

2010-180276

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marlboro County

Thomas A. Russo, Circuit Court Judge

GLENN QUANTA PERNELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

BREEN RICHARD STEVENS
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 Petitioner's decision to plead guilty was knowingly and voluntarily made where plea counsel failed to review the discovery with Petitioner and advise him of possibilities for challenging evidence before advising him to plead guilty in the middle of his trial?

STATEMENT

Glenn Quanta Pernell was indicted for several offenses stemming from an incident in Marlboro County that occurred on June 9, 2006. App. 242. The Marlboro County Grand Jury indicted Pernell for the following offenses: on August 3, 2006, for indicted for possession with intent to distribute (PWID) marijuana; on September 7, 2006, for failure to stop for a blue light; on April 5, 2007, for trafficking in cocaine in an amount between 28 and 100 grams, second offense; and on December 13, 2007, for trafficking crack cocaine in an amount between 28 and 100 grams, second offense. App. 238, 242, 246, 249.

Pernell's case was called for trial from February 11 through 13, 2008, before the Honorable James E. Lockemy and a jury. Pernell was represented by J.M. Long, III (Counsel). App. 1; App. 210, ll. 5-15. The State was represented by Elizabeth Munnerlyn and Rosalind Sellers. On the morning of February 13, 2008, Pernell entered into a negotiated plea deal with the following terms: three years for failure to stop for a blue light, five years for PWID marijuana, and thirteen years for each of the trafficking charges. App. 154, ln. 16—App. 155, ln. 16; App. 160, ln. 22—App. 164. All of the sentences were to run concurrently with each other, and with a fifty year sentence Pernell was already serving from convictions in Marion County. The court accepted the plea, and sentenced Pernell accordingly. App. 165, ln. 20—App. 166, ln. 14; App. 168, ll. 14-20. No direct appeal was filed. App. 171.

Pernell filed his application for post-conviction relief (PCR) on February 13, 2009, claiming Counsel provided ineffective assistance because he told Pernell to plead guilty due to the length of the term which Pernell was already serving. App. 170, 172. An evidentiary hearing was held on

September 14, 2010 before the Honorable Thomas A. Russo. Pernell was represented by Tynika Adams Claxton. The State was represented by Karen C. Ratigan.

At the hearing, Pernell confirmed that Counsel represented him not only on the current charges in Marlboro County, but also on the charges in Marion County for which he was sentenced to fifty years. App. 204, ln. 17—App. 205, ln. 21. Pernell alleged trial counsel never reviewed the discovery for Pernell’s Marlboro County charges. App. 199, ln. 24—App. 200, ln. 19; App. 206, ll. 3-6. He further testified that discrepancies existed between the drug weights alleged in the charging documents, and the amounts testified to at trial by the State’s witness prior to Pernell’s plea; the weights testified to at trial were significantly higher than those contained in the charging documents. App. 200, ln. 20—App. 201, ln. 9. Pernell also indicated there was a gap in the State’s chain-of-custody for the drugs, which he believes led to the weight discrepancy, yet Counsel failed to review that—or the possibility of challenging the drug evidence on that basis—prior to Pernell pleading guilty. App. 202, ll. 4—App. 203, ln. 17. Finally, Pernell stated that he did not want to plead guilty, and indicated that had he known of the issues surrounding the evidence, as well as his legal options to attempt to suppress the evidence, he would not have pled guilty. App. 202, ll. 23-25; App. 203, ll. 13-17.

Counsel’s testimony confirmed that he did not review the discovery with Pernell prior to trial. App. 211, ll. 7-24. Further, when Counsel received additional discovery from the State before trial regarding weight of the drugs seized and tested, he discussed the matter with Pernell’s family members rather than with his client. 219, ln. 15—App. 220, ln. 3.

Among its findings in the Order of Dismissal, the PCR court specifically determined that “plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was

thoroughly competent.” App. 232. The PCR court also found that Pernell failed to introduce evidence to support his contention that the difference in the drugs’ weights was due to a defective chain-of-custody. App. 232. This petition follows.

ARGUMENT

Petitioner’s decision to plead guilty was not knowingly and voluntarily made because Counsel failed to review the discovery with Petitioner and advise him of possibilities for challenging evidence before advising him to plead guilty in the middle of his trial.

Counsel advised Pernell to plead guilty to the charges in the middle of trial without reviewing the discovery with his client, or explaining the options to challenge the State’s evidence. Pernell would not have pled guilty had he been properly counseled regarding this information and his legal options. Therefore, Pernell’s decision to plead guilty was not knowingly or voluntarily made due to Counsel’s deficient performance.

The difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) to claims of the same against plea counsel). First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. 474 U.S. at 59, 106 S.Ct. at 370; see also Berry, 381 S.C. at 636, 675 S.E.2d at 428.

