

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

EVETTE FRANKLIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001948

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
Relevant Facts	4
Discussion	11
CONCLUSION	14
PETITION TO BE RELIEVED AS COUNSEL.....	15

ISSUE PRESENTED

Whether the PCR court erred in finding Petitioner's guilty plea was knowing, intelligent, and voluntary where he was compelled to plead guilty by plea counsel's refusal to prepare for his trial for the offense of murder?

STATEMENT

On July 14, 2010, Petitioner was indicted by the Richland County grand jury for murder. App. 142 – 143.

On June 17, 2013, Petitioner and his attorney, Joanna Delaney, appeared before the Honorable Robert E. Hood for an *in camera* hearing on Petitioner's motion to relieve counsel. App. 46. Judge Hood denied the motion, but instructed Delaney to review all discovery with Petitioner and visit the location of alleged crime. App. 65, ll. 2-13.

On July 3, 2013, Petitioner appeared before the Honorable DeAndrea Benjamin and entered a guilty plea to the offense of murder, with a negotiated sentence of thirty years. Petitioner was represented by Joanna Delaney and Mark Sawyer, Jr., and the State was represented by assistant solicitor Dolly Garfield. App. 1. Judge Benjamin accepted Petitioner's guilty plea and imposed the negotiated sentence of thirty (30) years incarceration. App. 17, ll. 11-17; App. 24, ll. 6-10.

Petitioner filed an application for post-conviction relief on October 1, 2013. App. 32 – 38. The State filed its Return and Motion for a More Definite Statement on December 16, 2013. App. 39 – 44. On April 28, 2014, the State filed the transcript of the June 17, 2013 hearing on the motion to relieve counsel, asking that it be incorporated with its prior Return. App. 45 – 67. Petitioner filed an amended application for post-conviction on July 9, 2014. App. 68 - 71. An evidentiary hearing was held before the Honorable L. Casey Manning on July 15, 2014. Petitioner was represented by Kristy Goldberg and the State was represented by Assistant Attorney General Croom Hunter. App. 72. Petitioner and plea counsel Delaney both testified at the hearing.

On August 29, 2014, Judge Manning filed an Order of Dismissal denying Petitioner's application for post-conviction relief. App. 132 – 141.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding Petitioner's guilty plea was knowing, intelligent, and voluntary where he was compelled to plead guilty by plea counsel's refusal to prepare for his trial for the offense of murder.

Relevant Facts

Petitioner pled guilty to the murder of Thomas Golson. App. 3, l. 1 – 17, l. 17. Petitioner admitted to authorities that he shot Golson but said that he did so in self-defense. App. 10, ll. 17-21. His public defender, Joanna Delaney, was troubled by Golson's desire to challenge the eyewitness identifications due to his prior statement claiming self-defense. App. 109, l. 4 – 111, l. 4. However, inconsistencies between statements made prior to trial are hardly unusual. See State v. Taylor, 261 S.C. 437, 441, 200 S.E.2d 387, 388 (1973) (holding that a defendant is entitled to a self-defense instruction even where he denies having inflicted the mortal wound if there is *any evidence* that the defendant inflicted the mortal wound but did so in self-defense); see also State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) (holding that where a defendant recants a prior confession, he is entitled to an instruction on the lesser included offense if the State introduces the confession which supports a charge on a lesser included offense); State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014). As will be seen infra, there were many problems with the identifications of Petitioner that could have been challenged at trial.

Guilty Plea Hearing

On May 4, 2010, Golson was found inside the Exclusive Bar and Grill having been shot eight times. App. 6, ll. 7-19. In its recitation of the facts that the State maintained that it would prove if the case proceeded to trial, the solicitor proffered that three witnesses gave a description of the clothing and hat worn by the shooter. App. 6, l. 20 – 7, l. 11. Surveillance footage was obtained from the BP gas station located next to the bar, which allegedly showed an individual matching the

description of the alleged shooter, accompanied by an individual wearing a navy recruiter uniform. App. 7, ll. 12-20. When law enforcement contacted the navy recruitment office the next day, Stacey Legette allegedly informed authorities it was he and Petitioner who were shown on the surveillance footage. App. 7, l. 21 – 8, l. 9. Authorities also spoke with two of Petitioner’s friends, Kevin and Torice Richardson, who were with Petitioner prior to the shooting. The Richardsons claimed that Petitioner told them he had “gotten someone” on the night of the shooting. App. 8, ll. 10-18.

