STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Dec 16 2020

S.C. SUPREME COURT

Certiorari to Richland County
Roger E. Henderson, Circuit Court Judge

SHAWN BETHEA,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000602

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where counsel's erroneous advice left Petitioner with the mistaken understanding that counsel would not represent Petitioner at trial, that Petitioner would be sentenced more harshly for exercising his right to a trial, and that Petitioner would be eligible for a five-year sentence upon reconsideration, since these facts resulted in Petitioner's entry of a plea that was not knowingly, voluntarily, and intelligently tendered?

STATEMENT

On July 15, 2014, a State Grand Jury indicted Petitioner for four counts of armed robbery and two counts of possession of a weapon during the commission of a violent crime. App. 181 – 185. On June 8, 2015, Petitioner appeared before the Honorable James Barber, III for a guilty plea hearing. Petitioner was represented by Seth Rose. The State was represented by Lawrence Wekekind and Joshua Underwood. App. 1.

Pursuant to a plea agreement, Petitioner pleaded guilty to one count of armed robbery with a recommendation of a cap of twenty years, a crime in which the State alleged Petitioner robbed an automated teller machine (ATM) repairman. App. 13, l. 21 – 16, l. 11. The remaining five charges were dismissed by nolle prosequi as part of the plea bargain. App. 4, l. 13 – 5, l. 15. Petitioner was sentenced to fourteen years' incarceration, with credit for two years, four months, and twenty-one days. App. 33, ll. 1-5; App. 186. No direct appeal was taken.

On June 8, 2016, Petitioner filed an application for post-conviction relief (PCR).[1] App. 35 – 41. A hearing was held on the matter before the Honorable Roger E. Henderson on August 20, 2019. Petitioner was represented by Tommy Thomas. The State was represented by Johnny James, Jr. App. 51.

Petitioner explained that he told plea counsel he was not guilty. App. 65, ll. 21-22. Petitioner said he told counsel he did not want to accept the State's plea offer "for a crime I didn't commit," and said he wanted to go to trial. App. 69, ll. 15-25. However, Petitioner said counsel advised him the judge would "get mad" if Petitioner asserted his right to trial and would "take it out on" Petitioner during sentencing. App. 70, ll. 17-22. Petitioner also said he thought he would have to represent himself at trial and so he felt he had no choice but to plead guilty.

[1] The State made its return and motion for a more definite statement on February 8, 2017. App. 42 – 47. On May 15, 2017, Petitioner filed an amended PCR application. App. 48 – 50.

App. 74, l. 4 – 75, l. 1; App. 102, ll. 14-23. Petitioner explained that his plea was not freely and voluntarily made. App. 79, ll. 22-24.

Petitioner also explained that, as evidenced by a letter he was given by plea counsel, he believed plea counsel would return him to court for a reconsideration of his sentence so that he could receive a lesser sentence of five years. App. 75, l. 1 – 79, l. 11. The letter was made an exhibit at the PCR hearing and reflects that plea counsel agreed to represent Petitioner in "any future" "[m]otion to reconsider sentencing."[2] App. 160.

In contrast, plea counsel, who was retained, claimed that he was prepared to go to trial and he claimed that Petitioner admitted to being "in the car" when the armed robbery at the ATM occurred. Counsel alleged that Petitioner "felt comfortable [going forward with the plea] under a hand of one hand of all [theory]." App. 108, ll. 9-10; App. 117, ll. 3-25. Plea counsel claimed that he "never forced [Petitioner] to do anything." App. 118, ll. 18-20. Plea counsel further claimed that some things Petitioner said during his testimony were "simply not true." App. 111, l. 24 –112, l. 1.

Plea counsel alleged that his agreement to represent Petitioner on a motion to reconsider was only applicable if Petitioner provided "substantial assistance" to law enforcement in their investigation of a "cold case" murder, in which case, counsel could seek sentence reconsideration "by consent" of the prosecutor. However, no one was ever charged with the murder. Plea counsel also claimed Petitioner got a "huge benefit" at his plea because a representative of the Sherriff's Department spoke at the plea, said Petitioner was assisting with the cold case, and asked for a sentence in the lower end of the range. App. 126, l. 25 – 130, l. 6.

