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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable William A. McKinnon, Circuit Court Judge

JOHNNY DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001382

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether, in this PCR appeal, the lower court erred in denying relief, where plea counsel advised Petitioner he could not hire another attorney, where plea counsel refused to refund any of the retainer agreement, and where the resulting plea was involuntary and thereby invalid?

STATEMENT

On July 25, 2019, a Cherokee County grand jury indicted Petitioner for attempted murder, possession of a weapon during the commission of a violent crime, and pointing or presenting a firearm. App. 9 ll. 3 – 25; App. 199. Represented by Fletcher Smith, Petitioner appeared before the Honorable Grace Knie on September 23 and 24, 2020 for a plea. App. 1. Kimberly Leskanic appeared on behalf of the state.

The state offered a plea to assault and battery of a high and aggravated nature as a lesser-included offense. App. 9 ll. 3 – 10. There was no negotiation or recommendation. Id. After initially pleading no contest, the plea was eventually made pursuant to North Carolina v. Alford.[1] App. 18 ll. 13 – 15; App. 22 ll. 11 – 14. Judge Knie found that the plea was made knowingly and intelligently. App. 22 l. 23 – App. 23 l. 5.

The facts as alleged by the state were that on or about March 13, 2019, Petitioner shot the victim in the hand after allegedly having pointed a gun at his head. App. 23 l. 9 – App. 26 l. 6. The victim received medical care at the hospital. Id.

Judge Knie found that a factual basis existed for the plea. App. 27 ll. 14 – 17. She sentenced him to ten years on the assault and battery charge and five years on the remaining indictments, concurrent. App. 69 ll. 15 – 25.

No direct appeal was taken. In July 2021, Petitioner filed an application for post-conviction relief. App. 72. It contained allegations of ineffective assistance of counsel and involuntary guilty plea. App. 73 – 74. Through accompanying pages, Petitioner alleged counsel was ineffective for three specific claims. App. 81 – 89.

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[1] 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

The state filed its Return and Motion for a More Definite Statement on December 13, 2021. App. 99.

An evidentiary hearing was held on June 6, 2022 before the Honorable William A. McKinnon. App. 111. Rodney Richey represented Petitioner, and Chelsey Marto appeared on behalf of the state. The PCR court heard from three witnesses: Petitioner, plea counsel Smith, and Petitioner's fiancé, Robin Cook. One exhibit was admitted, a chain of e-mails between Cook and Smith. App. 164.

At the conclusion of the hearing, the PCR judge took the matter under advisement. App. 162 ll. 11 – 13. An Order of Dismissal was filed on September 14, 2022. App. 184. The PCR court analyzed eight separate claims: 1) ineffective assistance of counsel, 2) invalid plea, 3) trial tax, 4) lack of understanding of the charges, 5) brevity of time, 6) failure to move to suppress ballistics, 7) failure to argue mistake, and 8) failure to obtain and review discovery.[2] No Motion to Alter or Amend was filed under Rule 59(e), SCRCP.

This petition follows.

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[2] Although Petitioner contended in his PCR application that he never waived his right to a direct appeal, no testimony regarding that issue was elicited at the PCR hearing, nor did the issue appear in the Order of Dismissal.

ARGUMENT

In this PCR appeal, the lower court erred in denying relief, where plea counsel advised Petitioner he could not hire another attorney, where plea counsel refused to refund any of the retainer agreement, and where the resulting plea was involuntary and thereby invalid.

Relevant facts

Petitioner paid counsel a retainer on January 29, 2022. App. 119 l. 1 – App. 120 l. 23. According to Petitioner's testimony at the PCR evidentiary hearing, he never say counsel until two days before his plea. Id. Petitioner testified that the $7,500 retainer he paid to counsel was for a jury trial. Id. As a result, Petitioner contended that counsel did not communicate with him enough. Id. Petitioner claimed this could be gleaned from the e-mails that were submitted as an applicant's exhibit. Id.

Based on the disagreements between himself and counsel, Petitioner inquired about hiring a different attorney. Petitioner spoke with an attorney from Rock Hill. App. 121 ll. 22 – 24. However, counsel advised Petitioner "[n]o other attorney can get involved." App. 167. The e-mails corroborated Petitioner's testimony.

Counsel informed Petitioner that the retainer fee was nonrefundable. App. 121 l. 24 – App. 122 l. 18; App. 179. After Robin Cook, Petitioner's fiancé, e-mailed counsel on July 31, 2020, inquiring about an update and requesting a copy of the retainer agreement, counsel responded:

> The retainer is non refundable. Plus the court is not going to let him hire another lawyer. If he gives up the gun he can probably get out. At least that is what the prosecution tells me. Also he runs his mouth too much and his letter to the clerk of court further incriminated him.

