

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Spartanburg County
Robin B. Stilwell, Circuit Court Judge

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OCT 14 2014

S.C. Supreme Court

DELONTE CARROLL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000503

JOHNSON PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to grant Petitioner relief from his conviction and sentence where trial counsel rendered ineffective assistance by failing to communicate adequately with Petitioner in order to learn the facts of the case and prepare a defense?

STATEMENT

At its July 2010 term, the Spartanburg County grand jury indicted Petitioner for assault with intent to kill, two counts of armed robbery, and two counts of possession of a weapon during the commission of a violent crime. App. 123-124; App. 131-132. On August 22, 2011, Petitioner pled guilty to one count of armed robbery before the Honorable J. Derham Cole. Petitioner's co-defendant, Andrea White also entered a guilty plea that day. Zachary Ellis represented the state. Robert Hall represented Petitioner, and Richard Whelchel represented White. App. 1. The state made no recommendation as to sentencing. App. 12, lines 9 – 15. Judge Cole sentenced Petitioner and White to twenty years' imprisonment. App. 45, lines 4 – 9. Petitioner filed a notice of appeal, but when no grounds were stated, the Court of Appeals dismissed the appeal. App. 124.

On August 27, 2014, Petitioner filed an application for post-conviction relief. App. 47 – 53. Subsequently, the state filed its return. App. 54 – 58. The matter proceeded to a hearing on November 15, 2013 before the Honorable Robin B. Stilwell. Lauren Barnwell represented Petitioner, and Suzanne White represented the state. App. 59. By an order filed March 6, 2014, Judge Stilwell denied Petitioner's request for relief. App. 123 – 130.

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

ARGUMENT

The PCR court erred in failing to grant Petitioner relief from his conviction and sentence where trial counsel rendered ineffective assistance by failing to communicate adequately with Petitioner in order to learn the facts of the case and prepare a defense.

Relevant Facts

Facts Produced at the guilty plea hearing

During the guilty plea hearing, Petitioner informed the plea judge that he was unaware his co-defendant had a gun during the robbery. App. 32, line 22 – App. 34, line 8. Further, he informed the plea judge that he initiated the robbery by walking to the passenger side of the parked car, in which two women sat. App. 40, line 25 – App. 41, line 12. Although Petitioner and his co-defendant participated in the robbery, they did not discuss the robbery, did not plan the robbery, and did not assist each other in the commission of the robbery. App. 39, line 17 – App. 43, line 15. Most importantly, Petitioner’s co-defendant told the plea judge that Petitioner was completely unaware that she was armed. App. 39, line 3 – 5. Additionally, she told the plea judge that Petitioner did not even see the gun during the robbery because they were on opposite sides of the car and Petitioner was not paying attention to her. App. 39, lines 6 – 16. Furthermore, the testing conducted on Petitioner’s gunshot residue kit revealed no gunshot residue on his hands. App. 31, lines 12 – 13.

Facts produced at the PCR hearing

Petitioner testified that plea counsel began representing him in June 2011, just two short months before the guilty plea. App. 64, lines 3 – 11. The two had their first meeting that month; however, the meeting was very brief and unproductive. App. 64, lines 9 – 13; App. 64, line 24 – App. 65, line 13. Petitioner next met with plea counsel on Friday before his trial scheduled on

Monday. App. 65, lines 20 – 22. During that second meeting, plea counsel gave Petitioner the discovery and presented him with a plea offer. App. 65, lines 23 – App. 66, line 5. When plea counsel informed Petitioner he had been charged with armed robbery, Petitioner told plea counsel that he was unarmed and was unaware of a weapon being used in the robbery. Instead of investigating this information and attempting to use this information to Petitioner’s benefit, plea counsel told Petitioner it was of no consequence to his case. Plea counsel’s advice to Petitioner was that Petitioner would be convicted if he went to trial. App. 67, lines 8 – 15; App. 68, lines 15 – 23. Petitioner readily admitted that plea counsel mentioned the concept of “the hand of one is the hand of all.” However, Petitioner did not understand the complicated legal theory due to plea counsel’s inadequate explanation. App. 75, line 25 – App. 76, line 12.

