

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

TIMOTHY JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000629

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when he failed to explain fully the consequences of the appellate review and post-conviction relief waiver in Petitioner's guilty plea, such that Petitioner's post-conviction relief waiver was not knowingly, voluntarily, or intelligently made?

STATEMENT

During the October 2015 term, the State Grand Jury indicted Petitioner for one count of trafficking heroin greater than 28 grams, one count of trafficking heroin greater than 28 grams (conspiracy), seven counts of distribution of heroin, and one count of possession of heroin with intent to distribute. App. 104 – 117.

On August 2, 2016, Petitioner pled guilty in Florence County before Honorable Roger E. Henderson. App. 1. Brendan P. Barth represented Petitioner. Id. David Fernandez represented the state. Id.

Pursuant to the negotiated plea agreement, Petitioner pled guilty to ten total charges. App. 3, l. 11; App. 4, ll. 4 – 5. Judge Henderson found that Petitioner freely, voluntarily, and intelligently entered a guilty plea. App. 16, ll. 3 – 11; App. 29, ll. 6 – 22.

The negotiated sentence for Petitioner was a range between 18 and 22 years' imprisonment. App. 20, ll. 14 – 18. Judge Henderson sentenced Petitioner to 19 years' imprisonment. App. 51, ll. 15 – 17.

Petitioner filed a post-conviction relief (PCR) application on March 22, 2017. App. 32 – 37. The state filed its Return and Partial Motion to Dismiss on October 6, 2017. App. 39 – 45.

Petitioner's PCR hearing was held on February 2, 2018 in front of the Honorable Michael G. Nettles. App. 47. Jonathon Waller represented Petitioner. Id. Megan H. Jameson represented the state. Id.

During Petitioner's PCR hearing, the state moved to dismiss all of Petitioner's PCR claims beyond whether plea counsel was ineffective for advising him to plead guilty and waive his PCR rights. App. 52, ll. 3 – 9. PCR counsel asked Judge Nettles to hear the testimony prior to ruling on the state's motion. App. 54, ll. 1 – 4.

Judge Nettles ruled for the state on the motion without hearing any testimony regarding Petitioner's remaining PCR allegations. App. 54, ll. 18 – 23.

Petitioner's PCR allegation that his counsel was ineffective for advising him to enter into the guilty plea, with appellate and collateral rights waived, was denied. App. 91, ll. 3 – 4. Judge Nettles specifically found, "that the waiver of the post-conviction relief and appellate review was adequately covered in... [plea counsel's] conversations with [Petitioner]." App. 92, ll. 1 – 4.

On March 20, 2018, Judge Nettles filed an order of dismissal where he found both [the state and Petitioner] received a benefit of the bargain and that Petitioner's plea agreement was valid under contractual law. App. 94 – 103; App. 99.

This Petition for Writ of Certiorari follows.

ARGUMENT

Trial counsel provided ineffective assistance of counsel when he failed to explain fully the consequences of the appellate review and post-conviction relief waiver in Petitioner's guilty plea, such that Petitioner's post-conviction relief waiver was not knowingly, voluntarily, or intelligently made.

Relevant Facts

The state alleged the facts as follows. Petitioner was involved in a “conspiracy that began sometime in an around the end of 2011,” and that Petitioner was part of “a vast network of distributors,” from New York City to Williamsburg County. App. 23, ll. 19 – 25.

On a trip to New York with confidential informants, law enforcement officers went to the residence of Dawn Marie Riley, “who share[s] children in common with [Petitioner].” App. 24, ll. 11 – 16. Petitioner used the residence as a drop off point for his heroin, Riley would collect money and distribute heroin for him. App. 24, ll. 16 – 18.

On February 17, 2015 confidential informants went to Riley's home. App. 24, l. 25 – 25, l. 2. Riley gave the informants: a rental car, six packets of heroin for the trip and \$300 of spending money. App. 25, ll. 2 – 4. The confidential informants and law enforcement then “conducted a controlled delivery” of 120 bricks of heroin to Williamsburg, South Carolina. App. 25, ll. 4 – 8.

After the controlled delivery, law enforcement executed a search warrant where the “120 bricks” were located. App. 25, ll. 9 – 13.

From March 29, 2011 to September 9, 2015, a series of confidential informants went to Petitioner's residence and performed controlled buys under the supervision of law enforcement. App. 25, ll. 14 – 17; App. 25, l. 24 – 26, l. 6; App. 26, ll. 7 – 12; App. 26, ll. 13 – 19; App. 26, ll.

