

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenwood County
R. Lawton McIntosh, Circuit Court Judge

S.C. Supreme Court

ZACHARY PHILLIPS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000646

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to argue for a sentence of less than fifteen (15) years at petitioner's hearing?

STATEMENT

On May 9, 2011, petitioner appeared before the Honorable Eugene C. Griffith in Greenwood County and pled guilty to trafficking in crack cocaine, second offense, and possession with intent to distribute marijuana, third offense. On May 17, 2011, two (2) concurrent fifteen (15) year sentences were imposed. Caroline Horlbeck, Esquire, represented petitioner. Elizabeth White, Esquire, was the assistant solicitor. (App. p. 1 – p. 31). A motion for reconsideration was filed and on July 13, 2011, Judge Griffith resentenced petitioner to two (2) twelve (12) year concurrent terms of imprisonment. (App. p. 39 – p. 40).

Petitioner filed an application for post-conviction relief on December 16, 2011. (App. p. 32 – p. 38). Respondent filed a return dated September 26, 2012. (App. p. 39 – p. 43). An evidentiary hearing was held on November 28, 2012, before the Honorable R. Lawton McIntosh. Petitioner was present and was represented by Tommy Lee Stanford, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 44 – p. 82). On March 25, 2013, Judge McIntosh issued an order denying and dismissing the application for post-conviction relief. (App. p. 83 – p. 89).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to argue for a sentence of less than fifteen (15) years at petitioner's hearing.

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

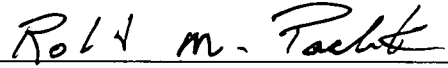
accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure 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.

In this case, petitioner testified at the evidentiary hearing that there was a recommended sentence of fifteen (15) years by the Solicitor, but the judge at the plea said his lawyer could argue for anything less than fifteen (15) years. Petitioner did acknowledge that there was a reconsideration hearing and his sentence was changed to twelve (12) years. (App. p. 54, line 5 – p. 55, line 2). But at the plea, counsel never asked for anything less, she just let the judge give him fifteen (15) years. (App. p. 56, lines 12 – 18). Petitioner testified that he was surprised at the sentence. (App. p. 59, lines 2 – 7). As can be seen from petitioner’s testimony, plea counsel was ineffective in failing to argue for a sentence of less than fifteen (15) years.

CONCLUSION

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

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENWOOD COUNTY
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

ZACHARY PHILLIPS,

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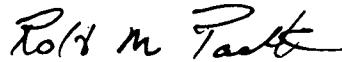
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Zachary Phillips 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 November 29, 2012. 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 Zachary Phillips.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of September, 2014

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IN THE SUPREME COURT

Certiorari to Greenwood County
R. Lawton McIntosh, Circuit Court Judge

ZACHARY PHILLIPS,

PETITIONER,

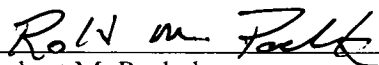
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STATE OF SOUTH CAROLINA,

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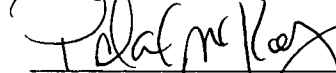
CERTIFICATE OF SERVICE

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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Zachary Phillips, #269602, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 18th day of September, 2014.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of September, 2014.


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