

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Dorchester County
Edgar W. Dickson, Circuit Court Judge

RECEIVED

JUN 19 2013

BENJAMIN DAVIS,

PETITIONER, **S.C. Supreme Court**

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-206668

JOHNSON PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 8

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty because Petitioner felt pressured to plead guilty where (1) he had only met with his plea counsel twice before his plea and his plea counsel failed to review anything with him in preparation for a trial; (2) plea counsel informed him he would be found guilty at trial and would be sentenced to forty or fifty years; (3) plea counsel told Petitioner how to respond to the plea judge’s questions at the plea hearing; and (4) Petitioner was unaware that he could request the jury to consider the lesser included offense of assault and battery of a high and aggravated nature which only carried a maximum sentence of ten years.

CONCLUSION 10

PETITION TO BE RELIEVED AS COUNSEL 11

ISSUE PRESENTED

Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently pled guilty where Petitioner felt pressured to plead guilty when (1) he had only met with his plea counsel twice before his plea and his plea counsel failed to review anything with him in preparation for a trial; (2) plea counsel informed him he would be found guilty at trial and would be sentenced to forty or fifty years; (3) plea counsel told Petitioner how to respond to the plea judge's questions at the plea hearing; and (4) Petitioner was unaware that he could request the jury to consider the lesser included offense of assault and battery of a high and aggravated nature which only carried a maximum sentence of ten years?

STATEMENT

Indictments

On September 4, 2007, Petitioner Benjamin Davis was indicted by the Dorchester Grand Jury for unlawful carrying of a handgun in violation of S.C. CODE ANN. § 16-23-20. App. 100-01. Petitioner was subsequently indicted on October 8, 2007 by the Dorchester Grand Jury for (1) assault and battery with intent to kill by shooting Teofil Justo Garcia in violation of § 16-3-620; and (2) attempted armed robbery in violation of § 16-11-330(B). App. 102-05.

Plea Hearing

On January 24, 2008, a plea hearing was held before the Honorable G. Edward Welmaker. App. 3 – 21. Petitioner was represented by Kenneth Cooper, and the State was represented by Assistant Solicitor Russell Hilton. App. 3.

At the plea hearing the State recommended a cap of fifteen years on the three indictments for (1) unlawful carrying of a handgun, (2) attempted armed robbery, and (3) assault and battery with intent to kill (“ABWIK”). App. 4, ll. 1-8.

The State presented the facts, stating that the incident occurred on April 27, 2007 at 11:38 p.m. in the parking lot of Brenda’s Bar. Mr. Garcia was walking to the bar with his friend, Ms. Denge, when Petitioner and several other co-defendants ran out and put a gun in Ms. Denge’s face. Another co-defendant grabbed Mr. Garcia, and when he was grabbed, Petitioner allegedly shot Mr. Garcia once in the upper chest. Petitioner and the co-defendants fled the scene. App. 9, l. 14 – 10, l. 11.

Ms. Denge recognized one of the co-defendants, Jonathan Lennon, who then gave a statement implicating Petitioner and the other co-defendants. App. 10, ll. 12-20. The other

co-defendants identified Petitioner as the shooter. App. 10, l. 21 – 11, l. 1. Petitioner agreed with the State’s version of the facts. App. 11, l. 23 – 12, l. 3.

The plea judge asked Petitioner a series of questions about his guilty plea, including his understanding of the sentences he could receive under each offense, to which Petitioner responded yes to each. App. 11, l. 23 – 15, l. 22.

When the plea judge questioned Petitioner as to whether he would need more time to decide whether or not he wanted to plead guilty, Petitioner hesitated and said “they were putting me on trial February 4th.” App. 15, l. 23 – 16, l. 5.

Petitioner, however, then indicated he was ready to plead guilty that day and was pleading guilty voluntarily of his own freewill and pleading guilty because he was guilty. App. 16, ll. 12-20.

The plea judge accepted Petitioner’s plea and sentenced him to a period of (1) fifteen years for ABWIK; (2) fifteen years concurrent for attempted armed robbery; and (3) one year concurrent for unlawful carrying of a handgun. App. 17, ll. 9-15; 20, ll. 12-24.

Direct Appeal

On December 10, 2008, Appellate Defender Robert M. Pachak filed an appellant’s brief pursuant to Anders v. California, 386 U.S. 738 (1967) regarding whether Petitioner’s guilty plea complied with constitutional standards. App. 30-29. The S.C. Court of Appeals dismissed the appeal on June 11, 2009. App. 40.

PCR Application and Evidentiary Hearing

On May 20, 2010, Petitioner filed his application requesting post-conviction relief citing ineffective assistance of guilty plea counsel (“PCR”). App. 41 – 47. The State filed its Return on May 2, 2011. App. 48-52.

Petitioner submitted an Amended PCR Application on May 25, 2011, asserting that Petitioner felt “that if he would have gone to trial he could have requested jury instructions on inconsistent statements, and lesser in offense [sic].” Petitioner felt “he was confused as to the plea of guilty” App. 53.

An evidentiary hearing was held before the Honorable Edgar W. Dickson on August 30, 2011. App. 54 – 79. Petitioner was represented by Charles T. Brooks, III, and the State was represented by Assistant Attorney General Rob. D. Corney. App. 54. Petitioner and plea counsel both testified at the evidentiary hearing. App. 58 – 78.

Petitioner testified that had he known then what he knew now, he would have not pled guilty, proceeded with a trial, and requested jury instructions for lesser included offenses and jury instructions on the conflicting statements of his co-defendants. App. 59, l. 20 – 60, l. 1. Petitioner believed that upon the facts of his case, he may have been found guilty on the lesser included offense of assault and battery of a high and aggravated nature which only carried a maximum ten year sentence at the time of the offense. App. 60, ll. 2-8.

