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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable D. Craig Brown, Circuit Court Judge

DANIELLE LAMAR PEAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001692

JOHNSON PETITION FOR WRIT OF CERTIORARI

Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding defense counsel's misleading sentencing exposure advice did not constitute ineffective assistance of counsel where Petitioner reasonably, but erroneously, believed he would receive a mandatory sentence of life without parole if he was convicted of murder and attempted murder after a trial, and he therefore pled guilty to voluntary manslaughter, where petitioner was not facing a mandatory life without parole sentence if convicted of these original charges?

STATEMENT OF THE CASE

In February 2016, the Lancaster County grand jury indicted Petitioner for one count of murder, one count of attempted murder, one count of possession of a firearm by a person convicted of a violent felony, one count of possession of a stolen handgun, and one count of possession of a weapon during the commission of a violent crime. App. 103-125. The charges arose from an incident that occurred on November 25, 2015, during which Delvelceo Kirk was killed. App. 15, ll. 9-15.

On July 21, 2017, Petitioner appeared before the Honorable Daniel D. Hall to enter a guilty plea. The state was represented by Lisa Collins. Kay Boulware represented Petitioner. App. 1. In support of the plea the state alleged that Kirk and Dayqwann Blakeney were in Kirk's car when they saw Petitioner and offered him a ride. Petitioner was in the backseat of the car, sitting behind Kirk who was driving, and Blakeney was in the front passenger seat. While they were in the car Petitioner purchased and used drugs[1]. App. 15, ll. 17-24. According to Blakeney, he had just learned that day that a "hit" had been taken out on him and was worried. However, because he was with Kirk and they knew Petitioner he was not afraid at the time of the incident.

Blakeney told law enforcement that Petitioner asked for a "blunt of marijuana" and then suddenly, without warning, shot Kirk in the back of the head. App. 16, ll. 1-8; App. 18, ll. 14-17. Blakeney fled the vehicle. Petitioner pursued him while firing his gun at Blakeney but Blakeney was uninjured. App. 16, ll. 11-16. When law enforcement arrived on the scene to process the car, they discovered a handgun between Kirk's right thigh and the center console of the vehicle, easily accessible by Kirk. App. 16, ll. 19-23. Petitioner was arrested at his home.

[1] It is unclear from the record what type of drugs Petitioner used or who Petitioner purchased the drugs from.

After waiving his Miranda[2] rights Petitioner stated simply that at the time of the incident, he was afraid for his life. A search warrant was executed at Petitioner's home and the gun used in the shooting was located in the attic, hidden in some insulation. App. 17, l. 24-App.18, l. 8

Counsel Boulware informed the plea court that Petitioner had not entered Kirk's vehicle with a gun but that they drove somewhere for Petitioner to get the gun. Apparently Blakeney wanted to purchase the weapon for protection. App. 32, ll. 1-11. It was revealed at the PCR hearing that there were some ongoing hostilities in the community with people "taking out hits" on one another and so tensions in general were very high. App. 71, ll. 16-19. Counsel Boulware further explained that Petitioner had no way to know that this was not "some kind of hit on him" and that Kirk was not shot directly in the back of the head, but more to the side as if he had been turning toward Petitioner when the fatal shot was fired. App. 33-34.

Petitioner pled guilty to the lesser included offense of voluntary manslaughter, attempted murder, possession of a weapon by a felon, possession of a stolen handgun, and possession of a weapon during the commission of a violent crime. Judge Hall sentenced Petitioner to an aggregate term of forty (40) years imprisonment: thirty years on the voluntary manslaughter, ten years on the attempted murder to be served consecutively, and five years on the three weapons charges to be served concurrently. App. 36. Pursuant to the plea agreement, the state dismissed an armed robbery and three attendant weapons charges from a separate incident, as well as an assault and battery by mob, second degree, and an indecent exposure charge. App. 3, l. 22-App. 4, l. 12.

On December 1, 2017, Petitioner filed an application for post-conviction relief. App. 38-44. The state submitted its return dated June 8, 2018. App. 45-51. PCR Counsel Donae Minor

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[2] Miranda v. Arizona, 384 US 436 (1966)

filed an amended PCR application dated November 13, 2018. App. 52-53. An evidentiary hearing was convened on July 29, 2019 before the Honorable D. Craig Brown. App. 54. The state was represented by Samuel Key. Petitioner was represented by Donae Minor.

Petitioner testified that his plea counsel told him he would “catch life due to a burglary” he had on his record if he went to trial, so he decided to plead guilty. App. 59, ll. 8-10. He also knew that if he was convicted of the murder charge, he could be sentenced to life in prison. App. 64, ll. 4-5. Petitioner asked plea counsel questions about his possible sentence, such as whether there would be concurrent or consecutive sentences, but she only told him that if he went to trial, he would get a life sentence. App. 59, l. 24-App. 60, l. 20.

When Petitioner and plea counsel discussed the plea offer, plea counsel told him that he “probably” would not get more than a twenty-year sentence. However, Petitioner understood the plea was a “straight-up” plea with a sentencing range of zero to sixty years. App. 60, l. 24-App. 61, l. 4. Petitioner testified that every time plea counsel met with him, the focus was that Petitioner would receive a life sentence if he went to trial on the murder charge and she never explained anything to him. App. 61, ll. 19-24. He stated if plea counsel had sufficiently answered his questions, he would have gone to trial and not entered a plea. App. 62, ll. 9-16.

