ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to York County

Alison Renee Lee, Circuit Court Judge

JOHN T. ROBINSON, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2015-000412

JOHNSON PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
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ISSUE PRESENTED

Did the PCR judge err by finding defense counsel provided effective representation where Petitioner had served seven months in jail awaiting trial for criminal domestic violence because he could not afford his $15,000 bond, counsel refused to request a lower bond, and Petitioner wanted a jury trial, since Petitioner pled "no contest" to the lesser included offense of third-degree assault and battery only because he could not bond out of jail and counsel advised him that he would be sentenced to time served if he accepted the plea offer?

STATEMENT OF THE FACTS

On December 12, 2013, the York County Grand Jury indicted Petitioner for criminal domestic violence (CDV), second offense. App. 65. On March 12, 2014, Petitioner pled "no contest" to third-degree assault and battery before the Honorable Paul Burch. App. 1. Ashley Anderson represented Petitioner. Chris Jones represented the State. App. 1.

According to the solicitor, on August 9, 2013, Marilyn Robinson called law enforcement to the residence which she shared with Petitioner in York County, South Carolina. App. 7. Robinson and Petitioner were married. App. 7. When the police arrived Robinson was "smoking a cigarette on the porch." App. 7. She told officers that when she tried to go into the house, Petitioner "became angry, got into a shoving match, he hit her on the head causing a lump on her forehead." App. 7. Officers took photos of the alleged injury.

Defense counsel explained to the plea judge that she and Petitioner were prepared to go to trial. She stated that "there were some differences in Ms. Robinson's statements to the police that were recorded on an in-car video." App. 8, lines 5 – 7. Petitioner "was also prepared . . . to testify on his own behalf in Court." App. 8, lines 8 – 9.

Counsel also stated that Petitioner was currently on probation and his plea to the third-degree assault and battery charge "would be the sole violation." App. 8, lines 12 – 15. Petitioner's probation agent informed the court that in May of 2013, Petitioner received a sentence of ten years suspended to probation for eighteen months for possession with intent to distribute cocaine base. App. 9, lines 14 – 18. The agent told the judge that a partial revocation for the time that Petitioner had already served in jail awaiting his trial for the CDV charge would be acceptable with the department. App. 9, lines 18 – 22.

Judge Burch sentenced Petitioner to time served for the third-degree assault and battery charge, revoked Petitioner's probation for the amount of time that he served, and continued his probation for one year to be terminated upon full payment of all fines. App. 10, lines 1 – 5. Petitioner did not appeal his plea or sentence.

On April 16, 2014, Petitioner filed a PCR application. App. 12. On July 18, 2014, Respondent filed its return requesting an evidentiary hearing. App. 21. On November 17, 2014, a PCR hearing was held before the Honorable Alison Renee Lee. App. 25. W. Michael Hemlepp represented Petitioner. J. Rutledge Johnson represented the State. App. 25.

During the PCR hearing, Petitioner explained that his bond was set at $15,000 and defense counsel refused to file a motion requesting the court to consider reducing Petitioner's bond. App. 33 – 34. Petitioner mailed counsel several documents in which he requested a bond reduction hearing. However, counsel "refused [him] each time." App. 33, lines 5 – 21. Petitioner stated that counsel "kept denying [him] over and over again for a bond, for a bond reduction hearing." App. 33, lines 9 – 10. Petitioner contended that counsel should have brought him before the judge to let the judge make the determination of whether he was entitled to a bond reduction hearing instead of counsel making the determination. App. 33, lines 11 – 15.

Petitioner also stated that defense counsel should not have advised him to plead guilty for the simple reason that he would be sentenced to time served. App. 34, lines 18 – 20. Petitioner explained that he had a chance of winning at trial, but because he was advised to plead to the lesser offense of third degree assault and battery, he lost the chance to win at trial and not have any conviction on his record. App. 34, line 20 – App. 35, line 9.

Defense counsel stated that Petitioner maintained his innocence and wanted to go to trial. App. 42, line 20. In fact, he rejected the first offer from the State to plead guilty to first offense

CDV instead of the second offense CDV for which he was charged. App. 41, line 15 – App. 42, line 16. Counsel explained that because Petitioner had a "fairly lengthy criminal record," she did not think $15,000 "was an unreasonable bond under the circumstances." App. 43, lines 9 – 12.

Defense counsel also explained that she was prepared to go to trial. App. 45, line 17. According to counsel, on the day of trial, the judge asked the attorneys whether the case can be worked out. App. 44, lines 6 – 11. The solicitor agreed to allow Petitioner to plead guilty to the lesser offense of third-degree assault and battery. App. 44, lines 13 – 16. The judge also agreed to only revoke the amount of time that Petitioner had already served in jail on the CDV charge and continue Petitioner on probation. App. 44, lines 16 – 19.

On rebuttal, Petitioner affirmed his desire to go to trial:

> "[T]he complaint is that we should not have plead (sic) guilty in this charge to a lesser included offense as I've already stated. We should have gone to trial. It's what I wanted to do. I stayed in jail seven months. All this time for a trial and then we get to Court we got to plead guilty to a charge for a lesser included offense."

App. 48, lines 10 – 15.

