

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED

JUL 23 2013

S.C. Supreme Court

TERRENCE GREENE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000267

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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 PRESENTED2

STATEMENT3

ARGUMENT4

CONCLUSION6

PETITION TO BE RELIEVED AS COUNSEL.....7

ISSUE PRESENTED

Whether petitioner's guilty plea was knowingly and intelligently entered when the plea judge incorrectly advised him that he could receive the death penalty?

STATEMENT

On January 25, 2011, petitioner appeared before the Honorable Clifton Newman in Richland County and pled guilty to voluntary manslaughter. A twenty-eight (28) year sentence was imposed. Nathaniel Roberson, Esquire, was plea counsel. Joanne McDuffie, Esquire, and Nichole Simpson, Esquire, were the assistant solicitors. (App. p. 1 – p. 64)

Petitioner filed an application for post-conviction relief on November 14, 2011. (App. p. 66 – p. 81). Respondent filed a return dated November 21, 2011. (App. p. 82 – p. 89). On December 4, 2012, a “Supplemental Grounds for Vacating Conviction and Memorandum in Support Thereof” was filed. (App. p. 90 – p. 93). An evidentiary hearing was held on December 7, 2012, before the Honorable J. Ernest Kinard, Jr. Petitioner was present and was represented by Jonathan Milling, Esquire. Respondent was represented by Robert Corney, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 94 – p. 159).

On December 31, 2012, Judge Kinard issued an order denying and dismissing petitioner’s application for post-conviction relief. (App. p. 161 – p. 176).

This petition follows.

ARGUMENT

Petitioner's guilty plea was not knowingly and intelligently entered because the plea judge incorrectly advised him that he could receive the death penalty.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, *supra*. This means that there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's

accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

Petitioner alleged in his “Supplemental Grounds for Vacating Conviction and Memorandum in Support Thereof” that his plea was not entered voluntarily, knowingly, or intelligently. This was because the plea court incorrectly advised him that if he proceeded to trial on the murder charge, that he would be facing up to life in prison or the death penalty. (App. p. 91).

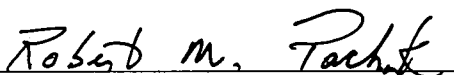
Petitioner testified at the evidentiary hearing that he was shocked when the judge mentioned the death penalty. That impacted his decision to plead guilty. If the judge had not mentioned the death penalty, he would not have pled guilty, but would have insisted on going to trial (App. p. 122, line 17 – p. 123, line 14).

In State v. Hazel, 337 S.C. 597, 524 S.E.2d 623 (1980), a defendant was never made aware that the charges against her carried a mandatory life sentence. Her plea was reversed because she did not understand the consequences of her guilty plea. In Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991), the Court held that a defendant’s guilty plea was not knowingly or voluntarily made because the trial judge misinformed him that he would be eligible for parole when he in fact was ineligible for parole. Petitioner was also misinformed about his sentence if he had gone to trial. That led him to pleading guilty. His guilty plea should also be reversed.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be reversed:

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

TERRENCE GREENE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000267

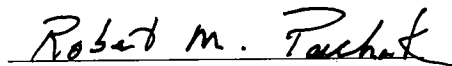
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terrence Greene states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on December 7, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Terrence Greene.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of July, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

TERRENCE GREENE,

PETITIONER,

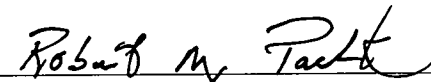
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

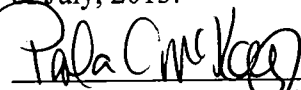
CERTIFICATE OF SERVICE

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 Terrence Greene, #344540, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23rd day of July, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of July, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.