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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable R. Kirk Griffin, Circuit Court Judge

BRYAN L ROEKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000284

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary because of counsel's failure to object to the faulty chain of custody when the BEST evidence kit was not properly sealed?

STATEMENT

In November of 2017, the Laurens County Grand Jury indicted Petitioner, Bryan Lee Roeker, for trafficking methamphetamine, malicious injury to property, and, resisting arrest, indictments 2017-GS-30, 1936, 1939, 1940. It appears there were also related charges of burglary third degree, a proximity charge, driving under suspension, and failure to stop for a blue light that were dismissed. (App. p. 8, lines 18-21; p.110, line 15). On February 20, 2018, Petitioner appeared before the Honorable Donald B. Hocker and pled guilty to the lesser included offense of possession with intent to distribute methamphetamine. He also pled to malicious injury to property and resisting arrest. Ivan J. Toney represented Petitioner at the plea. James C. Todd, IV, prosecuted the case. Pursuant to negotiations Judge Hocker sentenced Petitioner to fifteen (15) years for the drug charge and time served for the other two charges. Petitioner did not appeal his sentence or conviction.

On February 12, 2019, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 24-31). The State file a return and partial motion to dismiss on April 25, 2019. (App. pp. 32-41). An amended application was filed on February 6, 2020. (App. pp. 42 - 48). A second amended application was filed on October 15, 2021. (App. pp. 49-54). An evidentiary hearing was held before the Honorable R. Kirk Griffin via WebEx on October 26, 2021. Ashley A. McMahan represented Petitioner at the PCR hearing. Michael J. Neubauer represented the State. In a written order signed February 16, 2022, Judge Griffin denied relief and dismissed the application. A timely notice of intent to appeal was filed on March 11. 2022. This appeal follows.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary because of counsel's failure to object to the faulty chain of custody when the BEST evidence kit was not properly sealed.

During the guilty plea the prosecutor advised the judge that the charge had been reduced from trafficking methamphetamine to possession with intent to distribute because it was Petitioner's first drug offense. (App. p. 8, lines 12-17). Neither the prosecutor nor defense counsel informed the plea judge that the BEST evidence kit was not properly sealed. In the *pro se* PCR application Petitioner alleged that the chain of custody was broken and never logged properly. (App. p. 26). In the amended PCR application filed by PCR counsel Petitioner alleged that plea counsel was ineffective for, "Failure to object to faulty chain of custody. The SLED report on the drugs has a notation that the 'BEST evidence kit was not properly sealed when submitted.' Counsel failed to argue the chain of custody was irreparably broken. *See* State v. Pulley, 423 SC 371 (2018). The drugs were field tested weighing 43.5 grams. When SLED received the evidence the drugs weighed 36.25 grams." (App. pp. 42-44).

During the PCR hearing Petitioner testified that while plea counsel advised him the BEST evidence kit was not properly sealed, he never explained the requirement for a chain of custody. (App. p. 72, lines 5-24; p. 91, line 14 – p. 92, lines 1-6). Petitioner testified that if he had known that he could have challenged the chain of custody, he would have gone to trial. (App. p. 93, lines 3-12).

Plea counsel testified at the PCR hearing that he used the issue with the BEST evidence kit to negotiate a favorable plea offer. (App. p. 105, line 24 – p. 106, 107, 108, lines 1-8). Plea counsel testified that he discussed filing a motion to suppress with Petitioner. (App. p. 127, lines

8-23). Plea counsel testified that he believed a judge would allow the admission of the evidence. (App. p. 108, lines 4-5).

In the order of dismissal the PCR judge wrote:

> Applicant has failed to establish any evidence to support his assertion that Counsel was ineffective for failing to file a motion to suppress. Though Applicant testified he was the one who proposed filing a motion to suppress the drug evidence due to the issues with the BEST evidence, Applicant testified he did [not] know what a chain of custody was prior to arriving in prison, and he was relying on the advice of Counsel regarding the admissibility of the drug evidence. Applicant has failed to demonstrate that a motion to suppress would likely have been granted in this case. Counsel testified he review [sic]the issue with the BEST evidence kit and felt that it was an issue that would not warrant suppression of the drug evidence. Further, Applicant has failed to demonstrate that this motion to suppress would have changed the outcome of Applicant's case. Counsel testified he spoke with Applicant regarding the motion so suppress, and Applicant agreed that the issue should be used to help negotiate a more favorable plea offer.

(App. p. 160). The PCR judge erred.

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 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 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:

> 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."

While plea counsel advised Petitioner that the BEST kit was not properly sealed when submitted to SLED, plea counsel failed to adequately explain the requirement for the State to establish a complete chain of custody as far as practicable. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, (2011); State v. Pulley, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018). Plea counsel's performance was deficient. There is a reasonable probability that, but for counsel's errors, Petitioner would not have pled guilty and would have insisted on going to trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of November, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bryan L Roeker 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. Kirk Griffin, which was held on October 26, 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 Bryan L Roeker.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of November, 2022.

CERTIFICATE OF COUNSEL

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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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Johnson Petition for Writ of Certiorari and Appendix in the above-referenced case have been served upon Zachary W. Jones, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), and on Bryan L Roeker, #341043, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 15th day of November, 2022.

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