

RECEIVED

Apr 05 2024

STATE OF SOUTH CAROLINA

S.C. SUPREME COURT

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

TIMOTHY HARRISON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001858

PETITION FOR WRIT OF CERTIORARI

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where counsel advised Petitioner to plead guilty to assault and battery of a high and aggravated nature (ABHAN) against Trooper Dolman, and where Dolman was not injured, since ABHAN requires an unlawful injury to another person; and, where, as a result of the deficient performance, Petitioner's guilty plea was not knowingly, intelligently, and voluntarily tendered?

STATEMENT

On October 27, 2017, a Spartanburg County Grand Jury indicted Timothy Harrison, Petitioner, for assault and battery of a high and aggravated nature (ABHAN), habitual traffic offender causing great bodily injury, failure to stop motor vehicle with great bodily injury, and malicious injury to personal property. App. 85 – 86; App. 88 – 89; App. 91 – 92; App. 94 – 95. Petitioner’s indictment for ABHAN stated: “That Timothy Robert Harrison did in Spartanburg County on or about July 21, 2017, unlawfully injure L/Cpl. Dolman, and either great bodily injury L/Cpl. Dolman resulted, or the act was accomplished by means likely to produce death or great bodily injury, in that Timothy Robert Harrison intentionally backed into the patrol car with his vehicle during a chase, in violation of § 16-3-600(B)(1) . . .” App. 89.

On May 16, 2018, Petitioner appeared before the Honorable J. Mark Hayes, II, for a guilty plea hearing. Charles Snyder, II, represented Petitioner. Jennifer Jordan prosecuted the case. App. 1. Petitioner pleaded guilty as indicted with a recommendation of concurrent sentencing. App. 14, ll. 1-13. The solicitor recited the following facts at the plea hearing. On July 21, 2017, Trooper Dolman was on patrol on Fairfield Road in Spartanburg County when he saw Petitioner’s car “sit at the stop sign for longer than someone would normally sit at the stop sign[.]” Dolman followed Petitioner and turned on his blue light and siren when he observed Petitioner speeding. After a brief chase, Petitioner’s car “stopped abruptly in the roadway . . . the driver put the vehicle into reverse and rammed the trooper’s patrol car[.]” The driver then put the car into drive and began traveling forward again. Trooper Dolan followed and hit Petitioner’s car in an attempt to make it stop. The car came to a stop. One of the passengers in the car, Jessica Wyatt, suffered a fractured femur. App. 17, l. 10 – 19, l. 13. The solicitor stated, “The ABHAN is for hitting the vehicle[.]” Petitioner agreed with the facts as recited. App. 19, l. 21 – 20, l. 1.

Trooper Dolman was present and addressed the court; he noted that Jessica Wyatt's injury was a great bodily injury since, "A femur is a big part of the body." App. 23, l. 24 – 24, l. 1. The plea court found there was a substantial factual basis for the plea. App. 31, ll. 3-4. The court sentenced Petitioner to serve twenty years' incarceration suspended upon the service of ten years' incarceration and five years' probation for ABHAN. Concurrent with the sentence for ABHAN, the court sentenced Petitioner to serve concurrent ten-year terms of imprisonment for the three remaining offenses. App. 31, ll. 4-20; App. 87; App. 90; App. 93; App. 96. No direct appeal was taken.

On August 27, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 34 – 40. On June 24, 2019, the State made its return, partial motion to dismiss, and motion for a more definite statement. App. 41 – 49. On July 16, 2019, a hearing was held on the matter before the Honorable J. Derham Cole. Rodney Richey represented Petitioner. Johnny James, Jr., represented the State. App. 50. As an initial matter, Petitioner clarified the ABHAN conviction was the only conviction he was challenging through PCR. App. 55, l. 18 – 56, l. 6.

Petitioner testified plea counsel was ineffective for failing to investigate the facts of the case as they related to ABHAN; specifically, the trooper's condition. App. 68, ll. 11-17. Petitioner stated that if counsel had investigated, he would have learned Petitioner did not commit ABHAN against the trooper. App. 59, ll. 9-12.

Q You are asserting today that you do not believe that you were guilty of assault and battery of a high and aggravated nature?

A Yes, sir.

Q And you're basing that on the fact that the officer wasn't injured when he [sic] rammed his car?

A Yes, sir.

App. 61, ll. 17-23.

Plea counsel testified, incorrectly, that he believed Petitioner could have been found guilty at trial despite the fact that the trooper was not injured.

Q In terms of the ABHAN charge—Mr. Harrison—you heard him testify that he believed that he was not guilty of those charges and because the officer was not hurt. Do you agree with that assessment?

A I don't agree with that assessment because that's not the standard. **The standard is whether injury resulted or could have resulted. And their case could be made that ramming a car into another car could result in great bodily injury.** And if we went to trial that would be the issue we had, but there were other circumstances that – that prevented us from going to trial.

