

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

William Jeffrey Young, Circuit Court Judge

S.C. Supreme Court

KENYA E. SPRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000911

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to order a competency examination?

STATEMENT

On June 17, 2010, petitioner appeared before the Honorable Edward W. Miller in Greenville County and pled guilty to assault on a correctional facility employee. He was sentenced to five (5) years to run consecutive to the sentence he was already serving. Larry H. Cooke, Esquire, was plea counsel. William J. Weston, Esquire, was the assistant solicitor. (App. p. 1 – p. 17).

Petitioner filed an application for post-conviction relief on June 17, 2011. (App. p. 18 – p. 25). Respondent filed a return dated November 1, 2011. (App. p. 27 – p. 30). An evidentiary hearing was held on February 13, 2013, before the Honorable William Jeffrey Young. Petitioner was present and was represented by Caroline M. Horlbeck, Esquire. Respondent was represented by Karen C. Ratigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 32 – p. 59).

On March 13, 2013, Judge Young issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 61 – p. 66).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to order a competency examination.

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 was ineffective in failing to order a competency examination. (App. p. 21). Petitioner explained at the evidentiary hearing that he and counsel discussed getting an evaluation by the Department of Mental Health in Columbia. But, neither counsel nor anyone in his office ever discussed that he would be transported on a certain day. No one told him what would happen at the evaluation. (App. p. 38, lines 9 – 11; app. p. 40, lines 1 – 9). As a result, when the guards came to get him, he did not know why they were coming or where they were going to take him. They asked him to strip search and come out of his cell. He didn’t know what they were talking about. One of them shot him with gas and it turned into a big altercation with the officer. Petitioner said he got hit with a shield, he had gas in his eyes, and all over his body. He was burning. When they got to the place to do the mental evaluation, he could not see and he had restraints on. He could not use the restroom. He was mad and hysterical. The people did not really get to do an evaluation. They got mad and said they could not talk to him (App. p. 38, line 16 – p. 39, line 16).

As can be seen from petitioner’s testimony, plea counsel was ineffective in failing to prepare petitioner to take a mental health examination.

CONCLUSION

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

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

KENYA E. SPRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO.. 2013-000911

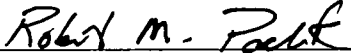
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenya E. Spry 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 February 13, 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 Kenya E. Spry.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of August, 2013

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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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Kenya E. Spry, #306964, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 26th day of August, 2013.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of August, 2013.

Talal McKey (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.