

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

---

RECEIVED

FEB 4 2013

S.C. Supreme Court

THOMAS MCCALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2010-173546

---

BRIEF OF PETITIONER

---

KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER.

## INDEX

INDEX .....	i
TABLE OF AUTHORITIES .....	ii
ISSUE PRESENTED .....	1
STATEMENT .....	2
ARGUMENT .....	3
CONCLUSION .....	8

TABLE OF AUTHORITIES

**Cases**

<u>Al-Shabazz v. State</u> , 338 S.C. 354, 527 S.E.2d 742 (2000).....	5
<u>Anders v. California</u> , 386 U.S. 738 (1967).....	2
<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985).....	6
<u>Gary v. State</u> , 347 S.C. 627, 557 S.E.2d 662 (2001).....	5
<u>Hill v. Lockhart</u> , 474 U.S. 52, 106 S.Ct. 366 (1985).....	7
<u>North Carolina v. Alford</u> , 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....	7
<u>Pittman v. State</u> , 337 S.C. 597, 524 S.E.2d 623 (1999).....	7
<u>Roddy v. State</u> , 339 S.C. 29, 528 S.E.2d 418 (2000).....	7
<u>Rolen v. State</u> , 384 S.C. 409, 683 S.E.2d 471 (2009).....	6
<u>State v. Wyatt</u> , 317 S.C. 370, 453 S.E.2d 890 (1995).....	6
<u>State v. Funderburk</u> , 367 S.C. 236, 625 S.E.2d 248 (Ct.App.2006).....	6
<u>State v. Irick</u> , 344 S.C. 460, 545 S.E.2d 282 (2001).....	6
<u>State v. Lytchfield</u> , 230 S.C. 405, 95 S.E.2d 857 (1957).....	6
<u>State v. McCall</u> , 2009-UP-273 (filed June 2, 2009).....	2
<u>State v. Preslar</u> , 364 S.C. 466, 613 S.E.2d 381 (Ct.App.2005).....	6
<u>State v. Ray</u> , 310 S.C. 431, 427 S.E.2d 171 (1993).....	7
<u>State v. Yarborough</u> , 363 S.C. 260, 609 S.E.2d 592 (Ct.App.2005).....	5
<u>Suber v. State</u> , 371 S.C. 554, 640 S.E.2d 884 (2007).....	7
<u>Whitehead v. State</u> , 310 S.C. 532, 426 S.E.2d 315 (1992).....	5

**Statutes**

S.C. Code §17-27-60.....	5
--------------------------	---

**Rules**

Rule 71.1(b) SCRCF ..... 2

Rule 71.1(d), SCRCF ..... 4

ISSUE PRESENTED

Did the PCR judge err in refusing to grant a continuance based on the fact that petitioner was denied funds to pay an investigator to serve subpoenas compelling attendance of certain witnesses and to continue to investigate the allegations of ineffective assistance of counsel?

## STATEMENT

In June 2006, the Florence County Grand Jury indicted McCall for assault and battery of a high and aggravated nature [ABHAN], criminal sexual conduct first degree [CSC] and possession of cocaine base, indictments #2006-GS-21, 869, 868, 867. On January 29, 2007, McCall appeared before the Honorable Michael G. Nettles and pled guilty. Attorney Scott P. Floyd represented McCall. Judge Nettles sentenced McCall to 5 years for ABHAN, 3 years concurrent for possession and 20 years consecutive for CSC. A timely notice of intent to appeal was filed and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), was submitted on McCall's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. McCall, 2009-UP-273 (filed June 2, 2009).

McCall filed a first application for post conviction relief on November 13, 2008. The direct appeal, however, was still pending and the application was dismissed without prejudice pursuant to Rule 71.1(b) SCRPC. On July 16, 2009, McCall filed a second application for post conviction relief. The State filed a return on March 25, 2010. An evidentiary hearing was held before the Honorable William H. Seals, Jr. on July 13, 2010. In a written order signed September 22, 2010, Judge Seals denied relief and dismissed the application. A timely notice of intent to appeal was filed on September 30, 2010. A petition for writ of certiorari was filed on April 26, 2011. The State filed a return on July 27, 2011. On October 3, 2012, this Court granted the petition for writ of certiorari and ordered briefing. This brief of petitioner follows.

## ARGUMENT

The PCR judge erred in refusing to grant a continuance based on the fact that petitioner was denied funds to pay an investigator to serve subpoenas compelling attendance of certain witnesses and to continue to investigate the allegations of ineffective assistance of counsel.

At the beginning of the evidentiary hearing PCR counsel for McCall moved for a continuance. (App. p.57, lines 1-20). Counsel stated:

The reason I cite this is, we had a prior order giving us access to an investigator who had started doing some work on the matter. Of course, as Your Honor might be aware, about, I want to say a week or so ago, got a note from Indigent Defense. They had no money to pay any expenses such as investigators and experts and things of that nature on civil matters such as PCRs. And as it relates to that I've informed my client that obviously Mr. Glen Harrell who is an investigator in Sumter working the case, obviously realized he's no longer going to get paid, he ceased working and obviously that would impact being able to subpoena witnesses.

