STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Apr 23 2020

S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

TIMOTHY WRIGHT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001872

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation where counsel was not appointed to represent Petitioner until shortly before trial, and where there was evidence Petitioner was pressured to plead guilty because he believed counsel was not prepared for trial, since this resulted in pleas that were not knowingly, voluntarily, and intelligently tendered?

STATEMENT

In July of 2014, a Charleston County Grand Jury indicted Petitioner for trafficking cocaine. App. 213 – 214. Petitioner was represented on this charge by Leon Stavrinakis. App. 66, ll. 5-25; App. 120, ll. 9-10.

In October of 2015, a Charleston County Grand Jury indicted Petitioner for two counts of distribution of cocaine; one count of trafficking in crack cocaine; and three counts of possession of a stolen firearm. App. 215 – 226. Petitioner was represented on these charges first by Peter McCoy (who was replaced by Dale Cobb), then by Dale Cobb (who retired), and finally by Charles Cochran (who was appointed by the court). App. 7, ll. 12-19; App. 68, l. 11 – 69, l. 3; App. 74, ll. 5-22; App. 78, ll. 22-23; App. 148, l. 18 – 149, l. 4.

Petitioner explained that he tried to retain Mr. Stavrinakis to represent him on his 2015 indictments, but that he could not afford Mr. Stavrinakis' fee. App. 68, ll. 11-20. Petitioner subsequently requested that Mr. Stavrinakis be relieved from representation, and Mr. Stavrinakis was relieved. App. 128, l. 7 – 130, l. 24; App. 1l. 4-5. Petitioner also had a case pending in which he was represented by Jim Smiley. App. 97, ll. 5-17; App. 120, ll. 12-13. Lauren Frierson prosecuted the cases. App. 1.

Petitioner wanted a trial on the 2014 trafficking indictment. App. 68, ll. 3-10.App. 151, ll. 5-6. However, the State did not attempt to try Petitioner's charges chronologically, and instead requested a date certain for trial on one of the 2015 distribution indictments, which involved a videotaped sale of drugs to a confidential informant. App. 131, ll. 2-5; App. 150, ll. 2-7.

When Petitioner sought a bond hearing, a meeting was held in the Honorable R. Markley Dennis, Jr.'s, chambers. The solicitor, Leon Stavrinakis, and Jim Smiley were present. App. 130, ll. 20-25; App. 148, l. 15 – 149, l. 12. At that time, Peter McCoy and Dale Cobb were no longer

representing Petitioner on the 2015 indictments. App. 126, ll. 13-17. Charles Cochran (counsel), who was an Assistant Public Defender with the Ninth Circuit, was asked to attend the meeting, and Judge Dennis appointed Mr. Cochran as Petitioner's counsel in the upcoming distribution trial. App. 148, l. 11 – 150, l. 7.

Counsel would later testify the trial was scheduled for a date certain that was about ninety days out. App. 148, l. 25 – 149, l. 4. Counsel would go on to admit that he had only a "short period of time" to prepare for the trial. App. 149, ll. 6-8.

At the conclusion of the meeting in chambers, Petitioner was brought into court for a bond hearing. App. 149, ll. 9-12. According to counsel, the bond that was set was "astronomical." App. 149, ll. 13-14. Petitioner recalled that his bond was set at fifty million dollars. App. 81, ll. 21-25. Petitioner explained that counsel was unprepared and unable to meaningfully advocate for him at the bond hearing, since counsel had just been appointed. App. 82, ll. 18-20. Petitioner was unable to post bond, and he remained in jail until his trial on allegations of drug distribution began.

At the start of trial about three months later, on February 6, 2017, Petitioner sought a continuance, which was denied. App. 6, l. 5 – 7, l. 19; App. 8, l. 19 – 9, l. 25. Petitioner also sought to have his counsel relieved. App. 10, ll. 18-22. Petitioner told the court he and counsel had argued in the holding cell and he did not believe counsel was representing him to the best of counsel's ability. App. 11, ll. 20-24. Petitioner explained, "Me and my attorney haven't had time to study the case." App. 15, ll. 11-12. "[B]efore my attorney even came and saw me at the county jail he agreed to a trial with [the solicitor] without consulting me or going over the case with me without even—we don't have a strategy . . . We haven't agreed to a strategy together." App. 15,

ll. 12-17. However, the court refused to relieve counsel unless Petitioner agreed to proceed pro se, and Petitioner did not want to go forward without a lawyer. App. 19, ll. 9-21.

