

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

PATRICK J. FEREBEE,

**ORIGINAL
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DEC 16 2019

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000963

PETITION FOR WRIT OF CERTIORARI

Victor R Seeger
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

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ISSUE PRESENTED

Whether Petitioner entered his guilty plea involuntarily because he pled guilty under the impression that the solicitor would stand silent during sentencing, where the solicitor instead said the complaining witness requested that Petitioner be sentenced “closer to the maximum,” since Petitioner would not have pled guilty and would have gone to trial had he known that the solicitor was going to make that sentencing request on behalf of the complaining witness?

STATEMENT

During the April 2015 term, the Charleston County Grand Jury indicted Petitioner for attempted murder and arson in the first degree. App. 116 – 119.

On October 12, 2016, Petitioner pled guilty to the lesser-included offenses of assault and battery of a high and aggravated nature (ABHAN) and arson in the third degree before the Honorable Kristi Harrington. App. 1; App. 3, ll. 11 – 15; App. 5, ll. 12 – 16.

Petitioner pled guilty believing that the solicitor would stand silent regarding sentencing at the guilty plea hearing and he was unaware that the solicitor would present the complaining witnesses' request that Petitioner serve "closer to the maximum" sentence. App. 11, ll. 12 – 16.

Judge Harrington found Petitioner's guilty plea was freely, knowingly, and voluntarily made. App. 19, l. 20. Petitioner was sentenced to twelve years' imprisonment. App. 23, ll. 15-18.

On October 9, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 27 – 36. The state filed its return on January 23, 2018. App. 37 – 42.

On July 26, 2018, Petitioner's PCR hearing was held before the Honorable Deadra L. Jefferson. App. 43. Rodney D. Davis represented Petitioner. Id. Deshawn H. Mitchell represented the state. Id.

In an order filed on February 15, 2019, Judge Jefferson denied Petitioner relief. App. 103 – 115. The order of dismissal addressed the voluntariness of Petitioner's guilty plea under the "failure to object" allegation. App. 111 – 113. Although Petitioner testified, "had he known the State could comment regarding the victim's desires [regarding sentencing], he would have proceeded to trial," the PCR court found Petitioner failed to prove that plea counsel provided ineffective assistance. Id.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner entered his guilty plea involuntarily because he pled guilty under the impression that the solicitor would stand silent during sentencing, where the solicitor instead said the complaining witness requested that Petitioner be sentenced “closer to the maximum,” since Petitioner would not have pled guilty and would have gone to trial had he known that the solicitor was going to make that sentencing request on behalf of the complaining witness.

Relevant Facts

On December 15, 2014, Petitioner and Mattie Brown, the complaining witness, got into an argument. App. 10, l. 7 – 11, l. 7. After the argument, Petitioner suspected Brown of cheating on him and that she was going to leave him. App. 12, l. 12 – 17, l. 2. Distraught, Petitioner doused himself and Brown’s car with gasoline and then set the car on fire with the intention of killing himself in the conflagration. Id. The fire spread from the car to Brown’s home and destroyed it. Id.

During the guilty plea, the solicitor stated that there was no recommendation from the state as to sentencing. App. 11, ll. 20 – 24. However, the solicitor also stated that the complaining witness wanted Petitioner to receive a sentence “closer to the maximum.” App. 11, ll. 12 – 16. Petitioner received a twelve-year sentence. App. 22, ll. 18 – 24.

At his PCR hearing, Petitioner testified that he thought that “no recommendation, no negotiation” meant the solicitor would stand silent, and not request any particular sentence. App. 52, ll. 3 – 17. Petitioner explained that at the time of the plea he did not understand, because plea counsel never explained to him, that the solicitor was going to present Brown’s sentencing request that he serve a sentence “closer to the maximum. App. 52, l. 19 – 53, l. 25; App. 11, ll. 12 – 16.

Petitioner stated that he did not object when the solicitor made that sentencing request because he thought he would be in contempt of court if he interrupted. App. 52, ll. 3 – 17; App. 54, l. 25 – 55, l. 16; App. 69, ll. 4 – 9. Further, plea counsel testified that he never told Petitioner, prior to the guilty plea, that could withdraw his guilty plea during the plea hearing. App. 79, ll. 3 – 10. Petitioner informed the PCR court that plea counsel never explained to him that the state was going to present Brown’s request that Petitioner should receive a “closer to the maximum” sentence. App. 83, ll. 13 – 18. Petitioner testified that had he known the solicitor was going request a sentence he would have proceeded to trial. App. 63, l. 25 – 64, l.

Plea counsel also testified at Petitioner’s PCR hearing. App. 71, l. 15. Plea counsel told Petitioner that “no negotiations or recommendations,” meant that the solicitor, “is not going to take a stance... and that [sentencing] is completely at the judge’s discretion.” App. 79, ll. 11 – 19. Plea counsel received an email from the solicitor *on the day of the guilty plea hearing* stating that he would not make a recommendation for a sentence, but that Brown wanted a maximum sentence. App. 80, l. 7 – 81, l. 11. Plea counsel admitted had no record that he ever told Petitioner that the solicitor was going to tell the plea court Brown wanted Petitioner to serve the maximum sentence. Id.

While the order of dismissal did not discuss plea counsel’s failure to advise as a stand-alone issue, the PCR court addressed it under the “failure to object” allegation¹. App. 111 – 113.

¹ Petitioner submits that the issue raised in this petition for certiorari was preserved for review. However, as a preliminary matter, if this Court were to determine that the issue raised in this petition for certiorari was not sufficiently ruled on in the order of dismissal, Petitioner would request that his case be remanded to the PCR court for specific findings of fact and conclusions of law on this issue. S.C. Code Ann § 17-27-80 (2014); Rule 71.1(a), SCRPC; Rule 52(a), SCRPC; see Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 590 (2019); see also Simmons v. State, 416 S.C. 584, 788 S.E.2d 220 (2016).

