

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

S.C. Supreme Court

RASHAD ALLEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000900

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

INDEX

INDEX.....	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	6
PETITION TO BE RELIEVED AS COUNSEL.....	7

ISSUE PRESENTED

Whether plea counsel was ineffective in failing to investigate.

STATEMENT

On June 6, 2011, petitioner appeared before the Honorable Roger L. Couch in Spartanburg County and pled guilty to kidnapping, second degree burglary, and strong armed robbery. He was sentenced to twenty (20) years suspended upon the service of fifteen (15) years and to three (3) years probation for kidnapping and to fifteen (15) years on the other two charges. James A. Cheek, Esquire, was plea counsel. Jennifer Jordan, Esquire, and Mandy Gallivan, Esquire, were the assistant solicitors. (App. p. 1 – p. 33).

Petitioner filed an application for post-conviction relief on December 20, 2011. (App. p. 35 – p. 41). Respondent filed a return dated September 11, 2012. (App. p. 42 – p. 46). An evidentiary hearing was held on January 8, 2013, before the Honorable J. Derham Cole. Petitioner was present and was represented by Rodney W. Richey, Esquire. Respondent was represented by Suzanne H. White, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 47 – p. 60).

On April 2, 2013, Judge Cole issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 62 – p. 68).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to investigate.

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.

In this case, petitioner alleged in his application for post-conviction relief that counsel failed to investigate. (App. p. 37). Petitioner testified about this at the evidentiary hearing. He said if counsel had investigated, he would have found out that the victim said she could not identify him. There were no fingerprints. The police were looking for a long gun, a ski mask, and things that were taken from victim. They found nothing. (App. p. 52, lines 8 – 25).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Court wrote that a criminal defense attorney has a duty to investigate. In that case, the attorney was held ineffective for failing to investigate. The attorney who represented petitioner should also be held ineffective.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

RASHAD ALLEN,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-000900

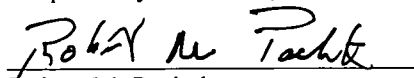
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rashad Allen 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 January 8, 2013. 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 Rashad Allen.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of August, 2013

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Certiorari to Spartanburg County
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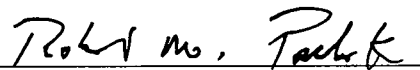
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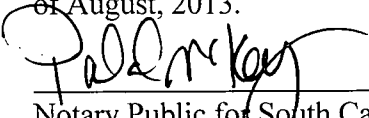
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rashad Allen, #344004, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 2nd day of August, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of August, 2013.


Notary Public for South Carolina

My Commission Expires: July 24, 2022.