

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

RECEIVED

AUG 14 2013

S.C. Supreme Court

BOBBY PYKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213654

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was the guilty plea rendered involuntary by counsel's failure to file a motion to suppress inculpatory statements that were the product of an illegal arrest made by a Richland County Investigator acting outside of his territorial jurisdiction in Kershaw County without assistance from Kershaw County and without proof that multi-jurisdictional agreement was in place between Richland and Kershaw Counties?

STATEMENT

In June of 2008, the Richland County Grand Jury indicted Pyke for two counts of armed robbery, indictments #2008-GS-40-369, 531. On March 30, 2009, Pyke appeared before the Honorable Michelle Childs and pled guilty as charged. Attorney Jennifer Davis represented Pyke at the plea. Attorney Vanessa Shipley prosecuted the case on behalf of the State. Pursuant to negotiations with the State, Judge Childs sentenced Pyke to twenty (20) years concurrent for each charge. Pyke did not appeal his sentence or conviction.

On October 9, 2009, Pyke filed an application for post conviction relief. The State filed a return on March 19, 2010. On May 22, 2012, an evidentiary hearing was held before the Honorable L. Casey Manning. Attorney Andrew W. Kunz represented Pyke at the PCR hearing. Attorney Rob Corney was present on behalf of the State. In a written order filed November 19, 2012, Judge Manning denied relief and dismissed the application. A timely notice of intent to appeal was served on December 20, 2012. This appeal follows.

ARGUMENT

The guilty plea was rendered involuntary by counsel's failure to file a motion to suppress inculpatory statements that were the product of an illegal arrest made by a Richland County Investigator acting outside of his territorial jurisdiction in Kershaw County without assistance from Kershaw County and without proof that a multi-jurisdictional agreement was in place between Richland and Kershaw Counties.

On January 4, 2008, Investigator Kevin Isenhoward with the Richland County Sheriff's Department obtained, from Richland County Magistrate G.A. Surles, an arrest warrant for Pyke for the armed robbery of the Pop's Pantry Express on Two Notch Road in Richland County on December 30, 2007. (App. p. 122). That same day the Richland County investigator arrested Pyke at his home in Kershaw County. (App. pp. 117-118). There were no Kershaw County deputies present at the time of Pyke's arrest. (App. p. 81, lines 6-11). During the PCR hearing Pyke testified that his arrest in Kershaw County by the Richland County Sheriff's Department was unlawful. (App. p. 60, lines 15-24).

The Richland County Sheriff's Department incident report reflects that upon his arrest Pyke admitted robbing the convenience store while holding a silver Leatherman multi-tool. (App. p. 118). On January 7, 2008, Pyke was charged with a second armed robbery of an individual in the parking lot of the CVS drug store on Clemson Road on December 26, 2007. (App. p. 127). That same day Investigator Isenhoward returned to the home Pyke shared with his mother in Kershaw County, obtained consent to search from Pyke's mother and then, according to the incident report, the daughter gave the investigator a silver multi-tool belonging to Pyke. (App. p. 118).

When questioned during the PCR hearing about the arrest outside of Richland County, Investigator Isenhoward testified that S.C. Code §17-13-40 allowed him to arrest Pyke outside of Richland County because he was in pursuit of Pyke. (App. p. 79, line 14 – p. 80, lines 1-21). During the PCR hearing plea counsel testified that she did not agree with Investigator Isenhoward's

reading of S.C. Code §17-13-40. (App. p. 97, lines 3-7). Plea counsel also testified that she researched the jurisdictional issue and would have addressed the issue if Pyke had proceeded to trial. (App. p. 94, line 14 – p. 95, lines 1-8).

In the order of dismissal the PCR judge, finding no merit in Pyke’s claim that counsel was ineffective for failing to move to **dismiss** the charges based upon an unlawful arrest, wrote:

Counsel testified she had reviewed and discussed with Applicant his claim regarding the unlawful arrest by Investigator Isenhoward, and had prepared such a motion to be filed on Applicant’s behalf. Counsel stated she was fully prepared to present such a motion in pretrial but that Applicant made the independent decision to enter a guilty plea instead, thereby precluding her from presenting such a motion. She went on to say she disagreed with Investigator Isenhoward’s interpretation of the statute dealing with an officer’s “pursuit” of a suspect over the county line, a point she would have raised in arguing the motion.

