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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable George M. McFaddin, Circuit Court Judge

DARYL L. SUTTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001573

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether petitioner's guilty plea was unknowing and involuntary because trial counsel failed to investigate a mere presence defense?

STATEMENT

Petitioner was indicted in Orangeburg County for murder, a weapons charge, first-degree burglary, and attempted armed robbery. App. 79-86. On October 24, 2019, petitioner pled guilty before the Honorable Edgar W. Dickson to voluntary manslaughter, first-degree burglary, and attempted armed robbery. App. 1-2. Thomas B. Scott, III, represented the State and Chad D. Shelton represented petitioner. App. 1. Judge Dickson sentenced petitioner to concurrent sentences of twenty-four years' imprisonment for voluntary manslaughter and first-degree burglary, and a twenty-year concurrent sentence for attempted armed robbery. App. 19. Petitioner did not appeal. App. 22.

On October 7, 2020, petitioner filed a PCR application. App. 21. On September 5, 2023, a hearing was held before the Honorable George M. McFaddin, Jr. App. 44. Rodney W. Richey represented petitioner and Danielle Dixon represented the State. App. 44. Judge McFaddin denied PCR from the bench after the hearing and requested a proposed order from the State. App. 69. On September 21, 2023, the court entered its formal Order of Dismissal. App. 71. This petition follows.

ARGUMENT

Petitioner's guilty plea was unknowing and involuntary because trial counsel failed to investigate a mere presence defense.

Petitioner was one of seven co-defendants in this robbery of a drug dealer gone bad. App. 7, l. 23 – 13, l. 19. The four male co-defendants were all charged with murder, first-degree burglary, and attempted armed robbery. App. 7, l. 23 – 13, l. 19. The three female defendants were charged with accessory before- and accessory after the fact. App. 7, l. 23 – 13, l. 19. One of the female defendants was a prostitute who identified the target. App. 7, l. 23 – 13, l. 19.

The State claimed at the guilty plea that petitioner was one of three men who entered the drug dealer's residence while another stayed in the car. App. 7, l. 23 – 13, l. 19. The men first attempted to kick in the back door. App. 7, l. 23 – 13, l. 19. When this attempt was unsuccessful, they went to the front of the house and forced their way in. App. 7, l. 23 – 13, l. 19.

Three people were in the drug house and one of them was shot and killed. App. 7, l. 23 – 13, l. 19. One of the drug dealers hid in his bedroom and when the intruders kicked open his door, he shot one of them. App. 7, l. 23 – 13, l. 19. The robbers fled. App. 7, l. 23 – 13, l. 19. The robbery occurred in Orangeburg. App. 7, l. 23 – 13, l. 19. Petitioner sought treatment for a gunshot wound, not in Orangeburg, but in Columbia. App. 7, l. 23 – 13, l. 19.

At the PCR hearing, petitioner testified he was only eighteen years old when this case started. App. 49, l. 21 – 22. Partly due to his youth, and partly to the seriousness of the charges he was facing, petitioner was afraid during plea counsel's representation. App. 51, l. 2 – 7. Plea counsel failed to "fight" and did not investigate whether one of petitioner's co-defendants was the person who shot the decedent. App. 50, l. 4 – 8; App. 55, l. 23 – 56, l. 5.

Petitioner testified, "I was with a mutual friend from Columbia, an older friend. I didn't know what was going on. So in the mix of everything, the robbery transpired and I got shot." App. 56, l. 6 – 12. Petitioner did not know the decedent. App. 56, l. 23 – 24. He agreed with the Attorney General that his defense was mere presence and he wanted to present that defense at trial. App. 56, l. 25 – 57, l. 6. When petitioner was picked up by his co-defendants in Richland County, he had no idea a robbery was going to happen. App. 53, l. 9 – 21. Petitioner had no intention to rob, much less shoot, anyone. App. 53, l. 9 – 21.

Plea counsel admitted at the PCR hearing that he thought petitioner "just happened to be there on the day they were going to do this robbery." App. 61, l. 23 – 24. But plea counsel felt that a mere presence defense would be difficult because of the attempt to kick in a door. App. 62, l. 3 – 5. When asked whether he discussed a mere presence defense with petitioner, plea counsel had no notes or specific memory of such a discussion. App. 63, l. 5 – 19. His focus with petitioner was on the credibility of his co-defendants. App. 63, l. 5 – 19.

The PCR court denied relief, stating, "This case presents a classic case of buyer's remorse." App. 76-77. The court recited the boiler-plate questions from the guilty plea colloquy but did not specifically discuss petitioner's potential mere presence defense. App. 76-77. The PCR court relied on plea counsel's expansive testimony that he explained petitioner's rights and the sentence he was facing. App. 77.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and

defendant's counsel, or both.'" Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)).

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). Because a guilty plea is equivalent to a conviction, the trial court's determination of voluntariness must consider that "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

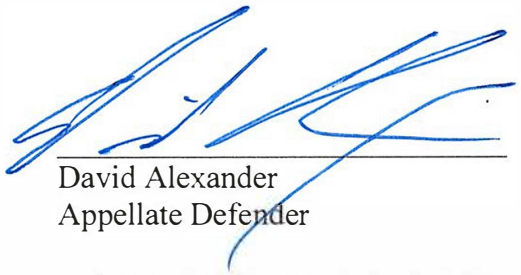
"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made 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, 339 S.C. at 33, 528 S.E.2d at 420.

The PCR court erred in finding petitioner's plea was knowing and voluntary because he would have proceeded to trial if plea counsel had explained the defense of mere presence. A defendant is entitled to a mere presence charge when "there is doubt over whether a person is guilty of a crime by virtue of accomplice liability." State v. Dennis, 321 S.C. 413, 420, 468 S.E.2d 674, 678 (Ct. App. 1996). Petitioner was not from Orangeburg. He was only eighteen and lured to Orangeburg by an older friend. He was one of seven co-defendants. Plea counsel even stated that he believed petitioner was merely present, but that circumstantial evidence made

the case difficult. Petitioner had a viable mere presence defense and would have reasonable rejected the plea offer and proceeded to trial but for the ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, petitioner's convictions should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

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This 1st day of April, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Daryl L. Sutton 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 George M. McFaddin, which was held on September 5, 2023, 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 Daryl L. Sutton.

Respectfully Submitted,

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of April, 2024.

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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