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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County

William Jeffrey Young, Circuit Court Judge

LANCE Q. HOLLOWAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000288

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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ISSUE PRESENTED

Whether petitioner's guilty plea was entered voluntarily and knowingly?

STATEMENT

On April 9, 2010, petitioner appeared before the Honorable G. Edward Welmaker in Pickens County and pled guilty to two (2) counts of trafficking in methamphetamine and one (1) count of distribution of methamphetamine. A twelve (12) year sentence was imposed. H. Chase Harbin, Esquire, was plea counsel. John K. Crout, Esquire, was the assistant solicitor. (App. p. 1 – p. 23).

On April 12, 2011, petitioner filed an application for post-conviction relief. (App. p. 24 – p. 56). Respondent filed a return dated September 20, 2011. (App. p. 57 – p. 62). An evidentiary hearing was held on February 13, 2013, before the Honorable William Jeffrey Young. Petitioner was present and was represented by Caroline Horlbeck, Esquire. Respondent was represented by Brian T. Petrano, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 63 – p. 141). On January 9, 2014, Judge Young issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 148 – p. 156).

This petition follows.

ARGUMENT

Petitioner's guilty plea was not entered voluntarily and knowingly.

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. 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 or failure to investigate. 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); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007); Stalk v. State, supra. The post-conviction relief court will normally consider the guilty plea transcript as well as the evidence presented at the post-conviction relief hearing in looking at guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the voluntariness of the plea. The difference "between a valid guilty plea and a 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 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. The Court went on to note:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Mallory v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400, 85 S. Ct5. 1065, 13 L. Ed. 2d 923. We cannot presume a waiver of these three important federal rights from a silent record.

395 U.S. at 243, 89 S. Ct. 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.

In this case, Counts II and III of the indictment charging petitioner with conspiracy to traffick in methamphetamine alleged an amount of over 400 grams. (App. p. 158 – p. 159). The plea agreement signed by petitioner on the same day he pled guilty just mentioned an amount of 28 -100 grams. (App. p. 142). At the guilty plea hearing itself, the court looked at the sentencing sheet and asked if petitioner was pleading down to 10 to 28 grams. The solicitor said, "Yes, sir." (App. p. 7, lines 9 – 16). The solicitor then recognized some confusion with the CDR codes and said he filled out the numbers wrong. The court then asked petitioner if he was pleading to between 10 and 28 grams and he replied, "Yes, sir." (App. p. 8, lines 1 – 25). The solicitor then said no it was between 28 and a hundred. He said the plea agreement was right,

but the sentencing sheets were wrong. (App. p. 9, lines 1 – 16). The court then clarified what petitioner was pleading to. (App. p. 10, lines 9 – 14).

Petitioner testified at the evidentiary hearing that he told plea counsel he did not want to take the plea, he wanted to go to trial. (App. p. 76, lines 23 – 24). He said he was slid these sentencing sheets which he thought was part of the plea agreement and it said 10 to 28 grams with a non-violent CDR code. (App. p. 78, line 25 – p. 79, line 5). The 10 to 28 grams was marked out and changed to 28 to 100 grams and the CDR code was scratched out and changed. (App. p. 80, lines 2 – 19). Petitioner said he thought he was pleading to 10 to 28 grams when he saw the sentencing sheets. That is the only reason he signed the plea agreement because he saw that the amount changed. (App. p. 81, lines 7 – 19). If he had known he was pleading according to the plea agreement rather than the sentencing sheets before they were changed, he would not have pled, but would have gone to trial. (App. p. 89, lines 6 – 19).

As can be seen from above, giving incorrect or confusing sentence advice can make a guilty plea involuntary and unknowing. Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

CONCLUSION

Petitioner's guilty plea should be vacated.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

LANCE Q. HOLLOWAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000288

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lance Q. Holloway 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 February 13, 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 Lance Q. Holloway.

Respectfully submitted,

Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of June, 2014

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Certiorari to Greenville County
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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 Lance Q. Holloway, #245099, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 23rd day of June, 2014.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

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

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