

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

D. Craig Brown, Circuit Court Judge

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S.C. Supreme Court

LEVON D. BLACK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001315

JOHNSON PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	9
PETITION TO BE RELIEVED AS COUNSEL.....	10

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel failed to properly communicate with Petitioner, review the discovery materials with him, advise him of the elements of the charges against him, and investigate his case, before advising him to plead guilty to the charges against him?

STATEMENT

A Florence County Grand Jury indicted Petitioner at the October 2011 term of General Sessions for two counts of armed robbery and two counts of possession of a weapon during the commission of a violent offense. App. 67-69. Petitioner pled guilty to both counts of armed robbery on March 12, 2012 before the Honorable Thomas A. Russo. App. 1. The weapon offenses were dismissed as part of the plea deal. App. 8, ll. 10-15. Assistant Solicitor Patricia Parr represented the state, and Richard Strobel represented Petitioner. App. 1. Petitioner was sentenced by Judge Russo to ten years' imprisonment on each count to be served concurrently. App. 12, l. 20 – 13, l. 4. Petitioner did not appeal.

On February 15, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 15-21. The state filed a return to this application dated May 8, 2013. App. 22-26. The matter proceeded to an evidentiary hearing on April 13, 2015 before the Honorable D. Craig Brown. App. 27. Assistant Attorney General J. Croom Hunter represented the state, and Jonathan Waller represented Petitioner. App. 27. By order dated May 26, 2015, Judge Brown denied Petitioner relief. App. 58-66.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel failed to properly communicate with Petitioner, review the discovery materials with him, advise him of the elements of the charges against him, and investigate his case, before advising him to plead guilty to the charges against him.

Guilty Plea

At the beginning of Petitioner's guilty plea, the assistant solicitor informed the court that Petitioner was pleading guilty to two counts of armed robbery with a sentence recommendation of ten years' imprisonment on each count to be served concurrently. She also told the court that the state was dismissing the two related weapon charges against Petitioner in exchange for his guilty plea. Judge Russo then advised Petitioner that armed robbery carries a mandatory minimum of ten years and up to thirty years imprisonment, and that it is classified as a "most serious" and "violent" offense. With this knowledge, Petitioner stated that he wished to plead guilty. App. 4, l. 19 – 5, l. 6. In a routine plea colloquy, the judge also informed Petitioner of his constitutional rights, including his right to a trial by jury and his right to remain silent. App. 5, l. 21 – 8, l. 4. Petitioner indicated that he wished to waive his rights and plead guilty. App. 8, ll. 5-9.

When asked for the state's version of the facts, the assistant solicitor told the court that on January 5, 2011 and May 29, 2011 the Papa John's Pizza on Cherokee Road in Florence was robbed. During each robbery, an armed intruder presented a firearm and demanded money from the restaurant's employees. During the January robbery, the intruder fled with over nine hundred dollars in cash. According to the solicitor, Petitioner was arrested shortly after the second robbery and gave a full confession admitting he robbed the restaurant on both occasions. App. 9, l. 17 – 10, l. 19.

After listening to the facts, the court found a factual basis to support the guilty plea and that Petitioner's decision to plead guilty was freely, voluntarily, and intelligently made. App. 11, ll. 1-5. Judge Russo ultimately went along with the state's sentence recommendation and sentenced Petitioner to the mandatory minimum of ten years imprisonment on each count of armed robbery and ordered the sentences be served concurrently. App. 12, l. 20 – 13, l. 4.

PCR Hearing

During the PCR hearing, Petitioner testified he was originally represented by William Vickery ("Vick") Meetze. However, the two did not get along because Meetze was "rude" and "inconsiderate." App. 31, l. 19 – 32, l. 1. As a result, Petitioner's family eventually hired Richard Strobel to represent him. App. 31, ll. 13-16. Petitioner testified that Strobel never visited him while he was in pretrial detention and that he met Strobel for the first time in the courtroom before his guilty plea. The only contact Petitioner had with Mr. Strobel's office was the Friday before his guilty plea when Strobel's assistant came to visit him at the detention center and told him "to have the rest of his money ready when we go to court Monday." App. 32, l. 2 – 33, l. 2.

Petitioner said when he spoke with Strobel on the morning of his guilty plea, Strobel told him "to be ready to plea to 15 years." However, Assistant Solicitor Parr had already offered to recommend a sentence of ten years' imprisonment if Petitioner pled guilty. App. 33, ll. 3-13. Petitioner testified that Strobel was "adamant about [him] taking 15 years," and he could not understand why Strobel was "trying to get me to sign for 15" when Parr had already offered to recommend a sentence of ten years. App. 33, ll. 3-13.

