

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

GARY WAYNE THOMAS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000440

PETITION FOR WRIT OF CERTIORARI

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Trial counsel erred in failing to adequately research petitioner’s prior record before the plea proceeding as this would have prepared counsel to correct the solicitor’s misstatement regarding petitioner’s prior pointing and presenting firearm conviction because the prior did not involve an ex-wife as misstated by the solicitor, which meant that this incorrect summary impacted the plea judge’s sentencing analysis to the extent that the misinformation suggested a threatening behavioral pattern, particularly after the solicitor stated that “this victim needs to be protected,” and the result was a forty-year sentence despite the fact that the solicitor recommended a thirty-year sentence.3

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ISSUE PRESENTED

Trial counsel erred in failing to adequately research petitioner's prior record before the plea proceeding as this would have prepared counsel to correct the solicitor's misstatement regarding petitioner's prior pointing and presenting firearm conviction because the prior did not involve an ex-wife as misstated by the solicitor, which meant that this incorrect summary impacted the plea judge's sentencing analysis to the extent that this misinformation suggested a threatening behavioral pattern, particularly after the solicitor stated "this victim needs to be protected," and the result was a forty-year sentence rather than the state's requested a thirty-year sentence.

STATEMENT OF THE CASE

Petitioner Gary Wayne Thomas pled guilty to attempted murder and armed robbery during the November, 2015 term of the Richland County General Sessions Court before Judge Tanya Gee and was sentenced to imprisonment for an aggregate forty-year term. App. 1-19. Tracey E. Pinnock represented petitioner at the plea proceeding and Assistant Solicitor Meghan Walker appeared on behalf of the state. On May 19, 2016, a sentencing reconsideration motion hearing was held before Judge Gee, who denied the motion by Order dated June 29, 2016. App. 21-42.

On January 5, 2017, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App. 44-50. The respondent filed a return dated December 12, 2017. App. 51-53.

A PCR hearing was convened on December 5, 2018, at the Richland County Courthouse before Judge Jocelyn Newman. App. 55-138. On January 27, 2020 Judge Newman filed an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 140-152.

Petitioner appealed Judge Newman's Order. This petition follows.

ARGUMENT

Trial counsel erred in failing to adequately research petitioner's prior record before the plea proceeding as this would have prepared counsel to correct the solicitor's misstatement regarding petitioner's prior pointing and presenting firearm conviction because the prior did not involve an ex-wife as misstated by the solicitor, which meant that this incorrect summary impacted the plea judge's sentencing analysis where the misinformation suggested a threatening behavioral pattern, particularly after the solicitor's plea that "this victim needs to be protected," and the result was a forty-year sentence despite the fact that the solicitor recommended a thirty-year sentence.

At the guilty plea proceeding, the solicitor presented the facts of the case. The solicitor alleged that petitioner assaulted his estranged wife and then took her purse. App. 6, l. 2 – p.8, l. 15. During the plea proceeding, the solicitor stated a summary of the estranged wife's injuries and then informed that court that petitioner "ha[d] a pointing and presenting [prior] conviction from his first wife" and that the estranged wife "needed to be protected from [petitioner]." App. 8, l.10-13. Defense counsel responded that petitioner had a prior 1991 CDV, first conviction, and a second one in 1995, but added that the pointing and presenting had not been discussed. App. 12, lines 3-11.

During the sentencing reconsideration hearing, defense counsel argued that the forty-year sentence was in effect a life sentence, but counsel failed to address the details of petitioner's pointing and presenting prior conviction. Counsel merely stated that the pointing and presenting prior was 24 or 23 years ago. App. 27, lines 10-13.

The plea judge stated that she did not intend to sentence petitioner to forty years, but noticed "anger that [petitioner] still had towards the victim," and that there was a "risk" of the

victim being “victimized” again, and that petitioner said that “victim needed to be forgiven too,” and that “there was a lot of blame [petitioner] put on the victim and not personal blame taken,” and “that the victim needed to be protected.” App. 25, 1.21-p.26, 1.25. Note that the solicitor asked for thirty years, but added the fear factor by stating that “this victim needs to be protected from this man.” App. 8, lines 12-13. Note also that the plea judge’s sentence exceeded the state’s recommendation by ten years.

During the PCR hearing held in the case, petitioner testified that there was no clarification on who was the victim of the pointing and presenting prior, and that it was an underlying charge in connection with a 1991 CDV charge, and that counsel erred in failing to correct his record before the plea judge to explain how the pointing and presenting was misrepresented by the solicitor, who assumed that the ex-wife was the pointing and presenting victim because that misinformation impacted the plea judge in a negative light against him by making him appear to be in effect a repeat violent offender against women. App. 73, 1.3-p. 76, 1.25. Petitioner stated that the pointing and presenting charge was an action against a male and not his first wife as stated by the solicitor. App. 83, 1.19-p. 84, 1.13.

