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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Lexington County

R. Lawton McIntosh, Circuit Court Judge

PHILLIP JACKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000780

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

I N D E X

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where plea counsel failed to adequately advise Petitioner on "the hand of one is the hand of all" theory of accomplice liability leading Petitioner to plead guilty without a full understanding of this legal principle and where Petitioner testified that he would not have pled guilty if "I had the knowledge that I have now?"

STATEMENT

A Lexington County Grand Jury indicted Petitioner at the October 2010 term of General Sessions for murder and armed robbery. App. 69-72. Petitioner pled guilty to voluntary manslaughter pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), and armed robbery on February 28, 2012 before the Honorable R. Ferrell Cothran, Jr. App. 1. Assistant Solicitor Colleen E. Dixon represented the state, and Charles E. Johnson represented Petitioner. App. 1. Petitioner was sentenced by Judge Cothran to twenty-five years imprisonment on each offense to be served concurrently. App. 17, ll. 5-14. Petitioner did not appeal.

On October 30, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 19-25. The state filed a return to this application dated March 22, 2013. App. 26-31. The matter proceeded to an evidentiary hearing on November 14, 2013 before the Honorable R. Lawton McIntosh. App. 32. Assistant Attorney General J. Walter Whitmire represented the state, and Charles T. Brooks, III represented Petitioner. App. 32. By order dated March 27, 2014, Judge McIntosh denied Petitioner relief. App. 60-68.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where plea counsel failed to adequately advise Petitioner on "the hand of one is the hand of all" theory of accomplice liability leading Petitioner to plead guilty without a full understanding of this legal principle and where Petitioner testified that he would not have pled guilty if "I had the knowledge that I have now."

Guilty Plea

The solicitor informed the court at the beginning of the guilty plea proceeding that Petitioner was pleading guilty to armed robbery and voluntary manslaughter. App. 4, ll3-10. Plea counsel later clarified that Petitioner was pleading guilty to voluntary manslaughter pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). App. 6, ll. 1-7. A representative of the Department of Probation, Parole, and Pardon Services also told the court that Petitioner was on probation for grand larceny and that his guilty plea would result in a violation. App. 4, ll. 13-18.

After Judge Cothran advised Petitioner of his constitutional rights and the direct consequences of his plea, the solicitor told the court the facts of the case. According to the solicitor, on November 1, 2009, Petitioner and three co-defendants, who are all "self-proclaimed gang members," were driving home from a club in Orangeburg County when they discussed "getting a body." App. 9, ll. 9-23. The solicitor maintained that the group saw a man walking on the side of the road, pulled over, and called the man over to their car. She explained that when the man approached the car and leaned in to talk to Petitioner and the others, "the State would prove based on co-defendant testimony, that [Petitioner] shot Mr. Lybrand [the man] in the head killing him instantly." App. 9, l. 24 – 10, l. 10.

The solicitor further maintained that three days later on November 4, 2009, Petitioner and five co-defendants, all armed, robbed a known drug dealer at his home of money and drugs. She conceded that Petitioner "was not one of the two individuals that actually went inside the house," but rather was one of the four that "stayed outside of the house ready to enter the house when the robbery was about to take place." She said the drug dealer was shot in the head, but survived. App. 10, l. 11 – 11, l. 9.

According to the solicitor, Petitioner and several co-defendants were apprehended while fleeing from the scene of the armed robbery after they got into a car accident. She maintained that "the gun that was used in the home invasion was found at the scene of the accident and that gun was matched through firearms and tool mark analysis as being the weapon that had killed Mr. Lybrand on November 1st of 2009." App. 11, ll. 10-19.

When asked by Judge Cothran if he was pleading guilty because he was guilty, Petitioner said, "No, sir." The court then asked Petitioner, "You're not guilty [of] armed robbery?" to which Petitioner again said, "No, sir." After conferring with plea counsel, the court again asked Petitioner, "So under the theory of the hand of one is the hand of all, you want to plead guilty to this [armed robbery]?" Petitioner finally told the court, "Yes, sir. You're right, yes, sir." App. 12, ll. 2-19. The court also asked Petitioner, "And do you want me to accept your plea for manslaughter under North Carolina versus Alford?" to which Petitioner answered, "Yes, sir." App. 13, ll. 2-5.

After this exchange, Judge Cothran found a factual basis for the guilty plea and that it was "freely and voluntarily entered into" with the "advice of competent counsel." He therefore accepted the plea. App. 13, ll. 6-10.

Plea counsel told the court, "In this case, Your Honor, the armed robbery, as stated, there [were] two individuals that entered the house . . . My client [Petitioner] was not one of them.

There was a shooting that occurred inside the house by some of the co-defendants. The gun that was used in the armed robbery was also connected to the murder. We ask the Court, because of North Carolina versus Alford, it's our contention that while my client [Petitioner] was there [in the car at the time of the murder], he was not actually the shooter [in the murder], Your Honor. He's always had that contingent. I explained to him the theory of the hands of one is the hand of all, as well as the possibility if he went to trial, that a jury could probably find him guilty. Therefore, in taking all those things into consideration, we thought that a negotiated plea was a reasonable solution . . . to the whole case." App. 14, l. 18 – 15, l. 10.

