing Petitioner that there was “no plea agreement” other than his other charges being dismissed. However, Petitioner testified at PCR that plea counsel told him he was “facing” twenty to twenty-five years and counsel did not deny telling Petitioner this. Counsel's advice to Petitioner was highly misleading in that he suggested to Petitioner that he would in fact be sentenced within the range of twenty to twenty-five years.

The fact that counsel did not “promise” Petitioner this was immaterial given the significant amount of weight that Petitioner placed on counsel’s opinion.

Petitioner repeatedly emphasized his reliance on counsel throughout the process because Petitioner was not trained in the law and counsel was trained. Petitioner pled guilty because he was led to believe that pleading was in his best interest *by his counsel*. Furthermore, the plea that Petitioner believed he was agreeing to, based on assurances made by his counsel, was that of a range of twenty to twenty-five years. Clearly, counsel’s assurances were incorrect because Petitioner was sentenced to forty-five years; twenty years more than the maximum he had assured Petitioner he would receive.

In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), this Court found that the defendant established he was prejudiced by his plea counsel’s incorrect advice regarding the possible sentence he was facing at trial. Specifically, the defendant testified at his PCR hearing that he would not have pled guilty but for his counsel’s incorrect advice regarding the sentencing range at trial. Id. at 543, 402 S.E.2d at 485-486. This Court stated: “We find that because trial counsel's improper sentencing advice induced petitioner's guilty plea, this case must be reversed.” Id. Plea counsel in Alexander, admitted at the PCR hearing that he told the defendant that “he faced fifty years without question, possibly one hundred if all four indictments stood, which ‘would have effectively been his life expectancy.’” Id. at 542, 402 S.E.2d at 485. This was incorrect however because the defendant faced only seven to twenty-five years on one count and a mandatory twenty-five on another. As in Alexander, Petitioner’s plea counsel here gave him erroneous information regarding the sentence he was facing, and Petitioner pled guilty as a result of that erroneous information.

In many respects, counsel for Petitioner was in a position of authority because he possessed legal knowledge that Petitioner did not. Because of this, Petitioner relied on counsel's advice that pleading guilty was his best course of action. Counsel's testimony that he did not advise Petitioner to plead guilty is inconsistent with his testimony that he told Petitioner that he would be convicted at trial *and also* that in counsel's experience, defendants who went to trial and lost were punished more severely than if they pled guilty. App. 88, ll. 18 – 25; app. 92, ll. 1 – 6. Counsel specifically admitted that he told Petitioner that if he went to trial and lost, he would receive a “substantially greater sentence.” This can only be interpreted by a criminal defendant as advising him to plead guilty. The PCR judge erred in finding that counsel was not ineffective because counsel made grossly inaccurate assurances to Petitioner which induced Petitioner's guilty plea and thus rendered his plea involuntary. See Hill v. Lockhart, 474 U.S. 52 (1985); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991).

CONCLUSION

Based on the foregoing argument, a writ of certiorari should issue to allow full briefing on the issue.

s/Adam Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2020.

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Counsel for Kenneth Deon Robinson 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 William H. Seals, which was held on June 25, 2019, 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 Kenneth Deon Robinson.

Respectfully Submitted,

s/Adam Ruffin

Adam Sinclair Ruffin

Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2020.

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.”

s/Adam Ruffin_____

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