Trial counsel testified at the PCR hearing and admitted that she failed to clarify the aspects and details of the pointing and presenting prior during the plea proceeding and at the sentencing reconsideration hearing. App. 119, 1.12-p. 120, 1.11; App. 128, 1.2-24.

The PCR judge ruled that trial counsel’s failure to correct the identity of the victim of the pointing and presenting prior charged against the petitioner was not ineffective legal assistance because petitioner did not speak out on the error and because counsel did mention that this prior was too remote to be considered; and as a result, the omission, even if deemed error, was harmless error. App. 145-146.

It was painfully clear that the plea judge apparently questioned whether petitioner lacked sorrow and the ability to view his culpability and appeared concerned that petitioner seemed to assigned blame to the estranged wife's for her affair, all of which were based on petitioner's comments at the plea proceeding. In addition to petitioner's remarks made at the plea proceeding, the combination of what was announced as a pointing and presenting prior against his ex-wife placed petitioner in the most negative light imagined, i.e. a serial assaulter of women who lacked regret or compassion or repentance.

This case is similar to the case of State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976), where the Court held as follows regarding sentencing matters:

Appellant Franklin first submits that the trial judge erred in considering unauthenticated and prejudicial matters at sentencing.

The record reveals that at the time of sentencing, after statements by counsel and the appellant, the trial judge examined the appellant's criminal record including his probation report, which included charges for which the appellant has not yet been tried, and charges of infractions of prison rules. Appellant asserted that the alleged prison rule violations had been dropped and also explained a prior armed robbery conviction. The trial judge stated, after objection to consideration by appellant's counsel, "I don't say that they will have any influence on the sentence, that I may give but I do have the duty and responsibility of examining the entire record when a defendant is before me."

Appellant contends that the trial judge's comments, after sentence was imposed, points inescapably to the conclusion that these matters were considered and influenced his sentence. We disagree.

If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and give serious consideration to any information material to punishment. If a defendant's record, as publicly disclosed, is incorrectly reported, defendant should have an opportunity to explain any discrepancy and inform the court concerning the alleged errors.

In Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948) the Supreme Court made it clear that a sentence cannot be predicated on false information. Here appellant did not deny the information was correct but rather attempted to explain.

Under these circumstances, we find that the facts which were divulged to the court were fully disclosed to the appellant in such a manner that he had an opportunity to explain any misapprehension the court may have had.

The State is correct in its assertion that this Court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive. State v. Goodall, 221 S.C. 175, 178, 69 S.E. (2d) 915, 916 (1952). "It does not appear here that the trial court's discretion was exercised arbitrarily, or for reasons clearly untenable or unreasonable."

To the contrary, in the instant case, the plea judge indeed issued a sentence with prejudice attached. Here, it is painfully obvious that the plea judge factored in what she believed to be an assessment of what she probably viewed as a low level of accountability and culpability taken on by petitioner for his actions, and leaned in on what appeared in her view to be petitioner's placement of a certain amount of blame on the victim, and considered the possibility of further harm to the estranged wife from petitioner in the future. Therefore, the misinformation that petitioner had in the past pointed and presented a weapon at an ex-wife added greatly to the plea judge's impression of petitioner as one who tends to engage in a pattern of violence against women as part of his modus operandi. The overall picture of petitioner was negative, and surely based on the misinformation about the one prior at issue, which was not corrected by trial counsel due to her lack of investigation into petitioner's rap sheet. Had this one segment, i.e., the pointing and presenting prior, of the judge's evaluation of petitioner at sentencing been corrected, then the overall depiction of petitioner to the judge could have been altered. In other words, the misinformation prejudiced petitioner because it added "fuel to the fire," so to speak.

Furthermore, trial counsel did not correct the information when a second opportunity presented itself at the sentencing reconsideration hearing. Thus, the plea judge continued to labor twice under misinformation about petitioner's prior record.

Trial counsel's deficient representation regarding the failure to clarify petitioner's record on two occasions violated petitioner's Sixth Amendment right to competent counsel in a criminal case under Hill v Lockhart, 474 U.S. 52 (1985); and petitioner was prejudiced by counsel's error because but for the error, a reasonable probability exists that petitioner might have received a different sentence in the case.

CONCLUSION

Based on the foregoing argument, counsel for the petitioner would request that the petition be granted and full briefing allowed on the above-raised issue.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of November, 2020.