STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

SHAQUAN BURGESS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000099

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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INDEX

QUESTION PRESENTED

Does the record support the PCR court's finding that plea counsel adequately conferred with Petitioner where plea counsel told Petitioner to be in court on the day of his sentencing hearing, where Petitioner arrived and stayed at the courthouse while plea counsel never met him there or otherwise communicated with him, and where Petitioner ultimately missed his opportunity to offer mitigating information to the plea judge before sentencing?

STATEMENT

During its April 2006 term, the Florence County Grand Jury indicted Petitioner Shaquan Burgess on two counts of armed robbery and one count of possession of a weapon during the commission of a violent crime. App. 108-109. On June 13, 2007, Petitioner appeared at a plea hearing before The Honorable Thomas A. Russo. Shannon Prosser represented Petitioner and John Jepertinger represented the State. App. 1. In return for Petitioner's plea to the robbery charges, the State agreed not to prosecute the weapon charge as well as another armed robbery charge that resulted from an incident allegedly involving Petitioner in May of 2007 and that had not yet been presented to the Grand Jury. App. 4, line 17—App. 5, line 12; App. 105-106. During the hearing the State alleged that on January 30, 2006, three codefendants gave Petitioner a pistol and involved him in robbing two victims of clothing and cash. App. 14, line 16—App. 15, line 5. In explaining the third armed robbery charge, the State alleged that Petitioner took valuables from a victim in his car while a separate codefendant held the victim at gunpoint. App. 15, 21—App. 16, line 10. Petitioner pled guilty, and Judge Russo deferred sentencing until the following Monday per an agreement between the parties. App. 5, lines 19-23; App. 18, line 5—App. 19, line 1.

On the afternoon of Monday, June 18, 2007, the court called Petitioner's case before Judge Russo. App. 21. Plea counsel was present but Petitioner was not. App. 23, lines 12-16. Plea counsel stated he called a few phone numbers that Petitioner gave him, which belonged to certain family members, but he never spoke to Petitioner. The Solicitor for the State informed the court that Petitioner was present and answered roll call that morning, but he was not present at 2:30 when the court reconvened. App. 23, line 25—App. 26, line 9.

Plea counsel allocuted for Petitioner. He explained Petitioner had "low mental abilities" and was "easily [led]." He was directed by his codefendants to take the pistol and participate in the

robbery for which he was indicted. He was also cooperative with police and willing to testify against his codefendants in the indicted robbery. He also noted that his codefendants received sentences of five and three years. Counsel stated Petitioner absence did not make sense: "Why you commit a crime and then turn around the next day and admit that you committed the crime and then help throughout and then don't show up for the plea sentencing is beyond me . . . ." Plea counsel also noted that Petitioner was seventeen at the time of the crime. App. 26, line 12—App. 30, line 3.

Before sealing a sentence, Judge Russo expressed frustration with Petitioner's absence:

> Even though he was the one who came forward and gave a statement [sic]. I will say this, Mr. Prosser, there's nothing like this that you do anything about, but you know, the longer you do a job you learn—we all learn the longer we do our work and Mr. Burgess is going a long way in teaching this judge to no longer agree to delay sentencing. When you come to the trough, it's time to eat. And that is certainly in no way a reflection on you and that you should have had him here. You've done everything you can do other than to chain him to you . . . .

App. 30, line 18—App. 31, line 3.

On May 29, 2008, after being arrested on a bench warrant, Petitioner appeared before Judge Russo for sentencing. Shannon Prosser again represented Petitioner, and Robert N. Wells represented the State. App. 33. Judge Russo unsealed concurrent sentences of twenty years. App. 38, lines 14-20.

On March 11, 2009, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. App. 40-54. The State filed a return on July 16, 2009. App. 55-60. On October 8, 2013, Petitioner appeared at an evidentiary hearing before The Honorable William H. Seals, Jr. Louis David Nettles represented the State. App. 62. Petitioner testified plea counsel arranged for delayed sentencing so that he could talk to his family before his incarceration. After his plea, plea counsel instructed him to return to court on the following Monday morning.

App. 67, lines 11-15; App. 72, lines 10-16. Specifically, he told Petitioner to be present to answer roll call, which Petitioner did. However, when plea counsel was not present, Petitioner "didn't have [an] understanding of [whether] to come back or when to come back." App. 70, lines 1-5. "I never talked to him after that . . . because he wasn't there; he wasn't present. I was present." App. 72, lines 15-18. Petitioner testified he stayed after roll call "the whole time until we went on break," when the courtroom cleared and he left. App. 78, 7-21.

Plea counsel testified that based on competency evaluation, Petitioner was determined to have "mild retardation," and he was only able to read at a fourth-grade level. App, 81, lines 5-13. Accordingly, plea counsel believed that Petitioner was someone who was targeted and taken advantage of by his ill-intending codefendants:

> [I]t just seemed clear to me that [Petitioner] was probably one of the kind of fellows that was easily led and that by virtue of that . . . he was the kind of guy who the other guys would just put the gun in his hand so that he would be most culpable and he wouldn't resist too much.

App. 83, lines 1-8. When asked about his failure to meet Petitioner on the morning of the sentencing hearing, plea counsel did not offer an explanation.

> Q: The transcript indicates that he . . . had appeared that morning though?
>
> A: He had. That was my–yes, sir, that was my understanding.
>
> Q: But you did not see him?
>
> A: I had not seen him. I don't recall seeing him.
>
> Q: And at that point, did you have any way to get a hold of him?
>
> A: No way to get a hold of him. I had some numbers for family members and we did call some family members . . . .
>
> Q: Did you think he would be disadvantaged in arguing at his plea if he wasn't there?