(App. p. 143). The PCR judge found that, “Applicant did not set forth at any point that counsel was ineffective for failing to move to suppress evidence obtained as a result of the alleged unlawful arrest.” (App. p. 145). In a footnote in the order of dismissal the PCR judge erroneously notes that the search of Pyke’s house took place prior to Pyke’s arrest. Pyke was arrested on January 4, 2008, and the search took place on January 7, 2008. (App. pp. 117-118). The order fails to specifically address counsel’s failure to move to **suppress** the inculpatory statements that were the result of the unlawful arrest. The PCR judge erred in refusing to find counsel ineffective for failing to file a motion to suppress the inculpatory statement resulting from the illegal arrest.

As a general rule, officers are without authority to effectuate arrests outside of their jurisdiction. See State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011). There are exceptions to this general rule. One exception is found in S.C. Code 17-13-40(B) which provides, “When the police authorities of a county are in pursuit of an offender for a violation of a county ordinance or statute of this State committed within the county, the authorities may arrest the offender, with

or without a warrant, at a place within the county, or at a place within an adjacent county.” In the present case, however, Investigator Isenhoward was not in pursuit of Pyke at the time of his arrest. S.C. Code §17-13-40(B) is inapplicable and the arrest in Kershaw County was unlawful. Pyke’s alleged statement admitting to the robbery of the convenience store and the use of the Leatherman should have been suppressed based on the unlawful arrest.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274

(1969). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “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).

The guilty plea in the present case was rendered involuntary by counsel's failure to move to suppress the inculpatory statement resulting from the illegal arrest. In State v. Boswell, 391 S.C. 592, 707 S.E.2d 265 (2011), the South Carolina Supreme Court found that Lexington County officers were without authority to arrest Boswell in Calhoun County. The Court wrote, “As an

initial matter, it is undisputed that the Lexington County officers were not ‘in pursuit’ of Boswell from Lexington County into Calhoun County; thus, section 17–13–40 of the South Carolina Code is not relevant to our determination of this issue. See S.C. Code Ann. § 17–13–40(B) (2003).” Boswell, 391 S.C. at 600, 707 S.E.2d at 269. The officers in Boswell set up surveillance of an abandoned building in Calhoun County based on a tip that stolen property from a Lexington burglary might be located at the building. Boswell was arrested at the building while it was under surveillance.

As S.C. Code §17-13-40 was inapplicable in Boswell, the State then argued that the Lexington county officers had the authority to arrest in Calhoun County based on a multi-jurisdictional agreement between the counties. The South Carolina Supreme Court found that S.C. Code section 23-20-50 (the Law Enforcement Assistance and Support Act) [the Act] required governing bodies to formally approve a pre-existing multi-jurisdictional agreement if the agreement is to retain validity. The Court found that the agreement in Boswell was invalid because it had not been formally approved. The agreement had only been sent to, rather than voted on, by county council. As a result of the invalid agreement, the Lexington County officers were not authorized to arrest Boswell in Calhoun County. The Court found that the trial judge erred in refusing to suppress Boswell’s confessions as the product of the unlawful arrest.

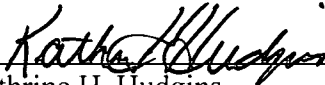
In the present case the Richland County investigator was not authorized to arrest Pyke in Kershaw County. The investigator had obtained an arrest warrant but was not in pursuit of Pyke from Richland into Kershaw County. Additionally, there is no evidence that a valid agreement was in place authorizing the Richland County investigator to arrest in Kershaw County. While the State’s brief following the evidentiary hearing references an agreement, the attorney for the State was unable to obtain copies of the alleged agreement. (App. p. 133).

Counsel was ineffective in failing to move to suppress the alleged statements admitting to the robbery of the convenience store and the use of the Leatherman that were the result of the unlawful arrest. There is a reasonable probability that if the inculpatory statements had been suppressed, Pyke would not have pled guilty but would have insisted on going to trial. The conviction should be reversed and the case remanded for a new trial.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
L. CASEY MANNING, CIRCUIT COURT JUDGE

BOBBY PYKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213654

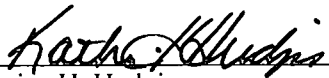
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bobby Pyke states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 22, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Bobby Pyke.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of August, 2013

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Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

BOBBY PYKE,

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APPELLATE CASE NO. 2012-213654

CERTIFICATE OF SERVICE

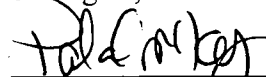
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Robert D. Corney, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Bobby Pyke, #143101, at Lieber Correctional Institution PO Box 205 Ridgeville, SC 29472 this 14th day of August, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of August, 2013.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.