

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

Edgar W. Dickson, Circuit Court Judge

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S.C. Supreme Court

MATTHEW GERALD

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000376

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

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ISSUE PRESENTED

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

STATEMENT

On August 22, 2011, petitioner appeared before the Hon. Michael G. Nettles in Marion County and pled guilty to kidnapping and first degree criminal sexual conduct. Petitioner was sentenced to respective consecutive terms of eight (8) years and twenty-three (23) years imprisonment. Henry M. Anderson, Jr. Esq. was plea counsel. John C. Jepertinger, Esq. was the assistant solicitor. (App. p. 1-p. 23).

Petitioner filed an application for post-conviction relief on June 27, 2012. (App. p. 24-p. 30). Respondent filed a return dated December 10, 2013. (App. p. 31-p. 35). An evidentiary hearing was held on October 8, 2014, before the Hon. Edgar W. Dickson. Petitioner was present and was represented by Tristan M. Shaffer, Esq. Respondent was represented by Croom Hunter, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 36 - p.57).

On December 19, 2014, Judge Dickson issued an order denying and dismissing the application for post-conviction relief. (App. p. 59-p. 66).

This petition 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,

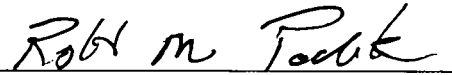
89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court 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 testified at the evidentiary hearing that he did not understand the plea offer because there wasn't one. He did not understand that they could run the sentences separate or one after another. At the time, he thought they were going to run the sentences together. If he had known they were going to run the sentences consecutive, he would not have pled that day. (App. p. 42, line 5-p. 44, line 3). In the past when he pled guilty, he never had consecutive time. All of the sentences were run together. (App. p. 45, lines 10-14). As mentioned above, giving incorrect sentencing advice constitutes ineffective assistance of counsel. Hinson v. State, 297 S.C. 456, 377, S.E. 2d 338 (1989).

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink that reads "Robt m Pachak". The signature is written in a cursive style and is positioned above a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO MARION COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

MATTHEW GERALD

PETITIONER,

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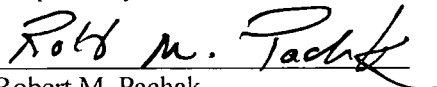
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Matthew Gerald 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 October 8, 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 Matthew Gerald.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of May, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

Edgar W. Dickson, Circuit Court Judge

MATTHEW GERALD

PETITIONER,

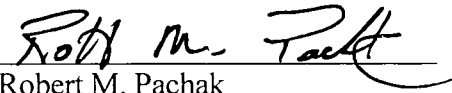
V.

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 Clay Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Matthew Gerald, # 286815, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th day of May, 2015.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of May, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.