

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Aug 12 2024

S.C. SUPREME COURT

Certiorari to Greenville County

Honorable J. Derham Cole, Circuit Court Judge

DEMOND DERRICK BURGESS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000148

JOHNSON PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily entered where Petitioner did not understand that he was pleading to negotiated sentences of fifteen years incarceration?

STATEMENT OF THE CASE

In September 2019, Petitioner was indicted by a Greenville County grand jury for one count of trafficking heroin first offense, one count of trafficking cocaine second offense, and one count of possession of a weapon during the commission of a violent crime. App. 15-19. On December 5, 2019, Petitioner appeared before the Honorable Letitia H. Verdin to enter a guilty plea. The State was represented by Hunter C. Blouin. Petitioner was represented by William G. Yarborough, III. App. 1. Prior to providing the factual basis for the charges, the State informed Judge Verdin that the plea was for negotiated fifteen-year sentences. App. 9, ll. 10-12.

The cocaine and weapon charges arose from a traffic stop in June 2019. Greenville County officers stated they observed Petitioner driving a car and had knowledge that his license was suspended. During the traffic stop officers discovered a handgun in Petitioner's waistband, 17.23 grams of cocaine in twenty-four separate baggies, and \$464 in cash. Post-Miranda, Petitioner admitted to knowing he possessed a large amount of cocaine. App. 9, ll. 13-24.

While incarcerated for the cocaine charge, Petitioner made several recorded jail calls. On those phone calls Petitioner spoke of narcotics at his father's house in Greenville County. A search warrant was executed on Petitioner's father's home and 10.76 grams of a heroin-fentanyl mixture was located exactly where Petitioner had described during the phone calls. App. 9, l. 25- App. 10, l. 7.

Petitioner pled guilty and Judge Verdin sentenced him to concurrent terms of fifteen years imprisonment. App. 10, ll. 14-16; App. 12, ll. 5-6; App. 17; App. 20. Petitioner appealed his guilty pleas and sentences, but the appeal was dismissed for failure to provide a sufficient explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. Petitioner filed for post-conviction relief on May 9, 2020. App. 21-27. The State filed a return and motion for more definite

statement dated March 24, 2021. App. 28-32. PCR Counsel Tommy Thomas filed an amended PCR application on July 20, 2023, alleging, *inter alia*, that Petitioner's guilty plea was not knowingly and voluntarily entered. App. 33-37.

An evidentiary hearing was held before the Honorable J. Derham Cole on July 25, 2023. App. 39. The State was represented by Melody Brown. Petitioner was represented by Tommy Thomas. App. 39. Petitioner initially clarified that numerous charges against him had been dismissed as a part of the plea deal and he understood that if he was successful on PCR that those charges could be reinstated. App. 45, ll. 7-23. Petitioner testified Counsel Yarborough spent most of their meetings trying to get Petitioner to work for the police in exchange for a deal. He was told that if he went to trial, he would be facing a sentence of life without parole (LWOP).¹ App. 49, ll. 8-19. Regarding the cocaine charge, Petitioner testified that he wanted to take it to trial because he believed the search and seizure was illegal. He discussed with Counsel Yarborough how he had not been driving his girlfriend's car but merely sitting in the car smoking a cigarette in a parking lot of a local restaurant. He believed that Counsel Yarborough had filed a suppression motion based on the fact he had not been driving the car. App. 51, l. 20-App. 53, l. 25.

Petitioner testified that he had wanted to go to trial but decided to plead because he believed the State was offering him the minimum sentences on the charges and taking LWOP off the table. He stated he would not have accepted a fifteen-year plea, especially because he strongly believed the search was illegal. App. 56, l. 9-App. 57, l. 8. The morning he went to court he did not realize he would be entering a plea and thought it was for the motion to suppress

¹ Petitioner was not eligible for LWOP at the time of his guilty plea. If he had chosen to go to trial, the State intended to try him on the various drug charges until he had the requisite convictions to be noticed for LWOP. App. 99, ll. 14-25; App. 107, ll. 2-18.

to be heard. App. 59, ll. 19-22. He testified he never saw anything in writing stating the plea was for a negotiated fifteen years. Based on his conversations with Counsel Yarborough he thought he was getting the minimum sentences in an open plea. Petitioner testified he was stunned and upset when he was sentenced to fifteen years. App. 58, ll. 1-24.

