

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Kristi F. Curtis, Circuit Court Judge

SYLVESTER JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001705

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily made where defense counsel failed to inform the court that the solicitor had impermissibly changed the plea agreement and counsel failed to move to enforce the original plea agreement, resulting in Petitioner being sentenced to an additional two years in prison?

STATEMENT OF THE CASE

On June 24, 2016, narcotics officers Lee Young and Bradley Lawson with the Kershaw County Sherriff's office were patrolling an area where there had been reports of drug activity when they encountered Petitioner. App. 144-154. During a search of the car Petitioner was driving, and of the area where the car was parked, the officers discovered narcotics. App. 154-162. Petitioner allegedly admitted that the narcotics found in and near the car were his.

During the December 2016 term of the grand jury Petitioner was indicted for one count of trafficking cocaine 10-28 grams¹, 3rd or subsequent offense, and possession of marijuana, second or subsequent offense. App. 4, ll. 5-10; App. 473-474. Prior to the first trial a plea offer² was extended to Petitioner for six years imprisonment which he rejected, insisting that he wanted to go to trial. App. 394, l. 9-23; App. 444, ll. 16-17. The case was first called to trial on June 26, 2017, before the Honorable G. Thomas Cooper and a jury. App. 1. When the solicitor called the case before the jury, he stated that the trafficking offense was a third or subsequent charge. App. 41, ll. 2-4. Since the jury had not yet been sworn in, defense counsel moved for a continuance and the state conceded its error. App. 42, ll. 9-21.

The case was next called to trial on July 17, 2017, before the Honorable Clifton Newman and a jury. App. 50. The state was represented by Jennifer McKellar and Brett Perry. Petitioner was represented by Ronald Moak. Again, prior to the start of trial, the state extended a plea offer to Petitioner for fourteen years, which he again rejected. App. 103, ll. 7-12. After a three-day trial the jury found Petitioner guilty of the marijuana charge but hung on the trafficking charge.

¹The total weight of the random selection of bags tested by SLED was 7.11 grams of cocaine; the total weight of the remaining untested bags was 14.7 grams of cocaine for a total of 21.81 grams. App. 209, l. 17-App. 210, l.

² The very first plea offer that Petitioner received was for fifteen years, which he rejected. App. 394, ll. 6-8.

App. 308-309. Petitioner was sentenced to one-year imprisonment on the marijuana conviction. App. 327, ll. 3-4.

The state called the case for retrial on the trafficking charge during the August 2017 term, again in front of Judge Newman. App. 333. Prior to the jury being sworn, Petitioner was offered the opportunity to enter a guilty plea to the lesser included offense of trafficking 10-28 grams, second offense. It was revealed during the PCR hearing that Petitioner had been offered and accepted a plea deal for a negotiated twelve-year sentence by Assistant Solicitor Brett Perry. App. 428, ll. 7-18. Counsel Moak had told Assistant Solicitor Perry that Petitioner was accepting the twelve-year plea offer but the judge had left for the day and the plea was postponed until the next day, when Assistant Solicitor Perry was not in court. App. 444, ll. 9-14.

Assistant Solicitor McKellar published the plea to the court as a negotiated sentence of fourteen years imprisonment. App. 335, ll. 7-12. As the trial judge was reviewing the plea with Petitioner the following exchange occurred:

The Defendant: I just don't feel like...this feels like forceful to me right now.

The Court: pardon me?

The Defendant: This feels forceful to me right now...*It is like two different – I'm hearing so many different things right now, and it, is like, I don't know what to do.*

The Court: Well, the last time we were here, you all went through the same – whether you are going to plead guilty or not plead guilty...When the jury was hung, there was a discussion once again, and you were trying to get them to give you a certain number of years...And this is a replay of the same thing over again. *I don't know if the number of years have changed.*

The Defendant: *Yes, sir. Yes, sir. That is what keeps doing it. That's what I'm trying to understand, like, I don't understand that.*

The Court: What is confusing to you?

The Defendant: I mean...

The Court: What is it you don't understand?

The Defendant: It just don't feel fair right now. *This range they have, it just popped back up again, like...*

App. 336, l. 1-App. 337, l. 5.

Further discussion occurred on the record regarding the number of years the state had offered Petitioner. Petitioner asserted that the offer had been for twelve years. Assistant Solicitor McKellar stated she spoke with the senior attorney on the case, Brett Perry, who said he had made it clear to Counsel Moak that after the last trial there was no offer on the table. As she had offered fourteen that morning, she would allow Petitioner to take that, but she would not go any lower. App. 337-339.

The court took a brief break during which Counsel Moak and Petitioner had a discussion off the record. App. 341, ll. 10-21. After the break Petitioner entered a guilty plea to the lesser included trafficking, second offense. App. 341-364. Judge Newman accepted the plea and sentence Petitioner to fourteen years imprisonment. App. 364.