According to the solicitor, while at the BP station earlier in the evening, Petitioner was haggling with an individual named Christopher Baldwin,¹ who sold boot-legged CD’s out of his car. App. 8, l. 19 – 9, l. 2. The victim laughed at the interaction between Baldwin and Petitioner, allegedly angering Petitioner to the point that he left and returned to the area later with a gun “to take care of business.”² App. 9, ll. 3-15.

¹ At the plea hearing, the solicitor referenced Roman Caldwell as being the individual known as “the CD man.” App. 8, ll. 19-23. However, the testimony at the PCR hearing and PCR Hearing Exhibit 1 indicate that “the CD man” is Christopher Baldwin a/k/a Roman Christopher Baldwin. For consistency, he is referenced as “Baldwin” in this Petition. In addition to selling CDs at the gas station prior to the shooting, Baldwin is also the individual who claimed to witness the shooting from the third pool table in the back of the bar. App. 91, l. 24; App. 124 – 126 (Ex. 1, Baldwin Interview Memo and Affidavit).

² Contrary to these assertions, in Baldwin’s sworn statement regarding his interactions with the shooter that night, he stated:

He walked up to me and asked me for a CD with Gucci, Young Jezy, and Lil Wayne. I said Nah... you are asking for the wrong CD and I told him the one he wanted. I gave him the CD and he asked me if I wanted to buy a strap, which is a gun. I asked him what kind of gun and he told me it was a Glock .40. He lifted up his shirt and I could see a gun in his waist band. The gun had a gray slide and the rest was black. I asked him how much he wanted for it and he told me \$250.00. I told him that was too much. Then he bought the CD and walked away.

App. 122 – 124 (Ex. 1, Baldwin Interview Memo and Affidavit).

Petitioner purportedly gave a statement to authorities that he returned to confront Baldwin but came into contact with the victim first. App. 9, ll. 16-21. Petitioner said that he acted in self-defense after the victim attacked him. App. 10, ll. 17-21. Other witnesses said that the shooter said “how do you like this now” and began shooting at the victim unprovoked. App. 9, ll. 21-25; App. 10, 22-25. The shooter followed the victim into the front of the bar and continued shooting, but eventually left the scene. App. 10, ll. 1-4.

The photographic lineups produced no positive identifications of Petitioner.³ App. 10, ll. 5-8. However, after Petitioner was apprehended, the bartender, a bar patron, and a woman who was talking to the victim from her motorcycle at the time of the shooting all identified Petitioner at an in-person line up as the shooter. App. 10, ll. 9-16. Law enforcement also located the gun purportedly sold by Petitioner after the shooting. Ballistics testing confirmed that the bullets removed from the victim matched that gun. App. 11, ll. 1-11.

Judge Benjamin accepted Petitioner’s guilty plea, listened to the argument and witnesses related to sentencing, and sentenced Petitioner to the negotiated thirty years incarceration. App. 17, l. 11 – 25, l. 5.

PCR Hearing

In Petitioner’s amended PCR application he cited three grounds for relief including:

- (a) Ineffective Assistance of counsel – Trial counsel failed to provide Applicant with all discovery and witness statements prior to the decision to enter a plea and therefore the plea was not knowingly entered as he did not have a full understanding of what could be presented at trial.

³ Contrary to this assertion, in Baldwin’s sworn statement he indicates that “the guy that showed [him] the gun and bought the CD from [him]” is “the same person that [he] identified in the phone lineup [police] showed [him].” App. 124 (Ex. 1, Baldwin Affidavit).