Counsel Yarborough testified that Petitioner did not seem interested in going to trial and was more concerned about the suppression issue in his case. App. 98, ll. 18-20. When Counsel Yarborough told the Solicitor that Petitioner was probably taking the cocaine charge to trial, the Solicitor stated he would try to LWOP Petitioner. App. 99, ll. 7-13. Counsel Yarborough confirmed that Petitioner wanted the minimum sentences on the charges but testified that the State would not agree to those terms, so Petitioner wanted to go to trial. App. 101, ll. 15-24. Counsel Yarborough testified that the plea deal came about on the eve of trial and that Petitioner was aware of his sentencing exposure. App. 101, l. 25-App. 102, l. 8; App. 110, ll. 9-12. He confirmed that Petitioner was upset with the fifteen-year sentence but stated Petitioner knew it was a negotiated plea. He also testified that Petitioner did not want to take a chance at trial of getting a big sentence. App. 110, l. 24- App. 111, l. 12.

An order of dismissal was filed on January 31, 2024. The PCR court found Petitioner's testimony that he would receive the minimum sentences on the charges not credible. The PCR court determined that Petitioner's plea was voluntarily and knowingly entered into, and that Petitioner could not show any prejudice. App. 119-132.

This petition follows.

ARGUMENT

The PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily entered where Petitioner did not understand that he was pleading to negotiated sentences of fifteen years incarceration.

A trial judge should not accept a guilty plea without an affirmative showing that it was intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238 (1969). Additionally, before a plea can be accepted, a defendant must be aware of the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

“An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.” Wiggins v. Smith, 539 U.S. 510, 521 (2003) (citation omitted). “To establish deficient performance, a petitioner must demonstrate that counsel's representation ‘fell below an objective standard of reasonableness.’” Id. (quoting Strickland v. Washington, 466 U.S. 668, (1984)). “[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 534 (quotations and citation omitted).

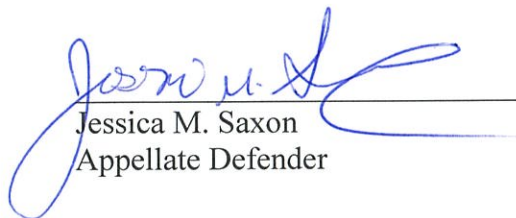
An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The “prejudice,” requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In other words, the

applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pled guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Importantly, “the voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing.” Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

Petitioner repeatedly testified that he wanted to go to trial, especially on the cocaine charge because he believed the search was illegal. Counsel Yarborough went so far as to file a motion to suppress, but that motion was never heard. Instead, Petitioner was convinced to enter a guilty plea to what he believed were the mandatory minimum sentences for the charges. He firmly maintained that if he had understood that he was getting fifteen years in prison that he would not have pled guilty. Petitioner also believed he was entering an open plea, not a negotiated plea. Petitioner’s testimony at the PCR hearing highlighted that he was unaware of the ultimate consequences of his guilty plea – that he would be spending the majority of the next fifteen years incarcerated. Petitioner lacked a fundamental understanding of his sentencing exposure. This rendered his guilty plea unknowingly and involuntarily entered.

CONCLUSION

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


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of August, 2024.

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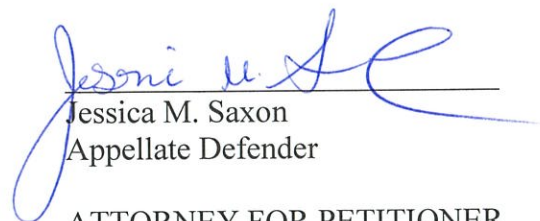
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demond Derrick Burgess 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 J. Derham Cole, which was held on July 25, 2023, 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 Demond Derrick Burgess.

Respectfully Submitted,


Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2024.

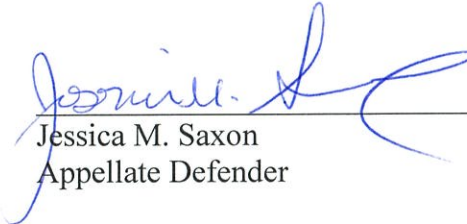
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CERTIFICATE OF COUNSEL

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."


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This 12th day of August, 2024.