

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Calhoun County
Edgar W. Dickson, Circuit Court Judge
—————

RECEIVED

Feb 24 2021

S.C. SUPREME COURT

TIMOTHY J. PHILLIPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001596
—————

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

INDEX i

ISSUE PRESENTED1

STATEMENT.....2

ARGUMENT

The PCR court erred where it found counsel provided effective representation where Petitioner pleaded guilty pursuant to a plea agreement in which the State would recommend a range of zero to twenty years for kidnapping, where the solicitor deviated from the terms of the plea agreement when he asked the court to impose a twenty year sentence, since counsel should have corrected the solicitor or moved to withdraw the plea5

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL9

ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation where Petitioner pleaded guilty pursuant to a plea agreement in which the State would recommend a range of zero to twenty years for kidnapping, where the solicitor deviated from the terms of the plea agreement when he asked the court to impose a twenty year sentence, since counsel should have corrected the solicitor or moved to withdraw the plea?

STATEMENT

During the November term of 2016, a Calhoun County Grand Jury indicted Petitioner for kidnapping. App. 193 – 194. The State alleged that on September 10, 2016, Petitioner hit his ex-girlfriend, the complainant, with a pistol and forced her to drive to a nearby church where he was going to kill her. However, Petitioner ultimately told the complainant to drive back home and he let her go. App. 15, l. 20 – 16, l. 5.

On November 28, 2016, Petitioner appeared before the Honorable Diane Goodstein for a guilty plea hearing. Martin Banks represented Petitioner. Ted Lupton represented the State. App. 1. At the outset of the plea hearing, the solicitor told the court that the plea agreement was a cap of twenty years. “Mr. Phillips is pleading guilty on one count of kidnapping with a recommendation of a cap of 20 years.” App. 3, ll. 9-10. During the plea colloquy, the court advised Petitioner that kidnapping carries a maximum term of imprisonment of thirty years. App. 6, ll. 18-21.

However, after the court accepted Petitioner’s plea, the solicitor essentially changed the State’s position as to sentencing. App. 28, ll. 7-11; App. 31, ll. 21-25. The solicitor said, “If the [c]ourt is inclined to go with the 20, I think that would be appropriate. If not, I’d ask the [c]ourt to go with something pretty close to it.” App. 31, ll. 23-25. The solicitor’s statement here changed the recommended sentence from a recommended range of zero to twenty years to a recommendation of twenty years. However, plea counsel neither objected and clarified the sentence recommendation nor did he ask to withdraw the plea. Plea counsel simply asked for a lesser sentence. App. 35, ll. 3-11. Counsel said to the plea court, “I felt like it wouldn’t be out of the question in asking the [court] for about ten years.” App. 35, ll. 3-5.

After his direct appeal was dismissed pursuant to Rule 203(d)(1)(B)(iv), SCACR, Petitioner filed an application for post-conviction relief (PCR) on July 19, 2017. App. 38 – 106. The State made its return and motion for a more definite statement on January 25, 2018. App. 107 – 115. Petitioner filed an amended PCR application on April 16, 2018. App. 116 – 118. On April 25, 2018, a hearing was held on the matter before the Honorable Edgar W. Dickson. Jonathan Waller represented Petitioner. Christian Saville represented the State. App. 119.

Petitioner testified that he wanted to exercise his right to a trial but explained he pleaded guilty based on his discussions with counsel, which led him to believe he would get ten years' imprisonment. App. 129, l. 18 – 130, l. 19. Petitioner understood that the State would recommend a cap of twenty—in other words, a recommended range of zero to twenty, not a recommended twenty. App. 132, ll. 1-14.

Plea counsel said that although the solicitor originally wanted a plea deal of a recommended twenty year term, ultimately the parties agreed to a recommendation of a cap of twenty years. App. 161, ll. 11-18. PCR counsel asked plea counsel why he did not respond when the solicitor asked the court to impose the cap. “Does that not kind of take it back to a recommendation of a 20 year sentence?” App. 161, l. 25 – 162, l. 9. Plea counsel claimed that he did not want to “split[] hairs” and said he thought what transpired was in keeping with the terms of the deal. App. 162, l. 10 164, l. 9. Plea counsel also alleged he told Petitioner that he could get up to twenty years as a result of the plea. App. 165, ll. 10-14.

