

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

CARNELL BLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001739

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 6

PETITION TO BE RELIEVED AS COUNSEL 7

ISSUE PRESENTED

Does the record does support the PCR judge's conclusion that Petitioner failed to show prejudice from counsel's failure to pursue an alibi witness where the State had no evidence to link Petitioner to the alleged crime other than the highly impeachable statements of codefendants and where Petitioner's codefendant was present at the PCR hearing and prepared to testify and exonerate Petitioner?

STATEMENT

In February of 2010, the Spartanburg County Grand Jury indicted Petitioner Carnell Bland for armed robbery, possession of a weapon during a violent crime, kidnapping, and first degree burglary. App. 3, ll. 1-8; App. 77-78. On July 11, 2011, Petitioner attended a plea hearing before the Honorable J. Derham Cole. William S. Bean, IV represented Petitioner and Danny Fulmer represented Petitioner. Petitioner pled guilty to one charge of armed robbery in exchange for the State's dropping the remaining charges. App. 4, ln. 25—App. 5, ln. 8. The plea judge engaged Petitioner in a plea colloquy. App. 3, ln. 9—App. 18, ln. 13. The State then alleged that on October 27, 2009, Petitioner and three others donned masks, barged into a private residence, and held the occupants at gunpoint while taking valuables. App. 18, ll. 15-22. The plea judge accepted the plea and sentenced Petitioner to fifteen years incarceration. App. 22, ln. 24—App. 23, ln. 1; App. 24, ll. 20-23.

On January 31, 2012, Petitioner filed an application for post-conviction relief. App. 26-32. On or about September 27, 2012, the State filed its return. App. 33-38. On April 3, 2013, Petitioner attended a hearing before The Honorable J. Mark Hayes, II. Kenneth P. Shabel represented Petitioner and Suzanne H. White represented the State. App. 39.

At the PCR hearing, Petitioner testified that he had always maintained he was innocent of the charges brought against him and was never even at the scene of the crime. App. 47, ll. 4-12. Other than the highly impeachable statements of one or two alleged codefendants, the State had no evidence against Petitioner, including having no fingerprints, eyewitnesses, or weapons. App. 49, ll. 14-14; App. 63, ll. 12-24; App. 65, ll. 7-22. Petitioner specifically pointed plea counsel to Tiffany Hughes, who would testify that Petitioner was elsewhere at time of the alleged crime. App. 45, ln. 21—App. 46, ln. 18. Moreover, Petitioner testified that one of the codefendants was present at the

PCR court and prepared to testify that Petitioner was not involved in the alleged crime. App. 47, ln. 16—App. 48, ln. 9. Plea counsel then testified that he called Ms. Hughes on the phone, who could not recall whether Petitioner was with her on the night of the alleged crime. App. 59, ln. 18—App. 60, ln. 8.

On July 26, 2013, the PCR court issued an order of dismissal. App. 69-76. The order stated, “Although Applicant alleged that Counsel failed to pursue his alibi witness, not only did Counsel testify that he did speak with the witness, but the witness was not presented to testify at the PCR hearing.” App. 73. Citing *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 266 (1992), the order stated held that Petitioner could not establish prejudice from plea counsel’s failure to interview or call a witness without producing the witness at the PCR hearing. The order also cited *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) and held that a PCR applicant “must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” *Id.*

ARGUMENT

The record does not support the PCR judge’s conclusion that Petitioner failed to adduce an alibi witness necessary to establish prejudice because Petitioner’s codefendant was present and prepared to testify at the hearing.

The record does not support the PCR judge’s conclusion that Petitioner failed to adduce an alibi witness necessary to establish prejudice because Petitioner’s codefendant was present and prepared to testify at the hearing. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must

show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. The two-part test adopted in *Strickland* “applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *see generally Brady v. United States*, 397 U.S. 742, 758 (1970) (“Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.”).

Specifically, 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,” a defendant sufficiently undermines the required voluntary and intelligent character of a plea. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); *accord State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (holding record must reflect that defendant freely and intelligently waived constitutional trial rights and had full understanding of the consequences of the plea); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding the difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea”).


In this case, the PCR judge concluded in the order of dismissal that Petitioner failed to adduce an alibi witness necessary to establish prejudice because Petitioner did not present Tiffany Hughes to testify at the PCR hearing. The order then held as a matter of law Petitioner could not have shown prejudice without producing the witness. However, the PCR judge improperly failed to consider Petitioner’s codefendant as an alibi witness. Petitioner specifically testified at the PCR hearing that one of his codefendants was in court and prepared to testify that Petitioner was not involved in the alleged crime. Considering the State had no evidence to link Petitioner to the alleged crime other than the highly impeachable statements of codefendants, the

prospect of such a recantation on the witness stand most reasonably constituted evidence that Petitioner would not have pled but would have proceeded to trial if plea counsel had pursued the witness. Thus, the record does not support the PCR judge's conclusions in the order of dismissal.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
J. MARK HAYES, II, CIRCUIT COURT JUDGE

CARNELL BLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001739

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carnell Bland 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 3, 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 Carnell Bland.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of February, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

CARNELL BLAND,

PETITIONER,

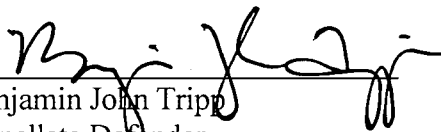
V.

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Carnell Bland, #294049, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 18th day of February, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of February, 2014.


_____(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.