STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Nov 27 2023

S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

MICHAEL E. KELLEY II,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2023-000584

JOHNSON PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
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ISSUE PRESENTED

Whether the PCR court erred in finding Petitioner's guilty pleas were knowingly and voluntarily entered where the court based its ruling solely on the plea colloquy and did not consider Petitioner's testimony from the PCR hearing?

STATEMENT OF THE CASE

Petitioner was indicted during the January 2019 term of the Spartanburg County grand jury for two counts of trafficking heroin, two counts of distribution of heroin, one count of distribution of fentanyl, and one count of possession with intent to distribute marijuana. App. 68-71; 76-77. The charges arose from three undercover buys conducted by a confidential informant working with investigators from the Spartanburg County Sheriff's Department. Two of the buys occurred at Petitioner's residence on November 16, 2017, and November 30, 2017. The third buy occurred on March 7, 2018, in a white Chevrolet Equinox that Petitioner's girlfriend owned. App. 33, l. 3-App. 34, l. 9; App. 35, ll. 18-19. When officers arrived at Petitioner's residence on July 19, 2018, to serve the arrest warrants for the three undercover drug buys, they obtained consent to search Petitioner's home. During the search of the home and the vehicle officers discovered 6.62 grams of heroin and 5.31 total grams of marijuana. App. 34, l. 10-App. 35, l. 9.

On February 8, 2019, while out on bond for the drug charges, Petitioner was involved in a multi-vehicle wreck. Petitioner ran a red light and t-boned a SUV being driven by Patricia Rubenizer. Mrs. Rubenizer's minor son was also in the vehicle. The force of the collision pushed the Rubenizer's SUV into a van being driven by Leah Clevenger. Troopers with the South Carolina Highway Patrol responded to the accident scene. Upon opening Petitioner's car door, the officers detected the smell of marijuana and located a baggie with marijuana inside the car. Petitioner consented to a blood draw. The toxicology reports revealed that Petitioner had both active and inactive THC in his system at the time of the accident. He admitted to smoking marijuana the evening before the accident but maintained he was not under the influence at the time of the wreck. Tragically, Mrs. Rubenizer's minor son succumbed to his injures. Mrs.

Rubenizer suffered broken ribs, a concussion, and other injures from the accident. App. 35, l. 9-App. 37, l. 14.

Petitioner was subsequently indicted during the March 2019 term of the Spartanburg County grand jury for one count of felony DUI death resulting, one count of felony DUI great bodily injury resulting, and one count of driving under suspension. App. 72-75; App. 78-79. On July 8, 2019, Petitioner appeared before the Honorable R. Keith Kelley to enter a guilty plea. Petitioner was represented by David A. Braghirol. The State was represented by Solicitor Barry Barnette. App. 1.

At the start of the hearing Solicitor Barnette informed the court that he had been made aware that Petitioner no longer wanted to accept a plea offer. The offer was to plead to the six drug charges as first offenses, reduced from second offenses, along with the felony DUI and DUS offenses. App. 5, l. 7-14. Upon completion of the guilty plea the State would dismiss four charges of distribution within one half mile of a school or park, a reckless homicide charge, and an assault and battery of a high and aggravated nature charge. Solicitor Barnette stated that if Petitioner decided not to plead guilty the State would move forward with a trial on one of the trafficking heroin charges that week. App. 7, l. 14-App. 8, l. 10.

After being sworn, Petitioner informed the court that he would plead to the drug charges but that he did not want to plead to the felony DUI or DUS charges. Solicitor Barnette stated that any plea to just the drugs charges would be straight up as indicted, which meant that Petitioner would have to plead to the charges as second offenses. Petitioner did not want to plead as indicted and therefore indicated he would go to trial on all the charges. Petitioner was placed as the number two case on the trial docket and the plea offer was formally withdrawn. App. 8, l. 18-App 14, l. 19.

Later that afternoon Petitioner reappeared before Judge Kelley to enter a guilty plea to the drug charges and a plea pursuant to North Carolina v. Alford[1] to the felony DUI and DUS charges. App. 15, l. 1-App. 17, l. 24. Judge Kelley questioned Petitioner on whether he wanted to plead guilty or proceed to trial App. 19, l. 11-App. 20, l. 9. Judge Kelley reviewed the indictments and possible sentences Petitioner faced on each charge. Petitioner then affirmed that he was pleading guilty, that it was his decision to plead, that he had not been pressured in any way to enter a plea, and that he was satisfied with his lawyer. App. 20, l. 10-App. 30, l. 6.

Counsel Braghirol informed the court that Petitioner's flip-flopping on entering a plea was due in large part to a "jailhouse lawyer" discussing various suppression issues with Petitioner that the jailhouse lawyer believed would have been dispositive of Petitioner's charges. After further discussions with Counsel Braghirol and public defender James Cheek, Petitioner had decided to enter the plea. App. 37, l. 24-App. 39, l. 9. Counsel Braghirol placed on the record the issues that had been brought up by the jailhouse lawyer and which he had discussed "ad nauseam" with Petitioner. App. 39, l. 10-App. 40, l. 11. Regarding the felony DUI charges, Counsel Braghirol informed the court that he believed the case was triable as Petitioner maintained he was not under the influence of marijuana at the time of the accident and the toxicology report came back as just over the THC inference threshold. However, based on the evidence Petitioner believed there was a substantial likelihood that he would be convicted at trial and therefore wanted to enter the plea pursuant to Alford. App. 41, l. 12-App. 42, l. 13.

