

State of South Carolina
In The Supreme Court

Certiorari to Orangeburg County
Diane Schafer Goldstein, Circuit Court Judge

David Colter, Jr.

Petitioner,

v.

State of South Carolina

Respondent

Appellate Case No. 2014-000309

Response To Johnson Petition for Writ of Certiorari

David Colter, Jr.
Petitioner

Walden Correctional Institution
4340 Broad River Road
Columbia, SC 29210

Pro Se

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JUN 17 2014

S.C. SUPREME COURT

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S.C. SUPREME COURT

Issues Presented

- 1) Was Petitioner's guilty plea knowingly, intelligently, and voluntarily made where plea counsel failed to properly investigate the case assuring that the evidence against Petitioner supported all elements of the alleged crime charged in the original indictment, which should have included the MAIT*1 Report and the Autopsy Report, before advising Petitioner to enter into a guilty plea? And was plea counsel ineffective for his performance in Petitioner's case?

- 2) Did the Circuit Court err in accepting and allowing Petitioner to enter into a guilty plea where the necessary elements needed to prove felony driving under the influence (death) had not been substantiated?

*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). Petitioner pled guilty on August 6, 2009 before the Honorable Edgar Dickson. Assistant Solititor Tommy Scott represented the state, and C. Bradley Hutto represented Petitioner. Petitioner was sentenced by Judge Dickson to eight years imprisonment, Petitioner's plea counsel did not appear on his behalf.

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

On May 23, 2014 Appellate Defender Lara M. Caudy Filed a Johnson's Petition for Writ of Certiorari and Motion to be relieved as counsel. The South Carolina Supreme Court served Petitioner with a notice stating that he had forty-five (45) days to file a response to counsel's petition.

This Response to Petition follows.

Argument

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel failed to properly investigate the case and assure that the evidence against petitioner supported all elements of the alleged crime charged in the original indictment, which should have been all evidence contained within the MAIT Report and Autopsy Report, before advising petitioner to enter into a guilty plea and made Counsel's performance ineffective in the process.

I.

Petitioner asserts that his plea was not knowingly, intelligently, or voluntarily entered on the factual basis that his counsel failed to conduct a full and proper investigation of the case against him so that he would be fully aware of what he may face at trial versus taking a plea bargain.

S.C. Code of Law Section 56-5-2945 states that felony DUI requires proof of these elements:

- 1) The actor drives a vehicle while under the influence of alcohol or drugs.
- 2) The actor does commit an act forbidden by law or neglect a duty imposed law and;
- 3) The act or neglect proximately caused great bodily harm or death to another person.

Not misconstruing the plain language used in section 56-5-2945 the word requires means; to need, demand or compel, and the word proof means; evidence that establishes the truth or validity of something. The language of this section states that required proof is needed when seeking to prove the three elements of felony DUI. In the above case, the act forbidden by law or neglected duty imposed by law was never factually proven, only alleged. (see per Hearing Transcript pg. 28, line 24-25, pg. 29, line 1-10)

The indictment must state with particularity the act forbidden by law or duty imposed by law which will be relied on by the state to support the felony driving under the influence charge. *State v. Grampus*, 288 S.C. 395, 343 SE2d 26, (1986). Since the act forbidden by law was never substantiated by the MAIT Report, Petitioner could have only been charged with DUI, which could have been proven. Thus, plea counsel was ineffective for failing to object to an improper indictment and allowing Petitioner to unintelligently plea guilty to an improper charge. (see transcript pg. 32 line 23-25, pg. 33 line 1-6)

"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."

Petitioner asserts that all evidence was not made available to him, (see per Hearing Transcript pg. 6, line 25, pg. 7 line 1-2) in particularly the MAIT Report and Autopsy Report was never disclosed to determine the actual cause of the accident and death of the decedent. (see per Transcript pg. 31, line 17-25, pg. 32, line 1-5)

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 further asserts that if he would have reviewed all of the evidence and been fully informed that he would have never taken the plea offer knowing that he possibly didn't cause the accident and/or the death of the decedent.

II.

Circuit Court erred in accepting and allowing Petitioner to enter into a guilty plea where the necessary elements needed to prove felony DUI (death) had not been substantiated.

The Circuit Court does not have subject matter jurisdiction to accept a guilty plea unless there is an indictment which sufficiently states an offense, the defendant has waived presentment, or the charge is a lesser included offense of the crime charged in the indictment. *State v. Funderburk*, 259 S.C. 256, 191 SE2d520 (1972)

Petitioner asserts that since there was no MAIT or Autopsy Report disclosed to determine the cause of the accident or death, that the indictment could not sufficiently state an offense which thus deprived the Circuit Court the subject matter jurisdiction to accept Petitioner's guilty plea. Being that the cause of death was not known, but only speculated the element of felony DUI (death) was illegitimate because only the Autopsy Report can determine if the cause of death was by vehicle or some other means. Thus, Petitioner's plea is invalid.

Conclusion

Petitioner respectfully requests this Court to grant the petition for Writ of Certiorari and permit full briefing on the issues presented.

Respectfully Submitted,

David Carter Jr

Pro Se

13th day of June, 2014

Y. Standa Long
Notary Public of South Carolina

My Commission Expires: 1/20/2022

State of South Carolina

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I, David Colter, do certify that I have sent a true copy of the response to Johnson Petition for Writ of Certiorari to the South Carolina Supreme Court by way of United States Mail Service at the following address:

South Carolina Supreme Court
Clerk of Court
P.O. Box 11370
Columbia, SC 29211

Dated _____ 2014

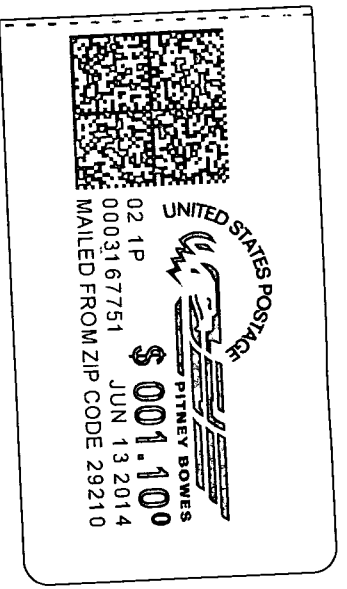

David Colter, Jr.

13th day of June, 2014

Yolanda Lem
Notary Public of South Carolina

My Commission Expires: 1/20/2022

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The Supreme Court of
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