Q **Do you believe the state could prove their case beyond a reasonable doubt as to that charge?**

A **I – I do.**

App. 67, l. 25 – 68, l. 13 (emphasis added).

On November 14, 2023, the PCR court issued an order of dismissal. App. 72 – 84. The order addressed the allegation of ineffective assistance of counsel based on “Failure to Investigate ‘Assault and Battery of a High and Aggravated Nature.’” App. 79. The order noted that a woman in the car with Petitioner, Jessica Wyatt, suffered a broken femur. The order noted Petitioner’s testimony that “his ramming of the police vehicle with his own vehicle did not constitute assault and battery of a high and aggravated nature.” App. 81. However, the order concluded, “To the contrary, ramming a car with one’s own car is an attack of means likely to produce death or great bodily injury, such that it may absolutely constitute ABHAN. It also appears that injuries resulted and great bodily injury was suffered by another person, though surely not the intended target of Applicant’s ramming.” App. 81. The order continued, “Applicant presents no evidence to show that the injuries relied upon to satisfy the requirements of the statute did not arise from the ramming of the police cruiser, or were not the natural and

probable consequence of that assault.” App. 81. “Having failed to show what, if anything, Counsel could have discovered had he more thoroughly investigated the case, Applicant has failed to meet his burden of proof.” App. 81.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel advised Petitioner to plead guilty to assault and battery of a high and aggravated nature (ABHAN) against Trooper Dolman, and where Dolman was not injured, since ABHAN requires an unlawful injury to another person. As a result of the deficient performance, Petitioner's guilty plea was not knowingly, intelligently, and voluntarily tendered.

The PCR court erred when it found ramming a car and injuring Jessica Wyatt could constitute ABHAN against Trooper Dolman. ABHAN requires: 1) that another person be injured, and 2) that either their injury was a great bodily injury, or the act was accomplished by means likely to produce death or great bodily injury. Trooper Dolman was not injured. The fact that Jessica Wyatt was injured did not support a conviction for ABHAN against Dolman. Counsel's advice that Petitioner plead guilty to ABHAN against Dolman fell below reasonable professional norms.

S.C. Code Ann. § 16-3-600(B)(1) provides that, "A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and: (a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600(A)(1) provides that, "'Great bodily injury' means *bodily injury* which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." (emphasis added).

"[T]o be convicted of assault and battery of a high and aggravated nature (ABHAN), an individual must "unlawfully injure[] another person" and the type of injury is one that meets the

definition of “great bodily injury” (as defined in the statute) or the act that caused the injury “is accomplished by means likely to produce death or great bodily injury.” *State v. Robinson*, 437 S.C. 226, 233, 878 S.E.2d 8, 12 (Ct. App. 2022). *See* Assault and Battery of a High and Aggravated Nature (ABHAN), Criminal Offenses in South Carolina § 5:17 (October 2023 Update) (the elements of ABHAN are: 1) unlawfully; 2) injuring; 3) another; 4) (a) great bodily injury of another results OR (b) act accompanied by means likely to produce death or great bodily injury).

ABHAN requires a bodily injury; specifically, it requires a great bodily injury. Petitioner was not charged with ABHAN as to Jessica Wyatt. Trooper Dolman did not have a bodily injury. The evidence did not support a verdict of guilty as to Dolman. Plea counsel’s understanding that ABHAN required only that an injury “could have resulted” to Dolman was incorrect as a matter of law. Similarly, the PCR court’s finding that an action merely likely to cause injury sufficed to constitute ABHAN was error. A bodily injury was required to Dolman to support a conviction of ABHAN as to Dolman. S.C. Code Ann. § 16-3-600(B)(1); *Robinson*, 437 S.C. at 233, 878 S.E.2d at 12.

A criminal defense attorney has a duty to conduct a “reasonable investigation.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). “This Court has stated previously that criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing *Ard v. Catoe*, *supra*). Counsel was required to do more than take the prosecutor’s word that Petitioner was guilty of ABHAN against Dolman. Had counsel performed an

independent investigation by comparing the facts of the case to the law, he would have realized he was mistaken in his understanding that Petitioner was guilty of the offense.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* Counsel’s advice that Petitioner plead guilty to a charge that he could not be convicted of as a matter of law was deficient performance under prevailing professional norms. *Strickland*, 466 U.S. at 687.

The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and 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.” *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing *Hill v. Lockhart, supra*). “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.” *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

Petitioner’s decision to plead guilty was not knowing and intelligent. Had Petitioner known he could not be found guilty of ABHAN, he would not have pleaded guilty and would have insisted on going to trial. By advising Petitioner to plead guilty because he incorrectly

believed Petitioner would be found guilty at trial, counsel's deficient performance resulted in Petitioner's entry of a plea that was not knowingly, intelligently, and voluntarily tendered. *Hill v. Lockhart*, 474 U.S. at 56; *Frierson v. State*, 423 S.C. at 262, 815 S.E.2d at 436.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of April, 2024.

RECEIVED

Apr 05 2024

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this 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.”



Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 5th day of April, 2024.