

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

G. Edward Welmaker, Circuit Court Judge

CHRISTOPHER JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000592

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	5
CONCLUSION	9
PETITION TO BE RELIEVED AS COUNSEL	10

ISSUE PRESENTED

Did the PCR court err in finding Petitioner knowingly, voluntarily, and intelligently entered into an *Alford* plea when Petitioner based his decision to plea on counsel's advice and Petitioner had no knowledge of counsel's failure to investigate the possibility of suppressing evidence found during a warrantless search of Petitioner's hotel room or of counsel's failure to investigate a possible agreement between an individual arrested with Petitioner and the State?

STATEMENT

Indictment and Plea Hearing

On August 16, 2011, Petitioner was indicted by a Greenville County Grand Jury for one count of trafficking heroin and for one count of possession of methamphetamine with intent to distribute. App. 143 – App. 146.

Alford Plea and Sentence

On April 9, 2012, Petitioner appeared before the Honorable Letitia Verdin and entered an *Alford*¹ plea to both charges. App. 1, 4, ll. 11-14. Petitioner was represented by Christopher Posey and Judy M. Munson represented the State. App. 1. There was no agreement between the Petitioner and the State regarding a sentencing recommendation. After the assistant solicitor stated the factual background, Petitioner made a statement to the Court requesting mercy. App. 13, ll. 3 – App. 31, ll. 3. The State requested a sentence in excess of fifteen years. App. 10, ll. 12-17. The plea was accepted by Judge Verdin and she sentenced the Petitioner to fifteen years' imprisonment for each count with the sentences to be run concurrently. App. 31, ll. 20 – App. 32, ll. 3. Petitioner did not appeal.

PCR Application and Evidentiary Hearing

On June 7, 2012, Petitioner filed his application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 34 – 95. The Respondent filed a return on August 31, 2012. App. 96 – 99. An evidentiary hearing was held before the Honorable G. Edward Welmaker on December 18, 2013. App.100. Petitioner was represented by Brian P. Johnson and the Respondent was represented by Karen C. Ratigan. *Id.* Petitioner and trial counsel testified at the evidentiary

¹Pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970), a defendant may consent a prison sentence even if he is unwilling or unable to admit to the crime. *United States v. Morrow*, 914 F.2d 608, 611 (4th Cir.1990).

hearing. App. 101. By an Order filed on February 17, 2014, Judge Welmaker denied Petitioner's PCR application. App. 133 – 140. Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently enter into an *Alford* plea when Petitioner based his decision to plea on counsel's advice and Petitioner had no knowledge of counsel's failure to investigate the possibility of suppressing evidence found during a warrantless search of Petitioner's hotel room and counsel's failure to investigate a possible agreement between an individual arrested with Petitioner and the State.

Relevant Facts

At the plea hearing, Petitioner explained that he was arrested leaving his hotel room which law enforcement had placed under surveillance after receiving a tip that Joyce Edwards, who was wanted by the Greer police and in Pennsylvania, was staying in Petitioner's hotel room. App. 8, ll. 14-23; App. 24, ll. 1-18. Petitioner stated that he had forcibly removed the tipster from the hotel room. *Id.* Petitioner also testified that the tipster likely reported them in retaliation. *Id.* Prior to receiving the signed warrant, law enforcement entered the hotel room, claiming exigent circumstances and hot pursuit, when either the Petitioner or Edwards attempted to leave the room sometime after law enforcement had positioned themselves in the hallway for the raid. App. 79. A search of the hotel room uncovered heroin and methamphetamines. App. 79-93.

The State contended at the plea hearing that the warrant was issued prior to the search. App. 8, 14-23. However, the affidavit of Officer C.J. Todd indicates the police entered the hotel prior to obtaining the signed search warrant. App. 79. In the affidavit Todd averred that police seized Petitioner and Edwards when Edwards left the room, saw the officers, and fled back into the room during the time between law enforcement seeking the warrant and the warrant being issued. *Id.* Todd swore that law enforcement followed her into the room, finding Petitioner and a quantity of materials that tested positive for heroin and Methamphetamine. *Id.* In contrast, the incident report states law enforcement entered the hotel room when Petitioner opened the door and placed a trash bag outside. App. 83.

Counsel was appointed to represent the Petitioner on April 2, 2011. App. 6, ll. 7-8. Counsel met with the Petitioner for the second time on April 9, 2011. App. 107, ll. 3-13. It was during this second meeting that the decision to enter an *Alford* plea was made and the plea hearing was held shortly thereafter. App. 123, ll. 12-23. At the evidentiary hearing counsel and Petitioner both testified that they discussed challenging the search of the hotel room. App. 109, ll. 3-12; App. 126, 3-7. Counsel testified at the evidentiary hearing that it was during this meeting that he told the Petitioner that any *Franks*² hearing on the warrantless search would come immediately before trial. App. 124, ll. 10-16. In contrast, Petitioner testified that counsel refused to move for a *Franks* hearing. App. 115, ll. 21 – App. 116, ll. 6.