In the present case, Counsel’s representation was deficient because he advised Pernell to plead guilty without ever reviewing the discovery with Pernell, and without thoroughly discussing

the possibility of suppressing the evidence of drugs against. See, Berry, 381 S.C. at 635-36, 675 S.E.2d at 427 (finding “plea counsel’s failure to inform [defendant] of the potential challenge of the use of paraphernalia conviction for enhancement purposes amounts to deficient representation.”); but see Harris v. State, 377 S.C. 66, 73-74, 659 S.E.2d 140, 144 (2008) (holding trial counsel was not ineffective for failure to consult with defendant where, although he did not provide defendant with a copy of discovery, he briefly spoke with defendant on at least two occasions prior to trial). Specifically, Pernell lacked adequate advice or knowledge regarding a potential gap in the State’s chain-of-custody linking him to the drugs, and which may have accounted for the wide discrepancy between the amount of drugs indicated in the initial charging documents and the amounts reported at trial by the State Law Enforcement Division (SLED) drug analyst. App. 202, ll. 4—App. 203, ln. 17. Further, the evidence does not show that Pernell was fully advised that he could seek to have the drugs suppressed if a gap indeed existed in the chain-of-custody. App. 221, ll. 3-16. Without this advice regarding his legal options, Pernell was advised to plead guilty to all the offenses, including trafficking both powder cocaine and crack cocaine in amounts between 28 and 100 grams. As such, Counsel’s representation was deficient. Hill, 474 U.S. at 58, 106 S.Ct. at 370; Berry, 381 S.C. at 635-36, 675 S.E.2d at 427.

Second, Pernell was prejudiced by Counsel’s deficient representation. At his PCR evidentiary hearing, Pernell stated he did not want to plead guilty, and repeatedly indicated that, had he known of the issues surrounding the evidence and his legal options to attempt to suppress the evidence, he would not have pled guilty. App. 202, ll. 23-25; App. 203, ll. 13-17. This is especially pertinent regarding the chain-of-custody of the drugs. Although the State produced the agent from SLED who analyzed the drugs, it did not produce any witnesses in the chain from the point the

drugs were allegedly seized out of Pernell's car and placed into evidence at the Marlboro County Sheriff's Office, to the point where the drugs were delivered to the evidence locker at the SLED laboratory and later examined by the analyst. App. 83, ln. 24—App. 84, ln. 2; App. 117, ll. 17-18; App. 130, ll. 9-11; App. 150, ll. 4-19.

Further, Counsel testified that the State had two more witnesses before it was going to rest its case: (1) the co-defendant, who decided during trial to plead guilty and testify against Pernell; and (2) a chain-of-custody witness. App. 220, ln. 16—App. 221, ln. 16. In order for the State to fill all the potential gaps in the chain with one witness, that individual would have to have not only seized the drugs from Pernell's car, but also taken the drugs to the SLED himself, checked them into evidence himself, and placed them into the evidence locker there. Hence, there is good reason why Counsel noticed the prosecutor was "tight lipped" about the chain-of-custody in the case; without a stipulation from the defense, she might not have been able to complete the chain-of-custody with only one chain witness to call.¹ App. 220, ln. 16—App. 221, ln. 2. Although Counsel indicated he discussed with Pernell that the State was being "tight-lipped" about calling its one chain witness, there was no evidence that Counsel discussed suppressing the drugs based on a gap in the chain-of-custody. App. 221, ll. 3-9. Under these circumstances, there is a reasonable probability that, but for Counsel's error in failing to inform Pernell of his option to challenge the drug evidence based on a likely gap in the chain-of-custody, Pernell would not have pleaded guilty. Hill, 474 U.S. at 59, 106

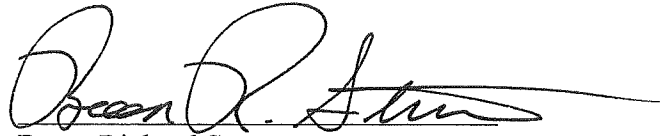
¹ Although the SLED agent who analyzed the drugs stated Jeff Locklear, the lead investigator in the case, submitted the evidence to SLED, there was no evidence that Locklear collected the evidence, transported it to the Marlboro County Sheriff's Office, or moved it within SLED from the point it was checked-in to the point it was placed in the evidence locker there.

S.Ct. at 370; see also Berry, 381 S.C. at 636, 675 S.E.2d at 428. Accordingly, Pernell's decision to plead guilty was not knowingly and intelligently made.

CONCLUSION

For the foregoing reasons, Glenn Pernell respectfully requests the Court to grant his petition for certiorari, reverse the PCR court's dismissal of his application for relief, vacate his convictions, and remand his case for trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO MARLBORO COUNTY
THOMAS A. RUSSO, CIRCUIT COURT JUDGE

THE STATE,

RESPONDENT,

V.

GLENN QUANTA PERNELL,

APPELLANT


PETITION TO BE RELIEVED AS COUNSEL

Counsel for Glenn Quanta Pernell 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 September 14, 2010. 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 Glenn Quanta Pernell.

Respectfully submitted,



Breen Richard Stevens

Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marlboro County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

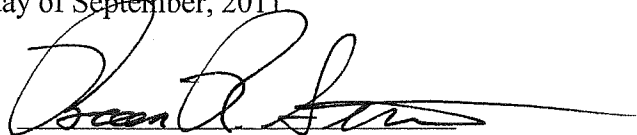
V.

GLENN QUANTA PERNELL,

APPELLANT

CERTIFICATE OF SERVICE

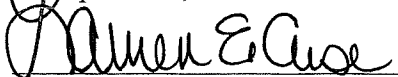
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire and Glenn Quanta Pernell, #263271, at Lieber Correctional Institution this 8th day of September, 2011



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of September, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.