- (b) Ineffective Assistance of counsel – Trial counsel failed to investigate case by failing to go to crime scene and take photographs.
- (c) Ineffective Assistance of counsel – Trial counsel failed to fully consider all of the issues and inconsistencies present in his discovery and erroneously advised Applicant to enter a guilty plea.

App. 68. At the hearing, he testified that the original attorney appointed to his case in May 2010 was Ashley R. Thomas. App. 77, ll. 5-10. He was subsequently assigned Clark Newton, James May, Joanna Delany, and Mark Sawyer at various times during the pendency of his case. App. 77, ll. 11-19. Delany was originally the second chair attorney working with May, but Petitioner believed that she became the first chair attorney in late 2012.⁴ App. 77, l. 21 -78, l. 4. Petitioner testified that he filed a motion to relieve Delaney as counsel because he felt that she was pressuring him to plead guilty despite his insistence on going to trial. App. 78, l. 13 – 79, l. 2. She advised him that his statement would not be suppressed and did not explain how they could challenge the eyewitness identifications. App. 79, ll. 8-14. Petitioner also noted that neither Lauren Stuckey nor Lakeisha Robinson could pick him out of the photo array, but not surprisingly after being shown his photo, both were then able to pick him out of a physical line-up. App. 79, l. 16 – 80, l. 6. He said that Delany did not think that anything Petitioner brought to her attention would be “a big issue if [they] went to trial.” App. 86, ll. 10-12.

Petitioner wanted Delany to go to the scene of the shooting and take photographs from the perspective of Christopher Baldwin, the bar patron who identified Petitioner. App. 81, l. 16 – 82, l. 9. Petitioner contended that Baldwin could not see the door of the bar from his vantage point at the third pool table. App. 83, l. 10 – 85, l. 19; see also App. 122 – 124 (Ex. 1, Baldwin Interview

⁴ At the hearing on the motion to relieve counsel, Delaney indicated that she took over as lead counsel in Petitioner’s case in April 2013. App. 50, ll. 15-24.

Memo and Affidavit); App. 125 (Ex. 2, Bar Photographs). Petitioner also noted inconsistencies in witnesses Lauren Stuckey's and Latasha Brown's statements to law enforcement compared to those given to the defense investigator, Dave Lawrence. App. 87, ll. 10-13. Stuckey told Lawrence that she went the window after hearing the shots and saw the shooter and the victim run inside. However, in her affidavit, she wrote that she did not make it to the windows because she "ducked" down behind a little wall" and stood up after she thought the gunfire stopped. She then stood up to see the shooter, who started shooting downward at the victim, who had fallen to the ground against the half-wall that she was hiding behind. However, in her statement to the police on the night of the incident, Stuckey had claimed that she saw the victim collapse through the front door and crawl into a corner to the right of the door way, followed by the shooter. App. 88, l. 1 – 89, l. 13; App. 90, l. 7 – 91, l. 8; see also App. 126 – 128 (Ex. 3, Stuckey Interview Memo, Affidavit, and Investigative Report).

Brown initially told police that she hid under a pool table and only saw the shooter as he was leaving. She said that he was a slim, dark-skinned black male wearing a white T-shirt, blue jeans, and a green hat. He may have had small braids or corn rows in his hair. App. 92, l. 23 – 93, l. 7; see also App. 130 – 131 (Ex. 4, Brown Investigative Report). However, in her statement to Lawrence she said that she saw the victim being chased inside the club by the shooter and that she was only ten feet from the incident. App. 93, l. 8 – 94, l. 10; see also App. 129 (Ex. 4, Brown Interview Memo). Petitioner testified that he did not receive Lawrence's reports showing these inconsistencies until July 11, 2013, after he pled guilty and was sent to the Department of Corrections. App. 89, l. 20 – 90, l. 6; App. 92, ll. 8-10.

