

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County

Honorable J. Mark Hayes, Circuit Court Judge

ALFONSO MORGAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001174

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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Mar 31 2021

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where Petitioner was under the impression that he would receive an eight year sentence following his plea, where he instead received a twenty-five year sentence suspended to twelve-and-a-half years?

STATEMENT

Petitioner was indicted by a Greenwood County grand jury on May 8, 2015 for murder. App. 735 – 736. After a multi-day immunity hearing, Petitioner pled guilty to the lesser-included offense of voluntary manslaughter before the Honorable Eugene C. Griffith, Jr. on February 5, 2016. App. 532. Townes Jones and James Bannister represented Petitioner; David Stumbo and Yates Brown appeared on behalf of the state.

The plea was “straight-up,” without recommendation or negotiation as to the sentence. App. 532 l. 16 – 533 l. 16. Petitioner stated to Judge Griffith that he waived his rights and elected to plead guilty. App. 537 ll. 8 – 11. He indicated that he was pleading freely and voluntarily. App. 537 ll. 12 – 14. The facts giving rise to the indictment were explored during the immunity hearing and summarized by the solicitor at the plea as follows:

On November 14, 2013, at the Triangle Senior Club, Petitioner shot and killed Jamaal Aiken. App. 537 l. 22 – 539 l. 19. Aiken passed away after being transported to the hospital. Id. Petitioner left the scene, but a witness provided license plate information to law enforcement which led to Petitioner’s arrest. Id.

Judge Griffith reiterated that Petitioner was pleading to voluntary manslaughter instead of the indicted offense, murder. App. 539 l. 23 – 540 l. 11. Additional charges were also dismissed as part of the plea. Id. Petitioner stated at the plea that no additional promises were made to him. Id.

Petitioner testified that he pled guilty because he committed the offense. App. 543 ll. 2 – 5. Judge Griffith found that Petitioner’s plea was freely, knowingly, and voluntarily made. App. 542 l. 24 – 543 l. 13. Judge Griffith found that a factual basis existed and accepted the plea. Id.; App. 558 ll. 5 – 17.

Petitioner was sentenced to twenty-five years, suspended upon the service of twelve-and-a-half years. App. 558 ll. 5 – 17. Upon release, Petitioner was sentenced to three years' probation after community supervision as well. Id. He received credit for his pre-trial confinement. Id.

Petitioner's conviction was affirmed by the South Carolina Court of Appeals. State v. Morgan, Op. No. 2018-UP-233 (S.C. Ct. App. filed June 6, 2018). Soon thereafter, Petitioner filed an application for post-conviction relief. App. 560. It contained allegations of ineffective assistance of counsel, including a failure to investigate.

The state filed a Return and Motion for More Definite Statement on or about December 4, 2018. App. 587. Through PCR counsel Ashley McMahan, an Amended Post-Conviction Relief Application was filed on or about February 28, 2020. App. 604. Two allegations were included in this filing: 1) counsels were ineffective when they informed Petitioner he would be pleading to a ten-year deal; and 2) counsels were ineffective when they did not call Nick Futch as a witness in the immunity hearing. App. 604 – 605.

Both of these contentions were discussed at Petitioner's PCR evidentiary hearing, held before the Honorable J. Mark Hayes, II on March 13, 2020. App. 607. Ashley McMahan represented Petitioner, and Janell H. Gregory appeared on behalf of the state. Four individuals testified at the hearing: Nick Futch, Petitioner, and both of Petitioner's attorneys. At the conclusion of the hearing, Judge Hayes took the matter under advisement. App. 705 l. 1.

An Order of Dismissal was signed on August 17, 2020 and filed ten days later. App. 707. The PCR court denied relief on both of the allegations contained in the amended PCR application.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where Petitioner was under the impression that he would receive an eight year sentence following his plea, where he instead received a twenty-five year sentence suspended to twelve-and-a-half years.

Relevant facts

Nick Futch was the Commander of the Greenwood City Police Department's Detective Division in November 2013. App. 613 ll. 6 – 9. He testified that “the chances of [Petitioner] being convicted of murder probably weren't extremely high, just due to the circumstances.” App. 616 l. 15 – 617 l. 5. Nonetheless, he believed the facts fit the elements of the crime. Id. Furthermore, he did not classify this as a self-defense case. App. 624 ll. 4 – 22.

The PCR court found Futch and trial counsel's testimony credible regarding this issue. App. 733. Although no case law was cited in this portion of the “Findings of Fact and Conclusions of Law” portion of the Order of Dismissal, the PCR court concluded that Petitioner failed to prove both deficiency and prejudice. Id.

