

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable R. Ferrell Cothran, Circuit Court Judge

TERRY WATSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-0000587

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel effective where counsel's investigation of Petitioner's case was limited to reviewing the discovery and visiting the crime scene but did not include any interviews of potential witnesses which was not a reasonable, independent investigation of the case and consequently rendered Petitioner's guilty plea unknowing and involuntary?

STATEMENT OF THE CASE

In the summer of 2017, Petitioner Terry Watson and his wife, Felicia Perkins, were experiencing marital problems. The couple had agreed to separate and see other people. However, they remained living together in the family home to co-parent their children. App. 6, ll. 14-17; App. 15, ll. 8-10. After they separated, Petitioner placed a GPS tracking device on the vehicle¹ that Perkins drove. App. 6, ll. 18-20. On June 19, 2017, Petitioner followed the GPS tracking device from the family home in North Carolina to a hotel in Florence, South Carolina. On the way to Florence, Petitioner stopped in Cheraw, South Carolina, and borrowed a friend's² vehicle. App. 6, ll. 20-23; App. 94-95.

When Petitioner arrived at the hotel, he found Perkins sitting in their vehicle with a man who was later identified as Lawrence Green, her boyfriend. Petitioner approached the driver side window where he observed Green in the driver's seat and Perkins in the passenger seat. An argument occurred during which Petitioner produced a handgun and fired eight shots into the parked vehicle. Five shots struck Perkins. Three shots struck Green, with one bullet striking him in the head. Perkins and Green spent approximately two weeks in the hospital with life-threatening injuries. Fortunately, both were eventually released. App. 7, ll. 2-18.

Petitioner was indicted by the Florence County grand jury for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. App. 94-95. On October 12, 2018, Petitioner appeared before the Honorable Michael G. Nettles to enter a guilty plea to two counts assault and battery of a high and aggravated nature without any negotiation or recommendation on sentencing from the State. App. 1; App. 4, ll. 9-16. The State

¹ The vehicle was registered to both Petitioner and Perkins. App. 55, ll. 1-4.

² During the plea hearing the State alleged that the friend of Petitioner would have testified Petitioner showed up without explanation and asked to borrow his vehicle. App. 6, ll. 23-25.

was represented by J. Ryan White. Petitioner was represented by Henry “Hank” M. Anderson. App. 1.

During the plea colloquy, when Judge Nettles inquired as to whether Petitioner was “indeed guilty,” Petitioner replied he had “a strong case of self-defense.” App. 9, ll. 20-22. Judge Nettles advised Petitioner that if he was “acting in self-defense” he was not guilty of the charged offenses and stopped the proceedings to allow Petitioner to consult with Counsel Anderson. After a pause in the proceedings, Petitioner continued with the guilty plea and was sentenced to twelve years imprisonment on each ABHAN charge, sentences to run concurrently. App. 10, ll. 4-17; App. 26, l. 21-App. 27, l. 5.

Petitioner did not appeal his convictions or sentences. On January 24, 2019, Petitioner filed an application for post-conviction relief alleging an involuntary guilty plea and failure of counsel to perform an independent investigation. App. 29-35. The State filed a return dated January 16, 2020. App. 36-42. An evidentiary hearing was convened before the Honorable R. Ferrell Cothran on March 29, 2021, via WebEx. The State was represented by Michael Davidson. Petitioner was represented by Jonathan Waller. App. 43.

At the evidentiary hearing, Petitioner testified he had wanted to go to trial and believed he had defenses to the charges. App. 62, ll. 1-20. However, Counsel Anderson told him³ that he did not have time to prepare for trial. Petitioner also stated that Counsel Anderson never discussed trial strategy and did not review the discovery with him in anticipation of trial. App. 59-62. Petitioner’s decision to enter a guilty plea was influenced by Counsel Anderson telling him the plea “was my best bet because he [Anderson] wasn’t prepared for trial.” App. 63, ll. 21-22.

³ Petitioner testified that Counsel Anderson told him both in person and in a letter that he did not have time to prepare for trial. App. 59-60.

Petitioner testified that he had instructed Counsel Anderson to investigate various aspects of the case “because a lot of the stuff [allegations] was false.” App. 53, ll. 2-13. Specifically, Petitioner asserted that he and his wife were not getting a divorce, that he had equal right to the vehicle, which is why he put a tracker on it, and that he did not know his wife was dating another person, and thus he was “blindsided” when he discovered Green in the vehicle. App. 53, l. 14-App. 55, l. 4. Petitioner asserted that he would not have pled guilty and would have gone to trial if Counsel Anderson had investigated his case. App. 62, ll. 8-20. Counsel Anderson also testified that Petitioner expressed a steady desire to proceed with trial until just before he entered the guilty plea. App. 72, ll. 3-App. 73, l. 14.