20 – 25; App. 27, ll. 1 – 7; App. 27, ll. 8 – 12. In one controlled buy, the confidential informant was recording the transaction with audio and video. App. 25, ll. 22 – 23. On every occasion, the confidential informants left Petitioner’s residence with varying amounts of substances that later tested positive for heroin. App. 25, ll. 12 – 13; App. 25, ll. 22 – 23; App. 26, ll. 5 – 6; App. 26, l. 12; App. 26, ll. 18 – 19; App. 26, ll. 24 – 25; App. 27, ll. 6 – 7; App. 27, l. 12.

On February 9, 2015, law enforcement executed a search warrant for Petitioner’s residence. App. 27, ll. 14 – 15. The search uncovered “a number of cash, as well as twenty-five packets of a substance that later tested positive for heroin.” App. 27, ll. 15 – 19.

Petitioner pled guilty to the aforementioned charges on August 2, 2016. App. 1; App. 28, ll. 14 – 17. Petitioner’s guilty plea agreement had a negotiated sentence range of eighteen to twenty-two years’ imprisonment. App. 20, ll. 11 – 13; App. 28, l. 23 – 29, l. 4. Petitioner’s guilty plea agreement contained a waiver of his appellate and post-conviction relief rights. App. 51, ll. 1 – 3.

Judge Henderson found Petitioner freely, voluntarily, and intelligently entered a plea of guilty and accepted it. App. 29, ll. 6 – 22. On November 14, 2016, Judge Henderson sentenced Petitioner to nineteen years’ imprisonment. App. 51, ll. 15 – 17.

Petitioner testified at his PCR hearing that although he signed the plea agreement, nothing was explained to him. App. 63, l. 24 – 64, l. 4. Petitioner was told, “you’re going to take the plea, sign this and initial here, initial here.” Id. Petitioner stated that none of the plea agreement was read to Petitioner and nothing was explained. App. 63, ll. 6 – 9.

Petitioner did not read the eight pages of the plea agreement. App. 63, ll. 10 – 16. Petitioner testified that plea counsel did not review the agreement with him and plea counsel

only said, “put your initial here, put your initial here, flipped the page and [told Petitioner] where to sign it.” Id.

Petitioner never spoke to plea counsel about the provision in the plea agreement that said he waived his rights to file a PCR. App. 65, ll. 5 – 9. Petitioner did not know what rights he was waiving pursuant to the plea agreement because he did not know what a “PCR” or an appeal was until he got to prison. App. 63, ll. 19 – 21; App. 65, ll. 17 – 25. Petitioner testified that the words “post-conviction relief” meant nothing to him on the plea agreement, “it was just three words put together.” App. 75, ll. 1 – 6.

Petitioner said that his answers during the plea court’s colloquy were coached by plea counsel and the solicitor, “I was instructed... before I went in to Judge Henderson that if I said anything... that they didn’t tell me, the judge was going to reject the plea and I was going to get... forty years.” App. 70, l. 25 – 71, l. 6. Petitioner testified that his attorney directed him how to answer questions during the plea colloquy and that if he did not answer the judge as directed, he would receive the maximum sentence. App. 74, ll. 20 – 25.

At Petitioner’s PCR hearing, plea counsel testified as well. App. 76, l. 3. Plea counsel stated that he only “generally” discussed Petitioner’s PCR rights with him, “during the course,” of discussing the plea and not prior to the plea agreement. App. 78, ll. 8 – 9; App. 86, ll. 7 – 11. Plea counsel did not give a specific explanation regarding what waiving appellate rights meant. App. 78, ll. 12 – 17. Plea counsel testified that, “[I] probably did not go into much more detail than he’d be waiving his right to accuse me of being ineffective if he was trying to set [the plea] aside. App. 79, ll. 4 – 7.

PCR counsel argued at the evidentiary hearing that the state’s motion to dismiss Petitioner’s PCR claims, other than his Sanders v. State, 412 S.C. 611, 773 S.E.2d 580 (2015)

claim of ineffectiveness for entering into a guilty plea with a PCR and appellate waiver, was improper because Petitioner entered into the waiver unknowingly. App. 90, ll. 1 – 4. PCR counsel argued that plea counsel was ineffective for allowing Petitioner to enter into an unknowing waiver. *Id.* He continued by arguing that plea counsel provided an incomplete explanation of the waiver of appellate rights. App. 89, ll. 14 – 19. Plea counsel did not go over all the aspects of the waiver, just that Petitioner could not raise ineffectiveness claims against him. App. 89, ll. 20 – 21; App. 86, ll. 7 – 11.

Judge Henderson found, “based on the testimony as presented here that the waiver of the post-conviction relief and appellate review was adequately covered in his - - in [plea counsel’s] conversations with [Petitioner].” App. 92, ll. 1 – 4.

