

RECEIVED

Oct 23 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for a Writ of Certiorari to Kershaw County

Kristi F. Curtis, Post-Conviction Relief Judge
Clifton Newman, Plea Judge

Appellate Case No. 2019-001705

SYLVESTER JOHNSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

ISSUE PRESENTED ON CERTIORARI..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW..... 3

ARGUMENT..... 4

The PCR court correctly found Petitioner knowingly and voluntarily pleaded guilty because Counsel reasonably did not end the plea hearing when the State placed the fourteen year plea offer on the record because Petitioner still wanted to proceed instead of go to trial; Petitioner informed the plea court he was displeased with the State’s plea offer but still decided to accept the State’s offer; and Petitioner testified during the PCR hearing he pleaded guilty to avoid the mandatory minimum twenty-five year sentence he faced at trial..... 4

CONCLUSION..... 8

ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue Presented

Whether the PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily made where defense counsel failed to inform the court that the solicitor had impermissibly changed the plea agreement and counsel failed to move to enforce the original plea agreement, resulting in Petitioner being sentenced to an additional two years in prison?

Respondent's Counter-Statement of Issue Presented

Whether the PCR court correctly found Petitioner knowingly and voluntarily pleaded guilty where Counsel reasonably did not end the plea hearing when the State placed the fourteen year plea offer on the record because Petitioner still wanted to proceed instead of go to trial; Petitioner informed the plea court he was displeased with the State's plea offer but still decided to accept the State's offer; and Petitioner testified during the PCR hearing he pleaded guilty to avoid the mandatory minimum twenty-five year sentence he faced at trial?

STATEMENT OF THE CASE

Petitioner Sylvester Johnson was indicted in December 2016 for trafficking cocaine, ten to twenty-eight grams—third offense, and simple possession of marijuana—second offense. App. 472–73. Petitioner was represented by Ronald W. Moak (Counsel). Assistant Solicitors Brett A. Perry and Jennifer H. McKellar prosecuted the case. App. 333.

Petitioner’s case proceeded to a jury trial on June 26–27, 2017, before Judge G. Thomas Cooper. App. 1–48. However, before the jury was sworn, Petitioner, through Counsel, moved for a continuance because the State indicated Petitioner’s trafficking charge was a third or subsequent offense. App. 41–42. The State conceded its error, and Judge Cooper continued the case until the next term of court. App. 42–43.

Thereafter, Petitioner’s case was called for a jury trial on July 17–19, 2017, before Judge Clifton Newman. App. 50–331. Petitioner was convicted of simple possession of marijuana, but the jury could not reach a verdict on his trafficking charge. App. 308–11. Judge Newman declared a mistrial on the trafficking charge, and sentenced Petitioner to serve one year imprisonment on the marijuana conviction. App. 311; 327. Petitioner did not appeal his simple possession conviction.

On August 9, 2017, Petitioner pleaded guilty to the lesser included offense of trafficking cocaine, ten to twenty eight grams—second offense, before Judge Clifton Newman. App. 333–64. Petitioner pleaded guilty with a negotiated sentence of fourteen years’ imprisonment. App. 335; 361. Judge Newman accepted Petitioner’s guilty plea and sentenced him to fourteen years’ imprisonment. App. 364; 472. Petitioner did not appeal.

Petitioner timely commenced the underlying PCR action on February 16, 2018. App. 366–71. The State made its return on April 24, 2018, requesting an evidentiary hearing. App. 373–77. Thereafter, Petitioner amended his PCR application on February 7, 2019, alleging:

1. Counsel was ineffective for failing to resolve the Petitioner's related driving under suspension case in magistrate's court prior to his General Sessions trial;
2. Counsel was ineffective for failing to move to suppress drugs due to an improper search;
3. Counsel was ineffective for repeatedly giving Petitioner bad advice and expectations that were not followed through;
4. Counsel was ineffective for failing to adequately argue issues regarding his indictment;
5. Counsel was ineffective for failing to ensure that the twelve year plea offer was still available;
6. Counsel was ineffective for improperly and unreasonably coercing and pressuring Petitioner to plead guilty to the cocaine charge;
7. Counsel was ineffective for failing to file a notice of appeal after his conviction by a jury on the marijuana charge; and
8. Counsel was ineffective for failing to file a notice of appeal after his guilty plea to the cocaine charge.