Delaney told Petitioner that with a plea he would have a "max-out" date rather going to trial and receiving life without parole. App. 80, ll. 7-12. She also told him how to answer the plea

court's questions, otherwise his plea would not be accepted. App. 80, ll. 13-15. He was further told that Judge Benjamin was the only judge who would accept his plea. App. 80, ll. 15-17. Though he had been adamant about going to trial, Petitioner ultimately accepted the plea agreement because "if [Delany was] not going to prepare for trial, why would [he] still go."⁵ App. 82, ll. 9-12; App. 96, ll. 7-22. Petitioner expressed that "I just wanted a lawyer that would adhere to what I had to say because it wasn't the lawyer going to trial, it was me going to trial." App. 103, l. 22 – 104, l. 3. Further, Delaney told him that if he went to trial, he would receive a life sentence because he had "no defense." App. 104, ll. 20-24.

Delany admitted that Petitioner's case was only the second murder case on which she had worked. App. 118, l. 22 – 119, l. 11. She met with Petitioner ten times, twice with attorney May, once with attorney Newton, and the rest once she took over the case. App. 106, ll. 12-20. She reviewed all of the discovery with Petitioner and visited the crime scene twice, the later time after the hearing on the motion to relieve counsel. App. 107, l. 3 – 108, l. 18. She did not recall Petitioner asking her to take any additional photos at the scene, but said that the front door was visible from the last pool table. App. 108, ll. 18-25. However, Delany admitted on cross-examination that the bar did not look the same when she visited as the crime scene photos from the night of the incident. Specifically, part of a wall had been torn down, though it would not have obstructed the view of the door from the pool table. App. 116, ll. 6-24. She was unable to confirm whether the crime scene photos were shown to Petitioner. App. 116, l. 25 – 117, l. 7. With respect to the Lawrence's reports, Delany's notes reflect that she discussed and gave him copies of them to Petitioner on June 21, 2013. App. 114, ll. 11-22.

⁵ Petitioner's case was scheduled to go to trial during the week of August 5, 2013. App. 50, l. 25 – 51, l. 1.

She discussed defenses of voluntary manslaughter and self-defense with Petitioner, but told him that it was her opinion that neither would work for them at trial. Even though the victim reached out to grab Petitioner, there was no evidence that the victim had any weapon. Thus, there would be a problem showing the “reasonableness” of the shooting. App. 109, ll. 4-20. Had they gone to trial, Delaney would have made a Denno⁶ motion, but she did not believe that they would be successful in excluding Petitioner’s statement. App. 109, l. 21 – 110, l. 9. While she did believe that there was a good chance of getting the witness identifications thrown out, she was concerned about the other non-tainted identifications and the incriminating statements that Petitioner made to non-law enforcement.⁷ Additionally, she said that she did not believe they could make the simultaneous arguments regarding identity and self-defense. App. 110, l. 10 – 112, l. 5. Her impression was more so that Petitioner wanted a better plea offer based on the inconsistencies in the witness testimony, not that he wanted a trial because of them. App. 112, l. 23 – 113, l. 3. Delany told Petitioner that there was so much other evidence of his guilt, that she did not think that he would win at trial. App. 113, l. 3-7. However, she claimed that she have taken the case to trial if Petitioner had said that was what he wanted. App. 113, ll. 21-24.

Order of Dismissal

The PCR court ruled that Petitioner had failed to demonstrate that plea counsel was deficient in any way and failed to show any resulting prejudice. App. 136 – 138. Additionally, the PCR

⁶ Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964).

⁷ Petitioner allegedly told Kevin Richardson that “the only people that could get him in trouble were the girl on the motorcycle and the guy selling CDs” and discussed “robbing the CD man” with Torice Richardson, to whom he later said “I got him.” Petitioner is also purported to have made statements to his girlfriend and her daughter that “he had gotten in some trouble” and “was going to have to go away for a while.” 111, l. 7 – 112, l. 2.

court ruled that Petitioner's guilty plea was knowing, intelligent and voluntary. App. 138 – 139. Therefore, the court denied Petitioner's application for post-conviction relief. App. 140.