Petitioner filed an application for post-conviction relief on February 16, 2018. App. 366-372. The state filed a return dated April 25, 2018. App. 373-378. PCR counsel Kristy Goldberg filed an amended PCR application on February 7, 2019, alleging, inter alia, that Counsel Moak was ineffective for failing to ensure the twelve-year plea offer was still available. App. 379-382. An evidentiary hearing was convened before the Honorable Kristi Curtis on February 20, 2019. App. 383. Kristy Goldberg represented Petitioner. Samuel Key represented the state.

Petitioner testified that when he returned for court in August, counsel Moak kept telling him he needed to enter a guilty plea. Counsel Moak's insistence that Petitioner accept a plea

offer severely undermined Petitioner's confidence in his attorney. He stated, "If he's not confident going to trial and he got my life in his hands right now ... I can't go with him ... So, I felt like, just get it over with by taking the plea, because he kept telling me to plea." App. 406.

On cross-examination Petitioner testified that the plea offer was for twelve years but that the solicitor changed it to fourteen years when they went before the judge. App. 416, ll. 23-24. On re-direct examination Petitioner clarified that after they had selected a jury, Solicitor Perry had offered him a negotiated twelve-year plea deal. The next day when they went back to court, Solicitor Perry was not present, and Solicitor McKellar "boosted" the plea offer to fourteen years. App. 419, ll. 12-18. He stated he did not know why it changed but that Counsel Moak kept telling him to plead and he went along with because "anything better than 25, 30 years." App. 420, ll. 1-8.

Counsel Moak testified that the agreement was to enter a plea for a negotiated twelve-year sentence. He stated that the day prior to the plea, Assistant Solicitor Perry offered twelve years and that is ultimately what Petitioner accepted, but that Assistant Solicitor Perry was not present on the day of the plea. When Assistant Solicitor McKellar published the plea as a negotiated fourteen years, Counsel Moak stated he whispered to Petitioner "I don't know what's going on here, buy you know, if fourteen is not cool, tell me the word and we're going to shut this down and to go trial." App. 428, ll. 1-25.

According to Counsel Moak, he and Petitioner had spent numerous hours the previous day and the day of the plea discussing the offer for twelve years. App. 441, l. 17-App. 442, l. 5. Counsel Moak said that at no point during that week had the offer been for fourteen years. App. 442, ll. 7-10. He was "shocked and surprised" when Assistant Solicitor McKellar told the judge the plea was for a negotiated fourteen years. App. 442, ll. 11-13. Counsel Moak stated that he

let Petitioner make the decision to enter the plea, despite calling the change in the terms of the agreement “bogus”. App. 442, ll. 14-24.

Counsel Moak did not inform the court that the plea was for twelve years and did not make a motion to the court asking that the twelve-year deal be enforced. He testified that Petitioner made the decision to go forward with the guilty plea. App. 443, ll. 1-9. However, after the plea hearing Counsel Moak mentioned the PCR process to Petitioner because he believed that Assistant Solicitor McKellar changing the terms of the plea agreement would be an issue. App. 444, ll. 3-14.

At the end of the hearing the court took the matter under advisement. An order of dismissal was filed on September 9, 2019. App. 450-471. In ruling that Petitioner had shown his plea was unknowing and involuntary, the PCR court found the plea colloquy to be dispositive of the issue. The order stated that Petitioner knew what rights he was waiving and had informed the plea court of his displeasure with the state’s offer, but had ultimately made the decision to take the offer because it took away the mandatory minimum twenty-five-year sentence he faced on the original charge. App. 465-467.

ARGUMENT

The PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily made where defense counsel failed to inform the court that the solicitor had impermissibly changed the plea agreement and counsel failed to move to enforce the original plea agreement, resulting in Petitioner being sentenced to an additional two years in prison.

Counsel Moak was ineffective for failing to move to enforce the original plea agreement of twelve years when the state, represented by a different solicitor than the one who negotiated the plea agreement, changed the terms of the twelve-year plea agreement. Further, Counsel Moak was ineffective for not even informing the court that the state had changed the terms of the plea offer. Defense counsel had a duty to move to enforce the plea agreement with the solicitor's office and the failure to perform that duty was ineffective assistance of counsel. See Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000).

In Jordan, *supra*, the defendant had repeatedly asserted to his counsel that he wanted to proceed to trial and would only accept a plea deal if the solicitor recommended probation. Jordan at 53, 374 S.E.2d at 684. Defense counsel was able to negotiate a deal with a particular solicitor that if the defendant pled guilty, she would neither recommend nor oppose probation. Id. Jordan accepted the terms of the agreement. Id. At the plea hearing, a different solicitor appeared on behalf of the state and vigorously opposed probation. Id. Defense counsel did not move to withdraw Jordan's plea, nor did he point out to the judge that the solicitor had altered the terms of the plea agreement. Id.

