

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Sep 23 2020

S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

JONATHAN JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000068

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred by finding petitioner's guilty plea was voluntary where defense counsel misadvised petitioner regarding his potential sentence where petitioner testified defense counsel made assurances he would receive a fifteen year sentence and petitioner was given a sentence of twenty five years' imprisonment?

STATEMENT

On October 2, 2017, a Spartanburg County grand jury indicted petitioner for two counts of armed robbery, two counts of assault and battery in the first degree, two counts of kidnapping, first degree burglary, possession of a weapon during the commission of a violent crime, and possession of a stolen pistol. App. 93-104. On March 30, 2018, petitioner pled guilty, as indicted, under *Alford v. North Carolina*, 400 U.S. 25 (1990), before the Honorable Grace Knie. App. 1. Jacqueline Moss represented petitioner, and Barry Barnette, solicitor, represented the state. App. 1. Judge Knie sentenced petitioner to an aggregate sentence of twenty-five years' imprisonment. App. 39-40.

Thereafter, petitioner filed an application for PCR on September 10, 2018. App. 43-52. An evidentiary hearing was held before the Honorable G. Thomas Cooper. App. 63. Rodney Richey represented petitioner, and Jacob Isenberg, assistant attorney general, represented the state. App. 63.

On December 27, 2019, Judge Cooper signed an order denying PCR. App. 83-92. The judge found defense counsel's testimony that she made no guarantees to petitioner regarding his sentence credible. The judge further found the record from the plea hearing cured any potentially erroneous advice defense counsel may have given petitioner regarding sentence because the record reflected petitioner told the plea judge he was not promised anything in exchange for his guilty plea. App. 90-91.

This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred by finding petitioner's guilty plea was voluntary where defense counsel misadvised petitioner regarding his potential sentence where petitioner testified defense counsel made assurances he would receive a fifteen year sentence and petitioner was given a sentence of twenty five years' imprisonment.

Relevant facts

At petitioner's guilty plea hearing the state alleged that on July 28, 2017, petitioner and Kado Bunche broke into the home where Michael Birk and his mother, Michelle Tidd, lived. The state claimed petitioner and Bunche demanded money and drugs and one of them shot a gun, injuring Birk. During the home invasion, Tidd called 911 and police arrived shortly thereafter. Petitioner and Bunche were found with items taken from the home including cash, jewelry, a stolen pistol, marijuana, and a PlayStation. App. 23-25.

Petitioner admitted the state could produce sufficient evidence at trial to prove his guilt beyond a reasonable doubt and entered an *Alford* guilty plea. App. 18.

At the evidentiary hearing, petitioner testified that, while he understood that the charges he was pleading to carried up to life in prison, counsel Moss promised him that if he pled guilty, he would be sentenced to fifteen years. App. 70, ll. 2-24. Petitioner testified that if counsel Moss had not promised him that he would receive a sentence of fifteen years, he would have proceeded to trial. App. 70, l. 25-71, l. 12.

Counsel Moss testified that it was her goal to help petitioner get sentenced to the least amount of time possible. App. 78, ll. 13-18. Moss said petitioner may have been confused regarding sentence because on the guilty plea affidavit she reviewed with petitioner, before the guilty plea, burglary first carried a range beginning at fifteen years. App. 77, ll. 4-15. However,

Moss insisted that she did not make any assurances to petitioner regarding his sentence and that she explained to him he was facing a sentence of life in prison. App. 77, ll. 4-25.

Discussion

Where a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52 (1985). The two-part standard adopted in *Strickland v. Washington*, 466 U.S. 668 (1984) for evaluating claims of ineffective assistance of counsel—requiring that the defendant show that counsel’s representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different—applies to guilty plea challenges based on ineffective assistance of counsel. *Id.* In order to satisfy the second, or “prejudice,” requirement, the defendant must show that 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. *Id.*

In this case, the court incorrectly found counsel was not deficient for failure to properly advise petitioner regarding the consequences of his plea. Petitioner testified at the evidentiary hearing that at the time of his guilty plea, he believed he would be sentenced to no more than fifteen years’ imprisonment. Defense counsel testified it was her goal to attain a lesser sentence for petitioner and that petitioner may have been confused as to his potential sentence by the guilty plea affidavit he signed. Furthermore, the court incorrectly found there was no prejudice where petitioner testified at the evidentiary hearing that had he known he would receive more than a fifteen-year sentence he would have gone to trial. *See Hill v. Lockhart*, 474 U.S. 52 (1985).

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jonathan Johnson 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 G. Thomas Cooper, which was held on October 8, 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 Jonathan Johnson.

Respectfully Submitted,

s/ Sarah E. Shipe

Sarah E. Shipe

Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2020.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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/ Sarah E. Shipe
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