STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

D. Craig Brown, Circuit Court Judge

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Jun 18 2020

S.C. SUPREME COURT

DERRICK LAMONT WADE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001897

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
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ISSUE PRESENTED

Whether the PCR court erred where it found Petitioner's plea was voluntarily, knowingly, and intelligently tendered where counsel's advice left Petitioner with the mistaken understanding that he would only have to serve sixty-five percent of the sentence if he accepted the plea bargain, since the record did not establish Petitioner had a full understanding of the consequences of his plea?

STATEMENT

On July 16, 2009, a Lancaster County Grand Jury indicted Petitioner for the offense of murder. App. 76 – 77. In 2009, Petitioner was twenty-eight years old, a high school graduate, and a veteran whose military service included two tours in Iraq. App. 21, l. 16 – 22, l. 2. Petitioner suffered from post-traumatic stress syndrome. App. 4, ll. 5-8.

It was alleged that Petitioner and four others took part in the beating of the decedent, Lamario Ford, and that one of Petitioner's codefendants unexpectedly shot and killed the decedent when the beating concluded. App. 8, l. 21 – 9, l. 22. The State claimed the decedent was beaten as "payback" for a home invasion that happened several days earlier. App. 9, ll. 8-16.

On October 31, 2016, Petitioner appeared before the Honorable D. Garrison Hill for a plea hearing. App. 1. Petitioner was represented by Leah Moody. App. 1. The State was represented by Lisa Collins. App 1. Petitioner entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to the offense of lynching in the second degree. App. 2, ll. 16-19; App. 10, ll. 10-18. The State recommended a cap of fifteen years. App. 3, ll. 2-6.

At the plea hearing, the solicitor stated that the offense carried a sentencing range of three to twenty years, was a nonviolent offense, and was a serious offense. App. 2, ll. 21-25. During the plea colloquy, the court reiterated that the charge carried a mandatory minimum sentence and was classified as a serious offense. App. 5, ll. 19-24. Sentencing was deferred and the parties reconvened for sentencing on January 13, 2017. App. 15.

The court sentenced Petitioner to ten years of imprisonment. App. 33, ll. 17-20. No direct appeal was taken.

On December 11, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 35 – 41. The State made its return on November 29, 2018. App. 42 – 46. A hearing was

held on the matter before the Honorable D. Craig Brown on July 29, 2019. App. 47. Petitioner was represented by Donae Miller. App. 47. The State was represented by Lindsey McAllister. App. 47.

Petitioner testified that he was surprised to learn from the Department of Corrections that he must serve eighty-five percent of his sentence to be eligible for release. App. 51, ll. 4-9. Petitioner explained that when he decided to enter a plea, he did so on the understanding that the sentence was "nonviolent" and therefore he would only have to serve sixty-five percent of the sentence to be released. App. 52, l. 24 – 53, l. 3; App. 51, ll. 12-13. Petitioner explained that his understanding he would only be required to serve sixty-five percent of the sentence was based on his discussions with counsel. App. 50, l. 23 – 51, l. 15. "From what I understood non-violent was 65 percent and work credits and things like that." App. 51, ll. 12-13. However, Petitioner said he and counsel did not discuss "what that [the term nonviolent] meant." App. 54, ll. 8-12.

Petitioner said he would have considered a trial in lieu of an *Alford* plea had he known the charge required service of eighty-five percent of the sentence. App. 52, ll. 10-12.

Petitioner's father testified that he was present during some of the discussions between Petitioner and his plea counsel. App. 57, l. 24 – 58, l. 4. Petitioner's father said that he heard plea counsel tell Petitioner the charge was nonviolent and mention eighty-five percent. App. 58, l. 12 – 59, l. 1.

Plea counsel testified and explained that the charge of lynching in the second degree was a nonviolent offense, but it was not a sixty-five percent offense—plea counsel said that because the offense carried a potential penalty of twenty years, a defendant must serve eighty-five percent of the sentence to be eligible for release. App. 61, l. 6 – 62, l. 6. According to plea counsel,

> I think the testimony from his father, the discussion of 85 percent, we did discuss what were the consequences based on the sentencing sheet. The sentencing sheet does have on it non-violent, I think most defendants get it confused when they ask for non-violent that that somehow adjusts the amount of time that they may serve. However, this was an offense, lynching, pleading to that, carried up to 20 years, so anything 20 years and above you're going to serve 85 percent, but he got non-violent.

App. 61, ll. 3-12.

Plea counsel said she could not "specifically say all of that was just like that explained, but we did go over his plea. We did go thoroughly over whether or not he should take his plea." App. 62, ll. 9-11.

