RECEIVED
May 31 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Clifton Newman, Circuit Court Judge

MONTRE DESEAN BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001807

JOHNSON 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

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel incorrectly viewed Petitioner's minimal prior record as an impediment to presenting his testimony that he acted in self-defense, since Petitioner's decision to plead guilty was based upon counsel's erroneous advice, and thus his pleas were not knowingly, voluntarily, and intelligently tendered 6

CONCLUSION 10

PETITION TO BE RELIEVED AS COUNSEL 11

ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where counsel incorrectly viewed Petitioner's minimal prior record as an impediment to presenting his testimony that he acted in self-defense, since Petitioner's decision to plead guilty was based upon counsel's erroneous advice, and thus his pleas were not knowingly, voluntarily, and intelligently tendered?

STATEMENT

Procedural history

On April 7, 2015, a Charleston County Grand Jury indicted Petitioner, Montre Brown, for murder and possession of a weapon during the commission of a violent crime. App. 96 – 99. On August 25, 2018, Petitioner appeared before the Honorable R. Markley Dennis for a plea hearing. Petitioner was represented by Lauren Williams. Burns Wetmore prosecuted the case. App. 1. Petitioner pleaded guilty to the lesser-included offense of voluntary manslaughter, and to the weapons charge, with no sentencing recommendation from the State. App. 4, l. 9 – 6, l. 20. The court sentenced Petitioner to twenty-eight years' imprisonment suspended to eighteen years' imprisonment for voluntary manslaughter, with five years' imprisonment to be served concurrently for possession of a weapon during the commission of a violent crime. App. 18, l. 17 – 19, l. 20.

On August 10, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 21 – 27. On November 5, 2018, the State made its return and motion for a more definite statement. App. 28 – 34. On December 10, 2020, Petitioner filed an amended PCR application. App. 35 – 36. On March 22, 2021, a hearing was held on the matter, via WebEx, before the Honorable Clifton Newman. James Falk represented Petitioner. Benjamin Limbaugh represented the State. App. 37. On October 18, 2023, the PCR court issued an order of dismissal. App. 87 – 95.

Relevant facts

The solicitor recited the following facts at the plea hearing. On January 9, 2015, Petitioner shot and killed Kenneth Robinson at an Exxon station in North Charleston. The shooting was captured by the store's video surveillance cameras. Prior to the shooting, Robinson

was being chased law enforcement and "passed off some drugs" to Petitioner. When Robinson was released from jail, he was unable to get the drugs back and became angry with Petitioner. "[T]his kind of rise in tension came to a head" when Robinson and Petitioner ran into one another at the Exxon. The video footage showed Petitioner was standing in line and was visibly startled to see Robinson coming into the gas station. Petitioner ducked into the bathroom quickly and armed himself before coming out and shooting Robinson several times. Law enforcement found that Robinson was armed with a handgun.[1] App. 8, l. 24 – 11, l. 9.

Similarly, plea counsel told the court that "as far as provocation, the escalating tensions, as the dispute got worse, Montre's panic really got worse. And when he saw [Robinson] that morning, he operated out of pure, intense emotion and not any kind of reasoned judgment." App. 14, ll. 8-12.

At the PCR hearing, Petitioner argued his guilty pleas were not knowingly, voluntarily, and intelligently entered, since he wanted to go to trial and present a defense of self-defense. App. 42, ll. 18-25; App. 47, l. 9 – 48, l. 3. Petitioner testified as follows. The night before the shooting Robinson came by the home of Petitioner's girlfriend, Kadeisha Gilliard, and her mother, Yolanda Gilliard. Robinson brandished a gun and told the women he was going to have Petitioner killed. Robinson also stated he would kill the Gilliards if they were around when Robinson caught up with Petitioner. Yolanda Gilliard called 911. Kadeisha Gilliard asked Petitioner to take her to a hotel, and he did—the Red Roof Inn. (Robinson, Petitioner, and the Gilliards all lived on the same street. This was not the first threat by Robinson.) App. 48, l. 4 – 52, l. 9.

---

1 The State also alleged Petitioner continued to shoot after Robinson had fallen, and it claimed Petitioner took money out of Robinson's hands. App. 10, ll. 7-12.

While they were staying at the Red Roof Inn, Petitioner went next door to the Exxon and the fatal confrontation occurred. "It had to be fate. Either he was following me or it had to be fate that he popped up there that day[.]" Petitioner explained he was unable to avoid Robinson and he shot in self-defense. There was no exit at the back of the store and Robinson was headed towards Petitioner. "I ran to the back of the store and when I came out he had his hand and he was reaching. They found the gun on him and everything[.]" "[T]hat guy, he was following me, he was coming after me. And I just acted how I felt I should act at the moment." The video surveillance footage showed Robinson's hand was by his front right pocket, which held a gun.[2] App. 49, l. 3 – 54, l. 21.

