

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 28 2014

Certiorari to Charleston County

S.C. Supreme Court

Stephanie P. McDonald, Circuit Court Judge

DERRICK A. CRISWELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001236

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT4

CONCLUSION6

PETITION TO BE RELIEVED AS COUNSEL.....7

ISSUE PRESENTED

Whether plea counsel was ineffective in misadvising petitioner that he would only receive a five (5) year sentence if he pled guilty?

STATEMENT

On October 20, 2009, petitioner appeared before the Honorable R. Markley Dennis in Charleston County and pled guilty to distribution of cocaine base. A ten (10) year sentence was imposed. R. Michael DuPree, Esquire, was plea counsel. Stephanie Lindler, Esquire, was the assistant solicitor. (App. p. 1 – p. 26). A motion for reconsideration was heard on March 23, 2010. Judge Dennis denied the motion. (App. p. 27 – p. 37).

Petitioner filed an application for post-conviction relief on February 10, 2012. (App. p. 38 – p. 44). Respondent filed a return dated June 19, 2012. (App. p. 45 – p. 51). An evidentiary hearing was held on July 26, 2012, before the Honorable Stephanie P. McDonald. Petitioner was present and was represented by Kelly Fitzharris Morrow, Esquire. Respondent was represented by Ashley Wilson, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 52 – p. 88). On April 29, 2013, Judge McDonald issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 89 – p. 97).

This petition follows.

ARGUMENT

Plea counsel was ineffective in misadvising petitioner that if he pled guilty he would only receive a five (5) year sentence.

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

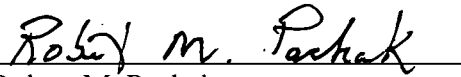
accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure 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 if he pled guilty he would get a five (5) year sentence. Petitioner said he would take the five years. On the day of court, he asked plea counsel to get something in writing from the assistant solicitor about the five years. She, however, would not agree to five years. (App. p. 59, lines 10 – 25). Plea counsel then said he was going to speak to the judge. He came out and said the judge would agree to five years. (App. p. 60, line 19 – p. 61, line 7). Petitioner went ahead and pled guilty, but ended up with ten years. (App. p. 61, lines 23 – 25). As noted above, giving incorrect sentencing advice constitutes ineffective assistance of counsel. Hinson v. State and Ray v. State, *supra*.

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 28th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
STEPHANIE P. MCDONALD, CIRCUIT COURT JUDGE

DERRICK A. CRISWELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Derrick A. Criswell 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 July 26, 2012. 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 Derrick A. Criswell.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of February, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Stephanie P. McDonald, Circuit Court Judge

DERRICK A. CRISWELL,

PETITIONER,

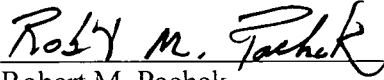
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

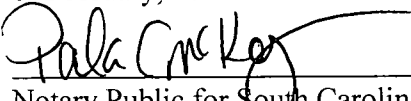
CERTIFICATE OF SERVICE

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 Ashleigh R Wilson, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Derrick A. Criswell, #337479, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of February, 2014.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of February, 2014.


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