

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Dorchester County
Maite Murphy, Circuit Court Judge

S.C. Supreme Court

ROGER RUTLEDGE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001891

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court abuse its discretion in refusing to grant Petitioner's motion for a continuance when Petitioner, who has a history of mental illness, stated that he did not have his prepared case notes as he was not notified that he was being transported for his evidentiary hearing and PCR counsel was not sufficiently prepared to represent Petitioner without the assistance of Petitioner's notes?

STATEMENT

Procedural History

In the early morning hours of August 29, 2008, Charleston County deputies responding to an emergency call discovered Herman Ward lying behind his vehicle, with a single gunshot wound to the head. App. 26, ll. 23 – App. 27, ll. 5. Ward was taken to a local hospital and died several days later. App. 29, ll. 8-9. Eight empty shell casing were collected from the crime scene and processed. App. 27, ll. 7-13. The casings were identical to shell casings recovered from an incident three weeks earlier where witnesses alleged Petitioner fired several times into the air after a confrontation at a birthday party. *Id.* at ll. 14-20.

The casings also matched a shell casing recovered from a third shooting where Petitioner was accused by witnesses of having fired into a television during an argument. *Id.* at ll. 21-25. A search warrant was executed on Petitioner's residence and vehicle. App. 28, ll. 11-18. A shell casing found in the back seat of the vehicle matched the shell casings from Herman Ward's shooting and the others Petitioner was suspected of. *Id.*

Investigators were able to locate eye witnesses who provided videotaped statements alleging that Petitioner and two other individuals had fought with Ward the night before his body was discovered. *Id.* at ll. 19-25. These witnesses further alleged that as Petitioner and the two others were walking away leaving the confrontation, Petitioner and Ward recommenced arguing. App. 29, ll. 1-3. Witnesses then claimed that Petitioner turned around and fired several shots in Ward's direction. App. 29, ll. 3-9. The State averred that one of the shots, allegedly fired by Petitioner, struck Ward in the head. *Id.*

Indictment and Guilty Plea

On February 5, 2009, Petitioner was indicted for one count of murder by the Dorchester County Grand Jury. App. 122-123. Mary LeMatty and Mitchell Farly represented Petitioner. The State was represented by Assistant Solicitor Russell Hilton.

On June 20, 2011, Petitioner proceeded to plead guilty to one count of voluntary manslaughter before the Honorable Diane Schaffer Goodstein. App.4 – App. 45. At the plea hearing, the court questioned Petitioner on whether he understood that by entering a guilty plea, he was foregoing his right to a trial and admitting his guilt. App. 22, ll. 1 – App. 23, ll. 12.

The State then provided a brief recitation of the facts of the case. App. 26, ll. 23 – App. 29, ll. 9. LeMatty cited Petitioner's difficult childhood, tight knit family, and strong local ties as mitigating factors. App. 42, ll. 20 – App. 43, ll. 20.

Judge Goodstein accepted Petitioner's guilty plea and sentenced Petitioner to twenty years imprisonment. App. 43, ll. 22 – App. 44, ll. 2. Judge Goodstein also ordered the Department of Corrections to insure that Petitioner continued to receive medication and mental health treatment while he was incarcerated. *Id.* Petitioner did not file an appeal.

PCR Application

On June 5, 2012, Petitioner filed an Application for post-conviction relief (PCR) alleging ineffective assistance of plea counsel resulting in an involuntary guilty plea. App. 46 – App. 51. On August 13, 2012, the State filed a Return. App. 62 – App. 66. On October 18, 2012, Petitioner filed an amended Application alleging plea counsel was ineffective for advising Petitioner to plead guilty to manslaughter. App. 54 – App. 61.

PCR Hearing

On May 28, 2014 a hearing was held before the Honorable Maite Murphy. App. 74. Petitioner was represented by Charles Brooks and the State was represented by Assistant Attorney General Megan E. Harrigan. Petitioner and LeMatty (plea counsel) both testified at the hearing. Mitchell Farly did not testify.

Prior to taking testimony, PCR counsel reluctantly brought to the court's attention Petitioner's request for a continuance and a motion to relieve counsel. App. 76, ll. 24 – App. 77, ll. 1. Petitioner stated to the court that he no longer wanted PCR counsel to represent him. App. 77, ll. 5-11.

The court then asked PCR counsel if he was ready to proceed. App. 77, ll. 20. PCR Counsel assured the court: "I have done a vast number of post-conviction reliefs. His case, as the Attorney General's indicated, it was a negotiated plea. That means the record is very small. But I do respect my client's position that he wanted me to ask the Court for a continuance." App. 77, ll. 21 – App. 78, ll. 1.

