

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Sep 30 2020

S.C. SUPREME COURT

Certiorari to York County

Michael G. Nettles, Circuit Court Judge

ARQUIVIUS MCCLEE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-0002565

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
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Division of Appellate Defense
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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective assistance where Petitioner believed he was pleading guilty to unlawful carrying of a pistol instead of possession of a weapon during the commission of a violent crime, since the misunderstanding resulted in Petitioner's entry of a plea that was not knowingly, voluntarily, and intelligently tendered?

STATEMENT

On June 16, 2016, a York County Grand Jury indicted Petitioner, Arquivius McClee, for armed robbery, criminal conspiracy, possession of a weapon during the commission of a violent crime, and two counts of attempted murder. App. 146 – 155. Petitioner was also indicted for murder, kidnapping, and two counts of unlawful carrying of a pistol. App. 4, l. 25 – 5, l. 5.

On March 22, 2017, Petitioner appeared before the Honorable John C. Hayes, III for a guilty plea hearing. Petitioner was represented by James Morton and John Shiflet. The State was represented by Walter Thompson, Sr. App. 1. Petitioner pleaded guilty to the reduced offense of strong arm robbery, two counts of attempted murder, criminal conspiracy, and possession of a weapon during the commission of a violent crime. In exchange for his pleas, the State dismissed Petitioner's charges of murder, kidnapping, and two counts of unlawful carrying of a pistol. App. 4, l. 8 – 5, l. 7. The court accepted the pleas and sentencing was deferred. App. 19, l. 24 – 21, l. 11.

On March 31, 2017, the parties reconvened for sentencing. Judge Hayes again presided, and Walter Thompson continued to represent the State. Petitioner was this time represented by Nathan Sheldon in addition to James Morton. App. 23. In accordance with the terms of the plea agreement, the State recommended that Petitioner be sentenced to serve concurrent terms of imprisonment of ten years for strong arm robbery and five years for the remaining charges (criminal conspiracy, possession of a firearm during the commission of a violent crime, and two counts of attempted murder). App. 26, l. 22 – 27, l. 3. The solicitor noted that Petitioner had complied with his half of the plea bargain by assisting with the prosecution of his codefendant. App. 26, ll. 19-21. Accordingly, the court sentenced Petitioner to be imprisoned for concurrent terms of ten years for strong armed robbery; five years for attempted murder; five years for

attempted murder; five years for criminal conspiracy; and five years for possession of a weapon during the commission of a violent crime. App. 31, l. 19 – 32, l. 1.

No direct appeal was taken, and on February 7, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 34 – 40. The State made its return. App. 41 – 48. On November 7, 2018, Petitioner filed an amended PCR application. App. 49. A hearing was held on the matter on January 6, 2020, before the Honorable Michael G. Nettles. Petitioner was represented by Jonathan Waller. The State was represented by Janelle Gregory. App. 50.

PCR counsel did not contest the majority of Petitioner’s convictions but instead argued that Petitioner was supposed to plead guilty to unlawful carrying of a pistol instead of possession of a weapon during the commission of a violent crime, and he asked the PCR court to order specific performance of the plea offer. App. 53, l. 22 – 54, l. 14.

Petitioner testified that prior to his plea hearing, he told his lawyers, “The only way I’ll plead guilty is if I can get something non-violent to where I can be able to go up for parole.” App. 60, l. 19 – 61, l. 1. Petitioner said that he told counsel there was a problem with the charges when they discussed his projected release date. Based on that discussion, Petitioner believed counsel would have the possession of a weapon during the commission of a violent crime “changed” to unlawful carrying of a pistol. Petitioner explained that he trusted his counsel would follow up on getting the plea agreement changed. App. 63, l. 16 – 66, l. 20.