Plea counsel agreed the Gilliards were "pretty terrified" of Robinson, and they had filed a police report. "[T]here were other even more serious threats by [Robinson] [in] the days leading up to Tre shooting him as well." App. 65, ll. 4-19. Plea counsel stated she was concerned that Petitioner's prior criminal record would be used for impeachment if he testified, and she would have tried to put forth a self-defense case without calling Petitioner as a witness. App. 64, ll. 4-9; App. 67, ll. 2-19. Petitioner's prior record consisted of the following convictions: "a 2006 ABHAN; a 2010 possession of marijuana, assault and battery first degree; 2013 possession of marijuana; and a 2014 assault and battery third." App. 11, ll. 10-13. However, counsel claimed she would have permitted Petitioner to testify if he "really, really wanted to." App. 67, ll. 13-15. Plea counsel further claimed the decision to accept the plea offer was Petitioner's decision. App. 68, ll. 7-11.

As seen, the PCR court denied relief. The order of dismissal stated: "Ultimately, counsel did not present self-defense because Applicant chose to plead guilty, and this Court finds

---

2 Petitioner stated it was his own money that he picked up of the floor; he did not take anything from Robinson's hands. App. 79, ll. 7-25.

Applicant knowingly, voluntarily, and intelligently pled guilty with a full understanding of the potential sentence he faced and the constitutional rights he was waiving. Applicant did not prove deficiency or prejudice[.]" App. 94.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding counsel provided effective representation where counsel incorrectly viewed Petitioner's minimal prior record as an impediment to presenting his testimony that he acted in self-defense, since Petitioner's decision to plead guilty was based upon counsel's erroneous advice, and thus his pleas were not knowingly, voluntarily, and intelligently tendered.

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. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced him. *Id.*

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).

There are four elements required to establish self-defense.

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

Rule 609, SCRE, governs impeachment by prior convictions and provides, in relevant part, as follows.

> (a) General Rule. For the purpose of attacking the credibility of a witness,
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
> For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).
>
> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and

> circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

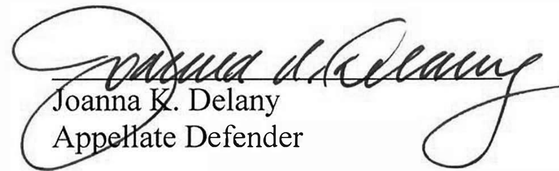
As seen, Petitioner's prior record consisted of "a 2006 ABHAN; a 2010 possession of marijuana, assault and battery first degree; 2013 possession of marijuana; and a 2014 assault and battery third." App. 11, ll. 10-13. The plea took place in 2018. The 2006 ABHAN (assault and battery of a high and aggravated nature) was thus inadmissible under Rule 609(b), SCRE, as it was more than ten years old. The possession of marijuana convictions and the third-degree assault and battery conviction were inadmissible under Rule 609(a)(1), as they carried less than a year in prison. *See* S.C. Code Ann. 16-3-600((E)(2) (providing penalty for third-degree assault and battery is a fine of not more than five hundred dollars and/or imprisonment for not more than thirty days); S.C. Code Ann. 44-53-370(d)(4) (providing penalty for possession of less than twenty-eight grams of marijuana is imprisonment for not more than thirty days or fine of not less than one hundred dollars nor more than two hundred dollars). This only left the first-degree assault and battery as potentially impeachable pursuant to Rule 609(a)(1). Plea counsel was irrationally overly concerned about the admissibility of this prior conviction. Plea counsel should not have discouraged Petitioner from going to trial and testifying in his defense. *E.g., State v. Rivera*, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) ("The right of a criminally accused to testify or not to testify is fundamental.").

Counsel's advice that Petitioner plead guilty was deficient performance given Petitioner's desire to go to trial and put up a self-defense case. *Strickland*, 466 U.S. at 687. Counsel's deficient performance resulted in Petitioner's entry of pleas that were 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. Petitioner has proven error and prejudice. This Court should grant the petition for writ of certiorari.

CONCLUSION

Based on the forgoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2024.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Clifton Newman, Circuit Court Judge

MONTRE DESEAN BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

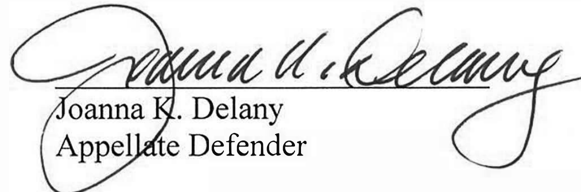
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Montre Desean Brown 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 Clifton Newman, which was held on March 22, 2021, 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 Montre Desean Brown.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2024.

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."

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 31st day of May, 2024.