Petitioner never did receive a trial on his 2014 or 2015 charges. After the motion to relieve counsel was denied, counsel told the court that Petitioner wished to plead guilty. App. 20, ll. 5-10. The court instructed the solicitor to find out if her supervisor would consent to a plea offer being extended. App. 20, l. 9 – 21, l. 21. Petitioner subsequently pleaded guilty to two counts of trafficking cocaine, second offense; two counts of distribution of cocaine, third offense; and three counts of possession of a stolen firearm, for a negotiated sentence of twenty-five years.[1, 2] App. 25, l. 2 – 27, l. 13.

The court engaged in a plea colloquy with Petitioner and at that time, Petitioner responded that he was truthfully answering the court's questions and wished to plead guilty to the charges. App. 39, ll. 20-22; App. 36, ll. 4-6. After reciting the facts of the cases, the solicitor noted that Petitioner had been in jail for six hundred and forty days. App. 39, ll. 7-8. At the conclusion of the plea colloquy, the court stated that Petitioner's plea was freely, voluntarily, knowingly, and intelligently made, and accepted the plea. App. 41, ll. 7-8; App. 43, l. 25 – 44, l. 1.

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[1] Counsel would later say that he did not remember whether he was appointed to represent Petitioner on either of his trafficking charges. App. 149, ll. 21-24. Nevertheless, counsel said that he took a "universal approach" to plea negotiations. App. 149, l. 21 – 150, l. 21. "Anything that was pending against him would have at least been discussed between us." App. 150, ll. 20-21.

[2] At the plea hearing, the solicitor said that pursuant to the plea agreement, she was dismissing by nolle prosequi three charges: possession with intent to distribute cocaine "proximity"; possession with intent to distribute marijuana; and possession of cocaine. App. 30, ll. 2-5. However, Petitioner later testified that those charges were not dismissed as part of the plea bargain but had been dismissed prior to his plea. App. 97, ll. 2-22.

Petitioner was sentenced to concurrent terms of imprisonment of twenty-five years for trafficking in cocaine, second offense; twenty-five years for trafficking in crack cocaine, second offense; twenty-five years each for two counts of distribution of cocaine, third offense; and five years each for three counts of possession of a stolen firearm. App. 227 – 233; App. 43, l. 25 – 44, l. 11.

Petitioner timely filed an application for post-conviction relief (PCR), alleging ineffective assistance of counsel, and the State made its return. App. 47 – 52; App. 53 – 58. A hearing was held on the matter before the Honorable Michael G. Nettles. App. 59. Petitioner was represented by James Craig. App. 59. The State was represented by Jacob Isenberg and Benjamin Limbaugh. App. 59.

Petitioner explained to the PCR court that he had always wanted a trial on at least one of his charges: the 2014 trafficking indictment. App. 68, ll. 3-10. However, as Petitioner told the PCR court, the State would not set a trial date on the 2014 trafficking, only on the 2015 distribution charges. App. 83, l. 24 – 85, l. 5. Petitioner's counsel testified at the PCR hearing, and he agreed that Petitioner did not want to accept any of the plea bargains offered by the State. App. 150, l. 22 – 151, l. 8.

Petitioner's dissatisfaction and unease with counsel's preparation were apparent at the PCR hearing. Petitioner was dismayed that at the outset of his representation, counsel told the court he could be ready for trial in February, despite the fact that it was already November and counsel had not even met with Petitioner yet. App. 83, ll. 5-12. As seen, counsel testified he only had a "short period of time" to prepare for trial. App. 149, ll. 6-8.

Petitioner testified that he only pleaded guilty to the charges because he was afraid to go to trial "with [counsel] because he wasn't prepared for trial." App. 90, ll. 3-10. Counsel also told

the PCR court that Petitioner did not want to plead guilty to the charges.[3] Nevertheless, counsel claimed that once Petitioner "was up against that wall he finally just decided to go forward with the guilty plea."[4] App. 154, ll. 2-4.

