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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Sumter County

R. Knox McMahon, Circuit Court Judge

KWAUN KA'SHAWN PEAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002651

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in denying Petitioner relief from his convictions and sentences in light of plea counsel's failure to communicate adequately with Petitioner to develop a defense strategy in violation of Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

On March 31, 2011, a Sumter County grand jury returned a six-count indictment (2011-GS-43-431) for Petitioner. He was charged with (1) trafficking cocaine base between twenty-eight and one hundred grams; (2) trafficking cocaine between two hundred and four hundred grams; (3) manufacturing cocaine base; (4) possession of marijuana; (5) resisting arrest; and (6) failure to stop for a blue light. App. 111-113. The state, represented by Jason Corbett, called the case for trial on January 25, 2012 before the Honorable W. Jeffrey Young and a jury. Lauren Stevens represented Petitioner. App. 1. After a jury was selected, Petitioner entered guilty pleas to trafficking cocaine base between twenty-eight and one hundred grams and trafficking cocaine between twenty-eight and one hundred grams – a lesser included offense of the second count in the indictment. App. 12, line 6 – App. 14, line 2; App. 27, lines 10-21.

On February 9, 2012, J. Todd Rutherford filed a motion to reconsider sentence on Petitioner's behalf. App. 47. 48. Although the motion remained pending for over one year with no action taken on it, Rutherford withdrew the "request for a hearing on a Motion to Reconsider Sentence" by letter after Petitioner had filed a post-conviction relief (PCR) application. App. 49.

On September 7, 2011, Petitioner filed an application for PCR. App. 50-56. An evidentiary hearing on Petitioner's allegations convened on October 2, 2013 before the Honorable R. Knox McMahon. Kristy Goldberg represented Petitioner, and Daniel Gourley represented the state. App. 61. By an order filed on December 9, 2013, Judge McMahon denied Petitioner relief. App. 102-110.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in denying Petitioner relief from his convictions and sentences in light of plea counsel's failure to communicate adequately with Petitioner to develop a defense strategy in violation of Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

Relevant facts

On January 25, 2012, the prosecutor called Petitioner's case to trial. App. 1. Petitioner moved to relieve plea counsel and retain private counsel. Petitioner explained Murrell Smith represented him on other pending charges, and he wanted to retain Smith on the instant charges. However, Smith, a member of the South Carolina General Assembly, was unable to be present because he was in session. App. 20, lines 4-17. Judge Young refused Petitioner's request. App. 20, line 18 – App. 21, line 12. Immediately thereafter, Petitioner changed his plea to guilty. App. 23, line 5.

During the plea colloquy, Petitioner informed Judge Young that he was not satisfied with the services of plea counsel. When Judge Young inquired as to why, Petitioner explained that plea counsel "never really worked with me." Judge Young responded that plea counsel was ready for trial and would work with Petitioner "right now." App. 37, lines 3-17. Judge Young continued that in his experience with plea counsel, "she is ready when she comes to trial." Concerning Petitioner's dissatisfaction with plea counsel, Judge Young stated, "[T]hat's between you and her." App. 38, lines 1-4. Judge Young also stated "that will be for a different for[u]m." App. 38, lines 7-8.

During the PCR hearing, Petitioner testified that he met with plea counsel only twice to prepare for trial. App. 66, lines 19-21; App. 69, lines 7-9; App. 75, liens 21-23. During those meetings, plea counsel discussed no strategy for trial. Instead, plea counsel suggested he inform on

others to the police in hop of leniency. App. 66, line 22 – App. 67, line 9; App. 68, lines 7-9. The only evidence reviewed during the two meetings was the arrest warrants. App. 67, lines 15-25; App. 75, line 24 – App. 76, line 4. Plea counsel left a message on Petitioner's answering machine just days before his scheduled trial to inform him of the trial date. App. 69, lines 12-23. Due to the complete lack of communication with plea counsel, no planned defense strategy, and the judge's denial of counsel of choice, Petitioner felt coerced to plead guilty. App. 71, liens 12-20. Had counsel not provided deficient performance, Petitioner would have gone to trial. App. 71, lines 21-22; App. 72, lines 6-9; App. 79, lines 19-20. Petitioner testified that he should have gone to trial. App. 71, lines 21-22. He clarified that he wanted the PCR court to vacate his plea and allow him a jury trial. App. 72, lines 6-17.

