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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable John C. Hayes, Circuit Court Judge

DASHON AMIN GARNER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001535

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding Petitioner's guilty plea knowing and voluntary where Petitioner was induced to plead guilty by plea counsel who erroneously informed Petitioner that he would receive a life sentence if he proceeded to trial?

STATEMENT OF THE CASE

During the late evening hours of December 29, 2014, the Myrtle Beach Police Department received a call about a possible drunk driver. Police located the vehicle, which turned out to be stolen, and began to pursue it. The vehicle was abandoned near Futrell Park and a brief manhunt in that area was conducted. The suspect, who was identified as Petitioner, was located by four officers. As Petitioner fled through the park, he fired several shots at the officers pursuing him and was able to elude capture. App. 9, l. 22-App. 10, l. 11.

Approximately an hour and a half later, in the early morning hours of December 30, 2014, the Myrtle Beach Police Department received a report of a carjacking of a purple Mercedes Benz from a local gas station. The owner of the vehicle, Robbie Buffkin, had been pumping gas when an individual approached him, shot him in the stomach and groin, and stole his vehicle. The purple Mercedes Benz was located by Horry County Police Department and pursued onto a dead-end street. Officers got out of their cars as the stolen Mercedes Benz turned around and drove at them hitting the leg of one officer as he jumped onto the running board of his Tahoe to avoid being run down. As the car approached the officers were able to see inside the vehicle and identified the driver of the Mercedes Benz as Petitioner. App. 10, l. 12-App. 11, l. 9.

Later that same day the Mercedes Benz was found abandoned. Petitioner was eventually arrested and charged with numerous crimes as a result of the evenings incidents. At the time of his arrest Petitioner was in possession of the key to the stolen Mercedes Benz. App. 65, ll. 6-10. Petitioner was also identified by various officers, as well as the victim of the carjacking, as the person involved in the incidents. App. 66, ll. 14-17.

In May of 2015, a Horry County grand jury indicted Petitioner for four counts of attempted murder and one count of carjacking.[1] On February 21, 2017, Petitioner appeared before the Honorable Steven H. John to enter a plea. The state was represented by George DeBusk. Petitioner was represented by Ralph Wilson, Jr. App. 1. Pursuant to the plea agreement Petitioner pled guilty to four counts of assault and battery of a high and aggravated nature, a lesser included offense of attempted murder, and one count of carjacking for a negotiated eighteen-year sentence on all charges, to be served concurrently. App. 2-3. The court accepted the plea and imposed the negotiated eighteen-year sentence.

On January 9, 2018, Petitioner filed a PCR application alleging, inter alia, that he was coerced into entering a guilty plea when plea counsel "threatened him" with a life sentence. App. 20-28. The state filed a return on March 23, 2018. App. 29-37. An evidentiary hearing was convened before the Honorable John C. Hayes, III, on June 20, 2019. The state was represented by Jacob Isenberg. Petitioner was represented by James Falk. App. 38. Petitioner, Ralph Wilson, and Robbie Bufkin[2] testified at the hearing. App. 39.

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1 During the May 2015 term Petitioner was also indicted for three additional counts of attempted murder, failure to stop for a blue light, grand larceny, possession of cocaine, first offense, possession of cocaine base, and two counts of possession of a weapon during the commission of a violent crime. In November 2015, Petitioner was indicted for threatening a state's witness. Petitioner was also charged, but not indicted, for obstruction of justice. These charges, along with an additional five charges from a separate incident, were dismissed as part of the plea agreement. App. 2-3.

2 Bufkin was the named victim of the carjacking and one count of attempted murder. He testified at the PCR hearing that he did not remember who had carjacked him and could not identify Petitioner as his attacker. App. 59-63.

