

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

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S.C. Supreme Court

WILLIE GILMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002383

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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 defense counsel was ineffective in failing to adequately advise petitioner of his right to testify?

STATEMENT

Petitioner was convicted of criminal sexual conduct in the first degree after a jury trial held before the Honorable J. Michelle Childs on June 18, 2008, in Richland County. A sentence of life imprisonment without the possibility of parole was imposed. Megan Lee, Esquire, and Mary LaFave, Esquire, were the defense attorneys. Margaret Fent, Esquire, and Richard Cathcart, Esquire, were the assistant solicitors. (App. p. 1 – p. 468).

Petitioner appealed his conviction and it was affirmed by the Court of Appeals on November 2, 2011. State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011).

Petitioner filed an application for post-conviction relief on January 23, 2012. (App. p. 469 – p. 475). Respondent filed a return dated January 25, 2012. (App. p. 476 – p. 483). On September 13, 2012, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. Petitioner was present and was represented by Mark E. Schnee, Esquire. Respondent was represented by Robert D. Corney, Assistant Attorney General. Petitioner and Mary D. LeFave, Esquire, testified. (App. 484 – p. 521). On October 8, 2013, Judge Kinard issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 528 – p. 536).

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to adequately advise petitioner of his right to testify in his own behalf.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution 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). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

In this case, petitioner testified at the evidentiary hearing that he told defense attorney Megan Lee that he wanted to testify.¹ She told him not to testify because she was concerned about petitioner's prior conviction for burglary in the second degree coming out if he took the stand to testify. She never told him that it was his decision on whether to testify. (App. p. 488, lines 12 –

¹ Ms. Lee was not available to testify at the hearing.

24). The trial judge did not go over with petitioner his right to testify. (App. p. 489, lines 4 – 7). Megan Lee never specifically asked petitioner if he wanted to testify. Neither did she tell him it was his decision alone on whether to testify. (App. p. 497, lines 12 – 17).

Mary LaFave, Esquire, testified that she was co-counsel on petitioner’s case. She said she did not talk to petitioner about his right to testify. She did, however, talk to him about testifying and petitioner did express an interest in testifying. She was not present with Ms. Lee during a discussion about petitioner’s right to testify and advice on those rights so she was not sure if that happened. (App. p. 504, lines 6 – 18).

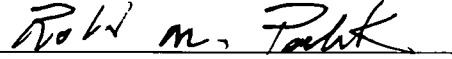
This Court has previously held that waiver of a constitutional right requires a showing on the record that the waiver was made knowingly and intelligently by the defendant. State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988). This Court reaffirmed this in State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) when it held the waiver “may be established by colloquy between the court and the defendant himself, between the court and defendant’s counsel, or both.” Orr was overruled in part on other grounds in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000), the Court held that prejudice must be shown if there is an insufficient waiver.

In petitioner’s case, he was accused of criminal sexual conduct with this former girlfriend. Petitioner’s defense was that it was consensual. Without taking the stand in his defense, the trial could not be much of a swearing match. That is why it was prejudicial to petitioner that no valid waiver was put on the record.

CONCLUSION

Petitioner's writ should be granted and his conviction should be reversed.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in black ink, written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

WILLIE GILMORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-002383

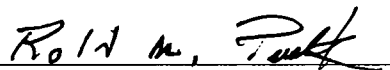
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Willie Gilmore 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 13, 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 Willie Gilmore.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st day of March, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

WILLIE GILMORE,

PETITIONER,

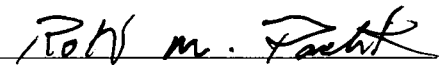
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

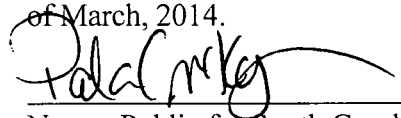
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Willie Gilmore, #281735, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 31st day of March, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31st day
of March, 2014.



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