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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable R. Scott Sprouse, Circuit Court Judge

JASON ALLEN LARSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000764

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that plea counsel ineffective for failing to advise Petitioner, in connection with entering into a plea agreement waiving the right to seek collateral review, that any time served for PWID methamphetamine and possession of a controlled substance prior to the State Grand Jury indictments would not apply to the trafficking methamphetamine charge?

STATEMENT

On October 16, 2014, Petitioner was arrested at a traffic checkpoint in Pickens County and charged with distribution of methamphetamine and possession of a controlled substance. (App. p. 25, line 22 – p. 26-27, line 1; p. 81). These charges resulted in indictments #2015-GS-39-915, 017 that were later dismissed on August 21, 2018, because the charges were transferred to the State Grand Jury. (App. pp. 82-83). On September 30, 2015, Petitioner pled guilty to an unrelated ABHAN. (App. p. 126, lines 13-16). On October 21, 2015, the State Grand Jury indicted Petitioner in count one of a multi-defendant, multi-count indictment for trafficking methamphetamine, 400 grams or more (conspiracy), indictment #2015-GS-47-08. (App. pp. 58-60). On October 21, 2015, the State Grand Jury also indicted Petitioner for possession with intent to distribute methamphetamine [PWID] and possession of a controlled substance stemming from the October 16, 2014, charges in Pickens County, indictment #2015-GS-47-10. (App. pp. 76-77).

On January 25, 2017, Petitioner appeared before the Honorable Perry H. Gravely and, pursuant to a written plea agreement, (App. pp. 38-44), pled guilty to the lesser included offense of trafficking methamphetamine, 28-100 grams (conspiracy), PWID methamphetamine and possession of a controlled substance. Scott Robinson represented Petitioner at the plea. Joshua Underwood represented the State. The judge deferred sentencing. (App. p. 35, line 25).

On May 18, 2018, Petitioner appeared before Judge Gravely for sentencing. Again, Scott Robinson represented Petitioner and Joshua Underwood represented the State. Defense counsel asked that the sentence be backdated and served concurrent to the ABHAN sentence. (App. p. 49, lines 14-17). The State did not oppose the sentences running concurrent to the ABHAN sentence. (App. p. 52, lines 22-25). As to backdating the credit for time served the

prosecutor told the judge, "I don't believe that that would be appropriate. Mr. Larson's ABHAN charge, which he was already in custody when these charges came about, that arose sometime significantly before these charges. I don't feel it would be appropriate to give him credit for that time in the middle." (App. p. 53, lines 1-7). Defense counsel argued that his client had no control over when the State Grand Jury brought charges but never argued that Petitioner was entitled to the time served on the Pickens County charges from October 16, 2014, until the plea to ABHAN on September 30, 2015. (App. p. 53, line 22 – p. 54, lines 1-11; p. 54, line 20 – p. 55, lines 1-12). Judge Gravely sentenced Petitioner to nine (9) years for trafficking, eight (8) years concurrent for PWID and time served for the controlled substance violation. (App. p. 56, lines 12-19). The judge ordered the sentences run concurrent to the ABHAN sentence and backdated the sentence to January 25, 2017, the time of the guilty plea. (App. pp. 78-80).

On December 19, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp.84-94). On April 30, 2019, the State filed a return and partial motion to dismiss. (App. pp. 95-103). On March 1, 2021, a hearing was held before the Honorable R. Scott Sprouse. Sarah M. Henry represented Petitioner. Lindsey A. McCallister represented the State. In a written order signed June 4, 2021, Judge Spouse denied relief and dismissed the application. (App. pp. 172-187). A timely notice of intent to appeal was served on July 13, 2021. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for failing to advise Petitioner, in connection with entering into a plea agreement waiving the right to seek collateral review, that any time served for PWID methamphetamine and possession of a controlled substance prior to the State Grand Jury indictments would not apply to the trafficking methamphetamine charge.

Petitioner pled guilty, pursuant to a written plea agreement, to trafficking methamphetamine, 28-100 grams (conspiracy), PWID methamphetamine and possession of a controlled substance. Two of these three charges, the PWID and controlled substance charges, resulted from a Pickens County traffic checkpoint arrest on October 16, 2014. (App. p. 25, line 22 – 26, 27, line 1). These charges were originally indicted in Pickens County, indictments #2015-GS-39-915, 017, These indictments were later dismissed because the charges were indicted by the State Grand Jury. (App. pp. 82-83). At the beginning of the PCR hearing the State moved to dismiss the application, arguing that Petitioner waived his right to file a PCR when he entered the written plea agreement. (App. p. 110, line 4 – p. 111, lines 1-8). Petitioner argued that plea counsel's advice to waive collateral review was constitutionally defective, particularly as it relates to sentencing. (App. p. 114, line 10 – p. 115, 116, 117 lines 1-20). The PCR judge denied the State's motion to dismiss and stated, "All right, I'll allow you to proffer that testimony for purposes of this hearing and with the statute. But as the PCR application is going to go, we're going to stick to the Sanders v. State[1] issue. I'll allow you to present it in as a proffer, okay." (App. p. 123, lines 6-11).

