

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

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JAN 27 2014

S.C. Supreme Court

MARK HARMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002191

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to advise petitioner that he would have to serve 85% of his sentence on the safecracking charge?

STATEMENT

On February 8, 2012, petitioner appeared before the Honorable Alison Renee Lee in Richland County and pled guilty to five (5) counts of burglary 2nd (violent) and one (1) count of safecracking. A sentence of ten (10) years was imposed on all charges. Jennifer Davis, Esquire, was plea counsel. Richard Cathcart, Esquire, was the assistant solicitor. (App. p. 1 – p. 32).

Petitioner filed an application for post-conviction relief on July 2, 2012. (App. p. 33 – p. 42). Respondent filed a return on September 4, 2012. (App. p. 45 – p. 55). An evidentiary hearing was held on June 5, 2013, before the Honorable James R. Barber, III. Petitioner was present and was represented by Kristy G. Goldberg, Esquire. Respondent was represented by Daniel F. Gourley, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 56 – p. 86).

On August 19, 2013, Judge Barber issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 87 – p. 97).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to advise petitioner that he would have to serve 85% of his sentence on the safecracking charge.

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.

Petitioner testified at the evidentiary hearing that his plea was on February 8, 2012, and he was not indicted for safecracking until January 20, 2012. (App. p. 65, lines 13 – 18). He said he had no idea he would have to serve 85% of the safecracking sentence. He said he never would have pled guilty to the charge if he had known this. (App. p. 66, line 2 – p. 67, line 20). As previously mentioned, counsel can be held ineffective for not giving correct sentencing advice.

CONCLUSION

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

Respectfully submitted,

Handwritten signature of Robert M. Pachak in black ink, written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
JAMES R. BARBER, III, CIRCUIT COURT JUDGE

MARK HARMON,

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APPELLATE CASE NO. 2013-002191

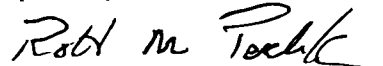
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Harmon 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 June 5, 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 Mark Harmon.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of January, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
James R. Barber, III, Circuit Court Judge

MARK HARMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

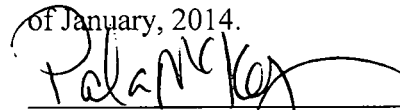
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mark Harmon, #130332, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 27th day of January, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of January, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.