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Jul 29 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

JERRY SIMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001378

JOHNSON PETITION FOR WRIT OF CERTIORARI

PURSUANT TO AUSTIN V. STATE

Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the post-conviction relief judge err in finding that plea counsel was not ineffective where counsel failed to conduct an adequate independent investigation by obtaining fingerprint testing on the bag that the drugs were found in prior to advising Petitioner to plead guilty since the drugs were found in a co-defendant's car that was not in Petitioner's possession and a fingerprint test of the bag would have likely revealed exculpatory evidence?

STATEMENT

Petitioner was indicted in March of 2016 by the Spartanburg County grand jury for trafficking in cocaine, more than 200 grams. App. 321 – 325. Petitioner was also indicted in August of 2016 for conspiracy to traffic cocaine, more than 200 grams. App. 369 – 370. Joseph Watson represented Petitioner and the state was represented by James Farr. App. 1.

On October 14, 2016, Petitioner appeared before the Honorable J. Derham Cole and pled guilty to the lesser-included offenses of conspiracy to traffic cocaine, 28 to 100 grams, second offense and possession with intent to distribute cocaine, second offense (PWID). App. 4, ll. 3 – 17. Pursuant to a negotiated sentence, the plea judge sentenced Petitioner to twelve-years imprisonment on the conspiracy charge and a consecutive thirty-years imprisonment suspended to five-years of probation on the PWID charge. App. 11, ll. 9 – 16.

Petitioner filed a notice of appeal which was dismissed by the Court of Appeals on February 1, 2017 for failure to provide a sufficient explanation as required by Rule 203(d)(1)(B)(iv), SCACR. App. 37. Petitioner then filed an application for post-conviction relief on September 11, 2017. App. 13 – 36. The state filed its Return on January 12, 2018. App. 76 – 84. Petitioner then filed an amended application through his attorney, William G. Yarborough, III on September 13, 2019. App. 86 – 89. An evidentiary hearing was held on October 7, 2019 before the Honorable G. Thomas Cooper. Mr. Yarborough represented Petitioner and the state was represented by Jacob Isenberg. App. 90. Petitioner and his plea counsel testified. App. 91.

At his PCR hearing, Petitioner testified that the drugs for which he was charged were found in his co-defendant's vehicle while Petitioner was not present. App. 98, l. 24 – 99, l. 3. Specifically, Petitioner recalled that the drugs were discovered inside of a bag that Petitioner had

no connection to. Petitioner believed that there may have been DNA or fingerprint testing done on the bag, but he was never made aware of the results and would have wanted to know those results before he made the decision to plead guilty. App. 111, l. 15 – 112, l. 4. Plea counsel confirmed in his testimony at the PCR hearing that the drugs were found inside a bag that was located in the co-defendant's car. At the time the drugs were located in the car, Petitioner was not present. App. 171, l. 8 – 172, l. 7. After the drugs were discovered in the co-defendant's car by the police, the co-defendant told the police that Petitioner had asked him to go to a storage unit to retrieve the drugs for him. App. 154, l. 11 – 155, l. 8.

The PCR judge found that Petitioner was "merely speculating" about the results of the fingerprint test on the bag where the drugs were found. App. 236 – 237. The judge further found that Petitioner's testimony that he would not have pled guilty without access to the fingerprint test results was not credible. The PCR judge denied Petitioner relief by order on January 6, 2020. App. 238.

Petitioner's PCR counsel filed a notice of appeal and a motion to file out of time on August 12, 2020. App. 241 – 242. This Court dismissed the appeal and denied the motion to file out of time on October 21, 2019. App. 266 – 267. On December 4, 2020, Petitioner filed a PCR application alleging ineffective assistance of PCR counsel for failing to timely file a notice of appeal from the PCR judge's order denying him relief. App. 268 – 284. The state filed its return and partial motion to dismiss on May 25, 2021. App. 285 – 291.