During the hearing PCR counsel asked Petitioner, "So did Scott [plea counsel] ever tell you prior to the sentencing that you would get or that you would be assured or that you would absolutely get jail credit for time you served?" (App. p. 128, lines 8-11). Petitioner answered,

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[1] 412 S.C. 611,773 S.E.2d 580 (2015).

"Yes." (App. p. 128, line 12). Petitioner, however, did not get credit for the time he served in jail from the time of his arrest in Pickens County on the charges that were later adopted by the State Grand Jury, October 16, 2014, to the time of his plea to an unrelated ABHAN on September 30, 2015.

With regard to the plea agreement, Petitioner testified that he remembered discussing with plea counsel the waiver of direct appeal but not the waiver of PCR. (App. p. 140, lines 2-8). Petitioner testified that he signed the plea agreement on counsel's advice and initialed without reading it. (App. p. 140, line 16 – p. 141, lines 1-6). Petitioner testified, "But if I would have known that I wasn't going to receive the time I already done, it may have persuaded me not to sign the agreement." (App. p. 140, lines 22-25). During the guilty plea the prosecutor did not mention the waiver of appellate and PCR rights with regard to Petitioner. (App. p. 3, line 12 – p. 4, lines 1-8). The prosecutor, however, specifically mentioned the waiver of appellate and PCR rights with regard to other defendants, Jose Manuel Carrillo, (App. p. 2, lines 21-24), Aubrey Trammell, (App. p. 4, lines 16-18), and Stephanie Joelle Hollingsworth, (App. p. 5, line 25 – p. 6, lines 1-2).

During the plea the prosecutor told the judge, "The State is recommending an overall sentence cap of fifteen (15) years, to run concurrently with each other as well as his current sentence in the Department of Corrections for an unrelated charge." (App. p. 4, lines 4-8). Petitioner pled guilty to ABHAN on September 30, 2015, and was serving an eight-year sentence for the ABHAN at the time of the State Grand Jury plea on January 25, 2017. The plea agreement states that, "The State will recommend that the sentence run concurrently with Defendant's current sentence and all other counts listed in this agreement." (App. p. 39). Petitioner testified at the PCR hearing, "Part of the plea agreement was to run my sentence

concurrent with what I was doing at that time. Which is ABHAN. He led me to believe that it would be backdated to June of 2014. Which is when I started the assault and battery high and aggravated nature." (App. p. 135, lines 13-17) The South Carolina Department of Corrections lists the start date of the ABHAN charge as June 2014. Petitioner believed that his State Grand Jury sentences would be backdated to June of 2014. Petitioner was arrested for the ABHAN on April 21, 2014. Petitioner was later arrested for PWID and possession of a controlled substance on October 16, 2014. While Petitioner was not entitled to a sentence backdated to June of 2014, Petitioner was entitled to the time he spent in jail on the two County charges that were later adopted by the State Grand Jury from October 16, 2014, to the time of his plea to ABHAN on September 30, 2015. See S.C. Code §24-13-40. Plea counsel failed to make the sentencing judge aware of the time served. Importantly, for purposes of waiver, plea counsel failed to advise Petitioner that he would not receive jail time credit on the State Grand jury trafficking methamphetamine, 28-100 grams (conspiracy) indictment.

During the sentencing hearing on May 18, 2018, plea counsel told the judge, "Judge, what we're asking for is a sentence, a minimum sentence of seven years in this case. We're actually asking that this be concurrent and that it be backdated to when he started this sentence about five years ago." (App. p. 49, lines 4-8). The State opposed backdating the sentence. (App. p. 52, line 22 – p. 53, lines 1-18). Neither plea counsel nor the State made the sentencing judge aware of the time served from the arrest for PWID and possession of a controlled substance on October 16, 2014, to the time of his plea to ABHAN on September 30, 2015. The judge declined to backdate the sentence.

During the hearing, when asked about time served credit, plea counsel testified, "And what I told him was that we would ask for the Judge to give him any time that he was entitled to.

I also advised him that once he gets to SCDC that they will figure out how much time he is entitled to. I asked The Judge to backdate the time at one point. And the Judge decided not to do that." (App. p. 150, line 21 – p. 151, line 1). When asked about his discussions about prior jail time plea counsel testified, "We would discuss anything as far as if he was entitled to any time served, SCDC would give that to him. And we would ask for any sort of time that he would be entitled to." (App. p. 151, lines 21-24). In this case, however, SCDC would not be aware of jail time served prior to the State Grand Jury indictments because neither plea counsel nor the prosecutor made the sentencing judge aware of the prior time served and the arrest warrants from October 16, 2014, are not referenced on the State Grand Jury indictment. When asked specifically what time plea counsel told Petitioner he was entitled plea counsel testified, "The time he would be entitled to is any time that he served in jail on these charges for the State Grand Jury. That's what he would be entitled to. When that first started." (App. p. 152, lines 5-8). When questioned further about the prior jail time plea counsel testified, "I don't know if I discussed the – you're basically, saying that he would be entitled to the previous time that he had when he was in jail on the other charges, right? The warrants; is that correct? That were took over by the State Grand Jury." Plea counsel then admitted, "Okay. I don't know if I discussed – I don't know if I knew about those times as far as what that was. I'm not sure about that one." (App. p. 153, lines 2-4).

