

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

G. Edward Welmaker, Circuit Court Judge

BENJAMIN L. MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001172

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in his representation of petitioner?

STATEMENT

On June 23, 2011, petitioner appeared before the Honorable Robin B. Stilwell in Greenville County and pled guilty to possession of ephedrine, second offense, manufacturing methamphetamine, second offense, and possession of a weapon during the commission of a violent crime. Respective sentences of eight (8) years, eight (8) years, and five (5) years were imposed. Scott D. Robinson, Esquire, was plea counsel. Bryna Seay, Esquire, was the assistant solicitor. (App. p. 1 – p. 12).

Petitioner filed an application for post-conviction relief on December 9, 2011, along with an amendment. (App. p. 13 – p. 32). Respondent filed a return dated June 5, 2012. (App. p. 33 – p. 37). An evidentiary hearing was held on April 16, 2013, before the Honorable G. Edward Welmaker. Petitioner was present and was represented by Brian P. Johnson, Esquire. Respondent was represented by Karen Ratigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 38 – p. 68).

On April 30, 2013, Judge Welmaker issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 69 – p. 76).

This petition follows.

ARGUMENT

Plea counsel was ineffective in his representation of petitioner.

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.

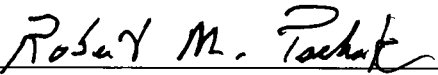
In this case, petitioner testified at the evidentiary hearing that he and plea counsel did not get into a whole lot of detail on the case. They went over some of the discovery, but there were no indictments and they were never explained to him. (App. p. 43, lines 15 – 23). He said counsel was ineffective because he allowed him to plead to manufacturing meth, second offense, when the indictment was only for a first offense. Also, counsel allowed him to plead to possession of ephedrine, second, to which there was no indictment. (App. p. 44, lines 14 – 21).

Petitioner said, on the sentencing sheet for manufacturing, it gives the arrest warrant number and the warrant was obviously for a first offense. The code section he pled guilty to was S.C. Code § 44-53-375(b)(1) with a CDR code of 3198, which reflects a first offense. With a code of 3198, you only have to do 51% of your sentence. You are also eligible for a work release. On petitioner’s sentencing sheet, however, S.C. Code § 44-53-375(b)(2) is listed and the CDR code is 3199, which makes the offense violent and you have to serve 85% of your sentence. (App. p. 46, line 6 – p. 47, line 11). It is for the above reasons that plea counsel was ineffective in failing to recognize the above discrepancies.

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 1st day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

BENJAMIN L. MOORE,

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V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-001172

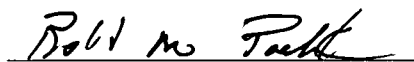
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Benjamin L. Moore 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 16, 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 Benjamin L. Moore.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of November, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

BENJAMIN L. MOORE,

PETITIONER,

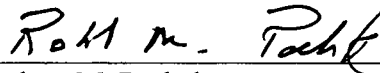
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

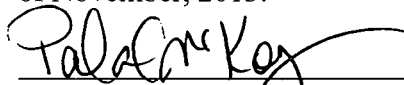
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Benjamin L. Moore, #346663, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 1st day of November, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of November, 2013.

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