Plea counsel’s recollection differed sharply from Petitioner’s testimony. Plea counsel claimed he met with Petitioner five times. App. 80, lines 13 – 21; App. 81, line 3 – App. 82, line 12; App. 83, lines 12 – 13; App. 84, lines 1 – 11; App. 85, line 13 – App. 87, line 9. During these meetings, the two discussed the state’s version of the facts. App. 81, line 7 – App. 82, line 1; App. 82, lines 12 – 19. According to plea counsel, he discussed “hand of one hand of all” with Petitioner: “If a codefendant had a gun, it does make it armed robbery under South Carolina law most of the time.” App. 82, line 20 – App. 83, line 1. Petitioner told plea counsel he was unaware of a gun being used and that he did not possess a gun. App. 87, lines 10 – 13. On this point, plea counsel told Petitioner it was an issue of credibility and that “while involved in the robbery together, the jury could find him guilty under the theory she had a gun. App. 87, lines 14 – 23; App. 88, lines 8 – 14.

Order of Dismissal

The PCR judge found the testimony of plea counsel more credible than Petitioner’s testimony. App. 127. Additionally, the PCR judge found Petitioner’s allegation that plea counsel

did not meet with him enough or review discovery to be not credible. App. 127. The PCR judge relied upon Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) for the proposition that the ““brevity of time spent in consultation, without more, does not establish that counsel was ineffective”” to support his conclusion. Further, citing Jackson v. State, 325 S.C. 210, 481 S.E.2d 129 (1997), the judge found that Petitioner “failed to point to any specific matters [plea] counsel failed to discover, or any defenses that could have been pursued had [plea] counsel spent more time with [Petitioner] or conducted any additional investigation.” App. 127 – 128. Further, the PCR judge found no prejudice. App. 128. Thus, the PCR judge denied Petitioner relief.

Discussion

“Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). “In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant’s case.” Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

As to the first prong, “In the context of a guilty plea, . . . [the] inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered.” Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013) (citations omitted). ““The second, or “prejudice,” requirement . . . focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.”” Id. (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Stated differently, to demonstrate prejudice, “the defendant must show that there is a reasonable probability that, but


for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.”
Hill, 474 U.S. at 59.

The PCR judge erred in failing to grant Petitioner relief where the evidence demonstrated plea counsel failed to communicate adequately with Petitioner. Had plea counsel communicated with Petitioner, he would have learned that Petitioner was not only unarmed but he was unaware that his co-defendant was armed and used a gun during the robbery. Even if plea counsel learned of this significant fact during his limited consultations with Petitioner, plea counsel failed to investigate to find evidence to support Petitioner’s contention that he was unarmed and unaware of the gun. The charge of armed robbery lodged against Petitioner depended upon the use of a weapon. Plea counsel testified that he explained Petitioner could be convicted of armed robbery despite the fact that Petitioner was unarmed and unaware of the gun held by his co-defendant under the theory of the hand of one is the hand of all. Although plea counsel explained this theory to Petitioner, he did so in a cursory and incomprehensible fashion. What plea counsel failed to explain was that Petitioner’s ignorance of his co-defendant’s possession of a gun may have provided Petitioner with a defense to the charges. For this reason, plea counsel rendered ineffective assistance.

CONCLUSION

Petitioner asks this Court to grant the writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

DELONTE CARROLL,

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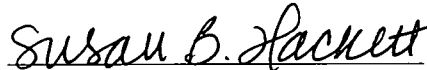
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Delonte Carroll 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 November 15, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), She has 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 Delonte Carroll.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of October, 2014

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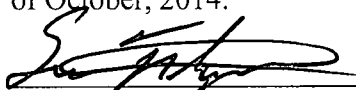
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Delonte Carroll, #347422, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 14th day of October, 2014.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of October, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.