STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Nov 25 2020

S.C. SUPREME COURT

Certiorari to Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

JOHNNY CAMPBELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000073

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for failing to file a motion to reconsider sentence the fifteen year suspended to seventy-eight month sentence when Petitioner previously chose not to plead guilty when another judge indicated that he would sentence Petitioner to about five years?

STATEMENT

In October of 2017, the Aiken County Grand Jury indicted Petitioner, Johnny Campbell, for two counts of felony driving under the influence [DUI] resulting in great bodily injury, indictments #2017-GS-02-1912, 1913. On February 22, 2019, Petitioner appeared before the Honorable Doyet A. Early and pled guilty, pursuant to a negotiated sentence of fifteen years suspended upon the service of between five and eight years, to one count of felony DUI resulting in great bodily injury. P. Andrew Anderson represented Petitioner at the plea. Paige E. Tiffany prosecuted the case. Judge Early sentenced Petitioner to fifteen (15) years suspended upon the service of seventy-eight (78) months followed by five years of probation. (App. pp. 15-17). Petitioner did not appeal the sentence or conviction.

On March 20, 2019, Petitioner filed an application for post-conviction [PCR]. The State filed a return on May 9, 2019. An amendment to the PCR application was filed on September 23, 2019. On October 3, 2019, an evidentiary hearing was held before the Honorable Courtney Clyburn Pope. Nancy Fennell represented Petitioner at the evidentiary hearing. Brianna L. Schill represented the State. In a written order signed December 11, 2019, Judge Pope denied relief and dismissed the application. (App. pp. 89-102). A timely notice of intent to appeal was served on January 17, 2020. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for failing to file a motion to reconsider sentence the fifteen year suspended to seventy-eight month sentence when Petitioner previously chose not to plead guilty when another judge indicated that he would sentence Petitioner to about five years.

Petitioner pled guilty to felony DUI resulting in great bodily injury and the judge sentenced him to fifteen years suspended upon the service of seventy-eight months followed by five years of probation. (App. p. 12, lines 22-25; p. 17). The sentence was imposed pursuant to negotiations with the State for a sentence of fifteen years suspended upon the service of between five and eight years. (App. p. 4, lines 5-6). Plea counsel did not file a motion to reconsider the sentence imposed.

In the amendment to the PCR application Petitioner alleged that plea counsel was ineffective for failing to file a motion for reconsideration. (App. p. 38). During the PCR hearing Petitioner testified that if he had known that he could have filed a motion to reconsider the sentence, he would have asked his attorney to file the motion. (App. p. 61, lines 4-17). During the PCR hearing plea counsel testified that he did not remember advising Petitioner about a motion to reconsider sentence. (App. p. 84, lines 6-16). When asked about the motion to reconsider sentence, plea counsel testified, "Truthfully, that moment, I felt lucky that the judge put it in the middle. We were hopeful he would do the five, obviously. But with the victim there - - and the victim was sympathetic - - I felt we were lucky to get right dead - - you know, slap in the middle, and it really was kind of better than he had indicated before." (App. p. 86, lines 19-24).

Earlier in the PCR hearing plea counsel testified that the sentencing judge, Judge Early, initially indicated that he would sentence Petitioner between five and fifteen years. (App. p. 73,

lines 5-10). At that time, Petitioner chose not to enter a guilty plea. (App. p. 73, lines 10-13). Another judge indicated he would probably sentence Petitioner to about seven years. (App. p. 74, lines 7-14). Petitioner again chose not to enter a guilty plea. (App. p. 74, lines 14-15). Another judge indicated he would probably sentence Petitioner to about five years. (App. p. 74, lines 16-21). Petitioner again chose not to plead guilty. (App. p. 74, lines 20-21). Plea counsel testified that when he once again met with the sentencing judge, he indicated that he would probably sentence Petitioner to between eight and twelve years, different from the earlier indication of a sentence between five and fifteen years. (App. p. 75, lines 6-8). Petitioner eventually accepted the plea negotiation with the State for a sentence of fifteen years suspended upon the service of between five and eight years.

In the order of dismissal the PCR judge wrote that, ". . . Counsel testified he did not believe there was a valid legal basis to file a motion to reconsider his sentence." (App. p. 99). The PCR judge mischaracterized plea counsel's testimony with regard to the motion to reconsider sentence. Counsel did not testify that he did not believe there was a valid legal basis to file a motion to reconsider. Instead, plea counsel indicated he did not think about a motion to reconsider sentence because he felt lucky that the sentence was less than originally indicated. The PCR judge then wrote:

> This Court finds Counsel's testimony regarding this allegation credible, and finds Applicant's allegation on this issue credible only to the extent Applicant testified he wanted to file a motion to reconsider his sentence because he believed he received "too much" time. This Court finds Applicant has failed to establish how Counsel was deficient in any way by failing to file a motion to reconsider his sentence. There is no professional obligation to file a motion for reconsideration of a sentence absent a legal reason to do so. *See Shraiar v. U.S.*, 736 F. 2d 817, 818 (1st Cir. 1984) ("No court has held that failure to file a [motion to reduce sentence] automatically constitutes ineffective assistance of counsel."). Counsel credibly testified that the sentence imposed was not illegal or imposed based on prejudice, corruption or any other improper motive. Additionally, Counsel credibly testified he was "surprised" because Judge Early ultimately sentenced

> Applicant to a shorter sentence than he previously indicted he would impose. Accordingly, Counsel was not deficient.

(App. pp. 99-100). The PCR judge additionally found that Petitioner failed to prove prejudice. (App. p. 100). The PCR judge erred. Counsel was deficient in failing to file a motion to reconsider sentence and Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Plea counsel was ineffective in failing to file a motion to reconsider sentence when Petitioner did not receive the five-year lower end of the negotiated sentence. Plea counsel knew that earlier Petitioner did not enter a guilty plea when another judge indicated that he would sentence Petitioner to five years. Plea counsel should have known that Petitioner was not happy with the sentence imposed and should have discussed a motion to reconsider sentence.

In State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

> The authority to change a sentence rests exclusively with the sentencing judge and is within his or her discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). A judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed. Wasman v. United States, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

The sentencing judge in the present case had the authority to reconsider and reduce the sentence imposed. As sentencing is discretionary, plea counsel did not need a specific reason to file the motion to reconsider. In this case plea counsel should have known Petitioner wanted him to file a motion to reconsider sentence because Petitioner earlier chose not to enter a guilty plea to a lesser sentence. Counsel was ineffective in failing to file a motion to reconsider sentence. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that if plea counsel had filed a motion to reconsider sentence, the judge would have granted the motion.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of November, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny Campbell 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 Courtney Clyburn-Pope, which was held on October 2, 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 Johnny Campbell.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of November, 2020.

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CERTIFICATE OF COUNSEL

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."

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This 25th day of November, 2020.