

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

S.C. Supreme Court

COREY LARKIN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002254

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether defense counsel was ineffective in failing to investigate?

STATEMENT

On February 3, 2011, petitioner was sentenced by the Honorable Roger M. Young, Sr., in Charleston County to twenty-five (25) years for criminal sexual conduct in the first degree, three (3) counts of kidnapping, and three (3) counts of armed robbery.¹ He was sentenced to ten (10) years for ABHAN, and to twenty (20) years for attempted armed robbery. Martha Kent Runey, Esquire, (first chair) and David Haselden, Esquire (second chair) represented him. Burns Wetmore, Esquire, and Russell Hilton, Esquire, were the assistant solicitors. (App. p. 1 – p. 77).

Petitioner filed an application for post-conviction relief on January 27, 2012. (App. p. 78 – p. 88). An amended application was filed on May 10, 2013. (App. p. 89 – p. 100). Respondent filed a return on November 13, 2012, and an amended return on February 5, 2013. (App. p. 101 – p. 114). An evidentiary hearing was held on May 22, 2013, before the Honorable Deadra L. Jefferson. Petitioner was present and was represented by Frank Capretti, Esquire. Respondent was represented by Ashleigh Wilson, Assistant Attorney General. Both petitioner and Martha Kent Runey, Esquire, testified at the hearing. (App. p. 115 – p. 228). On September 17, 2013, Judge Jefferson issued an order denying and dismissing the application for post-conviction relief. (App. p. 232 – p. 247).

This petition follows.

¹ Petitioner pled guilty to all of the charges on November 9, 2010.

ARGUMENT

Defense 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 in this case testified at the evidentiary hearing that defense counsel did not discuss with him any of the investigation that she undertook into possible defenses in his case in case he decided to go to trial. Petitioner said he was not aware of any investigation and possible defenses against the charges against him that defense counsel considered. (App. p. 136, lines 16 – 24). If defense counsel had investigated his case and presented a defense strategy, he would not have pled guilty, but would have gone to trial. Counsel also did not ask him if he had any alibi witnesses. (App. p. 137, line 13 – p. 138, line 16). In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Court held a defense attorney ineffective for failing to investigate. The Court noted that “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” 372 S.C. at 331, 642 S.E.2d at 597, quoting Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986) (emphasis in original).

Defense counsel in petitioner’s case should also be held ineffective for failing to investigate.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

COREY LARKIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-002254

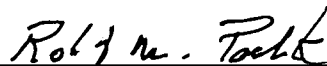
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Corey Larkin 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 May 22, 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 Corey Larkin.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of April, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Deadra L. Jefferson, Circuit Court Judge

COREY LARKIN,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

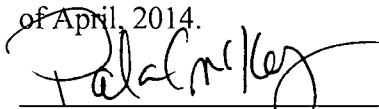
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Corey Larkin, #344734, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 25th day of April, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of April, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.