The court ultimately went along with the state's sentence recommendation and sentenced Petitioner to twenty-five years imprisonment for each offense to run concurrently. App. 17, ll. 5-14.

PCR Hearing

Petitioner testified at the PCR hearing that his "guilty plea should be overturned because Mr. Johnson [plea counsel] didn't properly advise [him]" regarding the hand of one is the hand of all. App. 37, ll. 10-14. He said he "didn't really understand the law." App. 40, ll. 7-8. Petitioner further testified, "[H]e [plea counsel] wasn't informing me of the things I needed to know. And I was saying that I wanted to go to trial, but we never really sat down and came up with a trial concept on how we [were] going to even proceed at trial." App. 45, ll. 3-7. Petitioner said that "[i]f I had the knowledge that I have now," he would have turned down the state's plea offer and proceeded to trial. App. 45, ll. 8-11.

Plea counsel, Charlie Johnson, testified that he met with Petitioner on several occasions to review the evidence against him. App. 50, l. 20 – 51, l. 1. He explained that he only gave Petitioner thirty-five pages of the discovery because those were "the only pages that referenced him . . . I gave him all the information that placed him at the scene, with all the statements of what all the other

codefendants made. Anything that was connected to him he had and anything he wanted to see he could see." App. 54, ll. 7-20. Johnson maintained that all of the co-defendants' statements "were consistent in saying that Mr. Jackson [Petitioner] was the one that ultimately pulled the trigger in the murder [and] . . . they were consistent that he was there with them at the armed robbery." App. 56, l. 25 – 57, l. 5.

Additionally, Johnson testified, "I told him [Petitioner] that under the armed robbery with the evidence that was there, there was a very likely chance he would be convicted of it. And he understood that. And I told him that he was looking at a possible 30 years for that, just that alone. But I told him my main worry was that if he got convicted for the armed robbery, [the state would] come back later and try him for the murder, and if found guilty for the murder, it would be a mandatory life sentence under the two-strike laws. And I told him that my main concern was trying to reduce his exposure to how much time he was exposed to." App. 52, ll. 10-24.

Furthermore, Johnson maintained that "under the circumstances and the evidence that was there, I felt that I did a real good job getting the 25 years and getting the Solicitor's Office to agree to that here in Lexington County." App. 53, ll. 3-7.

Order of Dismissal

The PCR court found Petitioner failed to meet his burden of proof in regards to his allegation that counsel did not "properly advise him regarding the 'hand of one' accomplice liability theory of guilt." The court found the allegation "wholly without merit." App. 64. The court further stated, "[Petitioner] has produced no credible evidence that shows how the State would not have been able to convincingly prove his culpability as an accomplice for the armed robbery" and that "[t]he doctrine has no application on the murder charge where [Petitioner] claimed he was not present at the scene in light of the State's clear evidence that he was the chief perpetrator." App. 65-

66. The court ultimately concluded that Petitioner did not establish any constitutional violations or deprivations that would require this Court to grant his Application for Post-Conviction Relief." App. 67.

Discussion

The difference "between a valid guilty plea and an 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 longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59. "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

Additionally, "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."

Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275-276 (1942)).

In this case, plea counsel was ineffective because he failed to adequately advise Petitioner on the hand of one is the hand of all theory of accomplice liability. This caused Petitioner to enter a guilty plea without a full understanding of the law applicable to his case and prevented him from making a "voluntary and intelligent choice among the alternative courses of action open to [him]." See Hill, 474 U.S. at 56. It was undisputed that Petitioner never entered the home during the commission of the armed robbery. See App. 10, ll. 11-21. Because of this evidence, Petitioner could have argued mere presence if he proceeded to trial on the armed robbery offense. Additionally, the only evidence against Petitioner on the murder charge was statements made by his co-defendants implicating him as the shooter. If he had proceeded to trial on the murder charge, Petitioner could have argued that he was merely present in the car during the killing, that he was not the shooter, and that he had no knowledge of his co-defendant's intentions.

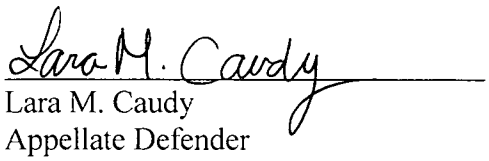
Moreover, there is a reasonable probability that but for plea counsel's deficient performance, Petitioner would not have pled guilty and would have insisted on proceeding to trial. See Hill, 474 U.S. at 59. Petitioner testified that he would not have pled guilty if he had have been properly advised on the hand of one is the hand of all theory and known what he knew now. See App. 45, ll. 8-11.

As a result of Petitioner's invalid plea and the resulting prejudice, his convictions should be reversed and this case remanded a new trial.

CONCLUSION

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

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

PHILLIP JACKSON,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000780

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Phillip Jackson 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 14, 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 Phillip Jackson.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of November, 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 John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Phillip Jackson, #317505, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of November, 2014.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day of November, 2014.

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