In an order filed on October 20, 2018, Judge Henderson dismissed Petitioner’s PCR allegation that plea counsel was ineffective for allowing Petitioner to enter a guilty plea with an appellate rights and collateral rights waiver unknowingly. App. 94 – 103. Judge Henderson stated, “[Petitioner] chose to plead guilty and agreed to waive his appellate and collateral rights in exchange for a favorable negotiated sentence. Both parties received a benefit of the bargain, and this Court finds [Petitioner’s] plea agreement is valid under contractual law. App. 99.

Discussion

Petitioner pled guilty without knowledge of the appellate and collateral rights he was waiving because plea counsel failed to advise him on the waiver aspect of his guilty plea. App. 65, ll. 5 – 9. Sanders v. State, 412 S.C. 611, 773 S.E.2d 580 (2015).

The difference, “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). A guilty plea with an appellate and collateral rights waiver can be entered knowingly and voluntarily

only when plea counsel has explained the consequences of the waiver. Sanders v. State, 412 S.C. at 615-616, 773 S.E.2d at 582 (citing Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999))

The longstanding test for determining the validity of a 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) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

In Missouri v. Frye, 566 U.S. 134 (2012), the United States Supreme Court noted that the, “Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea.” Id. at 141 (citations and internal quotation omitted). The Court further emphasized that, “[i]n today’s criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” Id. (emphasis added). Accordingly, “[a]nything less [than effective counsel during plea negotiations]... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964)) (quotation citation omitted).

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must

show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

In Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) this Court held that a guilty plea that contained a waiver of Spoone's right to a direct appeal, PCR, and habeas corpus relief was valid. Id. at 143, 665 S.E.2d at 607. However, this Court cautioned that to be enforceable, a waiver of appellate and collateral rights must show they "are knowing and voluntary." Id. at 142, 665 S.E.2d at 607. In holding that Spoone's waiver was enforceable this Court examined, "the particular facts and circumstances of the instant case, including: (1) the background experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing." Id. at 143, 665 S.E.2d at 608.

In Sanders v. State, supra, this Court held that there was an exception to the Spoone waiver, where Sanders alleged that plea counsel was ineffective for advising him to waive his appellate and collateral rights. Id. at 617, 773 S.E.2d at 583. This Court held that, "although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective. Id. Therefore, a guilty plea, with appellate and collateral review waivers, is not "constitutionally defective" only if plea counsel fully advises the defendant on the rights he is waiving, and that advice does not fall below an objective standard of reasonableness.

In the instant case, plea counsel's advice fell below an objective standard of reasonableness because he failed to fully explain the appellate and collateral rights that Petitioner waived when he advised Petitioner to plead guilty.

Plea counsel only "generally" discussed Petitioner's PCR rights with him during the course of discussing the plea and not prior to the plea agreement. App. 78, ll. 8 – 9; App. 86, ll. 7 – 11. Plea counsel did not give a specific explanation regarding what waiving appellate rights meant. App. 78, ll. 10 – 17. Plea counsel admitted, "I probably did not go into much more detail than he'd be waiving his right to accuse me of being ineffective if he was trying to set [the plea] aside." App. 79, ll. 4 – 7.


Petitioner testified at the PCR hearing that plea counsel did not review the plea agreement with him and that plea counsel only said only showed him where to initial and sign it. App. 63, ll. 10 – 16. Petitioner testified that he was coached through the plea court's colloquy by plea counsel and the solicitor, "I was instructed... before I went in to Judge Henderson that if I said anything... that they didn't tell me [to say], the judge was going to reject the plea and I was going to get... forty years." App. 70, l. 25 – 71, l. 6; App. 74, ll. 20 – 25. Petitioner never spoke to plea counsel about the provision in the plea agreement that said he waived his rights to file a PCR. App. 65, ll. 5 – 9. Petitioner did not know what rights he was waiving pursuant to the plea agreement because he did not know what a "PCR" or an appeal was at the time of the guilty plea. App. 63, ll. 19 – 21; App. 65, ll. 17 – 25; App. 75, ll. 1 – 6.

Therefore, because plea counsel's advice regarding the consequences of the appellate and collateral review rights waiver portion of Petitioner's plea was insufficient, Petitioner's guilty plea was not knowingly, intelligently, and voluntarily entered. That deficient performance prejudiced Petitioner because there is a reasonable likelihood that had plea counsel advised

Petitioner of the appellate and collateral rights he was waiving in his guilty plea, Petitioner would not have pled guilty, and would have gone to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests this Court grant certiorari and allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

TIMOTHY JOHNSON,

PETITIONER

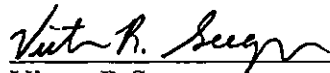
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STATE OF SOUTH CAROLINA,

RESPONDENT

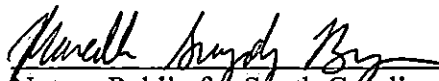
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Timothy Leverage Johnson, #370487, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 19th day of November, 2018.



Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of November, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028