Concerning the other allegation of ineffective assistance of relief, the claim that Petitioner was promised a more favorable sentence, Petitioner testified that he told his attorneys that he would accept an eight-year deal. App. 626 l. 7 – 627 l. 14. Even at the time of the plea, Petitioner believed he was going to receive an eight-year sentence. App. 628 ll. 2 – 16. Previously the discussion had revolved around a potential five-year plea. App. 633 l. 13 – 634 l. 3.

While meeting with his attorneys, after the decision was made for Petitioner to plead guilty, Petitioner was not prepared for the questions the plea judge was going to ask. App. 643

ll. 4 – 10. Petitioner was under the impression that he would be receiving an eight-year sentence and that he would only be required to serve a fraction of it, approximately five or six years. App. 643 ll. 11 – 21.

As part of his post-conviction relief application, Petitioner included a copy of case goals generated by his attorneys. App. 575. Created after the immunity hearing was lost, the third goal was:

3. Right NOW, get AL a deal with the Solicitor for less than 8½ years and an agreement that they won't send this case to federal. Suggest Voluntary Manslaughter : 20 years suspended to a service of a 10-year sentence. Of that 10 years, Aiken's family won't be aware that AL will get credit for 2½ years served. That equates to AL doing 6 years at a medium-security state facility. When finished with jail time, he'd have probation.

App. 575.

When asked why he did not speak up when the plea judge asked whether he had been promised anything, Petitioner responded that he trusted his attorneys to get the deal they discussed. App. 639 ll. 5 – 18; App. 641 ll. 7 – 20.

Townes Jones was retained to represent Petitioner. App. 644 ll. 15 – 18. He associated Jim Bannister to assist with the immunity hearing. App. 654 l. 19 – 655 l. 15. Jones recalled that after immunity was denied, the judge questioned whether plea discussions had occurred. App. 657 ll. 3 – 19. After Petitioner and his attorneys huddled at Jones' office, the decision was made for Petitioner to plead guilty with the hope that Judge Griffith would consider a ten-year sentence. App. 659 ll. 2 – 13; App. 660 l. 6 – 661 l. 12.

Jones recalled advising Petitioner that the sentence(s) they discussed could not be guaranteed. App. 672 l. 2 – 674 l. 15; App. 676 l. 19 – 677 l. 22. Jones outright denied ever promising Petitioner that he would receive an eight-year sentence. App. 674 ll. 16 – 17. The

conversations largely centered on a potential ten-year sentence with credit of approximately two years' time served. App. 678 l. 9 – 679 l. 20.

Counsel Bannister did not extend any plea offers or promises to Petitioner. App. 696 ll. 14 – 25. He reiterated that nothing was guaranteed. App. 697 ll. 20 – 25.

The PCR court found that Petitioner was not promised an eight year sentence. App. 731. As a result, the PCR court found that Petitioner failed to prove both deficiency and prejudice. App. 729 – 732.

Discussion

Petitioner testified that he believed he was receiving an eight year plea deal. The goals sheet created by his attorney reflects that understanding. Because he did not receive the deal he was promised, his plea was not intelligently made. He did not receive the sentence he expected following conversations with his attorneys, and he is entitled to relief.

In order to establish ineffective assistance of counsel, a PCR applicant must establish trial counsel's performance fell below an objective standard of reasonableness and, “the deficient performance prejudiced the [applicant] to the extent that ‘there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different’.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625, (1989), quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Id.

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for

counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 208-09 (1985). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCP, hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, supra. However, the appellate court will not uphold the findings of the PCR court if there is no probative evidence to support those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

Following the denial of immunity, Petitioner was faced with a decision. He could have proceeded to a jury trial on the murder offense or plead guilty and receive what he believed to be a guaranteed eight years. Based on the understanding he received from conversations with counsel, Petitioner elected to plead guilty. However, he did not receive the sentence he expected. The prejudice manifested in the lengthy sentence he received. His plea was induced by counsel's promises, yet the sentence he received was not what was promised. The PCR court erred in denying relief.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow further briefing.

A handwritten signature in blue ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of March, 2021.

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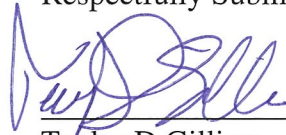
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Alfonso Morgan states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge J. Mark Hayes, which was held on March 13, 2020, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Alfonso Morgan.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of March, 2021.

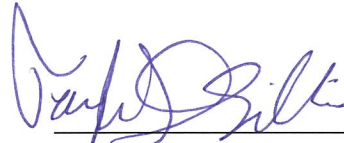
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of his 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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