ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

DAVID COLTER, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000309

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where plea counsel failed to properly investigate the case and discuss with Petitioner the evidence plea counsel had received from the state including the MAIT[1] report, the autopsy report, and the results of Petitioner's blood-alcohol content, and where Petitioner testified that he would not have pled guilty if he would have been fully informed of all the evidence?

[1] Multi-Disciplinary Accident Investigation Team, a division of the South Carolina Highway Patrol.

STATEMENT

An Orangeburg County Grand Jury indicted Petitioner at the October 2008 term of General Sessions for felony driving under the influence (death). App. 71-72. Petitioner pled guilty on August 6, 2009 before the Honorable Edgar Dickson. App. 1. Assistant Solicitor Tommy Scott represented the state, and C. Bradley Hutto represented Petitioner. App. 1. Petitioner was sentenced by Judge Dickson to eight years imprisonment. App. 12, ll. 17-20. He did not appeal.

On December 16, 2009, Petitioner filed an application for post-conviction relief (PCR). App. 15-23. The state filed a return to this application dated May 5, 2010. App. 24-28. The matter proceeded to an evidentiary hearing on December 1, 2011 before the Honorable Diane S. Goodstein. App. 29. Assistant Attorneys General Robert D. Corney and Mary S. Williams represented the state, and Andrew J. Brown represented Petitioner. App. 29. By order dated June 17, 2013, Judge Goodstein denied Petitioner relief. App. 63-70.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel failed to properly investigate the case and discuss with Petitioner the evidence plea counsel had received from the state including the MAIT report, the autopsy report, and the results of Petitioner's blood-alcohol content, and where Petitioner testified that he would not have pled guilty if he would have been fully informed of all the evidence.

Guilty Plea

After a truncated colloquy, Petitioner stated that he understood his right to a jury trial, but wished to go forward with his guilty plea. App. 4, ll. 10-19.

The facts according to the solicitor were around one o'clock in the afternoon on April 4, 2008, the decedent was riding his bicycle on the right-hand shoulder of the road when Petitioner, in a white pickup truck, drove outside the right lane onto the shoulder striking the decedent from behind. The decedent died of his injuries. The solicitor indicated that Petitioner was intoxicated at the time of the accident and had a blood alcohol level "around point two zero." The solicitor also informed the judge that Petitioner and the decedent were good friends who lived on the same street. App. 6, l. 10 – 7, l. 9.

Judge Dickson then found Petitioner's "decision to plead guilty [was] freely, voluntarily, and intelligently made" and "that there [was] a factual basis for [him] to plead guilty." Therefore, the judge accepted Petitioner's plea. App. 8, ll. 16-22.

Plea counsel then told the judge that Petitioner "had known [the decedent] his whole life" and that the two were neighbors. He explained that Petitioner "was going to turn the same place that Freddie [the decedent] was eventually going to turn because they lived on the same street, and

some vehicles were stopped, and one switched lanes and [Petitioner] moved to adjust, and when he did, the way the traffic was stopping in front of him, he went off the side of the road . . . In this case he ran off the road right where Freddie had pulled off on his bicycle and he hit him." Plea counsel told Judge Dickson that Petitioner jumped out [of his car] immediately, saw it was Freddie, and Freddie died in his arms, and it was a real tragedy." App. 9, ll. 6-19.

Petitioner's only prior record was a failure to stop for a blue light "that happened over a decade ago." App. 9, ll. 20-21; App. 7, ll. 10-12. Judge Dickson ultimately sentenced Petitioner to eight years imprisonment. App. 12, ll. 18-20.

PCR Hearing

Petitioner testified at the PCR hearing that he met with plea counsel twice, but that plea counsel failed to review "all the evidence with [him]." App. 34, l. 20 – 35, l. 6. Petitioner explained he thought plea counsel was waiting for the results of his blood alcohol test and the report from the MAIT team since there were other cars involved in the accident and he did not think that he was at fault. App. 35, l. 25 – 36, l. 9. Petitioner said he told plea counsel that another car ran him off the road and that he was never charged with a lane violation. App. 41, l. 12 – 42, l. 4. Petitioner maintained, "I didn't get the whole details of everything, what was supposed to be going on until after the fact . . ." App. 46, ll. 1-3.

Petitioner also testified that he "told him [Mr. Hutto] that I never caused the accident. And he kept insisting that I take the plea or they was going to give me 25 to 30 years if they found me guilty." App. 39, ll. 8-15. Petitioner said he "would have never took the plea knowing that I didn't cause the accident." App. 43, ll. 13-14. He explained that the only reason he pled guilty was because he was "scared" and "[j]ust didn't know what to do." App. 43, ll. 18-21.