Petitioner also testified that Strobel told him the day of his guilty plea that the assistant solicitor was going to dismiss the two related weapon charges. Petitioner said he did not understand why he was still going to plead guilty to an armed robbery "if the gun charges [were] being

dismissed” and Strobel did not take the time to explain it to him. Petitioner believed that the armed robbery charges should have been reduced since the weapon offenses were being dismissed. App. 34, ll. 9-15; App. 36, ll. 2-13.

Lastly, Petitioner testified that Strobel never reviewed the discovery materials with him and that he “basically had to learn about everything really on my own just reading it.” App. 35, ll. 5-21. Moreover, Petitioner maintained that Strobel failed to “[c]ommunicate with me, let me know what’s going on” and “[properly] investigate the case.” App. 37, l. 22 – 38, l. 2.

Plea counsel, Richard Strobel, testified he was retained to represent Petitioner after Petitioner’s girlfriend came into his office. He said he met with Petitioner several times before his guilty plea and that Petitioner signed the retainer agreement. App. 45, l. 10 – 46, l. 4. Strobel further maintained that he received the discovery materials from the solicitor’s office and that either he or his assistant, Skip Duffie, reviewed the documents with Petitioner before he pled guilty. App. 46, ll. 5-11. Moreover, Strobel said he reviewed with Petitioner the elements of armed robbery, his constitutional rights, and the fact that armed robbery was a “most serious” offense and “violent” offense and what those classifications meant. App. 47, l. 18 – 48, l. 24. He also said Petitioner never provided him “with any leads or witnesses to interview.” App. 47, ll. 21-24.

Lastly, Strobel maintained that Petitioner never wanted to proceed to trial and was “insistent upon getting a deal and pleading guilty.” App. 46, ll. 13-17; App. 48, ll. 11-15.

Order of Dismissal

The PCR court found Petitioner’s allegation that his guilty plea was involuntary to be without merit. The court further found Petitioner knowingly, intelligently, and voluntarily pled guilty and that he “presented to no credible evidence to the contrary.” App. 63-64. Therefore, the court denied Petitioner’s application and dismissed it with prejudice. App. 66.

Discussion

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel failed to properly communicate with Petitioner, review the discovery materials with him, advise him of the elements of the charges against him, and investigate his case, before advising him to plead guilty to the charges against him.

The difference "between a valid guilty plea and an 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 longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59. "[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

Moreover, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord

defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland, 466 U.S. at 685 (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275-276 (1942)).

Petitioner’s decision to plead guilty was not freely, voluntarily, and intelligently made because of the deficient performance of counsel. Plea counsel wholly failed to communicate with Petitioner or visit him at the detention center before advising him to plead guilty. See App. 32, ll. 2-6. Counsel also never reviewed with Petitioner the evidence against him which forced Petitioner to read through the discovery materials on his own and decipher the quality or sufficiency of the state’s case against him. See App. 35, ll. 5-21. Moreover, counsel also failed to advise Petitioner of the elements of the charges against him or do any sort of investigation. See App. 37, l. 22 – 38, l. 8.

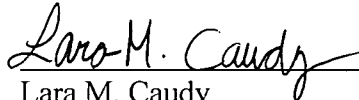
Petitioner was prejudiced by counsel’s deficient performance because if plea counsel would have properly communicated with Petitioner, reviewed the discovery materials with him, and investigated his case, perhaps Petitioner would have decided not to plead guilty and insisted on going to trial or perhaps counsel could have negotiated a more favorable plea deal on Petitioner’s behalf.

Based on the foregoing argument, this Court should reverse the decision of the PCR court and grant Petitioner relief.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
D. CRAIG BROWN, CIRCUIT COURT JUDGE

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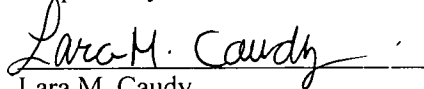
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Levon D. Black 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 April 13, 2015. 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 one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Levon D. Black.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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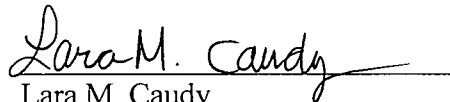
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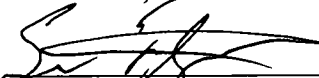
CERTIFICATE OF SERVICE

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 J. Croom Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Levon D. Black, #350129, at Turbeville Correctional Institution, P.O. Box 252, Turbeville, SC 29162 this 2nd day of October, 2015.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of October, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.