At the hearing Petitioner testified that he was originally brought to court for a pretrial motions hearing and that he was coerced into entering a guilty plea instead.[3] App. 46-47. He stated that plea counsel told him that he would lose at trial and get a life sentence. App. 42, ll. 9-14. Petitioner testified that when he told plea counsel he still wanted to go to trial that plea counsel "blew up at him," repeatedly telling him he would get a life sentence if he did not take the plea. Petitioner said he only answered "yes" to the judge's questions because plea counsel told him the judge would give him life in prison if he "spoke up" during the plea hearing. App. 47-49.

Plea counsel testified that Petitioner was "facing 274 years, when you add all of the time up consecutive." App. 70, ll. 13-15. He stated that he explained to Petitioner that, for all intents and purposes, Petitioner was facing a life sentence and that it was in Petitioner's best interest to plead guilty for the negotiated eighteen-year sentence. App. 87, ll. 20-App. 88, l. 12. According to plea counsel, he spent a month preparing for trial and conceded that Petitioner did not want to plead guilty during the trial preparation process. App. 72-73; App. 81-82. In plea counsel's own words Petitioner was "passionate about going to trial." App. 87, ll. 6-10. Plea counsel admitted that they had "intense conversations" the day of the guilty plea where he told Petitioner he was facing life in prison. App. 87, ll. 21-25. Plea counsel maintained that the ultimate decision to plead guilty was made by Petitioner. App. 88, ll. 15-16.

At the conclusion of the hearing the PCR court denied Petitioner's application finding that counsel had not acted coercively but had done as he was required to do by advising Petitioner of the sentencing exposure he faced. App. 96, ll. 1-16. An order of dismissal was

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3 Plea Counsel had filed a motion to sever the indictments for trial, a notice of intention to offer an alibi, and a motion to suppress certain evidence. All three motions were scheduled to be heard the day Petitioner pled guilty. App. 69.

filed on August 26, 2019. App. 98-21. In the order the PCR court wrote that Petitioner was fully informed of his rights, waived them freely and voluntarily, and failed to offer the court a "valid basis to depart from conclusive statements made" at the plea hearing. App. 110.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding Petitioner's guilty plea knowing and voluntary where Petitioner was induced to plead guilty by plea counsel who erroneously informed Petitioner that he would receive a life sentence if he proceeded to trial.

A defendant who is induced to plead guilty based on erroneous legal advice may have a valid ineffective assistance of counsel claim. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (court found ineffective assistance of counsel when trial counsel misinformed petitioner of sentence possibility and petitioner testified at PCR he would not have pled guilty absent the erroneous advice); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (new trial granted where incorrect parole eligibility advice induced plea).

In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), the petitioner was charged with grand larceny, second degree burglary, and two counts of armed robbery. Plea counsel for Ray told him that he would be subject to a sentence of life without parole if he proceeded to trial and was convicted on the two counts of armed robbery. Id. at 375, 401 S.E.2d at 152. Based on this advice Ray entered a plea pursuant to North Carolina v. Alford[4] to burglary, third, and armed robbery. Ray was sentenced to five years on the burglary and twenty years on the robbery, the sentences to run concurrently. Id.

This advice was in error, as Ray would not have been subject to a life without parole sentence had he been convicted of the two counts of armed robbery. At his PCR hearing Ray stated that the main factor in his decision to plead guilty to the single count of armed robbery was the possibility of the life without parole sentence. Ray stated that he would not have plead guilty absent the erroneous advice. Id.

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4 400 U.S. 25 (1970)

The state argued that since Ray was facing a possible maximum sentence of seventy-five years without parole if he elected to proceed to trial, he was in effect facing a life sentence such that counsel's erroneous advice did not prejudice Ray. Id. at 376, 401 S.E.2d at 152. In finding prejudice, this Court noted that Ray may have faced up to seventy-five years without parole if convicted at trial, but he could also face a sentence as short as ten years. This Court held the distinction between the actual possibly sentence Ray faced and Ray being told he would face life without parole was sufficient to satisfy the prejudice prong. Id. at 376, 401 S.E.2d at 153.

