

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

RAKEEM JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002407

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to investigate?

STATEMENT

On May 17, 2011, petitioner appeared before the Honorable G. Edward Welmaker in Greenville County and pled guilty to four (4) counts of armed robbery, one (1) count of possession of a weapon and one (1) count of conspiracy. He was sentenced to 185 months for each count of armed robbery and to five (5) years for possession of a weapon and conspiracy. Nihar Patel, Esquire, was plea counsel. L. Mark Moyer, Esquire, was the assistant solicitor. (App. p. 1 - p. 44).

Petitioner filed an application for post-conviction relief on May 31, 2012. (App. p. 45 - p. 52). Respondent filed a return dated August 31, 2012. (App. p. 53 - p. 58). An evidentiary hearing was held on August 28, 2013, before the Honorable Robin B. Stilwell. Petitioner was present and was represented by Caroline Horlbeck, Esquire. Respondent was represented by Karen C. Ratigan, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 59 - p. 78). On October 4, 2013, Judge Stilwell issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 79 - p. 85).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to investigate.

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.

Petitioner alleged in his application for post-conviction relief ineffective assistance of counsel and that his plea was involuntary. (App. p. 47). Petitioner testified at the evidentiary hearing that he believed that plea counsel should have pursued a suppression issue in his case. He said that he and his co-defendant were seized with deadly force. They were in a car in a neighborhood off South Street in Greenville. The car was not moving. The co-defendant was in the driver’s seat. A police officer came up to the driver’s side of the car and was screaming at the top of his lungs. The officer immediately discharged his firearm twice inside the car. The co-defendant put the car into gear and drove off a little bit. The officer again shot into the car. The shot paralyzed the co-defendant, he lost control of the car and it wrecked. (App. p. 62, line 21 - p. 64, line 19).

Petitioner said he and plea counsel talked about the issue “somewhat.” He wanted to know if the police had probable cause to do what they did. Plea counsel told him that even if it was illegal for them to do what they did, it still wouldn’t have anything to do with what he did. Petitioner said he still felt the police did not have any probable cause to approach them or detain them. He could not articulate this well enough because he did not understand the issue that well at the time. If he had known that he could pursue this issue, he would not have pled guilty. (App. p. 65, line 2 - p. 66, line 9).

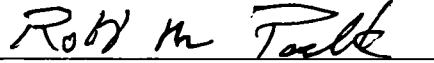
In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Court held that counsel in that case was ineffective in failing to investigate. The Court noted that counsel has a duty to “make an

independent investigation of the facts and circumstances of the case.” (citation omitted) (emphasis in original).

CONCLUSION

Because counsel failed to properly investigate, petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script, written above a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

RAKEEM JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-002407

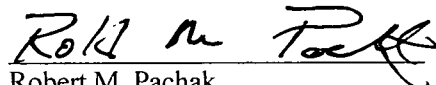
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rakeem Johnson 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 August 28, 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 Rakeem Johnson.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of April, 2014

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IN THE SUPREME COURT

Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

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PETITIONER,

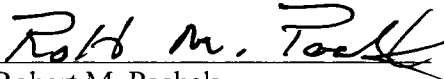
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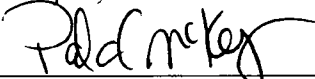
CERTIFICATE OF SERVICE

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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rakeem Johnson, #345999, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 7th day of April, 2014.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

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


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