Petitioner also said he asked counsel to investigate why Edwards had agreed to testify against him and to investigate her extensive drug history. App.109, ll.17 – App. 110, ll. 16. At the evidentiary hearing counsel testified that he never investigated or made a motion to discover the parameters of Edward’s agreement with the police, but simply assumed that she had been offered a deal based on a single, brief conversation with the solicitor. App. 126, ll. 18 – App. 127, ll. 21.³ Counsel did recall advising Petitioner if he lost at trial, “he would probably receive a more substantial penalty than he would if he took responsibility and the judge gave him the benefit of pleading guilty.” App. 123, ll. 5-9. Trial counsel did not explain how entering an *Alford* plea, where the accused does not admit guilt, would indicate to the judge that the Petitioner was taking responsibility for his alleged crimes.

² *Franks v. Delaware*, 438 S.C. 154, 98 S.Ct. 2674 (1978) (establishing a two part test for challenging the veracity of a search warrant after its issuance and execution based on (1) allegations and proof of deliberate falsehoods in the warrant affidavit; and, (2) whether those falsehoods were material to the determination of probable cause).

Discussion

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. Accordingly, we take great precautions against unsound results.” *Brady v. United States*, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969) (provides that a defendant’s decision to plead guilty must be knowingly and voluntarily made); *see also State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (provides that the record must reflect that the defendant freely and intelligently waived his constitutional trial rights and had a full understanding of the consequences of the plea).

The South Carolina Supreme Court has held that 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). However, “the 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, 572-74, 713 S.E.2d 611, 612-15 (2011).

Counsel was appointed two weeks before the trial date and seven days before Petitioner eventually pled. App. 107, ll. 3-13. Counsel never investigated the circumstances surrounding the search of the hotel room or filed a *Franks* motion based on the inconsistencies between the arrest warrant affidavit and the investigative report in an effort to probe weaknesses in the State’s case or secure a favorable sentencing recommendation from them. Petitioner said he requested a *Franks* hearing, but that counsel refused to seek one. App. 115, ll. 21 – App. 116, ll. 6. Counsel simply

³ Edwards was charged with trafficking methamphetamine, possession of methamphetamine with intent to distribute, and being a fugitive from justice. App. 88. These charges were either dismissed or *not prossed*.

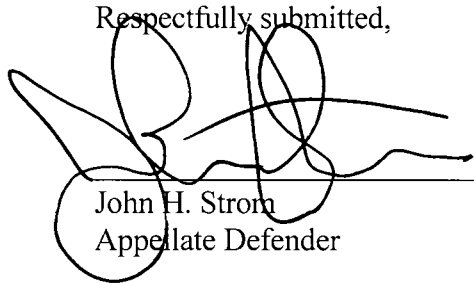
reviewed the discovery materials provided by the State, but never conducted any independent investigation of the case prior to the plea hearing. App. 125, ll. 15-22; *See State v. Coto*, 296 S.C. 480, 374 S.E.2d 181 (1988); *State v. Arthur*, 296 S. C. 495, 374 S. E. 2d 291 (1988) (Counsel must investigate all available defenses before the defendant enters a guilty plea); *See also Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (provides that failure to investigate possible defenses constitutes ineffective assistance of counsel); *see also Praylow v. Martin*, 761 F.2d 179 (4th Cir. 1985) (provides that a defendant's stated interest in pleading guilty does not relieve counsel of his duty to investigate possible defenses).

Counsel's seven day representation of Petitioner was deficient. Counsel's failure to investigate the merits of a *Franks* hearing and failure to investigate Edwards' history of drug use and agreement with the State deprived Petitioner of information critical to understanding the State's case against him. Due to these unprofessional failings, Petitioner did not voluntarily, knowingly, and intelligently enter his *Alford* plea. Therefore, the PCR Court erred in dismissing Petitioner's application as Petitioner's decision to enter an *Alford* plea was the unsound result of counsel's failure to investigate Petitioner's case. *Brady*, 397 U.S. at 758; *See also Boykin*, 395 U.S. at 240.

CONCLUSION

Based on the foregoing reasons, Christopher Johnson's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

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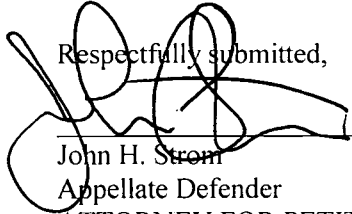
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher 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 December 18, 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 Christopher Johnson.

Respectfully submitted,



John H. Strom

Appellate Defender

ATTORNEY FOR PETITIONER

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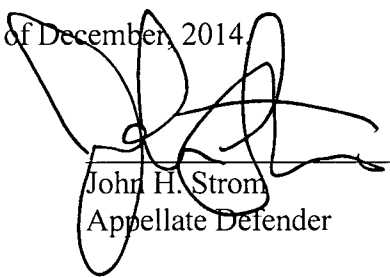
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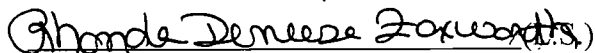
CERTIFICATE OF SERVICE

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 Karen Ratigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Christopher Johnson, #350430, at Allendale Correctional Institution this 22nd day of December, 2014.


John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of December, 2014.



Notary Public for South Carolina

My Commission Expires: October 17, 2021.