

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

R. Ferrell Cothran, Jr., Circuit Court Judge

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MAR - 7 2014

S.C. Supreme Court

TRAVIS MCKIE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001490

PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in finding that plea counsel rendered effective assistance of counsel despite failing to interview one of the victims to the shooting where (1) the victim testified that he did not know who shot him, had never identified Petitioner as the shooter, and did not believe Petitioner was the person who shot him; and (2) Petitioner testified that had he been aware of this information, he would not have pled guilty but would have insisted on going to trial.

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ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel rendered effective assistance of counsel despite failing to interview one of the victims to the shooting where (1) the victim testified that he did not know who shot him, had never identified Petitioner as the shooter, and did not believe Petitioner was the person who shot him; and (2) Petitioner testified that had he been aware of this information, he would not have pled guilty but would have insisted on going to trial?

STATEMENT

Indictments

On July 23, 2007, Petitioner Travis McKie was indicted by the Aiken County Grand Jury for two counts of assault and battery with intent to kill (“ABWIK”). App. 104-105; 109-110.

Guilty Plea

Petitioner appeared before the Honorable Doyet A. Early, III on June 15, 2009 to plead guilty to the above-referenced charges. App. 1-19. Petitioner entered into a negotiated sentence with the State which provided for a maximum of fifteen years on the first indictment for ABWIK and a twenty year sentence on the second indictment suspended to five years probation. App. 3, ll. 4-12.

The State presented the factual basis for the plea and stated that on October 3, 2006 at approximately 3:00 p.m., there was a report of shots fired in an area of Aiken, South Carolina known as Hahn Village. Two back seat passengers in a car had been shot – one was shot in his right arm, the other passenger shot in his left arm. A witness to the shooting apparently identified Petitioner as the shooter. App. 4, l. 22 – 5, l. 15.

The State alleged that Petitioner shot at the vehicle when he was driving his own vehicle away from the scene. The State posited that there may have been some confrontation between Petitioner and the driver of the other vehicle. The driver of the other vehicle was not shot, and he was uncooperative with law enforcement. The two victims who were shot, Stephen Pope and Wallace Smith, allegedly informed law enforcement that they did not know Petitioner and had never met him. According to the State, they identified Petitioner from a photo lineup the day after the shooting. App. 4, l. 22 – 7, l. 3.

Following Petitioner's guilty plea, Judge Early sentenced Petitioner to fifteen years imprisonment for one count of ABWIK and twenty years on the second count suspended to five years probation. The sentences were to run consecutive to each other. App. 19, ll. 8-22. Petitioner did not appeal his guilty plea.

First PCR Application and Evidentiary Hearing (2010-CP-02-01256)

Petitioner filed an application for post-conviction relief ("PCR") on May 27, 2010 asserting, among other things, that his plea counsel was ineffective for failing to interview victim Stephen Pope where Mr. Pope would have testified that he did not believe Petitioner was the person who shot him. App. 21-39. The State filed its Return on November 17, 2010. App. 40-44.

On July 11, 2011, Petitioner filed an amendment to his PCR application asserting that he "would not have entered the plea agreement if his counsel had interviewed his witness, namely Stephen Pope." Petitioner alleged that "Mr. Pope had crucial information concerning the allegations against" Petitioner. Petitioner believed Mr. Pope had information that would have bolstered his case. Petitioner asserted that he requested his plea counsel to interview Mr. Pope but that counsel refused to do so. App. 45-46.

An evidentiary hearing was held before the Honorable James R. Barber, II on July 14, 2011. App. 53-79. Petitioner was represented by Joan E. Smith, and the State was represented by Assistant Attorney Generals Robert D. Corney and Brian Petrano. App. 53. Stephen Pope, plea counsel, and Petitioner testified at the hearing. App. 59-77.

Mr. Pope testified that he did not see who shot him and did not believe that it was Petitioner who shot him on October 3, 2006. App. 60, l. 9 – 61, l. 4. Mr. Pope also testified that he did in fact know Petitioner because their fathers were good friends. Mr.