(App. p. 57, lines 2-14). The State opposed the continuance asserting that there was probably no need for an investigator because McCall entered guilty pleas. (App. p. 57, lines 22-25). The judge denied the motion for continuance stating, "I 'm gonna deny it, it is a guilty plea anyway; it wasn't a trial." (App. p. 58, lines 1-2). In the order of dismissal the PCR judge wrote, "This Court finds that Applicant has not met his burden of proof. He have[sic] failed to provide testimony of any purported favorable witnesses." McCall was unable to meet his burden because he was not provided funds to continue to employ the services of an investigator to explore the claim. The PCR judge erred in failing to grant a continuance.

McCall alleges that the guilty plea was rendered involuntary by the fact that plea counsel failed to conduct an adequate investigation concerning the CSC charge. (App. p. 82). During the PCR hearing McCall asserted that plea counsel was ineffective in failing to subpoena witnesses. (App. p. 60, lines 9-25). When asked about plea counsel failed to do, McCall testified, "Like

subpoena witnesses. If he told me that it wasn't make no sense to subpoena these witnesses cause they couldn't change the outcome of my trial or whatnot. I had some – these are the major part of my defense cause I need these people cause what they saying I did, I did not do from point A to point B. And I told Scott Floyd [plea counsel] I wanted to go to trial ever since he was appointed to my case.” (App. p. 60, lines 11-18). McCall testified that he asked counsel to speak to his brother, who was also the co-defendant on the ABHAN charge. (App. p. 61, lines 13-15). McCall also gave plea counsel the names and addresses of Andrell Black and Cedric Gregg and two other people he could not remember and counsel never subpoenaed these witnesses. (App. p. 61, lines 1- p. 62, line 1). McCall testified that these witnesses were present at the time of the alleged event and would testify that the allegation did not happen. (App. p. 60, lines 20-25). Plea counsel testified at the PCR hearing that McCall never gave him the names and addresses of any alibi witnesses. (App. p. 76, lines 1-2). Counsel, however, would certainly have been aware of the co-defendant brother.

Plea counsel also testified at the PCR hearing, “They [the State] took a – they had some DNA samples that they took from bed sheets and so forth in the house so I'm sure they were gonna present some type of DNA evidence. And I would think that was probably the guts of the case, her testimony, and the DNA evidence.” (App. p. 73, lines 8-12). In the recitation of facts the State asserted that a sexual assault took place in McCall's brother's bedroom. (App. p. 10, lines 22 – p. 11, lines 1-2). During the plea the State also referenced an alleged statement made by McCall. (App. pp. 10 – 13). During the plea hearing the state admitted, however, that a rape kit had not been conducted on the prosecuting witness. (App. p. 14, lines 2-10).

Rule 71.1(d), SCRCP, provides, “If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to

confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.” In Gary v. State, 347 S.C. 627, 630, 557 S.E.2d 662, 663 (2001) the South Carolina Supreme Court wrote, “Under this rule, an indigent applicant who is granted a hearing has a statutory right to be represented by a court-appointed attorney. Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000) citing Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992).”

S.C. Code §17-27-60 provides, “If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing and legal services, these costs and expenses shall be made available to the applicant in the trial court, and on review, in amounts and to the extent funds are made available to indigent defendants by the General Assembly.” At the time of the PCR hearing, an order had already been signed authorizing PCR counsel to hire an investigator to interview witnesses and serve subpoenas. According to PCR counsel, the investigator had been hired and had started work on the case but stopped working when he learned he would not be paid.

McCall was entitled to appointed PCR counsel to fully investigate the case. Appointed PCR counsel sought funds to pay for an investigator to assist in the preparation of the case. Funds for the investigator were approved. The investigation, however, was cut short when the investigator learned he would not be paid. McCall was entitled to a full investigation and assistance in locating and interviewing witnesses, serving subpoenas and compelling witness attendance at the evidentiary hearing. The PCR judge erred in refusing to grant a continuance.

“The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.” State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct.App.2005). “An abuse of discretion

arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct.App.2006) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law.”). Even if there was no evidentiary support, “[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.” State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct.App.2005); see also State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not warrant reversal). “[R]eversals of refusal of continuance are about as rare as the proverbial hens’ teeth.” State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

The PCR judge’s refusal to grant a continuance of the PCR case because the action resulted from McCall’s guilty plea is an error of law amounting to an abuse of discretion. McCall was prejudiced by the error of law. McCall alleged that plea counsel was ineffective in failing to interview witnesses prior to the plea, rendering the guilty plea involuntary. A judge had signed an order effectively finding that investigation was required. In PCR proceedings, the burden of proof is on the applicant to prove the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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).

“To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges

against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

“In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a 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 also from the record of the PCR hearing.” Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

McCall and his PCR counsel needed the assistance of an investigator to locate and interview potential witnesses, McCall's brother, Andrell Black and Cedric Gregg, to determine if counsel was deficient for failing to investigate. The judge's refusal to grant a continuance until funds were secured to pay the investigator to complete his work deprived McCall of the ability to meet his burden in the PCR case to prove that the guilty plea was rendered involuntary by counsel's failure to adequately investigate the CSC case. A hen's tooth is found.

CONCLUSION

Based on the above argument, the order of the PCR judge should be reversed, the case remanded for further investigation and a new PCR hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathryn H. Hudgins", written over a horizontal line.

Kathryn H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of February, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge  
\_\_\_\_\_

THOMAS MCCALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the brief of petitioner, in this case has been served on David Spencer, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 4th day of February, 2013.

*Kathrine H. Hudgins* for

\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

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

*[Signature]* \_\_\_\_\_ (L.S.)

Notary Public for South Carolina  
My Commission Expires: October 2, 2013