Petitioner responded that he was also requesting a continuance because he did not have his prepared notes to assist him in remembering his case. App. 78, ll. 4-8. Petitioner stated that he was not informed that he was being transported for the hearing and that he did not have the opportunity to take his notes with him. *Id.* The court denied Petitioner's request for a continuance and his request to relieve PCR Counsel. *Id.* at ll. 9-16.

When Petitioner protested that he did not have his prepared notes, the court responded that Petitioner "can testify as to what is contained in that paperwork; and that . . . [the court] may allow Petitioner to submit his notes to the court after the hearing. *Id.* at ll. 18-23. PCR counsel then affirmed that he was ready to proceed. App. 78, ll. 25 – App. 79, ll. 1.

Petitioner testified that he was seeking to have his guilty plea vacated and understood that the only possible relief he could receive is a new trial. App. 80, ll. 18 – App. 81, ll. 7. Petitioner also reiterated that he was proceeding with the hearing that day only because, “you all give me no choice but to go on, and I told you that I don’t have my paperwork to help me [*sic*] what I need to take care of.” App. 81, ll. 3-5.

PCR counsel then asked Petitioner why he pled guilty. *Id.* at ll. 6-7. Petitioner explained that he was scared before he entered the guilty plea and that he was given medication at the county jail that prevented him from understanding the full implications of pleading guilty. *Id.* at ll. 8-15. When asked to clarify what aspect of the guilty plea he did not understand, Petitioner explained that he would have “to go through my paperwork to explain what - - in my plea, in my case, I have to explain that off my paperwork is what I’m trying to tell you.” App. 82, ll. 3-8.

PCR counsel responded that “nobody knows the factual scenario of your case better than you -- nobody should. . . the facts, what happed in your case, how you ended up pleading, you that because --.” *Id.* at ll. 9-13. Petitioner restated that he did not have prepared notes with him and could not answer PCR counsel’s questions. *Id.* Petitioner then stated only that he was scared when he pled guilty and that he felt counsel had not investigated his case. *Id.* at ll. Ll. 11-22.

Petitioner also stated that the medicine he was taking at the time of the plea kept him “in a state of . . . unawareness” App. 83, ll. 18-22. PCR Counsel did not ask Petitioner was medicine he was taking or what medical condition the drugs had been prescribed for. App. 84, ll. 6-8. PCR counsel made no effort to refresh Petitioner’s memory with his Application or plea transcript. Counsel summarily concluded his direct examination by asking Petitioner three times whether Petitioner had “anything else [he] wanted to tell the court?” App. 84, ll. 9-22.

On cross-examination Petitioner stated that he pled guilty out of fear and that he did not understand the State's allegations against him. App. 86, ll. 11 – App. 87, ll. 23. Petitioner also stated that he did not recall telling the Judge Goodstein that he had reviewed his discovery with his attorneys and that his medication caused significant memory problems. App. 87, ll. 8 – App. 88, ll. 20. Without his prepared notes, Petitioner was unable to explain the facts supporting his PCR application and was unable to meaningfully participate in the evidentiary hearing.

LeMatty also testified at the hearing. She claimed that she and Petitioner did not establish a working attorney-client relationship and that Petitioner was not forthcoming with information regarding an alibi or possible defenses. App. 98, ll. 4 – App. 99, ll. 23. LeMatty recalled that she met Petitioner several times to review the State's discovery in Petitioner's case. App. 96, ll. 12 – App. 97, ll. 18. She also alleged that Petitioner was hostile to her and refused to cooperate in his own defense, but that Farly had been able to establish a better relationship with Petitioner. App. 101, ll. 19 – App. 102, ll. 19.

On cross-examination, LeMatty was able to inform PCR counsel with a recitation of the facts in Petitioner's case. App. 104, ll. 13-23. Finally provided with the facts of the incident, PCR counsel asked her a few questions about the strength of the State's evidence and whether or not she shared that information with Petitioner. App. 104, ll. 24 – App. 105, ll. 22.

LeMatty alleged that she had shared the information with Petitioner. LeMatty also claimed during cross-examination that the State had reduced its initial plea offer from a thirty year sentence to a twenty year sentence for manslaughter. PCR counsel then rested. PCR counsel's full closing argument stated:

Judge, briefly, as you heard from my client, he was obviously scared. There's a lot of things that he doesn't remember. He testified that he didn't really have an appreciation for this, the conversations that he may or may not have had with his attorney. We would respectfully ask the Court to grant him his post-conviction relief

application and grant him a new trial for the reasons we just argued towards the Court as well as all the testimony, particularly my client's testimony here today.

