

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the issue as to whether the waiver of collateral review was rendered involuntary by plea counsel's deficient performance in failing to explain to Petitioner that when he pled guilty to trafficking methamphetamine, 28-100 grams (conspiracy), PWID methamphetamine and possession of a controlled substance, he was not entitled to a sentence backdated to when he started serving time on a separate ABHAN offense is preserved for appellate review?

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 issue as to whether the waiver of collateral review was rendered involuntary by plea counsel's deficient performance in failing to explain to Petitioner that when he pled guilty to trafficking methamphetamine, 28-100 grams (conspiracy), PWID methamphetamine and possession of a controlled substance, he was not entitled to a sentence backdated to when he started serving time on a separate ABHAN offense is preserved for appellate review.

Petitioner challenged the waiver of collateral review at the PCR hearing. Petitioner argued that plea counsel's advice to waive collateral review was constitutionally defective. (App. p. 114, line 10 – p. 115, 116, 117 lines 1-20). The judge ruled on the issue. The issue is preserved for appellate review. The waiver of collateral review was rendered involuntary by plea counsel's deficient performance.

During the PCR hearing Petitioner testified that when he pled guilty to trafficking methamphetamine, 28-100 grams (conspiracy), PWID methamphetamine and possession of a controlled substance he thought the sentence would be backdated to when he started serving time on a separate ABHAN offense. Petitioner testified, "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 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). Petitioner's testimony is supported by the fact that at 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). Petitioner, however, was not entitled to a sentence backdated to the June 2014, start of the ABHAN sentence. While Petitioner should be entitled to credit for any time served on the Pickens County arrest for PWID and possession of a controlled substance on October 16, 2014, and later indicted by the State Grand Jury, to the time of his plea to

ABHAN on September 30, 2015, he was not entitled to a backdated sentence for the trafficking methamphetamine, 28-100 grams (conspiracy) offense indicted by the State Grand Jury in October 2015. Plea counsel failed to advise Petitioner that he was not entitled to a backdated sentence, rendering the waiver involuntary.

During the PCR hearing PCR counsel asked Petitioner, “So did you and Scott [plea counsel] ever discuss your appellate rights and your PCR rights if the sentence was not backdated like he said it was going to be?” (App. p. 137, lines 11-14). Petitioner answered, “Not at all.” (App. p. 137, line 15). PCR counsel asked, “Okay. Would you have gone forward with the plea if you had known that you were not – if you did not get this credit that could not appeal that or file a post-conviction relief action about that?” (App. p. 137, lines 16-19). Petitioner answered, “One hundred percent, no.” (App. p. 137, line 20).

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. Therefore, 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). The PCR judge erred. Plea counsel never accurately explained to Petitioner about backdating the sentence. Petitioner relied on a backdated sentence when he entered the plea and agreed to waive collateral review. The waiver of collateral review was rendered

involuntary by plea counsel's deficient performance. The issue was raised at the PCR hearing, ruled on by the PCR judge, and is preserved for appellate review.

Respondent misapprehends the issue raised in the petition for writ of certiorari. The issue raised in the petition for writ of certiorari was that "[t]he 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." (petition for writ of certiorari p. 4). After citing Sanders v. State, 412 S.C. 611, 615–16, 773 S.E.2d 580, 582 (2015), Petitioner argued that the waiver of collateral review in the present case was entered in reliance on delinquent representation. (petition for writ of certiorari p. 9). As written in the petition for writ of certiorari:


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.

(petition for writ of certiorari p. 9). Specifically, Petitioner entered the plea agreement waiving the right to collateral review believing that he would receive credit for time served and his sentence would be backdated to when he started serving time on a separate ABHAN offense. Counsel's deficient performance in failing to explain that Petitioner was not entitled to a backdated sentence rendered the waiver involuntary. Pursuant to Sanders, Petitioner received ineffective assistance of counsel in being advised to enter into the agreement containing the waiver of collateral review.

Petitioner is entitled to a new trial based on the fact that the waiver of collateral review was rendered involuntary by plea counsel's deficient performance in failing to explain that Petitioner was not entitled to a backdated sentence. The failure to make the trial judge aware of any time served on the Pickens County arrest for PWID and possession of a controlled substance on October 16, 2014, and later indicted by the State Grand Jury in addition to the trafficking charge, to the time of his plea to ABHAN on September 30, 2015, is a separate issue from the failure to explain that Petitioner was not entitled to a back dated sentence. Plea counsel testified that he told Petitioner he would be entitled to credit for time served on the Statewide Grand Jury indictments. (App. p. 152, lines 5-8). Plea counsel admitted that he may not have known about this period of jail time served before the State Grand Jury indictment. (App. p. 153, lines 2-4). As the waiver of collateral review is not valid, Petitioner should be able to, on remand, raise this separate claim of ineffective assistance of counsel.

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 any other PCR claims.


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ATTORNEY FOR PETITIONER

This 9th day of May, 2022.