

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Anderson County
Carmen T. Mullen, Circuit Court Judge

DANIELLE BOWEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000429

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to investigate an accident theory of the case?

STATEMENT

On October 15, 2009, petitioner appeared before the Honorable J. Cordell Maddox, Jr. in Anderson County and pled guilty to homicide by child abuse. She was sentenced to 25 years suspended upon service of 20 years with 5 years probation thereafter. Andrew Potter, Esq. was plea counsel. Kristen Reeves, Esq. was the assistant solicitor. (App. p. 1- p. 29)

On March 15, 2010, petitioner filed an application for post-conviction relief. (App. p. 30- p. 37) Respondent filed a return dated May 13, 2010. (App. p. 38- p. 41) On December 1, 2014, an evidentiary hearing was held before the Honorable Carmen T. Mullen. Petitioner was present and was represented by Hugh Welborn, Esq. Respondent was represented by John W. Whitmire, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 42- p. 66) On February 6, 2015, Judge Mullen issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 67- p. 77)

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to investigate an accident theory of the case. In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution 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). To prove prejudice, petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

Counsel also has a duty to investigate. He should investigate witnesses and make an independent investigation of the facts and circumstances of the case. And v. Catoe, 372 S.C. 318, 331-332, 642 S.E.2d 590, 597 (2006) In And, counsel was held ineffective in challenging gunshot residue evidence. He failed to hire an independent expert to look at the evidence.

In the present case, petitioner testified at the evidentiary hearing that counsel should have investigated the incident as an accident. She was chasing her 19 month-old son through the house

and her little girl was nearby and she fell on her. The State accused her of putting her on the floor and then stepping on her. (App. p. 47, l. 24- p. 49, l. 4) Plea counsel was ineffective in failing to investigate this aspect of the case.

CONCLUSION

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

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of June, 2015.

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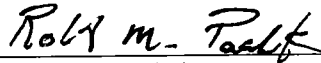
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Danielle Bowen 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 December 1, 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 Danielle Bowen.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of June, 2015

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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 and Danielle Bowen, #334349, at Leath Correctional Institution this 11th day of June, 2015.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of June, 2015.

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