Petitioner also testified that he felt scared, rushed and coerced into pleading guilty because his plea counsel told him Petitioner would be found guilty at trial and would probably receive forty to fifty years had he gone to trial. App. 60, l. 15 – 61, l. 8. His plea counsel also informed him that the statements of his co-defendants implicating him would almost guarantee that he would have been found guilty at trial. App. 60, ll. 7-18. Petitioner testified that he did not know if his co-defendants were planning to testify against him because his plea counsel never spoke to the co-defendants or their counsel. App. 60, ll. 23-

24; 63, ll. 16-21. Petitioner only met with plea counsel twice before he pled. App. 60, ll. 19-20.

Petitioner also testified that his plea counsel did not review anything with him in preparation of going to a trial. App. 63, ll. 7-10. Petitioner felt like his plea counsel was not really prepared to go to trial. App. 64, ll. 7-11.

Petitioner also stated that his original defense counsel told him that he was eligible for a ten year plea, but his plea counsel never pursued a plea deal for ten years. App. 64, ll. 19-23; 65, ll. 1-11.

Petitioner also testified that his plea counsel told him what to say when the plea judge was asking him questions about the plea. App. 68, ll. 5-12.

Plea counsel testified that Petitioner had admitted to being the shooter and all the witnesses and co-defendants were going to point to Petitioner being the shooter. App. 72, ll. 9-19.

Plea counsel was not aware of any ten year plea offer obtained by Petitioner's previous defense counsel. App. 72, l. 20 – 73, l. 1.

Plea counsel said he explained to Petitioner the guilty plea process and what type of questions the plea judge would ask. App. 73, ll. 5-16.

Plea counsel claimed he was prepared for trial. App. 73, ll. 17-18. Plea counsel said he was also pretty sure he explained the lesser included offense of assault and battery of a high and aggravated nature with Petitioner. App. 73, l. 24 – 74, l. 3.

Order of Dismissal

On December 21, 2011, Judge Dickson issued an order denying and dismissing Petitioner's PCR application, finding that Petitioner failed to prove his plea counsel was ineffective in his representation of Petitioner. App. 81-87.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty because Petitioner felt pressured to plead guilty where (1) he had only met with his plea counsel twice before his plea and his plea counsel failed to review anything with him in preparation for a trial; (2) plea counsel informed him he would be found guilty at trial and would be sentenced to forty or fifty years; (3) plea counsel told Petitioner how to respond to the plea judge's questions at the plea hearing; and (4) Petitioner was unaware that he could request the jury to consider the lesser included offense of assault and battery of a high and aggravated nature which only carried a maximum sentence of ten years.

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969); accord State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) (finding the record must reflect that the defendant freely and intelligently waived his constitutional trial rights and had a full understanding of the consequences of the plea); Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (finding the difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea”).

Furthermore, “[i]n determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

In this case, an “unsound result” occurred because the record does not reflect that Petitioner freely and intelligently waived his constitutional trial rights because he felt scared, rushed, and coerced into pleading guilty. App. 60, l. 15 – 61, l. 8; See Brady, 397 U.S. at 758; see also Boykin, 395 U.S. 238; accord Hazel, 275 S.C. 392, 271 S.E.2d 602; Berry, 381 S.C. at 635, 675 S.E.2d at 427.

Petitioner had only met with his plea counsel twice before the plea. His plea counsel told Petitioner that he would definitely be found guilty if he went to trial and would receive forty to fifty years. Plea counsel did not undertake any investigation such as speaking with the co-defendants or their attorneys about their potential testimony. Plea counsel also did not disclose to Petitioner that he might be able to request jury instructions for the lesser included offense of assault and battery of a high and aggravated nature, which at the time of the offense, only carried a maximum sentence of ten years. App. 59, l. 20 – 64, l. 11; State v. Fennell, 340 S.C. 266, 274, 531 S.R.2d 512, 516 (2000). Plea counsel instructed Petitioner how to respond to the plea judge’s questions at the plea hearing. App. 68, ll. 5-12.

Petitioner felt forced to plead guilty because his plea counsel did not fully prepare for trial or fully advise Petitioner of the advantages of going to trial. Therefore, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when he would have went to trial had he not felt pressured to plead guilty. App. 59-70; See Boykin, 395 U.S. 238; see also Hill v. Lockhart, 474 U.S. 52, 57-59 (1985).

CONCLUSION

Based upon the foregoing arguments, Petitioner Benjamin Davis respectfully requests this Court to grant his Petition for a Writ of Certiorari and allow full briefing on the issue.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of June, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

BENJAMIN DAVIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

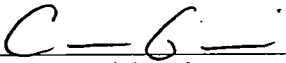
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Benjamin Davis states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 30, 2011. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Benjamin Davis.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of June, 2013

STATE OF SOUTH CAROLINA
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Certiorari to Dorchester County
Edgar W. Dickson, Circuit Court Judge

BENJAMIN DAVIS,

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RESPONDENT

CERTIFICATE OF SERVICE

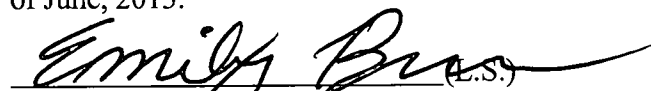
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Benjamin Davis, #326343, at Wateree River Correctional Institution this 19th day of June, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of June, 2013.


(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.