Counsel Anderson testified that he reviewed the discovery several times and went to the incident scene but admitted he did not perform any additional investigation. App. 67, l. 23-App. Regarding defenses, Petitioner asked Counsel Anderson about the “heat of passion” and was told it did not apply to his case. App. 56, ll. 7-12. Counsel Anderson admitted that Petitioner claimed he had acted in self-defense when Green “made a move like he was grabbing a gun.” App. 69, ll. 18-20. When discussing self-defense, Counsel Anderson told Petitioner “you know, you aren't charged with murder, but obviously self-defense does apply in some cases.” He then proceeded to tell Petitioner that he did not think self-defense would apply to Petitioner’s case considering that no weapons were found in the car and that he followed his wife to the motel with the aid of a GPS tracker. App. 74, ll. 1-16. When testifying about his trial preparation Counsel Anderson stated

[S]ome lawyers do things some ways and other lawyers do things another way. If you gave me a murder trial today, I could try it within, you know, 20 to 30 days. This is a case that I had for almost 6 months and had been over the discovery, had been to the scene. I mean I wasn't just sitting on it. I mean I was – I wanted to talk with him [Petitioner] some more because, obviously, I was going

to have to put him on the stand, but as far as the facts of the case, I mean I was ready to go forward.

App. 72, l. 21-App. 73, l. 4. Counsel Anderson maintained that it was Petitioner's decision to plead guilty. App. 75, ll. 9-10.

An order of dismissal was filed on May 19, 2021. The PCR court denied Petitioner's application, ruling that Petitioner had failed to prove that the performance of Counsel Anderson was constitutionally deficient. In support of its ruling, the PCR court noted that Counsel Anderson was "a trial practitioner" with "extensive experience in the trial of serious offenses" who had met with Petitioner on numerous occasions to discuss the case and who had conducted a reasonable investigation into the case by reading the discovery and visiting the crime scene. The court found that Petitioner's guilty plea was knowingly and voluntarily entered, and that Petitioner had failed to identify any additional investigation that Counsel Anderson could have done. App. 81-93.

ARGUMENT

The PCR court erred in finding plea counsel effective where counsel's investigation of Petitioner's case was limited to reviewing the discovery and visiting the crime scene but did not include any interviews of potential witnesses which was not a reasonable, independent investigation of the case and consequently rendered Petitioner's guilty plea unknowing and involuntary.

Counsel Anderson testified that he had reviewed the discovery and visited the scene of the incident. He acknowledged that he did not do any other form of investigation into Petitioner's case, despite Petitioner requesting he investigate specific facts. Counsel Anderson did not speak with the friend who loaned Petitioner his car and did not attempt to speak with the victims to ascertain any possible inconsistencies in their statements. This was ineffective assistance of counsel.

Without a doubt, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); see also Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. 2052. As this Court stated in Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007), “while the scope of a reasonable investigation depends upon a number of issues, **at a minimum, counsel has the duty to interview potential witnesses** and to make an independent investigation of the facts and circumstances of the case.” (internal citations and quotations omitted) (emphasis added).

“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.” Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) (citing Strickland v

Washington, 466 U.S. 668 (1984)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Strickland 466 U.S. at 695 (1984). A PCR applicant is entitled to relief based on ineffective assistance of trial counsel if he can establish that counsel's performance was deficient, and that this deficiency prejudiced his defense. Id.; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

“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 v. Lockhart, 474 U.S. 52, 56 (1985). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The “prejudice,” requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. at 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pled guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

The failure to investigate can support the contention that a defendant's plea was involuntary. In Hill, *supra*, the United States Supreme Court addressed the analysis to be used in addressing such ineffective assistance claims. The Court explained,

Where the alleged error is failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than to go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part

on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill at 59.

The appellate courts have not announced a *per se* rule requiring defense counsel to interview every witness in a case. As this Court clarified in Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011)

While our case law does provide that defense counsel must, at a minimum, interview potential witnesses, a strict adherence to that rule loses sight of the controlling standard for counsel's duty to investigate: reasonableness. Indeed, it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client ... So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient.

Edwards at 457, 710 S.E.2d at 64–65 (2011) (emphasis in the original).

In Edwards, *supra*, this Court again examined defense counsel's duty to independently investigate a case and interview witnesses. Terrence Edwards and Sergio Marshall were charged with murder and other felonies for the death of Jonathan Blackston. Marshall pled guilty as charged, while Edwards proceeded to trial. Trial counsel for Edwards did not interview Marshall prior to trial and did not call Marshall to testify at trial. Id. at 453, 710 S.E.2d at 62-63. Edwards was convicted on all counts under a theory of accomplice liability. In his PCR application, Edwards asserted that his trial counsel was ineffective for failing to interview Marshall prior to trial and failing to call Marshall to testify at trial. Id. at 453-54, 710 S.E.2d at 63.

