

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Chester County

S.C. Supreme Court

William Jeffrey Young, Circuit Court Judge

ANTHONY O. ISOM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002269

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX.....1

ISSUES PRESENTED.....2

STATEMENT3

ARGUMENT

 The guilty plea was rendered involuntary by the fact that the plea judge failed
 to advise Petitioner that the guilty plea waived his right to appeal a previous
 denial of immunity pursuant to the Protection of Person and Property Act.....4

CONCLUSION10

PETITION TO BE RELIEVED AS COUNSEL.....11

ISSUES PRESENTED

1. Was the guilty plea rendered involuntary by the fact that the plea judge failed to advise Petitioner that the guilty plea waived his right to appeal a previous denial of immunity pursuant to the Protection of Person and Property Act?
2. Did the PCR judge err in refusing to find counsel ineffective for failing to properly perfect the immunity issue for appeal by not obtaining a written order from Judge Goldsmith denying immunity?

STATEMENT

In September of 2012, the Chester County Grand Jury indicted Isom for murder, indictment #2012-GS12-442. On May 30, 2013, Petitioner sought immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §§16-11-410 to -450, in a hearing held before the Honorable Brooks P. Goldsmith. Judge Goldsmith found that Petitioner was not entitled to immunity and a timely notice of intent to appeal that ruling was filed with the South Carolina Court of Appeals. In a written order filed December 17, 2013, the Court of Appeals dismissed the appeal. (App. p. 25).

On January 28, 2014, Petitioner appeared before the Honorable Brian M. Gibbons and pled guilty to voluntary manslaughter. Michael Lifsey represented Petitioner at the guilty plea. Julie Hall prosecuted the case. Pursuant to a recommendation by the State, Judge Gibbons sentenced Petitioner to fifteen (15) years. Petitioner did not appeal his sentence and conviction.

On April 17, 2014, Petitioner filed an application for post conviction relief. The State filed a return on June 26, 2014. On July 28, 2014, an evidentiary hearing was held before the Honorable W. Jeffrey Young. Nathan Sheldon represented Petitioner at the PCR hearing. Croom Hunter represented the State. In a written order signed September 16, 2014, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on October 20, 2014. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea was rendered involuntary by the fact that the plea judge failed to advise Petitioner that the guilty plea waived his right to appeal a previous denial of immunity pursuant to the Protection of Person and Property Act.

On May 30, 2013, prior to the guilty plea, Petitioner sought immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §§16-11-410 to -450 [the Act], in a hearing held before the Honorable Brooks P. Goldsmith. Judge Goldsmith found that Petitioner was not entitled to immunity. According to plea counsel's testimony at the PCR hearing, Judge Goldsmith did not prepare a written order denying immunity. (App. p. 60, lines 15-25). The hearing held before Judge Goldsmith was prior to this Court's opinion in State v. Isaac, 405 S.C. 177, 185, 747 S.E.2d 677, 681 (2013) clarifying State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011) and holding that a request for immunity under the Act is not immediately appealable. Pursuant to Duncan counsel filed a notice of intent to appeal Judge Goldsmith's order denying immunity. (App. p. 61, lines 1-14). While the appeal was still pending on August 21, 2013, this court decided Isaac.

According to plea counsel's testimony at the PCR hearing, on November 26, 2013, the South Carolina Court of Appeals requested a written order of the denial of immunity. (App. p. 61, lines 22-23). Counsel testified that he did not respond to the Court of Appeals in writing but instead left a phone voice mail message indicating that Judge Goldsmith did not issue a written order. (App. p. 61, line 23 – p. 62, lines 1-10). There is no indication in the record that counsel attempted to obtain a written order from Judge Goldsmith pursuant to the Court's request. In a written order dated December 17, 2013, the Court of Appeals dismissed the appeal, noting that the Court had not received a response from counsel in regard to the request for a written order but also citing State v. Isaac.

On January 28, 2014, Petitioner appeared before the Honorable Brian M. Gibbons and pled guilty to voluntary manslaughter. During the plea colloquy the following exchange took place between the judge and Petitioner:

Q: Okay. Now are you satisfied with you lawyer?

A: Yes, sir.

Q: Has he answered all your questions?

A: Yes, sir.

Q: Have you been over your case in detail?

A: Yes, sir.

Q: Have you explored every defense you have imaginable?

A: Yes, sir.

Q: Okay. Do you understand all your constitutional rights?

A: Yes, sir.

Q: Do you understand that when you plead guilty you waive, that means you give up those rights?

A: Yes, sir.