App. 379–82.

An evidentiary hearing into the matter convened on February 20, 2019, before Judge Kristi F. Curtis. Petitioner was present and represented by Kristy G. Goldberg, Esquire. Assistant Attorney General Samuel L. Key represented the State. App. 383–448. The PCR court denied relief and dismissed the action on September 9, 2019. App. 450–71. Petitioner appealed.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give great deference to a PCR court's credibility findings because appellate court's lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The PCR court correctly found Petitioner knowingly and voluntarily pleaded guilty because Counsel reasonably did not end the plea hearing when the State placed the fourteen year plea offer on the record because Petitioner still wanted to proceed instead of go to trial; Petitioner informed the plea court he was displeased with the State's plea offer but still decided to accept the State's offer; and Petitioner testified during the PCR hearing he pleaded guilty to avoid the mandatory minimum twenty-five year sentence he faced at trial

Petitioner argues he did not knowingly and voluntarily plead guilty because Counsel was constitutionally ineffective for failing to move to enforce the original twelve year plea offer, and because Counsel failed to inform the plea court the State had changed the terms of the plea offer. Pet. 7. However, Counsel reasonably asked Petitioner during the plea hearing if Petitioner wanted him to move to withdraw the plea because the offer was raised to fourteen years. Petitioner informed Counsel he still wanted to go forward with the plea, so Counsel did not move to withdraw. App. 428. Therefore, Counsel was not deficient. Petitioner cannot show Counsel's alleged deficient performance prejudiced him because he informed the plea court the previous offer was for twelve years, but he accepted the fourteen year plea offer. App. 339–41. Further, Applicant testified at PCR he accepted the plea offer to avoid the mandatory minimum twenty-five year sentence he faced if convicted at trial. App. 418. Therefore, Petitioner knowingly and voluntarily pleaded guilty, and Counsel was not constitutionally ineffective. Certiorari should be denied and the PCR court should be affirmed.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). “The test for effective assistance of counsel is whether the representation was within the range of competence

demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

The 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.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). “[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). Plea counsel is not deficient for advising a defendant to plead guilty based on what counsel believes the sentence would be if the defendant were convicted at trial. *Bennett v. State*, 371 S.C. 198, 204–05, 638 S.E.2d 673, 676 (2006).

To prove prejudice, the applicant must show a reasonable probability he would not have pleaded guilty and would have insisted on going to trial absent plea counsel’s alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Petitioner argues Counsel had a duty to move to enforce the twelve year plea offer from the State, and Counsel’s failure to do so was ineffective, relying on *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988), and *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000). Pet. 7.

In *Jordan v. State*, Jordan only agreed to plead guilty because he believed the State would neither oppose nor recommend probation. 297 S.C. at 54, 374 S.E.2d at 684–85. The Court found plea counsel was deficient for failing to draw the plea court’s attention to the plea bargain, and because plea counsel “failed to move to withdraw Jordan’s guilty plea.” *Id.* at 54, 374 S.E.2d at 685. The Court found Jordan was prejudiced because Jordan would have chosen to withdrawal his guilty plea and gone to trial if plea counsel had objected to the State violating the plea agreement. *Id.* at 54–55, 374 S.E.2d at 685.

Similarly, in *Thompson v. State*, Thompson pleaded guilty with the understanding the State would remain silent during sentencing. 340 S.C. at 115–16, 531 S.E.2d at 296. However, the State asked for the maximum sentence, and Thompson’s plea counsel did not object. *Id.* at 116, 531 S.E.2d at 296. The Court found that like the attorney in *Jordan*, Thompson’s plea counsel was deficient for failing to object to the State speaking during sentencing. *Id.* The Court also found Thompson proved prejudice because he would not have pleaded guilty had he known the State was going to make a sentencing recommendation. *Id.* at 117, 531 S.E.2d at 297.