Plea counsel, Brad Hutto, testified that he has been practicing law for about thirty years and has been working on driving under the influence cases his "whole career." He said, "I've handled thousands of DUI cases and probably close to a hundred or, between a hundred and 200 felony DUIs."

Hutto testified that he informed Petitioner of the elements of the charge and the two discussed Petitioner's version of the facts. Hutto said, "[F]rom the beginning [Petitioner] had contended that there was . . . another car involved in the accident, directly involved. Another car was struck. There may yet have been other vehicles in the roadway that were changing lanes and depending on who you talked to, somebody moved lanes causing him to move lanes. That would be one version of the facts. Another version of the facts was somebody in front of him put on brakes suddenly. He switched lanes to avoid them. And yet another version of the facts would be that the other car hit him first causing him to leave the roadway. There were a lot of possibilities." App. 56, l. 22 – 57, l. 10.

However, Hutto explained that he spoke "directly to the driver and passenger in the other car that was struck to find out what they were going to say. And they were going to say that they always were on the traveled portion of the roadway and that [Petitioner] was the one that changed lanes improperly, striking them and then striking the bicycle." Furthermore, Hutto testified, "And, quite frankly, the physical evidence, the tire marks and where they went off the roadway, more supported that version of the facts than the other version . . ." App. 57, ll. 11-19.

Hutto said, "[W]e could have tried the case. And that would have been the issue; could we have created some doubt over whether [Petitioner] initiated this chain of events that led to him striking his good friend on the bicycle?" But Hutto testified, "I explained to [Petitioner] too, with a .22 blood-alcohol content, nearly three times [what] people would call the legal limit, and the other

witnesses, the other independent witnesses at the scene not supporting his version of the facts, you know, if we went to trial and lost he was going to get substantially more than if he took a plea and got what we believed to be, was going to be around an eight-year sentence . . ." App. 57, l. 23 – 58, l. 10. Hutto also testified that he did not think "we had any reason to get the blood results suppressed" because there was no "chain-of-custody issue with the blood." App. 58, ll. 22-25.

Hutto did admit that he never received an autopsy report in this case. However, Hutto maintained that he does not think an autopsy report is necessary to be able to advise a client whether or not to plead guilty. App. 59, l. 17 – 60, l. 5.

Order of Dismissal

The PCR court found plea counsel was not ineffective for failing to investigative the results of the blood alcohol test, the accident report, and the MAIT team report or for failing to review this information with Petitioner. The court found plea counsel's testimony that he reviewed the case extensively with Petitioner and answered all of Petitioner's questions credible. The court also noted that Petitioner "failed to produce any witnesses or evidence to show what additional information might have been gleaned from additional investigation." The court denied Petitioner relief. App. 67-68.

Discussion

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel failed to properly investigate the case and discuss with Petitioner the evidence plea counsel had received from the solicitor including the results of Petitioner's blood alcohol content, the MAIT report, and the autopsy report, and where Petitioner testified that he would not have pled guilty if he would have been fully informed of all the evidence. See App. 43, l. 7 – 44, l. 3.

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 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (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. at 59. "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275-276 (1942)).

In this case, plea counsel was ineffective because he failed to investigate Petitioner's assertion that he was not at fault in causing the accident that lead to the decedent's death. Plea counsel was also ineffective for failing to discuss with Petitioner the evidence against him including

the results of his blood alcohol test, the MAIT report, and the autopsy report. Plea counsel admitted during the PCR hearing that he not recall even receiving a copy of the autopsy report. App. 59, l. 17 – 60, l. 5. This corroborates Petitioner's testimony that plea counsel never reviewed the autopsy report with him.

Petitioner was prejudiced by plea counsel's ineffective assistance because without a full understanding of all of the evidence, he could not make a voluntary and intelligent decision to waive his constitutional right to a jury trial and plead guilty. Petitioner testified that if he would have reviewed all of the evidence and been fully informed he "would have never took the plea knowing that [he] didn't cause the accident." App. 43, ll. 13-14.

As a result of the invalid plea and the resulting prejudice, Petitioner's conviction should be reversed and this case remanded to the Orangeburg County Court of General Sessions for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

DAVID COLTER, JR.,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-000309

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Colter, Jr. states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.

2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing which was held on December 1, 2011. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She 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 her as counsel for David Colter, Jr.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of May, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
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DAVID COLTER, JR.,

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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 Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and David Colter, Jr., #336366, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 23rd day of May, 2014.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of May, 2014.

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