Counsel Boulware stated that she met with Petitioner seven to eight times to discuss the case. The week that Petitioner pled, Counsel Boulware met with him an additional two or three times to discuss the plea. App. 65, ll. 12-16. Counsel Boulware testified that she explained to Petitioner that if he was convicted of murder, he faced a possible life sentence. Further, she told Petitioner that, because of his prior burglary second violent conviction, if he was convicted of the murder and attempted murder, he would be eligible for life without parole on the pending armed

robbery charge. App. 67, ll. 1-10; App. 70, ll. 7-14. Counsel Boulware admitted that Petitioner frequently asked her questions about the possible sentences he could receive. App. 67, ll. 18-19.

Notably, Counsel Boulware testified that Petitioner's case was a trial until right before the plea. The day of the plea was initially supposed to be a bond hearing when the state "finally made a plea offer to voluntary manslaughter." App. 66, ll. 21-25; App. 70, ll. 21-25. Counsel Boulware testified that they had planned a "stand your ground motion" in relation to the murder charge and discussed the possible defenses that they would pursue at trial. App. 66, ll. 13-15; App. 71, ll. 1-7. Counsel Boulware stated that Petitioner hesitated in accepting the "last minute" plea deal but eventually decided to enter a plea after their discussions. App. 68, ll. 14-22.

At the end of the hearing Judge Brown orally denied Petitioner's PCR application. App. 73-74. An order of dismissal was filed on October 2, 2019. App. 82-100. The order stated that once Petitioner was aware that he faced a life sentence at trial he made the decision to enter a guilty plea. The court was not convinced that Petitioner would have gone to trial instead of pleading guilty because the plea offer to the lesser included charge of voluntary manslaughter removed the possibility of a life sentence. The court further found that Petitioner understood he would become LWOP eligible on the pending armed robbery charge unless he disposed of all of his pending charges at one time through the plea agreement. App. 94-95. Based on the testimony of both Petitioner and plea counsel, the court found Petitioner had not proven ineffective assistance of counsel.

ARGUMENT

The PCR court erred in finding defense counsel's misleading sentencing exposure advice did not constitute ineffective assistance of counsel where Petitioner reasonably, but erroneously, believed he would receive a mandatory sentence of life without parole if he was convicted of murder and attempted murder after a trial, and he therefore pled guilty to voluntary manslaughter, where petitioner was not facing a mandatory life without parole sentence if convicted of these original charges.

Petitioner's PCR testimony reflected that he believed that, because of his prior burglary conviction, he would receive a mandatory life sentence if convicted of murder at trial. This belief was based on the advice provided to him by his plea counsel. Although the advice that plea counsel gave was legally correct, it was unclear and confusing to Petitioner. As a result, Petitioner's guilty plea was not entered into freely and voluntarily.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury… Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); See also Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Six Amendment right

to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effect assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 147, 1480-81 (2010) (internal quotations omitted).

A PCR applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Petitioner testified that he pled guilty because plea counsel told him he was facing a life sentence due to a prior burglary second violent conviction on his record. This advice indicated that Petitioner was facing a mandatory life sentence upon conviction for the murder charge, which was incorrect. While Petitioner did face a possible life sentence if convicted at trial, the trial judge had discretion to sentence Petitioner anywhere from thirty years to life in prison. The record reflects that Petitioner did not have an understanding of the differences between a mandatory LWOP sentence and the discretionary life sentence that he could have received on the murder charge. Even plea counsel conceded that Petitioner repeatedly asked her questions about his possible sentences, suggesting that Petitioner was confused and did not fully understand his sentencing exposure.

Plea counsel not only had a duty to properly advise Petitioner but to ensure that Petitioner understood that advice so that he could make an informed decision about whether to enter a plea or go to trial. See ABA Model Rules for Professional Conduct Rule 1.4(b) (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). Here, plea counsel failed to ensure that Petitioner understood the possible sentences he faced, even after Petitioner repeatedly asked for clarification. Therefore, plea counsel's advice fell below an objective standard of reasonableness. See Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable") (internal citations omitted). This amounted to ineffective assistance of counsel that rendered Petitioner's guilty plea involuntary.

Petitioner's uncontested testimony was that he would have gone to trial if plea counsel had sufficiently answered his questions about sentencing and fully explained the case to him. This testimony alone meets the prejudice standard set forth in Hill, *supra*. See Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (holding that a defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty). Petitioner's testimony is bolstered by the fact that plea counsel testified that Petitioner wanted a trial until right before he entered the guilty plea. They had even gone so far as to plan a "stand your ground" motion and were prepared to assert a self-defense theory on the murder charge.

Petitioner only pled to the lesser included offense of voluntary manslaughter because he believed, based on the advice of plea counsel, that that was the only way to avoid a mandatory life sentence. The facts were that Petitioner faced anywhere from thirty years to life in prison if he was

convicted of the murder. The failure of counsel to make sure that Petitioner understood the difference between his actual possible sentence and a mandatory life sentence induced Petitioner to plead guilty, prejudicing Petitioner and rendering his plea involuntary. See Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991) (holding the distinction between the actual possible sentence Petitioner faced and Petitioner being told he would face life without parole was sufficient to satisfy the prejudice prong).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.

s/Jessica M. Saxon___________
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of July, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Danielle Lamar Peay 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 Danielle Lamar Peay.

Respectfully Submitted,

s/Jessica M. Saxon___________
Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of July, 2020.

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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/Jessica M. Saxon________
Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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