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[1] 400 U.S. 25 (1970)

Judge Kelley sentenced Petitioner to an aggregate term of forty years[2] imprisonment on the charges. App. 59, l. 2-App. 60, l. 3; App. 80-88. Petitioner's direct appeal was dismissed by the South Carolina Court of Appeals for failure to provide a sufficient explanation for the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR. The remittitur was issued on December 30, 2019. Petitioner filed his initial PCR application on February 11, 2020. App. 89-96. A handwritten motion to amend the PCR application was filed on March 16, 2020. App. 97. The State filed a return and motion for more definite statement on March 19, 2020. App. 98-111. A second PCR application was filed on August 11, 2020, by PCR Counsel Tommy Thomas. App. 112-120. The State filed a return and motion to merge the two applications on October 16, 2020. App. 121-131.

An evidentiary hearing was convened before the Honorable G.D. Morgan, Jr., on April 22, 2022. Petitioner was represented by Tommy Thomas. The State was represented by Chelsey Marto. App. 132. Counsel Braghirol, Petitioner, and Solicitor Barnette testified at the hearing. App. 133. Petitioner's main assertion at the evidentiary hearing was that his guilty plea was not freely and voluntarily entered and that he did not really understand what was going on in his cases. App. 172, l. 21-App. 173, l. 5. He testified that based on the information provided by the jailhouse lawyer, along with conversations with Counsel Braghirol, that he could beat all of the charges, so he initially told the judge he did not want to enter a guilty plea. App. 175, l. 16-App. 177, l. 22. Petitioner stated that James Cheek told him that he was "a black man and a young, white child got killed in a wreck, so, basically, the best thing was to do was take my lawyer's

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2 Petitioner was sentenced to fifteen years imprisonment on the distribution of fentanyl charge to be served consecutively to his other sentences. He received sentences of twenty-five years imprisonment on the felony DUI death resulting charge and the two trafficking heroin charges, sentences of fifteen years imprisonment on the felony DUI great bodily injury resulting and two distribution of heroin charges, a five-year sentence on the marijuana charge. and thirty days on the DUS charge.

advice and plea." Based on that conversation, Petitioner decided that even though he did not want to plead guilty, he would take his lawyer's advice and enter the plea. App. 178, ll. 1-App. 179, l. 25. During cross-examination Petitioner stated that he had really wanted to go to trial but that he entered the guilty plea out of fear of receiving a much more substantial prison sentence. App. 183, l. 21-App. 184, l. 8.

An order of dismissal was filed on March 6, 2023. The PCR court ruled that based on the plea colloquy Petitioner's pleas were freely, knowingly, intelligently, and voluntarily entered. The order focused only on the plea colloquy and cited no other reason for finding that the pleas were voluntarily entered. App. 211-212.

ARGUMENT

The PCR court erred in finding Petitioner's guilty pleas were knowingly and voluntarily entered where the court based its ruling solely on the plea colloquy and did not consider Petitioner's testimony from the PCR hearing.

"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 (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, (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 (quotations and citation omitted).

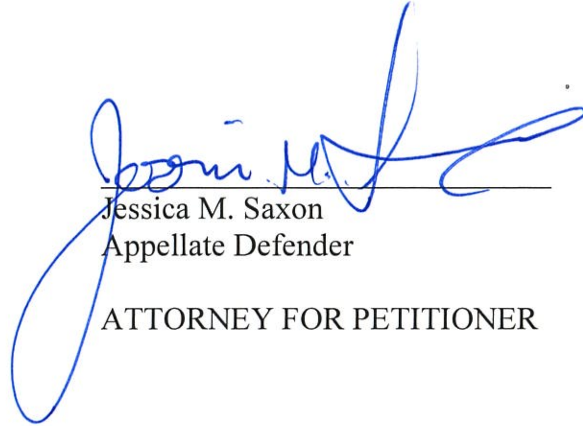
A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56-57 (1985). "[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

In finding that Petitioner's guilty pleas were knowingly and voluntarily entered, the PCR court focused solely on the plea colloquy. The PCR court did not consider that Petitioner had initially withdrawn his guilty plea. The court also failed to consider Petitioner's testimony at the

PCR hearing that he did not really understand what was happening in his cases and that he did not want to plead guilty but did so because he "was a black man and a young white child had been killed." It was improper for the PCR court to rely solely on the plea transcript as grounds to uphold Petitioner's guilty plea. This matter should be remanded back to the circuit court for an order that fully addresses not only the plea colloquy but Petitioner's actions of initially withdrawing his plea along with his testimony at the PCR hearing.

CONCLUSION

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



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of November, 2023.

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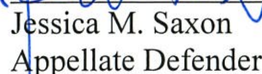
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Eugene Kelley 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 G.D. Morgan, Jr., which was held on April 22, 2022, 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 Michael Eugene Kelley.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of November, 2023.

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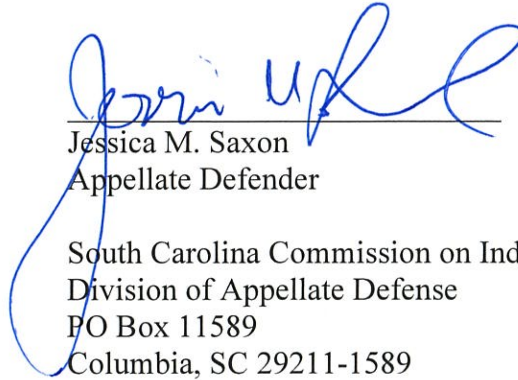
CERTIFICATE OF COUNSEL

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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This 27th day of November, 2023.