(App. p. 5, line 12- p. 6, lines 1-3). The plea judge then asked Petitioner about his right to a trial by jury, his right to remain silent and his right to confront witnesses. The prior immunity hearing before Judge Goldsmith and the appeal from Judge Goldsmith's ruling was not mentioned by the judge prior to him accepting the guilty plea. Defense counsel discussed the immunity hearing after the judge accepted Petitioner's guilty plea. (App. p. 12, lines 5-14). Petitioner was not informed during the plea colloquy that by pleading guilty he waived the right to appeal Judge Goldsmith's finding that he was not entitled to immunity from prosecution.

In the order of dismissal the PCR judge, addressing the allegation that the guilty plea was involuntary, made a credibility determination and then wrote, "This Court additionally finds that Applicant was well aware that he waived any challenges to the outcome of the immunity hearing by pleading guilty." (App. pp. 87-88). The PCR judge erred. The guilty plea was rendered

conditional guilty pleas in South Carolina." (App. p. 78, lines 2-5).
up any claim of self defense or immunity or anything else to prosecution, because there's no the immunity determination counsel testified, "Yes, sir. We discussed in detail that he was giving later asked about whether he advised Petitioner that by pleading guilty he waived the right to appeal was aware that any plea, that's the end of any defenses." (App. p. 62, line 22 - p. 63, line 1). When then claim a defense. We don't have conditional guilty pleas in South Carolina. So he certainly answered, "Yes, yes. Well, I told him he waived all defenses. I mean, you can't plead guilty and waiving any challenges to the stand your ground?" (App. p. 62, lines 20-21). Plea counsel The State asked plea counsel, "Did you tell Mr. Isom prior to his plea that he would be (App. p. 55, line 22 - p. 56, lines 1-3).

law.
A: He didn't say nothing about waiving no rights on my appeal, on my stand-my-ground
Q: Okay. Even though the judge told you that you were waiving all those rights?

A: Yes.

Q: Okay. So you believe that you could still appeal your stand-you-ground hearing?

51, lines 1-16). During the PCR the following took place between the State and Petitioner:
pleading guilty he waived the right to appeal the immunity determination. (app. p. 50, line 22 - p.
During the PCR hearing Petitioner testified that plea counsel did not advise him that by

involuntary by the trial judge's failure to advise Petitioner that by pleading guilty he was waiving his right to appeal the immunity determination.

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 v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 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, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). 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, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "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." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the

constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and 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.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

The record in the present case fails to reflect that Petitioner knowingly and voluntarily entered the guilty plea. Petitioner was unaware that by entering the guilty plea he waived his right to appeal the immunity decision. There is a reasonable probability that if Petitioner had known the guilty plea waived his right to appeal the immunity decision, he would not have pled guilty and instead would have insisted on going to trial.

2. The PCR judge erred in refusing to find counsel ineffective for failing to properly perfect the immunity issue for appeal by not obtaining a written order from Judge Goldsmith denying immunity.

Plea counsel admitted at the PCR hearing that he failed to provide the Court of Appeals with a written order of Judge Goldsmith's finding that Petitioner was not entitled to immunity, as requested by the Court of Appeals. (App. p. 61, line 23 – p. 62, lines 1-10). Counsel's failure to provide the Court of Appeals with a written order was one of the reasons for the dismissal of the appeal. (App. p. 25). State v. Isaac, 405 S.C. 177, 185, 747 S.E.2d 677, 681 (2013) should not have prevented an immediate appeal in the present case because Isaac was decided after the notice of intent to appeal was filed in the present case.

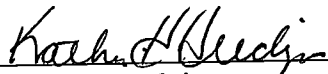
In the order of dismissal the PCR judge wrote, "This Court further finds that Counsel did not commit any error in his handling of Applicant's immunity hearing and the appeal thereafter. This Court finds, additionally, that even if Counsel did commit any errors in his handling of the immunity hearing, any error would be harmless because Applicant was well aware that he was waiving any further challenge to the ruling by entering his guilty plea." (App. p. 86). The PCR judge erred. As discussed in issue one, Petitioner did not knowingly and voluntarily waive the right to appeal the immunity decision.

Applying the Strickland factors as discussed in issue one, counsel was ineffective in failing to properly perfect the immunity issue for appeal by not obtaining a written order from Judge Goldsmith denying immunity, as requested by the Court of Appeals. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that if counsel had properly perfected the appeal, the Court of Appeals would have decided the immunity issue in Petitioner's favor.

CONCLUSION

Based on the above arguments the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHESTER COUNTY
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

ANTHONY O. ISOM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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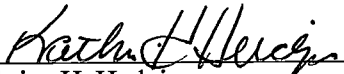
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony O. Isom 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 28, 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 Anthony O. Isom.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of June, 2015

STATE OF SOUTH CAROLINA

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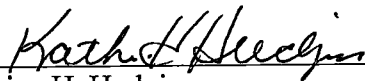
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APPELLATE CASE NO. 2014-002269

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 J. Croom Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Anthony O. Isom, #356819, at Lieber Correctional Institution this 4th day of June, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of June, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.