App. 108, ll. 4-11. PCR counsel did not renew any of Petitioner's motions and did not request that Petitioner be allowed to submit his notes after the hearing, as the PCR court had recommended. In contrast the State argued at length that Petitioner was not entitled to relief under the *Strickland v. Washington*¹ ineffective assistance of counsel framework. App. 108, ll. 13 – App. 109, ll. 16.

Order of Dismissal

The PCR court denied Petitioner's application by way of an Order of Dismissal issued on August 18, 2014. App. 111 – App. 120. The court concluded that failed to prove that Petitioner's guilty plea was involuntarily entered into. App. 117. The court also held that LaMatty's performance was within prevailing professional norms and that she was able to secure Petitioner a favorable plea deal. *Id.* Finally, the court determined that the plea hearing transcript demonstrated that Petitioner entered into the guilty plea with a complete understanding of the charges and the consequences of admitting guilt. App. 117 – App. 118.

This petition for writ of certiorari follows.

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

ARGUMENT

The PCR court abused its discretion in refusing to grant Petitioner's motion for a continuance when Petitioner, who has a history of mental illness, stated that he did not have his prepared case notes as he was not notified that he was being transported for his evidentiary hearing and PCR counsel was not sufficiently prepared to represent Petitioner without the assistance of Petitioner's notes.

Petitioner's motion for a continuance should have been granted as Petitioner explained that he was not prepared for the hearing as he did not have his prepared case notes because he did not know that he was being transported to court. App. 78, ll. 4-8; *State v. Babb*, 299 S.C. 451, 385 S.E.2d 827 (1989)(lack of notice of hearing or trial may form the basis of a continuance).. Petitioner should have also been granted a continuance once it became clear that PCR counsel was unprepared to argue without Petitioner's assistance, in spite of PCR Counsel's pre-hearing assurances of preparedness. App. 77, ll. 4 – App. 79, ll. 3; *State v. Squires*, 248 S.C. 239, 149 S.E.2d 239 (1966)(whether continuance will aid or hinder the presentation of evidence).

Grant or Denial of a Request for a Continuance

“The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.” *State v. Yarborough*, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); *see also State v. Funderburk*, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006)(“An abuse of discretion occurs when the trial court's ruling is based on an error of law”). Even if there was no evidentiary support, “[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.” *State v. Preslar*, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005); *see also State v. Wyatt*, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891 (1995) (stating that error without prejudice does not warrant reversal).

Ineffective Assistance of Plea Counsel

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland*, 466 U.S. at 686. “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*, 466 U.S. at 686).

As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 668). First, the applicant must demonstrate counsel’s representation was deficient, which is measured by an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88. Second, the applicant must demonstrate he was prejudiced by counsel’s performance in such a manner that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Moreover, “[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, 90 S.Ct. 1463, 1474 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969); *see also Pittman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *See Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty.” *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing *Hill v. Lockhart*, 474 U.S. at 56–58). On review, a PCR judge's findings will be upheld if there is evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Right to Assistance of Counsel in a PCR Proceeding

The United States Supreme Court has also noted that PCR proceedings present the “first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial,” and as such, PCR hearings are “in many ways the equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.” *Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012). Individuals face great difficulties in vindicating claims of ineffective of counsel because the claims “require investigative work and an understanding of trial strategy”. *Id.*

Moreover, the individual cannot rely on a court opinion or prior work of an attorney addressing that claim. *Id.* “To present a claim of ineffective assistance at trial in according with the State’s procedures, then, a prisoner likely needs an effective attorney.” *Id.* Developing an evidentiary basis for a claim of ineffective assistance at trial often requires an investigation beyond a simple review of the trial record. *Id.*

Discussion

The PCR court erred in not granting Petitioner's motion for a continuance once Petitioner explained to the court that he was not prepared for the hearing, as he did not have his prepared case notes because he did not know that he was being transported to court. App. 78, ll. 4-8; *See Babb*, 299 S.C. 451, 385 S.E.2d 827. Further, the PCR court erred in not allowing Petitioner a continuance once it became clear that PCR counsel was unprepared to proceed with the hearing without Petitioner's assistance despite PCR Counsel's pre-hearing assurances of preparedness. App. 77, ll. 21 – App. 78, ll. 1; *Squires*, 248 S.C. 239, 149 S.E.2d 239.