Counsel should have known about the prior jail time served for PWID and possession of a controlled substance from October 16, 2014 to September 30, 2015. Petitioner reasonably believed, based on counsel's general advice that Petitioner would receive the jail time credit to which he was entitled, that he would receive credit for the time served for all three of the State Grand Jury indictments. Plea counsel was ineffective in failing to advise Petitioner that he

would not receive credit for time served for the trafficking charge. Petitioner testified that if he knew that he would not receive credit for time served he may not have signed the plea agreement. (App. p. 140, lines 22-25). Counsel's failure to advise Petitioner that he would not receive jail credit for the trafficking methamphetamine charge rendered the waiver of collateral review involuntary and unknowing. Counsel was constitutionally ineffective in advising Petitioner to waive collateral review without specifically advising Petitioner about time served credit.

In the order of dismissal the judge wrote:

> Here, Applicant chose to plead guilty and agreed to waive his appellate and collateral rights in exchange for a favorable negotiated sentence. Both parties received a benefit of the bargain, and this Court finds Applicant's plea agreement is valid under contractual law. This Court also finds Counsel's testimony on this issue to be credible. Counsel is experienced in handling similar plea agreements based on his significant criminal defense experience. Counsel's credible testimony established that he adequately and fully explained all portions of the plea agreement to Applicant including the waiver of Applicant's direct appeal and post-conviction relief remedies, and Applicant knowingly and voluntarily waived his rights after these conversations with Counsel. This Court find Counsel was prepared and competent n his representation of Applicant generally. Therefor, the allegation Counsel was constitutionally ineffective in advising Applicant to enter into the waiver provision is denied and dismissed with prejudice.

(App. pp. 185-186). Plea counsel was ineffective in generally advising Petitioner he would get credit for jail time served but failing to specifically advise Petitioner he would not receive jail time credit for the State Grand jury trafficking methamphetamine, 28-100 grams (conspiracy) charge.

In Sanders v. State, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015), the South Carolina Supreme Court agreed with a number of federal jurisdictions and held, ". . . [T]hat although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective.

Accordingly, the PCR court erred in not allowing Sanders to present evidence of ineffective assistance of counsel on the limited issue of his counsel's advice in connection with entering into the agreement." The Court also expressed concerns about the ethical implications of a waiver of ineffective assistance of counsel claims writing in a footnote, "Furthermore, we express our concern with the ethical implications of a waiver of ineffective assistance of counsel claims. A number of jurisdictions have acknowledged the conflict of interest that arises when an attorney counsels his client to waive the right to challenge his representation." Sanders v. State, 412 S.C. 611, 616, 773 S.E.2d 580, 582, n. 2 (2015) (citations omitted). Also in Sanders, the South Carolina Supreme Court quoted the Seventh Circuit Court of Appeals writing:

> Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation. Jones v. United States, 167 F.3d 1142, 1145 (7th Cir.1999).

Sanders v. State, 412 S.C. 611, 615–16, 773 S.E.2d 580, 582 (2015). In the present case Petitioner accepted the waiver in reliance on delinquent representation.

Petitioner presented evidence that plea counsel failed to advise him in connection with entering into the plea agreement that any time served would not apply to the trafficking charge. Counsel's failure to advise Petitioner that he would not receive time served credit constituted ineffective assistance of counsel and rendered the plea agreement containing the waiver of collateral review involuntary and unknowing. The PCR judge erred in refusing to find counsel ineffective with regard to his advice about entering the plea agreement.

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.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty [Alford] plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and

intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving "(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). In order to establish prejudice when challenging a guilty plea, a defendant 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. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

Trial counsel was ineffective in failing to advise Petitioner in connection with entering into the plea agreement that any time served would not apply to the trafficking charge. There is a reasonable probability that if Petitioner knew that the time he served from the arrest for PWID and possession of a controlled substance on October 16, 2014, to the time of his plea to ABHAN on September 30, 2015, would not count toward the trafficking charge, there is a reasonable probability that Petitioner would not have pled guilty and would have insisted on going to trial. Petitioner is entitled to relief in the form of a new trial. Alternatively, as the waiver is invalid based on ineffective assistance of counsel, this Court should remand the case to fully hear all

PCR claims, including the fact that Petitioner did not receive credit for the time he served on the PWID and possession of a controlled substance charges prior to State Grand Jury indictment.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari, find counsel ineffective in his advice to enter the plea agreement and waive collateral review and then, either grant Petitioner a new trial or remand the case for a hearing on the other PCR claims.

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Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of December, 2021.