

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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S.C. Supreme Court

MARLON J. CURRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001170

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in incorrectly advising petitioner of the length of the sentence he would have to serve?

STATEMENT

On August 2, 2010, petitioner appeared before the Honorable Edward W. Miller in Greenville County and pled guilty to possession with intent to distribute marijuana, second offense, distribution of cocaine base, and distribution of cocaine base within one-half (1/2) mile of a school. Respective sentences of ten (10) years, suspended on service of five (5) with three (3) years' probation, five (5) years, and five (5) years were imposed. Christopher T. Posey, Esquire, was plea counsel. Julie J. Anders, Esquire, was the assistant solicitor. (App. p. 1 – p. 38).

Petitioner filed an application for post-conviction relief on August 3, 2011. (App. p. 40 – p. 46). Respondent filed a return dated December 30, 2011. (App. p. 47 – p. 50). An evidentiary hearing was held on April 18, 2013, before the Honorable G. Edward Welmaker. Petitioner was present and was represented by Caroline Horlbeck, Esquire. Respondent was represented by Karen Ratigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 52 – p. 72).

On April 30, 2013, Judge Welmaker issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 74 – p. 80).

This petition follows.

ARGUMENT

Plea counsel was ineffective in incorrectly advising petitioner of the length of the sentence he would have to serve.

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

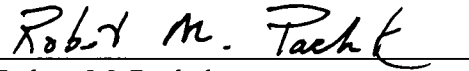
accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure 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 testified at the evidentiary hearing that plea counsel told him that the offenses he would be pleading guilty to were non-violent. Petitioner took this to mean that he would only have to serve half of his sentence. (App. p. 59, lines 9 – 13). Based on counsel’s advice that his sentence would be cut in half, petitioner decided to take the plea. (App. p. 60, lines 6 – 15). If petitioner had known he was going to have to serve 85 percent, he would not have taken the plea. (App. p. 62, lines 1 – 8). As can be seen from petitioner’s testimony, plea counsel was ineffective in giving incorrect sentencing advice.

CONCLUSION

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

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

MARLON J. CURRY,

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APPELLATE CASE NO. 2013-001170

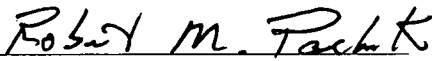
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marlon J. Curry 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 April 18, 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 Marlon J. Curry.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of September, 2013

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IN THE SUPREME COURT

Certiorari to Greenville County
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MARLON J. CURRY,

PETITIONER,

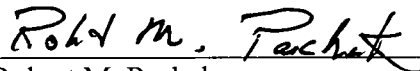
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STATE OF SOUTH CAROLINA,

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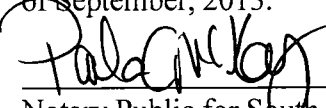
CERTIFICATE OF SERVICE

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 Marlon J. Curry, #339456, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 4th day of September, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of September, 2013.


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