---

[2] Jamie Moses also testified at the PCR hearing and said she was Petitioner's girlfriend. Moses said that plea counsel told her that he would "bring [Petitioner] back up in front of another judge to get a lesser amount of time." App. 104, l. 19 – 105, l. 23. However, plea counsel claimed that Moses was not Petitioner's girlfriend. App. 107, l. 17-25.

Petitioner testified in rebuttal and said that plea counsel did not advise him "the only way I get my motion to reconsider sentencing [was] if somebody was to get charged. Not once did he say that." App. 157, ll. 4-7.

On March 25, 2020, the PCR court issued an order of dismissal. App. 161. The PCR court found Petitioner's testimony "not to be credible in its entirety . . ." and found plea counsel's testimony to be "highly credible." App. 172 – 173. The court also found Jamie Moses' testimony not credible. App. 173.

The order addressed Petitioner's claim that "his guilty plea was not voluntarily entered, because [c]ounsel misadvised him that he would be able to receive a sentence of five years in exchange for his plea and cooperation, and thereafter forced him to plead before Judge Barber as part of a scheme to effectuate as much." App. 179. The PCR court found the allegation was resolved by its credibility findings and by Petitioner's statements at the plea hearing. The PCR court found that counsel "did not force" Petitioner to plead guilty and only advised Petitioner he could receive an "undefined benefit" if he provided substantial assistance which resulted in charges against the perpetrators of the cold case murder. App. 179.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel's erroneous advice left Petitioner with the mistaken understanding that counsel would not represent Petitioner at trial, that Petitioner would be sentenced more harshly for exercising his right to a trial, and that Petitioner would be eligible for a five-year sentence upon reconsideration, since these facts resulted in Petitioner's entry of a plea that was not knowingly, voluntarily, and intelligently tendered.

Plea counsel provided ineffective assistance where Petitioner was left with the incorrect impression that counsel would not represent Petitioner at trial, that Petitioner would be sentenced more severely for exercising his right to trial, and that Petitioner could receive a five-year sentence upon reconsideration—facts which resulted in Petitioner's entry of a plea that was not knowingly, voluntarily, and intelligently made.

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). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (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 v. Lockhart*, 474 U.S. 52, 58 (1985). 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). "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).

Counsel would have been obliged to represent Petitioner at trial. The trial judge would have been forbidden from "taking [Petitioner's decision to go to trial] out on" him in sentencing. Any motion to reconsider could not have resulted in a five year sentence, since the mandatory minimum sentence for armed robbery is ten years. Petitioner's plea was involuntarily entered here, based on these misunderstandings, which were due to counsel's deficient performance.

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*, 474 U.S. at 56. The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969). Here, Petitioner did not believe he had a real choice between entering a plea and standing trial, so his plea was involuntarily made.

Moreover, the court is constitutionally prohibited from imposing a so-called "trial tax" in sentencing a defendant. "When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion." *Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016); U.S. CONST. amend. VI. *See also Davis v. State*, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999); *State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995). Here, Petitioner incorrectly believed the judge would be "mad" and "take it out on" him if he stood trial.

Finally, armed robbery carries a mandatory minimum sentence of ten years, which is not suspendable. S.C. Code Ann. § 16-11-330(A). Counsel's erroneous advice left Petitioner with the incorrect understanding that the sentence could be suspended to five years upon reconsideration, and that counsel would seek such reconsideration. The advice contributed to Petitioner's entry of a plea that was not voluntarily and intelligently made.

These facts supported a finding that Petitioner established deficiency and prejudice, and this Court should grant certiorari. *Strickland v. Washington*, 466 U.S. at 687.

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 16th day of December, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Dec 16 2020

S.C. SUPREME COURT

Certiorari to Richland County
Roger E. Henderson, Circuit Court Judge

SHAWN BETHEA,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shawn Bethea 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 Roger E. Henderson, which was held on August 20, 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 Shawn Bethea.

Respectfully Submitted,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of December, 2020.

RECEIVED

Dec 16 2020

S.C. SUPREME COURT

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."

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 16th day of December, 2020.