In the case at bar, plea counsel testified repeatedly that he told Petitioner he was facing life in prison. This was based on Petitioner's possible sentencing exposure if he was convicted of every charge and the sentences were ran consecutively. Specifically, plea counsel stated Petitioner was facing "274 years [in prison], when you add all of the time up consecutive. He was definitely facing life in prison and I explained that to him." App. 70, ll. 13-16. This was erroneous advice analogous to the advice the petitioner in Ray, supra, received.

Notably, only the possession of a weapon during the commission of violent crime charges carried mandatory time, a five-year sentence. Every other offense, including what was arguably the most severe charge – attempted murder – carried *a range of years* from zero up to thirty. Petitioner was told, in no uncertain terms, that he would be sentenced to life in prison if he went to trial and was convicted. However, much like the petitioner in Ray, supra, the reality was that *if Petitioner was convicted,* he *possibly* faced a de facto life sentence, but he also *possibly* faced a sentence as low as five years.

Considering that Petitioner had asserted an alibi defense, it is not outside the realm of possibility that he could have been successful at trial. Further, even if convicted, given his

minimal prior criminal record and age,[5] the sentencing judge could have exercised leniency. Despite the assertion by counsel, Petitioner did not "definitely" face a life sentence.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). This is a right that extends to the plea process. Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 147, 1480-81 (2010) (internal quotations omitted). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688). In Hill v. Lockhart, 474 U.S. 52, 56 (1985), the Court clarified that the result of the proceeding difference requires the defendant to show that there is a reasonable probability he would not have pleaded guilty and would have insisted on going to trial.

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5 At the time of his plea Petitioner was 26 years old.

When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Importantly, the voluntariness of a guilty plea is not determined by an examination of the plea colloquy alone but is determined from both the record of the guilty plea and *also from the record of the PCR hearing*. Id. (emphasis added).

The PCR court relied solely on the plea colloquy to support the finding that Petitioner's plea was entered knowingly and voluntarily. However, there was uncontested testimony at the PCR hearing that, but for being told he would receive a life sentence, Petitioner would not have entered a guilty plea. This uncontroverted testimony, combined with the testimony of plea counsel that Petitioner was steadfast in his desire to have a trial, is enough to satisfy the prejudice prong. See Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (holding the petitioner had satisfied the prejudice prong when "the only evidence in the record on this point [was] petitioner's own testimony that had trial counsel not misinformed him that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty.")

Further, the plea colloquy in this case cannot cure the deficient advice given by counsel. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997) (stating that plea counsel's deficient performance can be cured by the plea court's colloquy). At no point during the plea hearing were the sentencing ranges of the charges Petitioner faced reviewed. The plea judge simply clarifies that the plea was negotiated and that the only sentence Petitioner could receive was the eighteen years. With a silent record, there is nothing to combat Petitioner's testimony that he believed he would face a life sentence if he proceeded to trial and therefore entered a guilty plea.

Plea counsel's repeatedly misinformed Petitioner that he would receive a life sentence if he proceeded to trial. There is nothing in the record to reflect that plea counsel clarified to Petitioner that his sentence would be a de facto sentence *if* he was convicted of all the charges and *if* the judge ran the sentences consecutively. Plea counsel's own testimony was that he believed Petitioner was "definitely" facing a life sentence and advised Petitioner of that fact during "intense conversations" the day the plea occurred. Petitioner's belief that he would spend life in prison is the only reason he entered a guilty plea. This contention is buttressed by the fact that Petitioner was "passionate about going to trial" and was in fact in court that day for a pretrial motions hearing. Petitioner has shown both deficient performance and prejudice as he would not have pled guilty but for the erroneous legal advice repeatedly provided by plea counsel that he would face a life sentence if convicted at trial. See Hill v. Lockhart, 474 U.S. 52, 56 (1985).

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

s/ Jessica M. Saxon

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of May, 2020.