Jordan was sentenced to imprisonment for ten years, suspended upon the service of three years and five years on probation. Id. at 52, 374 S.E.2d at 648. This Court held that defense

counsel's conduct in failing to protect Jordan's right to enforce the original plea agreement fell below the prevailing professional norms as required by Strickland, 466 U.S. 668 (1984). Further, this Court held that based on the "original vehemence" of Jordan in wanting to pursue his right to a jury trial, that there was a "reasonable probability that but for the fact that Jordan's attorney failed to object to the continuation of the guilty plea proceeding once the solicitor reneged on the plea bargaining agreement, that Jordan would not have pleaded guilty, but would have insisted on going to trial." Jordan v. State, 297 S.C. 52, 54–55, 374 S.E.2d 683, 684–85 (1988).

Likewise, in Thompson, *supra*, this Court found trial counsel ineffective where counsel failed to object when the solicitor recommended that the trial judge impose the maximum sentence in violation of the plea agreement. Thompson, at 115, 531 S.E.2d at 296. Pursuant to the agreement, the solicitor was not supposed to make any recommendation as to sentencing. Id. at 116, 531 S.E.2d at 296. The PCR court had ruled that Thompson's attorney's conduct fell below prevailing professional norms. However, the PCR Court found Thompson was not prejudiced because, *based on the plea colloquy*, Thompson had been adequately informed of the twenty to thirty-year sentencing range. Id.

In overturning the PCR court and analyzing the prejudice to Thompson this Court stated that,

“[T]he fact that the judge sentenced Thompson within the range is irrelevant. To establish prejudice, the proper analysis is to determine whether there was a reasonable probability that, but for counsel's unprofessional errors, the defendant would not have pled guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).”

Id. at 116, 531 S.E.2d at 297. This Court found that, based on the testimony from the PCR hearing, Thompson was unsure whether to plead guilty up right before trial and he only entered

the guilty plea based upon the fact that he was under the impression the solicitor would not make a sentencing request. This was enough evidence to demonstrate a reasonable probability that Thompson would not have pled guilty but for his attorney's ineffective assistance in failing to object when the solicitor reneged on the plea agreement and recommended the maximum sentence. Id. at 117, 531 S.E.2d at 297.

The facts of Jordan and Thompson are analogous to Petitioner's case. Both Counsel Moak and Petitioner testified at the PCR hearing that the plea agreement was for a negotiated twelve years. When Assistant Solicitor McKellar stated the agreement was for fourteen years both were surprised. Petitioner even stated on the record, prior to the plea, that "this range they have. It just popped back up again." App. 337, ll. 3-4. Counsel Moak stated he did not make a motion to enforce the plea agreement because he had asked Petitioner if he wanted to proceed with the guilty plea and Petitioner had made the choice to move forward. App. 443, ll. 3-6. Counsel Moak fully shirked his duty to protect Petitioner's right to enforce the plea deal and then attempted to hide behind the excuse that it was Petitioner's choice to enter a plea. This was ineffective assistance of counsel.

Also like the defendants in Jordan and Thompson Petitioner had demonstrated a "vehemence" to pursue trial by jury. He had in fact gone through the *jury selection process three times and had already proceeded through one full trial*. At the time of his guilty plea a jury had been chosen and was waiting to be sworn. It was only after the persisting badgering of Counsel Moak that Petitioner accepted the twelve-year offer. Further, Counsel Moak's deficient performance resulted in Petitioner receiving an additional two years in prison. As the United States Supreme Court stated in Lafler v. Cooper, 566 U.S. 156, 165 (2012), "ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because *any*

amount of additional jail time has Sixth Amendment significance.” (internal quotations and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001)) (emphasis added).

In dismissing Petitioner’s PCR application, the PCR court wholly failed to consider the testimony presented at the PCR hearing and rested its decision solely on the plea colloquy. This was an error of law. 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*. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). (emphasis added). When the entire plea transcript is reviewed alongside the testimony from the PCR hearing it is apparent that Counsel Moak was ineffective and that Petitioner suffered prejudice.

Counsel Moak had a duty to ensure that the plea agreement for twelve years was enforced. He cannot abdicate that duty by claiming it was Petitioner’s decision to go forward with the plea once the state changed the terms. It was not within Petitioner’s knowledge or ability to motion for the court to enforce the plea agreement. That duty rested on Counsel Moak alone. Throughout the proceedings Petitioner maintained a strong desire to have a jury trial. Therefore, it is reasonable to conclude that but for Counsel Moak’s failure to object to the continuance of the guilty plea proceeding once the solicitor changed the terms of the plea agreement, Petitioner would not have pleaded guilty, but would have insisted on going to trial. See Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988); See Also Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (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 9th day of June, 2020.