At the PCR hearing, trial counsel admitted he had not interviewed Marshall but stated he had observed Marshall's guilty plea and obtained a transcript of the plea. Trial counsel testified that while Marshall had accepted responsibility for the murder and denied Edwards's involvement in that, his version of the events after the murder, in which Edwards was admittedly

involved, changed multiple times. Id. at 454, 710 S.E.2d at 63. Counsel testified that after observing Marshall's guilty plea, he decided not to call as a witness him for several reasons. First, counsel did not agree with Marshall's changing version of the facts. Second, counsel had serious concerns about Marshall's ability to withstand cross examination at trial. Finally, counsel determined that any testimony Marshall gave would be cumulative to Edwards's statement which was introduced during trial through law enforcement. Id. at 455, 710 S.E.2d at 63.

The PCR court found that counsel's decision to not interview and call Marshall to testify was "planned and calculated." Id. This Court affirmed the PCR court's decision writing

Given this Court's admonition against second-guessing counsel's trial strategy, Marshall's performance and the cumulative nature of his testimony provide probative evidence under our prevailing law to support the PCR court's determination that Petitioner's attorney articulated a valid trial strategy when he chose not to call Marshall as a witness. **Because Petitioner's attorney had valid reasons for not calling Marshall to testify, it would be futile and unreasonable to also require defense counsel to interview him to satisfy the Sixth Amendment because doing so would serve no purpose in connection with Petitioner's defense.**

Id., at 458, 710 S.E.2d at 65 (2011) (emphasis added).

Counsel in Edwards made a strategic decision not to interview a witness and articulated that reason to the PCR court such that the court could find the investigation in that case reasonable. The same cannot be said in the case at bar. Not only did Counsel Anderson fail to interview any witnesses in Petitioner's case, but he also offered no valid strategy for the failure. Instead, counsel maintained that his review of the discovery, along with a single visit to the crime scene, was all that he needed to do to be able to try Petitioner's case.

Petitioner was asserting that he acted in self-defense, accordingly it was integral to his defense that counsel interview the witnesses prior to trial to ascertain any variances in their

statements and not merely rely on the statements provided in discovery. Additionally, counsel recommended that Petitioner enter a guilty plea without knowing whether his claim of self-defense was valid because counsel never spoke with a single witness. Counsel's failure to conduct any investigation into Petitioner's case was not reasonable under prevailing professional norms and as such his performance was deficient.

The PCR court ruled that even if Counsel Anderson had performed deficiently that Petitioner could not prove any prejudice. Admittedly, Petitioner did not provide the PCR court with any indication of what could have been gained through witness interviews. However, "in certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Strickland, 466 U.S. at 692 *citing* United States v. Cronin, 466 U.S., at 659, and n. 25. "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." Id.

Courts "normally apply a strong presumption of reliability to judicial proceedings and require a defendant to overcome that presumption by showing how specific errors of counsel undermined the reliability of the [proceedings]." Flores-Ortega, 528 U.S. 470 at 482 (internal quotations and citations removed). However, "in some cases the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was - either actually or constructively - denied the assistance of counsel altogether." Id. at 483. "Under such circumstances, no specific showing of prejudice is required, because the adversary process itself is presumptively unreliable." Id.

The utter lack of investigation into Petitioner's case constructively denied him the assistance of counsel such that prejudice can be presumed. Petitioner specifically and repeatedly requested that Counsel Anderson investigate certain aspects of the case. Importantly, to

effectively investigate those aspects of the case, Counsel Anderson would have had to interview the witnesses in the matter. As Petitioner testified during the PCR hearing, he wanted to proceed to trial but did not believe that Counsel Anderson was prepared. Based on counsel's own testimony, he was not prepared for trial.

Counsel's failure to investigate the case and interview witnesses was deficient performance that prejudiced Petitioner by forcing him to either plead guilty or go to trial with a lawyer that could not properly represent him. Petitioner had a steadfast desire to defend himself and a claim of self-defense that he believed should have been pursued. Counsel Anderson did nothing to investigate this defense. Accordingly, Petitioner has shown both deficient performance and prejudice. Counsel Anderson provided constitutionally ineffective assistance of counsel and the resultant guilty plea was neither knowing nor voluntarily entered.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



Handwritten signature of Jessica M. Saxon in blue ink, written over a horizontal line.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of November, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terry Watson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Ferrell Cothran, which was held on March 29, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Terry Watson.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of November, 2021.

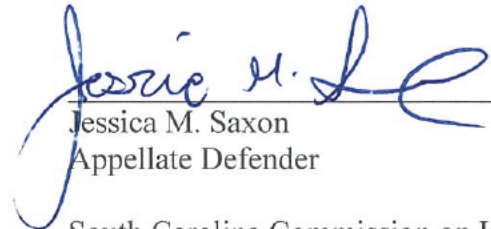
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her 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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