Counsel acknowledged that on the day of trial, he unsuccessfully "asked for a continuance because [Petitioner] really wanted a continuance." App. 166, ll. 19-20. Counsel also acknowledged that that Petitioner was dissatisfied with counsel's trial preparation. App. 167, l. 23 – 168, l. 2. Counsel admitted that he only had the case a "short period of time," but nevertheless claimed, "I felt prepared." App. 168, l. 4. Counsel claimed the case had been on his "front burner." App. 149, ll. 17-20.

However, counsel did agree that he "understood any potential misgivings that [Petitioner] had." App. 168, ll. 6-7. "[G]iven the unusual circumstances his misgivings were very understandable so I thought it was only fair to tell the Court that we did have some grounds for a continuance and asked that [the court] give us more time." App. 168, ll. 12-15.

On October 1, 2019, the PCR court issued an order of dismissal. App. 185 – 212. In its summary of the testimony given at the PCR hearing, the order stated, "[Petitioner] testified he felt pressured by the court to plead guilty. [Petitioner] also testified he believed [counsel] was not prepared to move forward with trial." App. 190 – 191. [Petitioner] testified he was afraid to go to trial with an unprepared attorney." App. 191.

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[3] However, counsel claimed that Petitioner did not want to go to trial and did not want to plead guilty. According to counsel, Petitioner "didn't want to do anything." App. 152, l. 25 – 153, l. 1.

[4] According to counsel, he allowed Petitioner's sister to sit in "the booth" with he and Petitioner when they discussed whether Petitioner should accept the plea offer. App. 155, ll. 21-22. Petitioner was facing a mandatory sentence of life without parole on some of his pending charges, and according to counsel, Petitioner's sister had a "very strong influence" on Petitioner's decision-making. App. 30, ll. 18-22; App. 155, ll. 23-25. Counsel claimed that Petitioner had apparently rejected prior plea offers on his sister's advice and that Petitioner "was literally begging her to let him accept that 25 years." App. 155, l. 25 – 156, l. 5.

The order also cited to counsel's testimony that "this trial was based on video evidence. Therefore, it did not take long to prepare for." App. 195. The order also referred to counsel's testimony that he recalled Petitioner begging his sister to allow him to accept the plea offer. App. 195.

The order of dismissal addressed Petitioner's claim that "he was forced to plea because [c]ounsel had not prepared an adequate strategy for trial." App. 205. However, the order stated that counsel "credibly testified" that he had reviewed the evidence and was pursuing the best strategy available for the defense. App. 205 – 206. The order of dismissal also stated that the trial court had "called out" Petitioner for attempting to delay the process and that Petitioner had not met his burden of producing "credible testimony as to why they needed additional time to prepare." App. 206.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation where counsel was not appointed to represent Petitioner until shortly before trial, and where there was evidence Petitioner was pressured to plead guilty because he believed counsel was not prepared for trial, since this resulted in pleas that were not knowingly, voluntarily, and intelligently tendered.

Evidence was before the PCR court that Petitioner was pressured to plead guilty based on his counsel's lack of time to prepare for trial. Although Petitioner had been in jail for six hundred and forty days, counsel had only a "short period of time" to prepare for trial on very serious charges. The PCR court's decision to deny Petitioner post-conviction relief here was error.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687).

"[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea

process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill*, 474 U.S. at 56. The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969).

Although Petitioner had been in jail for over six hundred days, counsel only had three months to prepare for trial. Rather than an attempt to delay, petitioner reasonably had concerns about counsel's preparedness. Counsel even acknowledged that Petitioner's misgivings about whether he was prepared for trial were understandable. App. 168, l. 6-15. Because Petitioner understandably thought his attorney was not prepared to represent him competently at trial, he thus felt pressured to plead guilty against his will.

The order of dismissal noted Petitioner's testimony that he felt pressured by the court to plead guilty. App. 190. The order also recited Petitioner's testimony that he was "afraid to go to trial with an unprepared attorney," and that he believed counsel "was not prepared to go to trial." App. 190 – 191. However, after citing these facts, the PCR court failed to give them any weight. This was error, since a guilty plea must be knowingly, voluntarily, and intelligently made. *Boykin*, 395 U.S. 238.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of April, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Timothy Montez Wright states:

1. She is 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 Michael G. Nettles, which was held on July 23, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

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 Timothy Montez Wright.

Respectfully Submitted,

s/ Joanna K. Delany
Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of April, 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."

s/ Joanna K. Delany
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