Pope did not believe Petitioner would have ever done anything like shooting him. App. 61, ll. 7-12. Mr. Pope said he never told investigating officers that he had never met Petitioner before the shooting. App. 62, l. 25 – 63, l. 8. Mr. Pope also testified that he never picked Petitioner out of a photo lineup and that law enforcement merely showed him a picture of Petitioner and told Mr. Pope that Petitioner was the one who shot him. App. 63, ll. 14-24.

Plea counsel for Petitioner acknowledged never interviewing Mr. Pope. App. 67, l. 22 – 68, l. 2. He further agreed that information from Mr. Pope that he did not know if it was Petitioner who shot him would have been important information. App. 68, ll. 3-7. He further agreed that information from Mr. Pope that law enforcement showed him a picture of Petitioner and told Mr. Pope that the person in the picture had shot him would have also been important. App. 68, ll. 8-12. Finally, plea counsel concurred that had the information about Mr. Pope been conveyed to Petitioner, Petitioner may not have accepted the plea agreement. App. 68, ll. 13-17.

On cross-examination by the Assistant Attorney General, plea counsel testified that based on his discussions with Petitioner, he believed Petitioner was the shooter in the case. App. 68, l. 24 – 69, l. 4. Plea counsel testified that after he and Petitioner decided they were going to accept the plea bargain with a cap of fifteen years, plea counsel suggested to Petitioner that they should go out and try to recover the firearm in an effort to get a sentence under the fifteen year cap. Officers, Petitioner, and plea counsel went out to an area in the woods to try to find the firearm, but no firearm was ever recovered. App. 69, l. 20 – 70, l. 15.

Petitioner testified that he asked his plea counsel several times to interview Mr. Pope. App. 72, ll. 23-25. He said his plea counsel was adamant about not interviewing

either victim because they had picked Petitioner out of a photo lineup. App. 74, ll. 18-22. Petitioner asserted that he would have went to trial had he been aware of the information from Mr. Pope. App. 73, ll. 17-22.

Petitioner further testified that he never told his plea counsel that he was the shooter and only said that he was there at the incident scene but was not the shooter. App. 74, l. 23 – 75, l. 5. Petitioner testified the reason the firearm was never found when he, plea counsel, and officers tried to look for it was because he did not know where it was since he was not the shooter. App. 76, ll. 1-13.

At the close of the hearing, counsel for Petitioner argued that plea counsel provided ineffective assistance of counsel where he acknowledged not interviewing Mr. Pope and where Petitioner would not have pled guilty had he been privy to Mr. Pope's testimony. App. 77, l. 23 – 78, l. 5.

Order of Dismissal

Judge Barber issued his Order of Dismissal denying Petitioner's PCR application on August 17, 2011. App. 80-86. Judge Barber found that the testimony offered by Mr. Pope was "vague and not sufficient to prove that [Petitioner] was not the shooter in this case." Judge Barber further ruled that "counsel's failure to interview [Mr. Pope] in no way affected his representation of [Petitioner], as [Mr. Pope] offered no testimony at the PCR hearing to show [Petitioner] was not the shooter and [Petitioner] had admitted his guilt to counsel early on in his representation. Counsel gave [Petitioner] all the information and advice to make an intelligent and voluntary decision on whether to enter this plea, and therefore his guilty plea was entered knowingly and voluntarily after being fully and adequately advised by

competent counsel acting within the range of competence demanded of attorneys in criminal cases.” App. 84-85. Petitioner’s PCR counsel did not appeal this Order of Dismissal.

Second PCR Application and Consent Order Allowing Belated PCR Appeal (2012-CP-02-01881)

On July 30, 2012, Petitioner filed a second PCR application asserting that he had wanted to appeal the Order of Dismissal in his first PCR action but his PCR counsel failed to file the notice of appeal. App. 87-93. The State filed its Return on October 8, 2012. App. 94-98.