A: Certainly.

Q: And what has been your . . . experience with sentences when the defendant isn't there?

A; Usually it's not a good situation.

App, 85, line 19—App. 86, line 12.

On November 27, 2013, the PCR court issued an order of dismissal. App. 96-104. The order concluded that Petitioner failed to prove ineffective assistance of counsel because plea counsel adequately conferred with Petitioner and was generally thoroughly competent in his representation. App. 101.

ARGUMENT

The record does not support the PCR court's finding that plea counsel adequately conferred with Petitioner because plea counsel's insufficient communication prevented Petitioner from exercising his right to offer the plea judge mitigating information in seeking a less harsh sentence.

The record does not support the PCR court's finding that plea counsel adequately conferred with Petitioner because plea counsel's insufficient communication prevented Petitioner from exercising his right to offer the plea judge mitigating information in seeking a less harsh sentence. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland,* 466 U.S. at 687. "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C 467, 470, 560 S.E.2d 401, 402 (2002)).

"'Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence.'" *Weik v. State*, 409 S.C. 214, 761 S.E.2d 757(2014) (quoting *Romano v. Gibson*, 239 F.3d 1156 (10th Cir. 2001). "[P]ossession of the fullest information possible concerning the defendant's life and characteristics is highly relevant—if not essential—to the selection of an appropriate sentence." *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586 (1978). The trial judge in return has a duty to examine any mitigating evidence in sentencing a defendant:

> If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and give serious consideration to any information material to punishment.

State v. Franklin, 267 S.C. 240, 245-46, 226 S.E.2d 896, 897 (1976). Thus, the Sixth Amendment requires an attorney to adequately inform a defendant of his right to appear in front of a judge and offer mitigating information to receive a less harsh sentence. *Cf. Brown v. State*, 340 S.C. 590, 595, 533 S.E.2d 308, 310 (2000) ("Failure to inform a client of his Fifth Amendment rights and the consequences of exercise and waiver of those rights falls below an objective standard of reasonable representation.").

In this case, plea counsel did not adequately communicate with Petitioner to enable him to appear at his sentencing hearing. Plea counsel arranged for delayed sentencing so that Petitioner could talk to his family before his incarceration. After his plea, plea counsel merely told him to return to court on the following Monday morning to answer roll call. On Monday morning, Petitioner was present, but plea counsel was not. Petitioner waited all morning until the courtroom cleared. At that point Petitioner left because he had no way to communicate with plea counsel, and he did not understand when to come back.

Additionally, the record shows the lack of communication resulted from plea counsel's deficiency. Plea counsel was keenly aware that Petitioner had a low mental capacity, and therefore would need substantial assistance in navigating the courthouse and esoteric courtroom procedures. He was also aware that Petitioner was knowingly facing a high-pressure, nerve-wracking, and highly consequential phase of his prosecution in appearing before a judge for sentencing. Nevertheless, plea counsel did not meet Petitioner when he told him to arrive at court. Plea counsel knew he had no way to get in touch with Petitioner outside of a face to face meeting because he could only call the phone numbers of Petitioner's family members to try to locate him. Finally, plea counsel offered no excuse at the PCR hearing as to his reasoning or behavior in general in failing to meet Petitioner when he instructed him to be at court. The only evidence in the record relevant to plea counsel's thought process was his statement to the judge at sentencing that Petitioner's knowingly and voluntarily abandoning his opportunity to be heard in mitigation was the least likely explanation: "[W]hy you commit a crime and then turn around the next day and admit that you committed the crime and then help throughout and then don't show up for the plea sentencing is beyond me . . . ."

Finally, Petitioner's lack of understanding as to how to appear before the judge for mitigation resulted in prejudice through an unnecessarily harsh sentence of twenty years' incarceration. Petitioner had compelling mitigating information to justify a relatively mild sentence. Petitioner was only seventeen at the time of the crime, and professionals described him as having mild retardation and reading at a fourth-grade level. The facts of the case showed Petitioner's codefendants took advantage of him because he was easily led. They attempted to exculpate themselves and make him appear more culpable by scheming to recruit him to their plan and

instructing him to hold a gun. Ultimately, Petitioner was also cooperative with police and willing to testify against his codefendants.

Nevertheless, because Petitioner did not personally appear at the sentencing hearing, the plea judge issued an especially harsh sentence. The plea judge explicitly stated on the record that his sentencing was in response to Petitioner's failure to appear "[e]ven though he was the one who came forward and gave a statement." His sentencing decision particularly turned on his misapprehension that plea counsel had "done everything [he could] do other than to chain" Petitioner to him. Indeed, plea counsel admitted on the record that Petitioner was "disadvantaged" by not being present. Thus, the judge issued Petitioner relatively harsh sentences of twenty years concurrent when Petitioner's codefendants received sentences of five and three years.

The PCR court's order concluded that plea counsel adequately conferred with Petitioner and was generally thoroughly competent in his representation. However, the evidence in the record in does not support the conclusion. Petitioner was prejudiced by plea counsel's deficient communication and representation, and therefore Petitioner was denied the effective assistance guaranteed to him under the Sixth Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari of Petitioner Shaquan Burgess to allow full briefing on the issue.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of October, 2014.

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IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shaquan Burgess states:

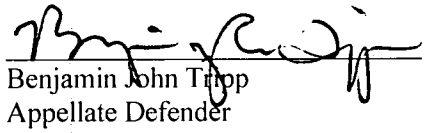
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 8, 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 Shaquan Burgess.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of October, 2014

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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 Joshua L. Thomas, Esquire and Shaquan Burgess, #314924, at Lieber Correctional Institution this 8th day of October, 2014.

Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of October, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.