An evidentiary hearing was held before the Honorable William A. McKinnon on September 13, 2021. Petitioner was represented by Rodney Richey and the state was represented by Chelsey Marto. Petitioner and his PCR counsel, William Yarborough, both testified. App. 293 – 295. At the end of the hearing, judge McKinnon granted Petitioner relief and ordered that

Petitioner was entitled to an appeal from the denial of his PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 318 – 320.

This Austin petition and a separately filed petition for writ of certiorari supporting the grant of the belated appeal follow.

ARGUMENT

The post-conviction relief judge erred in finding that plea counsel was not ineffective because counsel failed to conduct an adequate independent investigation by obtaining fingerprint testing on the bag that the drugs were found in prior to advising Petitioner to plead guilty since the drugs were found in a co-defendant's car that was not in Petitioner's possession and a fingerprint test of the bag would have likely revealed exculpatory evidence.

In order to prove ineffective assistance of counsel, Petitioner must show that "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); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

Criminal defendants have a right to effective assistance of counsel during the plea negotiating process. Missouri v. Frye, 566 U.S. 134, 144 (2012). Criminal defense attorneys have a duty to conduct a reasonable independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-332, 642 S.E.2d 590, 597 (2007). "[C]ounsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment." Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

In this case, counsel failed to adequately investigate the circumstances surrounding the bag in the co-defendant's car where the drugs were found. Counsel's failure to investigate whether the bag had fingerprints on it constituted ineffective assistance of counsel. This is especially true because the drugs were found in a vehicle that Petitioner had no connection to and was not present in when the drugs were found. Petitioner was charged with the drugs based solely on the word of the co-defendant who alleged Petitioner had sent him to pick the drugs up from the storage unit.

Had counsel preformed his constitutionally required duty to investigate he may have been able to determine that Petitioner's fingerprints were not present on the bag where the drugs were found. This evidence would have been critical in Petitioner's decision as to whether he would plead guilty or proceed to trial. Had the results of any fingerprint testing been favorable to Petitioner and corroborated his innocence, Petitioner would have proceeded to trial instead of pleading guilty to an offense he was not guilty of.

In Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014), the Court of Appeals found that trial counsel was ineffective for failing to obtain DNA testing on blood that was found at the crime scene. The state had alleged that Bagwell committed a burglary and that the alleged

victims had seen the defendant exiting through a glass door, which was shattered. Id. at 262, 763 S.E.2d at 632. Both alleged victims testified that Bagwell had blood on his face from an apparent cut. Id. The state also introduced a photograph of Bagwell allegedly taken after the burglary which showed him with blood on his face. Id. The state then argued in its closing argument that the cut on Bagwell's face came from the glass door at the scene of the burglary. Id.

In Bagwell, trial counsel testified at the PCR that she did not request DNA testing on the blood found on the glass door at the scene because she thought that the state was going to test it. At the PCR hearing, trial counsel said that the results of the DNA test would not have exonerated Bagwell but that it "may have affected" the outcome. Id. at 263, 763 S.E.2d at 632-633. The Bagwell Court ultimately concluded that trial counsel was ineffective because her failure to obtain DNA testing was unreasonable since the state relied on the glass door and the cut on Bagwell's face as evidence of his guilt. Id. at 265, 763 S.E.2d at 634. Furthermore, Bagwell presented DNA evidence at his PCR hearing that showed his DNA was excluded from the blood on the glass door at the scene. Id. at 263, 763 S.E.2d at 632. As a result, the Bagwell Court found that trial counsel's failure to investigate and introduce this evidence at trial prejudiced the defendant. Id. at 268, 763 S.E.2d at 635.

Here, plea counsel's failure to adequately investigate the bag that the drugs were located in deprived Petitioner of being able to knowingly and intelligently decide whether to plead guilty or demand a jury trial. As Petitioner testified, he did not want to plead guilty without having seen the results of any forensic testing that was done on the bag. The PCR judge erred in finding that plea counsel was not constitutionally ineffective.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of July, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jerry Simpson 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 G. Thomas Cooper, which was held on 9/13/21, 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 Jerry Simpson.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of July, 2022.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari pursuant to Austin v. State 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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Appellate Defender

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This 29th day of July, 2022.