STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Sep 08 2020

S.C. SUPREME COURT

Certiorari to Clarendon County

Honorable Kristi F. Curtis, Circuit Court Judge

ROOSEVELT SABB, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001990

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel only met with Petitioner on the eve of trial, where Petitioner did not believe counsel was prepared for trial, and where Petitioner had no choice but to plead guilty?

STATEMENT

On October 9, 2014, Petitioner was indicted by a Clarendon County grand jury for murder. App. 77 – 78. On October 3, 2017, he pleaded guilty to voluntary manslaughter before the Honorable George M. McFadden, Jr. App. 1. Shaun Kent represented Petitioner; Christopher DuRant appeared on behalf of the state. The plea was negotiated; the proposed sentence was fifteen years. App. 3 ll. 2 – 20.

The facts according to the assistant solicitor were as follows: On July 5, 2014, Petitioner and the decedent got into an argument. App. 6 l. 6 – 9 l. 1. The disagreement turned physical. After the decedent went inside and then came back outside, Petitioner allegedly hit him with his car. Id.

Petitioner pleaded guilty to voluntary manslaughter, and the plea judge accepted his plea. App. 9 l. 20 – 10 l. 7. The plea judge sentenced in accordance with the negotiation; Petitioner received a fifteen year sentence. App. 11 ll. 6 – 10.

Petitioner filed an application for post-conviction relief in March 2018. App. 13 – 21. It contained allegations of ineffective assistance of counsel, including the claim that counsel failed to "make a reasonable investigation in the applicant's case." App. 20. The state made its Return on or about August 6, 2018. App. 22 – 27.

An evidentiary hearing was held on March 27, 2019 before the Honorable Kristie F. Curtis. App. 28. Timothy Griffith represented Petitioner; Janell Gregory appeared on behalf of the state. Petitioner and plea counsel testified at the hearing. At the conclusion of the hearing, the plea judge took the matter under advisement. App. 61 ll. 2 – 3.

An Order of Dismissal was signed on May 7, 2019. App. 63 – 76. The plea judge denied relief on all of Petitioner's claims, finding that he failed to prove deficiency.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel only met with Petitioner on the eve of trial, where Petitioner did not believe counsel was prepared for trial, and where Petitioner had no choice but to plead guilty.

Relevant facts

Trial counsel began representing Petitioner in 2014, three years before his plea date. App. 31 ll. 2 – 15. After Petitioner was bonded out of jail, he did not see counsel until a few days before the plea. App. 34 ll. 4 – 10. For approximately thirty-four months, counsel did not meet with Petitioner. Id. When the two finally met, Petitioner was only shown part of the discovery in his case. App. 34 l. 11 – 35 l. 18. A MAIT animation had been prepared and was going to be utilized by the state; that was the only item of evidence Petitioner was shown. App. 37 ll. 16 – 18. Although counsel advised Petitioner that he was prepared for trial, Petitioner did not believe that assertion. App. 35 ll. 10 – 13. Considering counsel had not spoken with Petitioner about the facts leading up to the incident, petitioner questioned how counsel could be ready to try the case. Id.

Petitioner maintained that the death was an accident. App. 38 l. 1 – 39 l. 4. He indicated that his preference would have been for counsel to hire an expert witness to rebut the state's case. Id. Even beyond expert witnesses, Petitioner remarked counsel did not investigate any potential lay witnesses who would have been favorable to his case. App. 39 ll. 10 – 22. Petitioner felt forced to plead guilty:

> So, basically on the day before trial was supposed to start, he called me in and gives me this option of you're going to go to trial tomorrow or take this plea. We haven't met. We haven't discussed anything. We didn't find favorable witnesses. He didn't interview anything. It was just, basically - - I don't know what we would have went to trial with because he was unprepared.

App. 39 ll. 10 – 22. Petitioner truthfully stated that but for the fact that his attorney did not prepare for trial, he would not have pleaded guilty. App. 39 l. 23 – 40 l. 2.

At the evidentiary hearing, counsel validated Petitioner's testimony that there was minimal interaction between attorney and client during the period of representation after Petitioner made bond. App. 43 ll. 1 – 16. When asked about Petitioner's complaint that he did not have enough opportunities to speak with counsel prior to the plea, counsel agreed with the gripe. App. 59 ll. 2 – 21. There were no substantive telephone calls leading up to the plea. App. 59 l. 22 – 60 l. 7.

Discussion

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a PCR applicant must show: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. To show deficient performance, an applicant must prove "counsel's representation [fell] below an objective standard of reasonableness." Id. at 688. To demonstrate prejudice, an applicant must show "'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.'" Smith v. State, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010) (quoting Strickland, 466 U.S. at 694).

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). This

Court has held that, "in addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A plea made in ignorance of its direct consequences is entered in ignorance and is invalid. Hazel, 275 S.C. 392, 271 S.E.2d 602.

When a defendant is represented by counsel during the plea process and enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Shirley v. State, 306 S.C. 241, 411 S.E.2d 215 (1991). 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) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill at 56-57, 106 S.Ct. at 369, 88 L.Ed.2d at 208-09.

"That the plea be voluntary is not only a requirement of due process, but a premise of the defendant's meaningful participation in the plea process." United States v. Savinon-Acosta, 232 F.3d 265, 268 (1st Cir. 2000) (citing McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)).

Petitioner did not feel like he had a choice in this matter. Faced with the option of going to trial with an attorney he had not met with and therefore believed him to be unprepared or pleading guilty to voluntary manslaughter in a murder case, Petitioner chose the fifteen year

negotiated plea. Had he thoroughly discussed his case with counsel in time to make an informed decision, he may have been able to articulate his defense of accident to counsel, and a trial strategy could have been developed. Instead, Petitioner felt rushed to decide. As a result, he received a fifteen year sentence and never got the opportunity to defend himself at trial. Had counsel communicated with him more and performed a more thorough investigation, Petitioner may have gone to trial.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing.

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2020.

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Counsel for Roosevelt Sabb, Jr. states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Kristi F. Curtis, which was held on March 27, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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 him as counsel for Roosevelt Sabb, Jr..

Respectfully Submitted,

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of September, 2020.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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/Taylor D. Gilliam
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Appellate Defender

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This 8th day of September, 2020.