Petitioner’s plea counsel submitted an affidavit averring:

[Petitioner] verbally requested that I appeal the Court’s decision to deny him relief. I missed the deadline for filing the Notice of Appeal. I notified [Petitioner] of his right to file a petition for Post-Conviction Relief alleging ineffective assistance of counsel against me for my failure to file a timely Notice of Appeal.

...

I believe my former client should be allowed to file a belated appeal of the Final Order entered on August 29, 2011, since I failed to file a Notice of Appeal on behalf of [Petitioner].

App. 99.

On July 9, 2013, the court, noting the consent of the State, ruled that Petitioner was entitled to a belated appeal from the Order of Dismissal in the first PCR action. App. 101.

This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel rendered effective assistance of counsel despite failing to interview one of the victims to the shooting where (1) the victim testified that he did not know who shot him, had never identified Petitioner as the shooter, and did not believe Petitioner was the person who shot him; and (2) Petitioner testified that had he been aware of this information, he would not have pled guilty but would have insisted on going to trial.

When Petitioner pled guilty to two counts of ABWIK, he lacked crucial knowledge that Stephen Pope did not know who had shot him, that Mr. Pope had never identified Petitioner as the shooter, and that Mr. Pope did not believe Petitioner was the shooter. Petitioner's plea counsel, who did not interview Mr. Pope despite Petitioner's requests for him to do so, agreed at the PCR evidentiary hearing that this information would have been important to Petitioner and there was a possibility that Petitioner would not have accepted the plea agreement with that information. App. 68, ll. 3-17. Petitioner asserted that he would have insisted on going to trial had he been aware of Mr. Pope's testimony, App. 73, ll. 19-22.

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) (“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.’ ” (quoting North Carolina v.

Alford, 400 U.S. 25, 31(1970)). “The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. 52 at 59. In other words,

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

Deficient Performance and Prejudice

The evidence presented at the PCR hearing established that (1) plea counsel did not interview Mr. Pope; (2) Mr. Pope did not know who shot him, never identified Petitioner as the person who shot him, and did not believe that Petitioner had shot him; (3) plea counsel believed this information would have been important to Petitioner and would have possibly caused Petitioner to not accept the plea agreement; and (4) Petitioner affirmatively stated that had he been made aware of Mr. Pope's testimony, he would have insisted on going to trial. App. 60, l. 9 – 61, l. 12; 62, l. 25 – 63, l. 24; 65, l. 14; 67, l. 22 – 68, l. 17; 73, ll. 19-22.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

By not interviewing the victim and discerning whether he had actually identified Petitioner as the shooter or whether he knew who shot him, plea counsel's investigation of

the case was inadequate and unreasonable. Petitioner was prejudiced by plea counsel's inadequate and unreasonable investigation where Petitioner would have insisted upon going to trial had he been aware of Mr. Pope's testimony. See Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty.").

The PCR court dismissed Mr. Pope's testimony, finding it was vague and insufficient to prove that Petitioner was not the shooter. The PCR court further found that Mr. Pope's testimony did not matter because plea counsel alleged Petitioner told him he was the shooter. App. 84.

However, whether Mr. Pope's testimony would have been sufficient to prove that Petitioner was not the shooter and whether Petitioner may have acknowledged any guilt to plea counsel is not relevant to the issue of whether Petitioner would have pled guilty had he had full knowledge of the facts of his case. The issue is whether Petitioner had all the necessary information to make an informed, intelligent, and voluntary decision to plead guilty. Petitioner did not. Therefore, the PCR court's ruling that "[c]ounsel gave [Petitioner] all the information and advice to make an intelligent and voluntary decision on whether to enter [the] plea," was not supported by the evidence. Petitioner is accordingly entitled to a new trial for his plea counsel's failure to interview material witness Mr. Pope.

CONCLUSION

Based on the reasons set forth herein, Petitioner Travis McKie requests this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of March, 2014.

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TRAVIS MCKIE,

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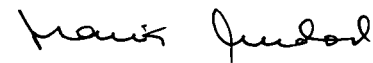
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Travis McKie, #296831, Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 7th day of March, 2014.


Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of March, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.