

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to McCormick County

S.C. Supreme Court

R. Lawton McIntosh, Circuit Court Judge

ROGER ALLEN DYKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-001256

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

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

INDEX

INDEX 1

QUESTION PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 6

PETITION TO BE RELIEVED AS COUNSEL 7

QUESTION PRESENTED

Whether plea counsel was ineffective in giving petitioner incorrect sentencing advice?

STATEMENT

On August 29, 2011, petitioner appeared before the Honorable Edward B. Cottingham in McCormick County and pled guilty to attempted armed robbery and first degree burglary. Respective sentences of five (5) years and fifteen (15) years were imposed. The sentences were ordered to be served consecutively. Greg Seigler, Esquire was plea counsel. Errin J. Maye, Esquire was the assistant solicitor. (App. p. 1 – p. 20.)

Petitioner filed an application for post-conviction relief on July 13, 2012, along with a memorandum in support of the application. (App. p. 20 – p. 31.) Respondent filed a return dated March 11, 2013. (App. p. 32 – p. 37.) An evidentiary hearing was held on November 15, 2013, before the Honorable R. Lawton McIntosh. Petitioner was present and was represented by John Long, Esquire. Respondent was represented by Walter Whitmire, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 38 – p. 71.) On May 19, 2014, Judge McIntosh issued an order denying and dismissing the application for post-conviction relief. (App. p. 72 – p. 80.)

This petitioner follows.

ARGUMENT

Plea counsel was ineffective in giving petitioner incorrect sentencing advice.

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 prejudiced 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).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243,

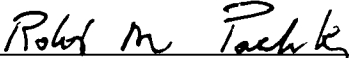
89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

In this case, petitioner wrote in his memorandum of law in support of his application for post-conviction relief that counsel tricked him into believing he would receive concurrent sentences. (App. p. 30.) At the evidentiary, he testified that plea counsel told him if he pled guilty to first degree burglary and attempted armed robbery he would get a 15-year sentence. To petitioner, that was part of the plea negotiations. When he later saw the sentencing sheet, it said non-negotiable plea, so he figured he had been lied to. (App. p. 49, lines 2-11.) As can be seen from above, giving incorrect sentencing advice constitutes ineffective assistance of counsel. Hinson v. State; Ray v. State.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of March, 2015.

STATE OF SOUTH CAROLINA
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CERTIORARI TO MCCORMICK COUNTY
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

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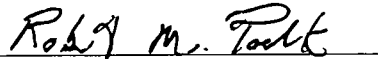
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roger Allen Dyke 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 November 11, 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 Roger Allen Dyke.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of March, 2015

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ROGER ALLEN DYKE,

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CERTIFICATE OF SERVICE

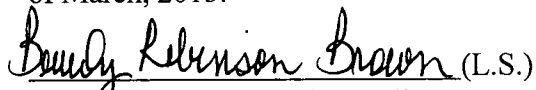
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Roger Allen Dyke, #347604, at Perry Correctional Institution this 2nd day of March, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of March, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 9, 2024.