Discussion

Petitioner had no choice but to accept the plea offer of a negotiated thirty years because his attorney was not prepared for trial. App. 82, ll. 10-12. Despite Petitioner's repeated attempts to discuss a trial strategy with Delany, she continually focused on the negative aspects of the case and discouraged him from proceeding to a trial. Petitioner attempted to address his concerns about Delany by filing a Motion to Relieve Counsel. However, the court denied the motion at the June 17, 2013 hearing, ruling that another attorney would not have adequate time to prepare for the case if Delany were removed. App. 64, l. 12-21. Notably, Petitioner faced a maximum sentence of life without the possibility of parole if he was convicted at trial, which seemed a surety with an unprepared attorney. App. 80, ll. 8-10. Under these circumstances, his guilty plea was not knowing, intelligent, and voluntary, because it was induced only by his lack of confidence in his inexperienced, unprepared attorney.

An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383–84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead,

would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing.” Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). “When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420.

In the present case, Petitioner attempted to discuss many aspects of a potential trial with plea counsel, including suppression of his statement and impeachment of witnesses. Much of this was also discussed with prior defense counsel, May, who seemed to present a more positive outlook on Petitioner’s chances at trial. App. 86, l. 15 – 87, l. 13. Delany, however, expressed an inability to simultaneously argue that the Petitioner was not the shooter and argue self-defense. App. 110, l. 10 – 112, l. 5. Contrary to that assertion, there is no bar on presenting inconsistent defenses. See State v. Taylor, 261 S.C. 437, 441, 200 S.E.2d 387, 388 (1973) (“If, however, there is any evidence in the record from which it can be reasonably inferred that the accused inflicted the mortal wound but justifiably did so in self-defense, then the accused is entitled to a charge on the law of self-defense, despite his denial of having inflicted the mortal wound. These principles seem to be clearly established by the weight of authority in this jurisdiction as well as elsewhere.”). Petitioner was also aware of Delany’s inexperience in handling a murder case, having only worked

on one previously. App. 54, ll. 2-6; App. 118, ll. 22-24. She was seemingly promoted to “first seat” by necessity after the prior attorneys left the public defender’s office. App. 50, ll. 8-20; App. 118, l. 25 – 119, l. 8.

While providing an assessment of the strengths and weaknesses of a client’s case is essential, an attorney must base that assessment in the law itself and emphasize to a client that it is the client who makes the ultimate decision of whether to plead guilty or proceed to trial. If the client’s decision is to proceed to trial, the attorney must zealously advocate for their client. Delany’s failure to prepare for the trial gave Petitioner only two options – one, accept the plea offer with a maximum of thirty years despite his desire to go to trial, or two, proceed to trial with an attorney who did not listen to him and had shown no interest in representing him at trial with the possibility of a life sentence without parole if convicted. Under these circumstances, Petitioner’s “decision” to plead guilty was not a meaningful one. The plea colloquy is also of little significance because Petitioner testified that he was told how to answer the questions in order to make sure his plea was accepted. App. 80, ll. 13-15. Thus, Petitioner’s testimony at the PCR hearing unequivocally establishes that were it not for Delany’s lack of preparation and unduly pessimistic attitude toward Petitioner’s case, he would have proceeded to trial. App. 96, ll. 7-22. His testimony is supported by the concerns that he expressed at the hearing on the motion to relieve counsel, which was held just two and a half weeks before the plea hearing.

Therefore, Petitioner’s guilty plea should be vacated.

CONCLUSION

For the reasons set forth herein, Petitioner Evette Franklin respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
L. CASEY MANNING, CIRCUIT COURT JUDGE

EVETTE FRANKLIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001948

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Evette Franklin 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 July 15, 2014. 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 Evette Franklin.

Respectfully submitted,



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

EVETTE FRANKLIN,

PETITIONER,

V.

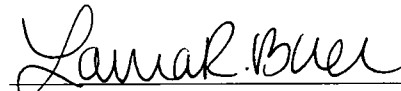
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001948

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 Jameson, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC, 29201, and Evette Franklin, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of May, 2015.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

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

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.