

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Colleton County

D. Craig Brown, Circuit Court Judge

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APR 30 2012

S.C. Supreme Court

SAMUEL T. JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel failed to subject the State's case to meaningful adversarial testing?

STATEMENT

On January 13, 2009, petitioner appeared before the Honorable Perry M. Buckner in Colleton County and pled guilty to first degree burglary, armed robbery, four (4) counts of kidnapping and attempted escape. A sentence of fifteen (15) years was imposed for attempted escape and twenty (20) years was imposed on each of the other charges. Harris S. Beach, Esquire was plea counsel.

Petitioner filed an application for post-conviction relief on June 11, 2009. An evidentiary hearing was held on April 21, 2011, before the Honorable Craig Brown. Petitioner was present and was represented by J.D. Bryan, Esquire. Respondent was represented by Matthew J. Friedman, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. On May 9, 2011, Judge Brown issued an order denying and dismissing the application for post-conviction relief.

This petition follows.

ARGUMENT

Plea counsel failed to subject the State's case to meaningful adversarial testing.

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 prejudice 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).

Prejudice does always not have to be shown. In Nance v. Ozmint, 367 S.C. 547, 626 S.E. 2d 878 (2006) the Court observed how prejudice may be presumed in the context of ineffective assistance of counsel:

The Supreme Court also recognized in both Strickland and Cronic that in certain circumstance "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry... is not worth the cost." Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S.Ct. 2039). In *552 Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice The Supreme Court also recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so

likely that case-by-case inquiry... is not worth the cost.” Strickland, 466 U.S. at 692, 104 S. Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S. Ct. 2039). In *552 Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel “at a critical stage of his trial.” Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer “entirely fails to subject the prosecution’s case to meaningful adversarial testing,” thus making “the adversary process itself presumptively unreliable.” Id. Third, the Court identified certain instances “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” Id. (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is “an extremely high showing for a criminal defendant to make.” Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998).

In this case, petitioner testified at the evidentiary hearing that he wanted to go to trial. (App. p. 69, lines 11-12). Plea counsel never discussed the elements of the crime. Neither did he explain to him that the State would have to prove every element of the crime. If that had been explained, petitioner said he would have gone to trial. Plea counsel did not explain how petitioner was connected with the crimes. There was also an alibi witness. (App. p. 70, lines 3-20).

Petitioner said he had a .380 semi automatic in his possession when he was arrested, but the solicitor said he had a Lorein 9mm pistol. (App. p. 28, lines 9-10; app. p. 72, line 6 – p. p. 73, line, 4). No one picked petitioner out of a photo line-up or a show up identification. That may have been because the suspect was wearing a mask. (App. p. 73, lines 14-24).

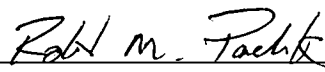
Plea counsel did not challenge the basis of the evidence behind the arrest warrant. He did not file a motion to dismiss the charges based on a lack of evidence. There was no suppression hearing on the pistol. (App. p. 74, line 16 – p. 75, line 1). Counsel did not discuss any exculpatory

evidence with petitioner. He did not file a Brady and Rule 5 motions. And finally, he did not ask for a preliminary hearing. (App. p. 75, lines 18-24).

CONCLUSION

As can be seen from the above, counsel did not subject the State's case to meaningful adversarial testing. Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO COLLETON COUNTY
D. CRAIG BROWN, CIRCUIT COURT JUDGE

SAMUEL T. JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

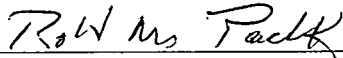
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Samuel T. Johnson 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 April 21, 2011. 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 Samuel T. Johnson.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of April, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

D. Craig Brown, Circuit Court Judge

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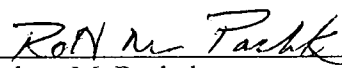
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Matthew J. Friedman, Esquire and Samuel T. Johnson, #332718, at Broad River Correctional Institution this 30th day of April, 2012.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of April, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.