

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Orangeburg County

Edgar W. Dickson, Circuit Court Judge **S.C. Supreme Court**

ANTONIO HAIR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001734

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

INDEX

INDEX..... 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL..... 8

ISSUE PRESENTED

Trial counsel erred in allowing petitioner to plead guilty to armed robbery despite his claim of actual innocence on the charge because this deprived him of the right to put the state to its burden of establishing guilt beyond a reasonable doubt on the same via a trial by jury.

STATEMENT

Petitioner Antonio Hair pled guilty to kidnapping and armed robbery during the June 2010 term of the Orangeburg County General Sessions Court before Judge Roger Young. Pursuant to plea negotiations, petitioner was sentenced to fifteen-year prison terms to run concurrently on both convictions. App 1-14. Petitioner was represented by Doug Mellard at the plea proceeding and Assistant Solicitor Son Sorenson appeared on behalf of the state.

Petitioner appealed, but his case was dismissed by the South Carolina Court of Appeals per Order dated August 13, 2010. App. 23.

On January 14, 2011, petitioner filed a PCR application with the Orangeburg County Office of the Clerk of Court. App. 16-22. The respondent filed a return dated May 3, 2011, requesting that a PCR hearing be held in response to petitioner's PCR action. App. 23-27

A PCR hearing was convened on May 31, 2013, at the Orangeburg County Courthouse before Judge Edgar W. Dickson. Petitioner was present at the hearing and represented by Charles T. Brooks, and Assistant Attorney General Megan E. Harrigan appeared on behalf of the State. App. 29-65.

On July 1, 2013, Judge Dickson issued an Order of Dismissal in the case therein denying petitioner's collateral claims and allegations of ineffective assistance of counsel in the case. App. 68-75.

Petitioner appealed Judge Dickson's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in allowing petitioner to plead guilty to armed robbery despite his claim of actual innocence on the charge because this deprived him of the right to put the state to its burden of establishing guilt beyond a reasonable doubt on the same via a trial by jury.

During the plea proceeding, the solicitor apprised the trial judge of the facts in the case. Apparently, Koie Glover was cleaning his Oldsmobile at a self-service car wash in Orangeburg when a vehicle containing petitioner, Spigner, and Butler pulled up beside him. Petitioner and Spigner exited the vehicle and accosted Glover. Spigner pointed a gun (AK-47 assault rifle) at the scene and forced Glover into the back seat of his own vehicle (Oldsmobile). Glover and Spigner rode in the backseat of the Oldsmobile while petitioner drove the vehicle to a remote area nearby. Butler drove their vehicle trailing behind them. After parking, Glover was forced out of the Oldsmobile at gunpoint. Glover's cell phone was taken and the speakers out of his Oldsmobile were taken also. Then, petitioner, Spigner, and Butler fled in their vehicle. App. 10, l. 20 – p. 13, l. 3. Ultimately, the three men were arrested.

During the guilty plea proceeding, petitioner asserted his innocence as follows:

The Court: Indictment 2010-GS-38-0709, armed robbery. Your weapon was allegedly described as a rifle. Did you do that?

Petitioner: Well, my intentions was (sic) to take some things from Glover, but –

The Court: Well, okay. Did you take --

Petitioner: Well, one of the co-defendants pulled out a gun, which is a gun – I thought the gun was still in the car, but the gun was – and I'm saying one thing led to another. That's my being – you know, armed robbery...I mean, my intentions was just taking the merchandise, but unfortunately it ain't (sic) worked that way, so I'm here pleading to armed robbery and kidnapping.

Solicitor: It was a co-defendant that was armed. [Petitioner] was not – never been an allegation that he actually had the weapon. It was the co-defendant that had an assault rifle.

The Court: Did the lawyers explain to you the hand of one is the hand of all?

Petitioner: Yes, sir. App. 5, l. 2 – p. 6, l. 8.

