

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County
Deadra L. Jefferson, Circuit Court Judge

KEITH JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000819

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in misadvising petitioner that if he pled guilty to assault and battery of a high and aggravated nature it would be treated as a nonviolent offense?

STATEMENT

On June 28, 2012, petitioner appeared before the Honorable Larry B. Hyman, Jr. in Spartanburg County and pled guilty to assault and battery of a high and aggravated nature (ABHAN). Petitioner was sentenced to 20 years, suspended to 15 years imprisonment and 5 years of probation. John G. Reckenbeil, Esq. was plea counsel. Barry Barnette, Esq. was the solicitor. (App. p. 1- p. 53)

Petitioner filed an application for post-conviction relief on May 9, 2013. (App. p. 54- p. 60) Respondent filed a return dated March 20, 2014. (App. p. 61- p. 65) An evidentiary hearing was held on January 14, 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, Shena Anderson, on John Reckenbeil, Esq. testified at the hearing. (App. p. 66- p. 116) On March 31, 2015, Judge Jefferson issued an order denying and dismissing the application for post-conviction relief. (App. p. 117- p. 135)

This petition follows.

ARGUMENT

Plea counsel was ineffective in misadvising petitioner that if he pled guilty to assault and battery of a high and aggravated nature it would be treated as a nonviolent offense.

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.

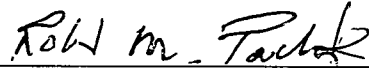
Petitioner's sole complaint in this PCR action was that plea counsel promised him that if he pled guilty to assault and battery of a high and aggravated nature as a lesser included offense of attempted murder for which he was indicted, the sentence would be treated as nonviolent. He said this was his big concern when looking at the plea offer. He told plea counsel he was not pleading to a violent sentence. Counsel told him it was not violent. He showed petitioner the paper where the box was marked nonviolent. Petitioner signed the paper (App. p. 78, lines 6- p. 79, line 4) When told that the sentencing sheet showed his sentence to be violent and serious, petitioner said that was not the paper he signed. (App. p. 81, lines 9-19) He again said counsel told him his sentence would be nonviolent. (App. p. 80, lines 12-14) The PCR judge said the original sentencing was marked violent and serious. (App. p. 81, line 25- p. 82, line 23) Petitioner reiterated that counsel told him that the sentence for assault and battery of a high and aggravated nature would be nonviolent. (App. p. 84, lines 6-11)

As noted above, misadvice as to sentencing constitutes ineffective assistance of counsel. Hinson v. State; Ray v. State. Petitioner has shown prejudice because he testified he relied on the erroneous advice. Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991)

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 26th day of August, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

KEITH JOHNSON,

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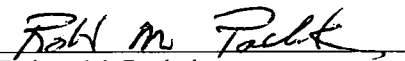
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Keith Johnson 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 14, 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 Keith Johnson.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of August, 2015

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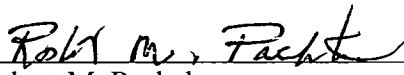
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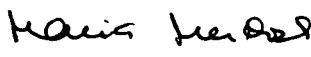
CERTIFICATE OF SERVICE

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 Alicia Olive, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Keith Johnson, #252251, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC, 29162, this 26th day of August, 2015.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of August, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: July 3, 2023.