

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County

S.C. Supreme Court

Deadra L. Jefferson, Circuit Court Judge

TRAVIS COLSTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001009

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to advise petitioner of the charges he was facing, the associated penalty ranges, and the consequences of his plea agreement which rendered his plea involuntary?

STATEMENT

On July 24, 2012, petitioner appeared before the Honorable Lee S. Alford in Cherokee County and pled guilty to trafficking in crack cocaine 10-28 grams, second offense, and possession with intent to distribute marijuana. Respective sentences of 15 years and 5 years were imposed. Michael A. Berry, Esq. was plea counsel. Kimberly Leskanic, Esq. was the assistant solicitor. (App. p. 1- p.23)

Petitioner filed an application for post-conviction relief on April 11, 2013. (App. p. 24- p. 30) Respondent filed a return dated March 18, 2014. (App. p. 31- p. 37) An evidentiary hearing was held on January 15, 2015, before the Honorable Deadra L. Jefferson. Petitioner was present and was represented by Leah B. Moody, Esq. Respondent was represented by Suzanne H. White, Assistant Attorney General. Petitioner testified at the hearing and Michael Berry testified via telephone. (App. p. 38- p. 94) On March 31, 2015, Judge Jefferson issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 95- p. 120)

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to advise petitioner of the charges he was facing, the associated penalty ranges, and the consequences of his plea agreement all of which rendered his plea involuntary.

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. 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 or failure to investigate. 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); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007); Stalk v. State, *supra*. The post-conviction relief court will normally consider the guilty plea transcript as well as the evidence presented at the post-conviction relief hearing in looking at guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the voluntariness of the plea. The difference "between a valid guilty plea and a invalid

guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). 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. The Court went on to note:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Mallory v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Third, is the right to confront one’s accusers. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923. We cannot presume a waiver of these three important federal rights from a silent record.

395 U.S. at 243, 89 S. Ct. 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.

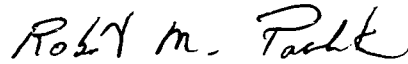
In this case, petitioner testified at the evidentiary hearing that he was given an offer of 15 years. He said he signed off on it because he did not feel he had a choice. If he had gone to trial he would be facing life without parole. (App. p. 56, lines 15-22) Counsel never took into account what petitioner told him about his case. (App. p. 57, lines 5-7) Counsel did not say anything about the incident reports. (App. p. 58, lines 2-5) He did not attempt to contact witnesses. (App. p. 60, lines 7-9) They never discussed the nature of the charges. (App. p. 65,

lines 9-11) Petitioner said he did not understand the sentencing ranges. He thought his original charge was first offense trafficking, 28 to 100 grams. He thought he was facing 7 to 25 years and they were going to give him 15 years. He did not understand that they were dropping the charge to 28 grams and making it a second offense. He said if it had been a first offense, he would have been eligible for parole sooner. He was also not clear on enhancement. (App. p. 66, line 4- p. 67, line 6) He could not understand the serious offenses and the strikes. (App. p. 68, lines 19-22) As can be seen from petitioner's own testimony all of this led to an involuntary guilty plea.

CONCLUSION

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

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of August, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

TRAVIS COLSTON,

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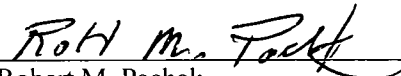
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Travis Colston 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 January 15, 2015. 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 Travis Colston.

Respectfully submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of August, 2015

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IN THE SUPREME COURT

Certiorari to Spartanburg County
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TRAVIS COLSTON,

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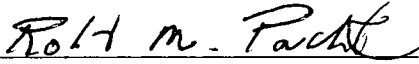
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APPELLATE CASE NO. 2015-001009


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 Alicia Olive, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Travis Colston, #240843, at Perry Correctional Institution this 25th day of August, 2015.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of August, 2015.


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