On November 8, 2019, the PCR court issued an order of dismissal denying Petitioner relief. App. 65 – 75. The order stated, "The plea transcript reflects [Petitioner] indicated he understood the charge he was pleading guilty to, the sentencing range, and the fact that it would be considered a serious strike on his record." App. 72. Petitioner "averred he was pleading guilty of his own free will and had not been threatened or promised anything to induce his plea." App. 72 – 73. Petitioner "did not ask the plea court how much of his sentence he would be required to serve before he became parole eligible, nor did the plea court, the assistant solicitor, or [c]ounsel ever indicate [Petitioner's] sentence would fall under the sixty-five percent parole eligibility classification." App. 73.

The order of dismissal continued that the PCR court "finds credible [c]ounsel's testimony she explained [Petitioner's] sentence would be non-violent but still require the service of eighty-five percent of the sentence." App. 73.

> [S]pecifically, she explained this was a non-violent sentence that still carried a requirement to serve eighty-five percent because the penalty is up to twenty years. This was correct advice pursuant to statute, and therefore, this [c]ourt finds [c]ounsel was not deficient *See* S.C. Code Ann. § 16-3-220 ("Any person found guilty of

> lynching in the second degree shall be confined at hard labor in the State Penitentiary for a term not exceeding twenty years nor less than three years, at the discretion of the presiding judge.") (2009); S.C. Code Ann. § 24-13-100 ("[A] 'no-parole' offense means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.") (2009).

App. 73.

The order continued, "In any event, at the evidentiary hearing, [Petitioner] testified only that he would have *considered* proceeding to trial if he had known he would have to serve eighty-five percent of his sentence. This [c]ourt finds that testimony is insufficient to meet [Petitioner's] burden of proving prejudice." App. 73 (emphasis in original).

Finally, the order stated that Petitioner "himself testified [c]ounsel never told him he would have to serve sixty-five percent of his sentence, but he made his own assumption because he pleaded guilty to a non-violent charge." App. 74. Petitioner "entered his guilty plea knowingly and voluntarily." App. 74.

This petition for certiorari follows.

ARGUMENT

The PCR court erred where it found Petitioner's plea was voluntarily, knowingly, and intelligently tendered where counsel's advice left Petitioner with the mistaken understanding that he would only have to serve sixty-five percent of the sentence if he accepted the plea bargain, since the record did not establish Petitioner had a full understanding of the consequences of his plea.

Counsel provided ineffective assistance because she knew the crime's designation as nonviolent was an important part of why Petitioner was willing to accept the plea bargain. However, her discussions with Petitioner were not sufficiently clear for him to understand that although the offense was nonviolent, it was a "no parole offense."

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, 686 (1984). 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 v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (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*, 474 U.S. at 58.

> A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by

> showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial.

Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

Here, counsel's performance fell below an objective standard of reasonableness, and thus her performance was constitutionally deficient because she did not clear up a critical misunderstanding by Petitioner about the effect of his plea bargain—the amount of time in prison that he would have to serve.

The record must establish the defendant had "a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). At the plea hearing, the solicitor stated the charge was a nonviolent offense. Plea counsel told Petitioner the offense was a nonviolent offense in her meetings with him. When he accepted the plea offer and entered his plea, Petitioner was operating under the mistaken impression that *all* nonviolent offenses require the service of only sixty-five percent of the sentence.

Petitioner did not understand that second degree lynching was, in fact, a "no parole offense" even though the offense was nonviolent. *See* S.C. Code Ann. § 24-13-100 (1995) ("a 'no parole offense' means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more."); Douglas S. Strickler, South Carolina Criminal Offenses and Penalties 364 (2005 Edition) (lynching in the second degree is a class C felony). Because plea counsel failed to correct this misapprehension, Petitioner's plea was tendered without a full understanding of the consequences of his plea and the charge against him. The PCR court's finding in its order of dismissal that Petitioner "entered his guilty plea knowingly and voluntarily" was therefore error.

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).

Petitioner said he would have considered a trial in lieu of an *Alford* plea had he known the charge required service of eighty-five percent of the time, i.e., that it was a "no parole offense." App. 52, ll. 10-12. Here, Petitioner's testimony established prejudice since, but for, counsel's error, Petitioner would have likely gone to trial.

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 18th day of June, 2020.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Derrick Lamont Wade 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 D. Craig Brown, which was held on July 29, 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 Derrick Lamont Wade.

Respectfully Submitted,

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

This 18th day of June, 2020.

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S.C. SUPREME COURT

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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This 18th day of June, 2020.