The instant case is distinguishable from *Jordan* and *Thompson* for several reasons. First, unlike in *Jordan* and *Thompson*, Petitioner had not formally accepted the State’s offer when the State indicated the plea offer was for fourteen years. *See Reed v. Becka*, 333 S.C. 676, 687, 511 S.E.2d 396, 401 (1999) (“Once a defendant enters a guilty plea and the plea is accepted by the court, due process requires the plea bargain be honored.”). Counsel reasonably asked Petitioner if he wanted to end the plea hearing when the State stated the offer was for fourteen years. However, Petitioner testified he wanted to accept the State’s fourteen year offer to avoid the mandatory minimum twenty five year sentence. App. 418. Specifically, Petitioner testified, “I just know 14 had sounded a lot better than 25 years at the time” App. 418.

Counsel was not deficient because the plea offer had not become binding, and the only thing he could have done was to stop the plea hearing and go to trial. The plea offer was not enforceable, and the State was free to change or withdraw the offer until Petitioner pleaded guilty and the plea court accepted the plea. *See Reed*, 333 S.C. at 690–91, 511 S.E.2d at 404 (“The State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer.”) There is no evidence, nor does Petitioner allege, he detrimentally relied on the State’s twelve year offer. Instead, Petitioner, at the time of the plea

hearing, clearly did not want to go to trial and risk being exposed to the twenty-five year minimum. Therefore, Counsel was not deficient.

Second, while Counsel may not have informed the plea court the State previously offered twelve years, Petitioner informed the plea court and that issue was resolved during the guilty plea. App. 337–41. Petitioner informed the Court he thought he was pleading with a twelve year negotiated sentence, but then decided to accept the State’s fourteen year offer anyway. Therefore, Petitioner knowingly and voluntarily pleaded guilty.

Third, this case is different from *Jordan* and *Thompson* because Petitioner did not testify he would have only pleaded guilty to the twelve year plea offer. To the contrary, Petitioner informed the plea court he thought the previous offer was for twelve years, and still decided to plead guilty to the fourteen year offer. Petitioner testified at PCR, “I just know 14 had sounded a lot better than 25 years at that time, and I felt like okay . . . I’m going to take this 14 right now and hopefully by the grace (sic) I can go back to Court and get this resolved, get this looked at.” App. 418. Petitioner knew the offer changed to fourteen years before he decided to plead guilty; therefore, Petitioner knowingly pleaded guilty to the negotiated fourteen year offer and he cannot show prejudice.

Certiorari should be denied because Petitioner has failed to show Counsel was deficient and he was prejudiced by Counsel’s alleged deficiency. Therefore, the PCR court should be affirmed.

CONCLUSION

Based on the foregoing, Petitioner knowingly and voluntarily pleaded guilty because Counsel reasonably did not end the guilty plea because Petitioner did not want to go to trial at that point. Petitioner cannot show prejudice because he knew he was pleading to fourteen years and did so, and Petitioner testified he accepted the fourteen year plea offer because he did not want to face the mandatory minimum twenty-five year sentence he was exposed to at trial. Therefore, certiorari should be denied and the PCR court should be affirmed.

Respectfully submitted,

s/ Samuel L. Key

SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

Post Office Box 11549
Columbia, S.C 29211
(803) 734-3737

October 23, 2020

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for a Writ of Certiorari to Kershaw County

Kristi F. Curtis, Post-Conviction Relief Judge
Clifton Newman, Plea Judge

Appellate Case No. 2019-001705

SYLVESTER JOHNSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Jessica M. Saxon, Esquire
jsaxon@sccid.sc.gov

This 23 day of October, 2020.

s/Samuel L. Key

SAMUEL L. KEY
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
skey@scag.gov