Plea counsel agreed that she met with Petitioner only twice prior to his case being called for trial. App. 81, lines 18-21. Nevertheless, plea counsel claimed she was ready for trial. App. 83, lines 13-15. Plea counsel's purported strategy for trial was to challenge the drugs as not being in Petitioner's possession because the home in which the drugs were found was not Petitioner's. App. 87, line 25 – App. 88, line 7. Plea counsel admitted the strategy was unlikely to prevail because the police found mail with Petitioner's name on it and the address of the residence in which the drugs were found. App. 88, lines 7-18. Plea counsel admitted she encouraged Petitioner to inform on others to police to get a lesser sentence. App. 83, line 19 – App. 84, line 12. Plea counsel further admitted she never met with Petitioner to prepare for trial. App. 86, lines 15-17. Plea counsel suggested that it was Petitioner's responsibility to stay in contact with her: "I was in the same office for 12 twelve years with the same phone number. If Mr. Peay wanted to meet with me at any time, I would have been available." App. 86, line 23 – App. 87, line 1. To inform clients of their upcoming trials, plea counsel's office provided the clients with a telephone number to call to find

out if they were on the trial list. The recording provided the names of defendants on the trial roster for the following week. Clients were to call the number "every week there was general sessions" even if the case remained pending for over a year. App. 87, lines 12-24.

The PCR judge denied Petitioner relief, finding his claim to be without merit. App. 107. The PCR judge found plea counsel's communications and development of a defense strategy to be consistent with prevailing professional norms. App. 107. The PCR judge was persuaded by plea counsel's testimony that Petitioner was free to stop by her office or call her to discuss his case. App. 107. Oddly, the PCR court held Petitioner's claim of ineffective assistance was a direct appeal issue because Petitioner informed the plea judge that he was not satisfied with plea counsel. The PCR court held the issue was procedurally barred and noted "[p]ost-conviction relief is not a substitute for a direct appeal." App. 108.

Discussion

The Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently because the defendants waive important constitutional rights. Boykin v. Alabama, 395 U.S. 238, 242-243 (1969). This Court has held that a defendant must "be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999)(citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable

professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). In cases involving guilty pleas, the prejudice prong requires a showing that there is a reasonable probability, but for counsel's errors, Petitioner would have insisted upon a trial. Hill v. Lockhart, 474 U.S. 52 (1985).

South Carolina's Rules of Professional Conduct impose duties of competence, diligence, and communication on lawyers. Specifically, Rule 1.1 of the Rules of Professional Conduct provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." And Rule 1.4 imposes duties of communicating with a client. Important for Petitioner's case, Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and Rule 1.4(a)(3) requires a lawyer to "keep the client reasonably informed about the status of the matter." Additionally, Rule 1.4(a)(4) requires a lawyer to "promptly comply with reasonable requests for information," and Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." These are duties of professional responsibility imposed on lawyers practicing in South Carolina, such as plea counsel.

In Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008), this Court adopted a holding from the Fifth Circuit Court of Appeals that even if trial counsel's meetings with the client were brief, "this fact alone is not indicative of inadequate trial preparation." However, Harris' trial counsel testified that he had met with Harris on several occasions prior to the first trial. Id.

Additionally, Harris failed to offer any evidence or argument as to how counsel's alleged lack of preparation prejudiced him. Id. In another case, Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012), the Court of Appeals rejected a similar claim where "the uncontradicted evidence in the record show[ed] that counsel met with [Smith] prior to trial, discussed the discovery materials with him, and provided [Smith] the opportunity to explain his version of the events."

As an initial matter, the PCR judge erred in finding Petitioner's claim was procedurally barred. Although Petitioner informed the plea judge that he was not satisfied with plea counsel and moved to relieve her, his claim of ineffective assistance was not morphed into a direct appeal issue.

Additionally, plea counsel's performance was deficient due to her lack of communication with Petitioner and failure to develop a defense strategy. Plea counsel placed the entire burden of communicating and developing a defense on Petitioner. Due to plea counsel's deficits, Petitioner was compelled to plead guilty. Plea counsel's performance prejudiced Petitioner in light of Petitioner's testimony that he would have proceeded to trial but for plea counsel's deficient performance. The record supported Petitioner's testimony because Petitioner initially selected a jury for his trial and repeatedly informed the plea judge of his dissatisfaction with plea counsel.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
R. KNOX MCMAHON, CIRCUIT COURT JUDGE

KWAUN KA'SHAWN PEAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002651

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kwaun Ka'Shawn Peay states:

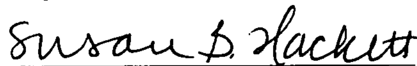
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 2, 2013. 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 Kwaun Ka'Shawn Peay.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of July, 2014

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KWAUN KA'SHAWN PEAY,

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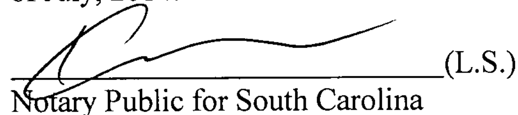
CERTIFICATE OF SERVICE

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 Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Kwaun Ka'Shawn Peay, #349444, at Lee Correctional Institution this 7th day of July, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

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


______________________(L.S.)
Notary Public for South Carolina

My Commission Expires: August 21, 2023.