During the PCR hearing, petitioner testified that despite receipt of advice regarding accomplice liability, he maintained his innocence on the armed robbery charge and desired a jury trial on the same in order to prove this. Petitioner added that he was guilty of and confessed to strong armed robbery sans a weapon. App. 39, l. 12 – p. 40, l. 11; App. 48, 8-18; App. 50, l. 24- p. 51, l. 4. Petitioner explained in effect that he pled guilty to armed robbery because he realized that counsel was not interested in going to trial on the robbery charge and that he “wasn’t going to get the [proper legal] representation” in this regard. App. 47, l. 1-14; App. 49, lines 5-22. Petitioner’s PCR testimony on this issue follows:

Assistant Attorney General: Do you recall you telling Judge Young that you wished to plead guilty during your guilty plea?

Petitioner: Actually I froze. He asked me do I want to plead guilty to the charges. I told him yes and no. And my reason for telling him yes and no because I was willing to plead to strong armed robbery but not armed robbery and kidnapping. App. 48, lines 1-7.

Assistant Attorney General: So are you indeed guilty of armed robbery and kidnapping?

Petitioner: No, ma’am. App. 49, lines 1-3.

During the PCR hearing, trial counsel admitted that petitioner desired a jury trial on the armed robbery charge, but later decided to accept the bargain, plead guilty, and receive the fifteen-year negotiated prison sentence offered to him by the state. App. 52, lines 1-20. Counsel admitted

further that petitioner insisted that he was guilty of strong armed robbery, but not guilty on the armed robbery charge. App. 60, l. 4 – p.62, l. 9

The PCR judge ruled that since petitioner elected to take advantage of the plea offer, and had no viable defenses, and was advised regarding accomplice liability, then he did not satisfy his burden of proving that counsel rendered ineffective assistance regarding his representation of him in connection with his guilty plea proceeding. App. 68 – 74.


A guilty plea must be given voluntarily in order to be valid. Boykin v. Alabama, 395 U.S. 695 (1969). A defendant who pleads guilty on the advice of counsel can 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 error, the defendant would not have pled guilty, but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). Additionally, a plea received despite a defendant's protests of innocence cannot be considered voluntarily given. Rolen v. State, 384 S.C. 409, 683 S.E. 2d 471 (2009). In Rolen, trial counsel was found ineffective in failing to move for the withdrawal of the defendant's guilty plea where the defendant repeatedly asserted his innocence prior to sentencing at this plea proceeding. Also in Rolen, the trial judge had formally accepted the defendant's guilty plea prior to his protestations of innocence. Moreover, in the instant case, the trial judge was aware of petitioner's protests of innocence before accepting the guilty pleas. In South Carolina, a trial judge can reject a guilty plea if the defendant protests his innocence. State v. Paris, 354 S.C. 578 S.E. 2d 751 (2003). Here, counsel's error in allowing petitioner to plead guilty to armed robbery despite his protests of innocence on that charge constituted deficient legal representation. But for the error, petitioner would have opted to exercise his right to a trial by jury on the armed robbery charge.

Counsel's error violated petitioner's Sixth Amendment right to effective legal assistance during a plea proceeding. Hill v. Lockhart, *supra*.

CONCLUSION

Based on the following argument, petitioner requests that this Court grant the petition and allow full briefing on the issue raised above in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

ANTONIO HAIR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-001734

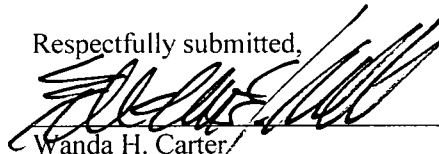
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Antonio Hair states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 21, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Antonio Hair.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of March, 2014

STATE OF SOUTH CAROLINA

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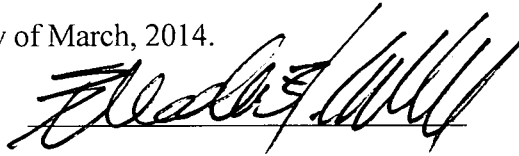
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CERTIFICATE OF SERVICE

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 and Antonio Hair, #248402, at Macdougall Correctional Institution this 27th day of March, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

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

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.