> Finally, I have earned the fee by planning for trial after his alleged bungled robbery attempt that he has allegedly admitted to.

App. 179.

Cook inquired how Petitioner incriminated himself and remarked that Petitioner never admitted to a robbery. App. 180. The record does not contain a responsive e-mail from Petitioner.

At the PCR evidentiary hearing, the PCR judge asked Petitioner why he pled guilty before Judge Knie if he did not want to plead guilty. App. 124 ll. 21 – 22. Petitioner claimed duress:

> I was stressed. I was stressed, Your Honor. My kids was ill. I as forced, like he wasn't communicating with me. I paid him seventy-five hundred to email my fiancée. He never visited me. He never got in no motion of discovery. He never gave me a copy of my retainer agreement. And I got all of this in email, sir.

App. 125 ll. 5 – 10.

Petitioner reiterated that he felt powerless. He could not have moved to have counsel relieved and he therefore felt forced to plead. App. 127 l. 16 – App. 128 l. 3. Petitioner testified that he believed he could have won at trial, but counsel never showed him the evidence in his case. App. 128 ll. 4 – 12.

On cross-examination, Petitioner agreed that he pled guilty because he was afraid of receiving a lengthier sentence had he gone to trial. App. 134 ll. 9 – 15. When asked whose decision it was to plead guilty, Petitioner pointed the proverbial finger at counsel:

> It was, basically, my attorney took over. Like, I wanted a trial. Like, I wasn't wanting nothing but trial. And he told me, like I asked him. I said, well, what. He said I earned my fee by preparing for trial.

App. 140 ll. 2 – 8.

Petitioner felt trapped due to his inability to hire another attorney. App. 141 ll. 4 – 7. Cook, Petitioner's finance, took the stand and confirmed his duress. App. 157 ll. 9 – 24.

Relying heavily on the plea transcript, the Order of Dismissal denied relief on this claim. App. 191 – 194. The PCR court summarily concluded Petitioner failed to meet his burden on this issue:

> At the evidentiary hearing, Applicant testified that he pled because he was afraid of a harsher sentence at trial and that he understood the rights he was waiving by pleading. Additionally, Counsel credibly testified that Applicant seemingly understood what he was pleading to and what his rights he was waiving. Accordingly, this Court finds that the plea was entered freely, voluntarily, intelligently, and voluntarily and cannot be withdrawn now.

App. 194.

Discussion

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" Id. (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "[T]o establish prejudice, a 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." Id. at 534, 123 S.Ct. 2527 (quotations and citation omitted). In assessing prejudice, appellate courts "reweigh the evidence in aggravation against the totality of available mitigating evidence." Id. Prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance." Id. at 537, 123 S.Ct. 2527 (citation omitted). A "reasonable probability" is less than a preponderance of the

evidence but still "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693–94, 104 S.Ct. 2052.

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 208-09 (1985). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). To ensure the defendant understands the consequences of his guilty plea, the trial judge usually questions the defendant about the facts surrounding the crime and punishment that could be imposed. Id. at 434-435, 405 S.E.2d at 392. Although the trial court is not required to direct defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of the guilty plea. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). See, e.g., Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant

twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge).

The appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, supra. However, the appellate court will not uphold the findings of the PCR court if there is no probative evidence to support those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

In Pittman v. State, this Court affirmed the PCR court's grant of relief where Pittman's guilty plea was neither voluntary nor knowing. 337 S.C. 597, 524 S.E.2d 623 (1999). In that case, Pittman "did not fully understand the nature of the constitutional rights being waived." Id. at 600, 524 S.E.2d at 625. Pittman only met with his attorney twice for approximately twenty minutes each time. Id. Further, the trial judge did not ask Pittman if he was guilty and failed to inform him of the mandatory minimum sentence. Id. at 601, 524 S.E.2d at 625.

Similarly, the plea judge in the matter *sub judice* did not find that the plea was made voluntarily, only that it was entered knowingly and intelligently. App. 22 l. 23 – App. 23 l. 5. Petitioner felt coerced, unable to control his choice of attorney. As a result, his plea was involuntary and therefore invalid.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests for this Court to grant certiorari and allow further briefing.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of February, 2023.

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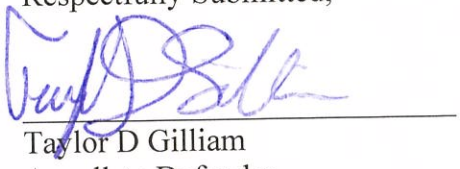
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny Edward Davis 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 William A. McKinnon, which was held on June 6, 2022, 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 Johnny Edward Davis.

Respectfully Submitted,



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This 10th day of February, 2023.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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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This 10th day of February, 2023.