In summation, PCR counsel argued that the solicitor told the court “there was a recommendation of a cap of 20 years. . . when he then turns around and asks the [c]ourt to give 20 years, I think **that changes from a recommendation of a cap to a recommendation of twenty years.**” App. 168, l. 25 – 169, l. 5 (emphasis added). “[A]t that point, it’s up to [plea counsel] to

object or to, to clarify with the [c]ourt that . . .that the Solicitor’s Office has changed their position, and to allow [Petitioner], if he wants to at that time, to attempt to withdraw the plea . . .” App. 169, ll. 5-10.

On October 15, 2020, the PCR court issued an order of dismissal in which it addressed Petitioner’s allegation that counsel was ineffective when he failed to object to the solicitor “breaching the plea agreement.” App. 182; App. 190 – 191. The order of dismissal stated, “There is no indication in the record before this [c]ourt that the State’s silence as to sentencing was ever a part of Applicant’s plea deal. The record indicates the plea deal was for a recommended sentencing cap of twenty years.” App. 190. “Further, the solicitor simply stated that the case was indeed serious and that the [c]ourt would be within its discretion to sentence Applicant at the higher end of the recommended sentencing range.” App. 191. “Therefore, Applicant has failed to prove counsel was deficient for failing to object to something for which he had no articulable basis and that any prejudice resulted.” App. 191.

The plea court had imposed the sentence recommended by the solicitor, sentencing Petitioner to twenty years’ imprisonment. App. 35, l. 25 – 36, l. 1; App. 195.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation where Petitioner pleaded guilty pursuant to a plea agreement in which the State would recommend a range of zero to twenty years for kidnapping, where the solicitor deviated from the terms of the plea agreement when he asked the court to impose a twenty year sentence, since counsel should have corrected the solicitor or moved to withdraw the plea.

Counsel provided deficient representation where he failed to respond when the solicitor improperly changed the terms of the plea bargain during the plea hearing by asking the court to impose a twenty year sentence rather than impose a sentence within the range of zero to twenty years. Petitioner understood that he was pleading guilty pursuant to a recommended range of zero to twenty years (which the parties referred to as a cap of twenty years since the offense carried up to thirty years), rather than a recommended sentence of twenty years. Therefore, his plea was not knowingly, voluntarily, and intelligently entered.

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); *McMann v. Richardson*, 397 U.S. 759, 771 (1970). 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.

“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. 4, 12, 644 S.E.2d 36, 40 (2007). “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” *Sellner v. State*, 416 S.C. 606, 611, 787 S.E.2d 525, 527 (2016) (internal quotations omitted); *Wolfe v. State*, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997). “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).

Here, Petitioner explained he did not know the solicitor intended to ask the court to impose the cap. Petitioner believed the State was recommending a range of zero to twenty years, capped out at twenty. Petitioner thought he was agreeing to limit his probable exposure rather than agreeing to a recommended sentence of twenty years. Counsel should have corrected the record as to the plea agreement’s terms, and counsel should have asked to withdraw the plea if necessary.

“The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement.” *Custodio v. State*, 373 S.C. at 11, 644

S.E.2d at 39. “Once a defendant enters a guilty plea and the plea is accepted by the court, due process requires the plea bargain be honored.” *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (citing *Santobello v. New York*, 404 U.S. 257 (1971)). Here, the State changed the terms of the plea agreement after Petitioner’s plea had been accepted by the court. PCR counsel correctly argued that defense counsel’s failure to object under these circumstances, when the solicitor breached the plea offer, was deficient performance.

Petitioner was prejudiced because he relied upon the plea offer of a recommended range of zero to twenty in making his decision to forego a trial, and he only accepted the plea on the advice of counsel. Petitioner was prejudiced because had he known the terms of the plea offer would be changed by the solicitor during the plea hearing, he likely would have proceeded to trial. *Strickland*, 466 U.S. at 687; *Sellner v. State*, 416 S.C. at 611, 787 S.E.2d at 527; *Frierson v. State*, 423 S.C. at 262, 815 S.E.2d at 436.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully request 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 24th day of February, 2021.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Feb 24 2021

S.C. SUPREME COURT

—————
Certiorari to Calhoun County

Edgar W. Dickson, Circuit Court Judge
—————

TIMOTHY J. PHILLIPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

—————
PETITION TO BE RELIEVED AS COUNSEL
—————

Counsel for Timothy J. Phillips 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 Edgar W. Dickson, which was held on April 25, 2018, 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 Timothy J. Phillips.

Respectfully Submitted,

sl. Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of February, 2021.

RECEIVED

Feb 24 2021

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

This 24th day of February, 2021.

ATTORNEY FOR PETITIONER