After Petitioner's rebuttal testimony, Judge Lee denied Petitioner's application on the record. App. 57. The PCR judge stated that counsel "may have had a responsibility or duty to at least raise the [bond] issue before the Court" and the prejudice to Petitioner "was that he remained incarcerated for a period of time longer than ultimately what he would have plead (sic) to." App. 52, lines 20 – 25. However, the judge did not find Petitioner was prejudiced "as it relates to the charge that was pending against him of criminal domestic violence, second offense." App. 53, lines 5 – 8. The judge found that Petitioner "failed to meet his burden showing that counsel was ineffective." App. 55, lines 22 – 23.

On January 27, 2015, Judge Lee issued an order of dismissal. App. 59. The PCR judge found that defense counsel provided effective representation. App. 62. The judge found that Petitioner's claim that counsel was ineffective for not filing a motion for reduction of his bond was without merit. App. 62. Further, the judge wrote that Petitioner made the decision to plead "freely and voluntarily." App. 62. The judge denied Petitioner's application. App. 63.

Petitioner appealed Judge Lee's order. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding defense counsel provided effective representation where Petitioner had served 215 days in jail awaiting trial for criminal domestic violence because he could not afford his $15,000 bond, counsel refused to request a lower bond, and Petitioner wanted a jury trial, since Petitioner pled "no contest" to the lesser included offense of third-degree assault and battery only because he could not bond out of jail and counsel advised him that he would be sentenced to time served if he accepted the plea offer.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). In the context of a guilty plea, a court will conduct a two-prong test when determining whether defense counsel's assistance was ineffective. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (citing Strickland, 466 U.S. at 688). "A plea of nolo contendere is for all practical purposes treated as a guilty plea." Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)).

First, an applicant must show that counsel's performance was deficient. Hill, 474 U.S. at 58 – 59. Whether counsel was "deficient" turns on whether the guilty plea was entered voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). See Hill, 474 U.S. at 56 (1985) ("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.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

Second, the applicant must show that he was prejudiced by counsel's deficient performance during the guilty plea process. Hill, 474 U.S. at 59. Specifically, the applicant must show 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." Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

When a court is evaluating guilty plea issues, "it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007); Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

Under S.C. Code Ann. Section 17–55–55, "circuit courts may consider motions regarding reconsideration of bond for general sessions offenses set by summary court judges upon motions filed with the clerks of court." In determining conditions of a defendant's release from jail "that will reasonably assure appearance," a court may consider "(1) family ties; (2) employment; (3) financial resources; (4) character and mental condition; (5) length of residence in the community; (6) record of convictions; (7) record of flight to avoid prosecution or failure to appear at other court proceedings." S.C. Code Ann. § 17-15-30.

Here, counsel should have filed a motion requesting a bond reduction for Petitioner. While Petitioner did have a criminal record and was on probation at the time of his arrest for the CDV charge, a circuit court could have determined that Petitioner's bond was, in fact, unreasonable based on the factors to be considered in S.C. Code Ann. § 17-15-30. Petitioner was gainfully employed at the time of his arrest for the CDV charge. Because he had minimal financial resources and health problems, Petitioner was not a flight risk. See App. 8, lines 20 – 25. Further, he adamantly denied the allegations against him.

Petitioner had denied the domestic violence allegations from the beginning and even rejected the State's original plea offer to plead to CDV first offense. Counsel admitted during

Petitioner's plea that they were prepared for trial and that there were differences in the alleged victim's statements which were recorded on the police in-car video.

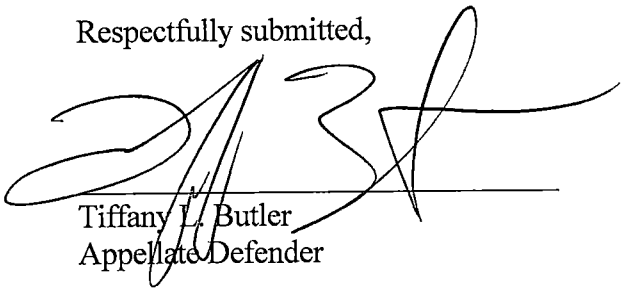
The PCR judge even stated on the record that counsel may have had a responsibility to file a motion to attempt to get Petitioner's bond lowered. Had counsel filed a motion requesting the circuit court to reconsider Petitioner's bond, there is a reasonable likelihood that the bond would have been reduced. Petitioner would not have been forced to sit in jail because he could not afford to pay his bond. Petitioner would not have been forced to accept a plea offer while knowing he was innocent and that he could prevail at trial. Accordingly, Petitioner would not have the assault and battery conviction on his record.

If defense counsel had filed a motion requesting the court to reconsider and lower Petitioner's bond, like he had requested numerous times, Petitioner would have bonded out of jail, would not have pled "no contest" to third-degree assault and battery, and would have proceeded to trial.

CONCLUSION

For the reasons argued above, Petitioner John Robinson respectfully requests this Court to grant his petition for writ of certiorari.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
ALISON RENEE LEE, CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Thomas Robinson 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 November 17, 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 John Thomas Robinson.

Respectfully submitted,

Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of September, 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 J. Rutledge Johnson, Esquire and John Thomas Robinson, 364 State Street, Rock Hill, S.C. 29730, at this 14th day of September, 2015.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

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

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.