

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County
R. Lawton McIntosh, Circuit Court Judge

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MAR 28 2014

S.C. Supreme Court

BRANSON JAMAL THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002471

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

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ISSUE PRESENTED

Whether defense counsel was ineffective in failing to advise petitioner that a jury could have considered a lesser charge from first-degree burglary?

STATEMENT

On December 6, 2010, petitioner appeared before the Honorable J. Mark Hayes in Cherokee County and pled guilty to first-degree burglary, criminal domestic violence of a high and aggravated nature, and two (2) counts of pointing and presenting a firearm. Respective sentences of twenty (20) years, ten (10) years, five (5) years, and five (5) years were imposed. Don A. Thompson, Esquire, was plea counsel. Michael Morin, Esquire, was the assistant solicitor. (App. p. 1 – p. 18).

Petitioner filed an application for post-conviction relief on May 23, 2011. Amendments to the application were filed on January 17, 2013, and January 25, 2013. (App. p. 19 – p. 47). Respondent filed a return dated May 2, 2012. (App. p. 48 – p. 52). An evidentiary hearing was held on June 24, 2013, before the Honorable R. Lawton McIntosh. Petitioner was present and was represented by David C. Alford, Esquire. Respondent was represented by Suzanne H. White, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 53 – p. 97). On October 31, 2013, Judge McIntosh issued an order denying and dismissing the application for post-conviction relief. (App. p. 100 – p. 110).

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to advise petitioner that a jury could have considered a lesser charge from first-degree burglary.

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

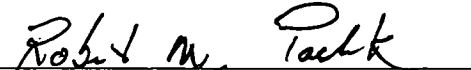
accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure 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 alleged in his amendment to his application for post-conviction relief that defense counsel was ineffective in failing to advise him that a jury trial could have considered a lesser charge to first-degree burglary. (App. p. 32). Plea counsel testified at the evidentiary hearing that he tried to negotiate the charges down, but the State would not negotiate. He also said if they had gone to trial, he did not know if it would have been successful in getting a burglary second as opposed to a burglary first. (App. p. 88, lines 3 – 18). Whether he could have gotten a burglary second at trial was a decision that should have rested with petitioner. Petitioner could not make that decision if the idea was never communicated to him. In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), the Supreme Court of the United States wrote, “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.’” 474 U.S. at 56, 106 S.Ct. at 369. (citations omitted). In Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991) a defendant pled guilty to grand larceny of an automobile. His conviction was overturned in the South Carolina Supreme Court because he was not informed that if he went to trial, he could have requested a charge on the lesser offense of use of a vehicle without permission. Petitioner in this case should have been informed of the lesser offense of burglary second.

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 March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

BRANSON JAMAL THOMPSON,

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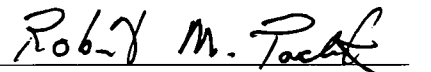
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Branson Jamal Thompson 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 June 24, 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 Branson Jamal Thompson.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of March, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

R. Lawton McIntosh, Circuit Court Judge

BRANSON JAMAL THOMPSON,

PETITIONER,

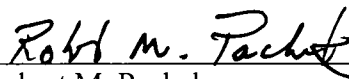
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

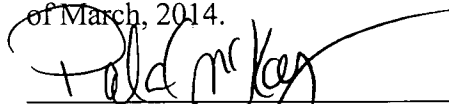
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Branson Jamal Thompson, #326685, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of March, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.