The PCR court found that the assistant solicitor in his comments was merely complying with the Victim's Bill of Rights. S.C. Const. art. I § 24; App. 112. Therefore, the PCR court reasoned that Petitioner failed to show that plea counsel provided ineffective assistance in allowing Petitioner to plead guilty without knowing that the solicitor would present Brown's sentencing request. App. 113.

Discussion

Petitioner's guilty plea was entered involuntarily and unknowingly where plea counsel told him the solicitor would not make any sentencing recommendations or requests during the guilty plea, but where plea counsel failed to inform him that the solicitor would present the plea court with the complaining witness' sentencing request that Petitioner serve "closer to a maximum sentence." App. 52, ll. 3 – 17. That failure to advise prejudiced Petitioner because he would not have pled guilty had he known the solicitor was going to tell the judge that the complaining witness wanted Petitioner to serve close to the maximum sentence. App. 52, l. 19 – 53, l. 25.

The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for

In Fishburne, this Court held the PCR court erred when it failed to address in its order of dismissal Fishburne's claim that trial counsel provided ineffective assistance for mentioning at trial that Fishburne was at a roll call to answer for another criminal charge, and that Fishburne was a "usual suspect." Id. at 513, 832 S.E.2d at 587. This Court remanded the case to the PCR court and also held that a failure to file a Rule 59(e) motion in the PCR context did not prevent the Court from remanding claims of ineffective assistance of counsel when the PCR court's order did not comply with S.C. Code Ann § 17-27-80 (2014). Id. at 516, 832 S.E.2d at 589.

claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims against guilty plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Hill, at 56. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. “[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State, 393 S.C. 565, 572 – 574, 713 S.E.2d 611, 615 – 612 (2011).

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687 – 688. Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

In Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991), Alexander pled guilty to trafficking in cocaine. Id. at 541, 402 S.E.2d at 484. However, Alexander alleged at PCR that his guilty plea was involuntary because plea counsel provided him erroneous sentencing advice. Id. at 541, 402 S.E.2d at 484 – 485.

This Court agreed with Alexander and held that, “trial counsel’s sentencing advice was obviously defective,” because plea counsel advised Petitioner that he was facing up to one hundred years’ imprisonment if he was found guilty on all charges; however, Petitioner was actually facing about twenty-five years’ imprisonment. Id. at 542 – 543, 402 S.E.2d at 485. This Court determined that Alexander’s testimony that he would not have pled guilty but for plea counsel’s ineffective assistance was sufficient to prove prejudice under Strickland. Id. at 543, 402 S.E.2d at 485 – 486. This Court held that Alexander was prejudiced by plea counsel’s wrongful sentencing advice because plea counsel’s misinformation induced him to plead guilty. Id. at 543, 402 S.E.2d at 486.

In Missouri v. Frye, 566 U.S. 134 (2012), the United States Supreme Court noted that the, “Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings[, which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea.” Id. at 141 (citations and internal quotation omitted). The Court further emphasized that “[i]n today’s criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” Id. (emphasis added). Accordingly, “[a]nything less [than effective counsel during plea negotiations]... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275 (1942)). Additionally, a guilty plea that was entered by one fully aware of the direct consequences “must stand *unless* induced by . . . misrepresentation.” Brady v. United States, 397 U.S. 742, 755 (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

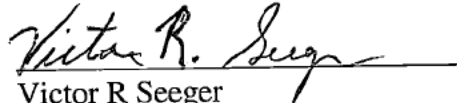
In the instant case, Petitioner’s guilty plea was induced by misrepresentation because plea counsel failed to advise Petitioner that the solicitor would present Brown’s sentencing request that Petitioner get close to the maximum sentence at the guilty plea hearing. App. 52, l. 19 – 53, l. 25. Plea counsel admitted that he had no record that he informed Petitioner of the email that the solicitor sent stating the complaining witness wanted Petitioner to serve closer to the maximum sentence. App. 80, l. 7 – 81, l. 4; App. 81, ll. 5 – 11. Petitioner testified that plea counsel did not inform him of the complaining witness’ sentencing request or that the solicitor would present it to the plea court. App 83, ll. 13 – 18.

Petitioner was under the impression that “no negotiations and no recommendations” meant that the solicitor would not speak as to sentencing *whatsoever*. App. 52, l. 19 – 53, l. 25. That was a reasonable, common sense understanding of what “no negotiations and no recommendations” meant. Plea counsel’s rationalization that “no negotiations and no recommendations” did not include that the solicitor would still present Brown’s request that Petitioner serve “closer to a maximum sentence” was unreasonable. App. 79, ll. 11 – 19. Petitioner could not be expected to know the solicitor was going to convey to the sentencing court that the complaining witness wanted close to the maximum sentence where he was

promised the solicitor would make no sentencing recommendations. Had Petitioner known the solicitor was going to make that sentencing request at the plea hearing, he would not have pled guilty and would have proceeded to trial. App. 63, l. 25 – 64, l. 1. Hill v. Lockhart, supra.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari to allow for a full briefing on this issue.


Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

PATRICK J. FEREBEE,

PETITIONER

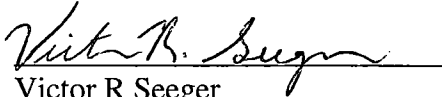
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STATE OF SOUTH CAROLINA,

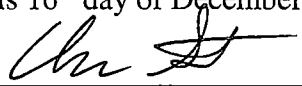
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Patrick Jerene Ferebee, #370050, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 16th day of December, 2019.


Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of December, 2019.



Notary Public for South Carolina
My Commission Expires: September 30, 2029