Petitioner’s three former lawyers testified: Nathan Sheldon, Jim Morton, and John Shiflet. Sheldon said that Petitioner accepted a plea offer which included possession of a weapon during the commission of a violent crime and that he was “extremely clear” with Petitioner that the charge was “day for day.” App. 87, l. 6 – 92, l. 17. Similarly, Morton testified he discussed with Petitioner the fact that the plea offer included the offense of possession of a weapon during

the commission of a violent crime, for a “day for day five-year sentence.” App. 107, ll. 14-22. Morton said, “Unlawful carry was never really in the mix.” Morton claimed that Petitioner never indicated he wished to withdraw his plea. App. 108, l. 2 – 109, l. 20. The third attorney, Shiflet, said he went through a “plea waiver form” with Petitioner prior to the plea hearing, and that when he did so he went over the fact that Petitioner would be pleading guilty to possession of a weapon during the commission of a violent crime. Shiflet also said Petitioner did not ask to have his plea withdrawn. App. 114, l. 9 -116, l. 11.

On February 13, 2020, the PCR court issued an order of dismissal in which it addressed Petitioner’s allegation that “Counsel was ineffective for failing to object to the State’s breach of the plea agreement, or in the alternative make a motion to withdraw Applicant’s plea.” App. 134; App. 138. The order of dismissal stated that the court “finds the testimony of Sheldon, Morton, and Shiflet as to this allegation very credible and the testimony of Applicant is not credible. This Court finds the plea and sentencing transcripts show the plea was freely and voluntarily entered.” App. 144. “Further this Court finds credible the testimony of Applicant’s attorneys that Applicant never requested his plea be withdrawn after his guilty plea hearing or his sentencing hearing, and, therefore, his attorneys cannot be found deficient for failing to file such a motion in this case.” App. 144.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective assistance where Petitioner believed he was pleading guilty to unlawful carrying of a pistol instead of possession of a weapon during the commission of a violent crime, since the misunderstanding resulted in Petitioner's entry of a plea that was not knowingly, voluntarily, and intelligently tendered.

Counsel's conduct in not protecting Petitioner's right to enforce the plea agreement here—by either objecting during the plea hearing or by failing to move to withdraw the plea—was deficient performance.

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 (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).

The appellate courts of this State have found ineffective assistance of counsel may exist under circumstances similar to those here. *See Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) (counsel was ineffective for failing to object when the solicitor recommended that the judge impose the maximum sentence despite an agreement not to make any specific recommendation); *Custodio v. State*, 373 S.C. 4, 12–13, 644 S.E.2d 36, 40 (2007) (plea counsel was ineffective for failing to seek specific performance of the original plea agreement based on the detrimental reliance exception); *Sprouse v. State*, 355 S.C. 335, 339-40, 585 S.E.2d 278, 280 (2003) (PCR court erred in finding plea was voluntary where one solicitor promised sentence would be nonviolent but another solicitor subsequently classified offenses as violent); *see also Reed v. Becka*, 333 S.C. 676, 690, 511 S.E.2d 396, 404 (Ct. App. 1999) (State may withdraw a plea offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer).

Here, counsel’s performance was deficient, since Petitioner testified that he believed counsel would have the possession of a weapon during the commission of a violent crime “changed” to unlawful carrying of a pistol. Petitioner explained that he trusted his counsel would follow up on getting the charge changed. However, his lawyers neither objected during the plea hearing nor moved to have the plea withdrawn. Moreover, Petitioner detrimentally relied on the plea bargain such that he is entitled to specific performance, since he cooperated with the State’s prosecution of his codefendant.

“To prove counsel ineffective when a guilty plea is challenged, petitioner must show that counsel’s performance was deficient and that, but for counsel’s errors, there is a reasonable probability a guilty plea would not have been entered.” *Custodio v. State*, 373 S.C. at 12, 644

S.E.2d at 40. 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); *see also Bennett v. State*, 371 S.C. 198, 203, 638 S.E.2d 673, 675 (2006). “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 testified that he told his lawyers he would not plead guilty unless the charges were nonviolent. Therefore, Petitioner has shown he was prejudiced. Given these facts, the appropriate remedy is specific performance of the plea agreement. *See Custodio v. State*, 373 S.C. at 13, 644 S.E.2d at 40; *Sprouse v. State*, 355 S.C. at 340, 585 S.E.2d at 281; *Jordan v. State*, 297 S.C. 52, 55, 374 S.E.2d 683, 685 (1988).

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 30th day of September, 2020.

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Counsel for ArQuivius McClee 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 Michael G. Nettles, which was held on January 6, 2020, 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 ArQuivius McClee.

Respectfully Submitted,

sl Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th 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/ Joanna K. Delany

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This 30th day of September, 2020.

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