Once PCR counsel began Petitioner's direct examination, he was unable to refresh Petitioner's recollection regarding the factual basis for his guilty plea as he did not provide Petitioner with a copy the plea hearing transcript or his PCR Application. App. 82, ll. 3-22. When Petitioner stated that he was heavily medicated at the time of the guilty plea and could not remember the medications he was taking; counsel seemed to have no knowledge of Petitioner's mental health problems. App. 83, ll. 15 – App. 84, ll. 22. Counsel never asked any additional questions about how Petitioner's mental health problems might have impacted the voluntariness of his guilty plea. *Id.* That Petitioner currently resided in the mental health ward at Lieber Correctional Institute only brought to the court's attention on cross-examination. App. 93, 14-25.

PCR Counsel simply resorted to asking Petitioner if there was "anything else" that he wanted the PCR court to know about. App. 83, ll. 15 – App. 84, ll. 22. It was not until his cross-examination of plea counsel, that PCR counsel was finally able to enter a summary of the factual basis for Petitioner's guilty plea into the record. App. 104, ll. 13 – App. 106, ll. 17. PCR counsel's perfunctory cross-examination of plea counsel failed to identify any grounds which could have constituted ineffective assistance of counsel and never challenged plea counsel's

contention that Petitioner freely and voluntarily entered into his guilty plea. In sum, plea counsel's representation of Petitioner was never subjected to meaningful adversarial scrutiny by PCR counsel.

Finally, the technical fact that Petitioner did not renew his motion for a continuance at the close of the hearing should not preclude appellate review or deprive Petitioner of his "one bite of the apple." *Martinez*, 132 S.Ct. at 1317; *State v. Daniel*, 83 S.C. 309, 65 S.E. 236, 237 (1909)(in criminal cases, involving the liberty of a citizen, the doubt, if there is a doubt, as to whether this important point was properly made, will be resolved in favor of the defendant); *State v. Forrester*, 343 S.C. 637, 541 S.E.2d 837 (2001)(denying the defense's pre-trial motions constituted a final ruling by the trial court as it was made immediately prior to the introduction of the evidence).

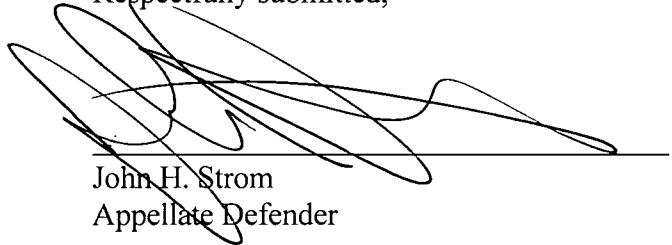
Accordingly, it was an abuse of discretion for the PCR court to refuse to grant Petitioner a continuance so that he could have his prepared case notes ready to assist PCR counsel in the evidentiary hearing. App. 77, ll. 21 – App. 78, ll. 1. Petitioner was deprived of his "one bite of the apple" in challenging the voluntariness of his guilty plea. *Martinez v. Ryan*, 132 S.Ct. at 1317.

PCR counsel was unprepared to advocate Petitioner's case and failed to subject the decisions and conduct of defense counsel to meaningful adversarial scrutiny. *Id.* **Petitioner could have meaningfully participated in the PCR hearing if he had been afforded the opportunity to have his prepared case notes with him.** Petitioner was without fault in causing this difficulty and, as such, the PCR abused its discretion by refusing to grant a continuance. *Irick*, 344 S.C. at 464, 545 S.E.2d at 284.

CONCLUSION

For the reason herein stated, Petitioner Roger Rutledge respectfully requests that his petition for writ of certiorari be granted to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line. The signature is stylized and somewhat cursive.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of March, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
MAITE MURPHY, CIRCUIT COURT JUDGE

ROGER RUTLEDGE,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-001891

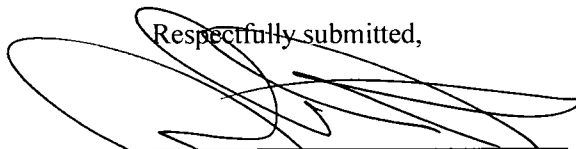
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roger Rutledge 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 May 28, 2014. 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 Rutledge.

Respectfully submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of March, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Maite Murphy, Circuit Court Judge

ROGER RUTLEDGE,

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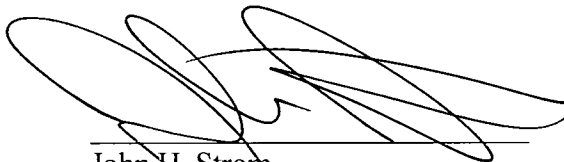
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001891

CERTIFICATE OF SERVICE

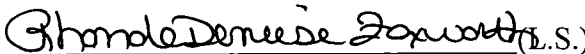
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Roger Rutledge, #310245, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of March, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of March, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.