

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

Eugene C. Griffith, Jr., Circuit Court Judge

HAROLD WATTS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000812

JOHNSON PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to challenge the assistant solicitor's improper contact with two potential defense witnesses before Petitioner pled guilty?

STATEMENT

A Greenville County Grand Jury indicted Petitioner at the September 2012 term of General Sessions for attempted murder and first degree burglary. App. 99-100. Petitioner pled guilty as indicted on April 8, 2013 before the Honorable Letitia Verdin. App. 1. Assistant Solicitor Allen Fretwell represented the state, and James Bannister represented Petitioner. App. 1. Petitioner was sentenced by Judge Verdin to thirty-five years imprisonment for first degree burglary and thirty years concurrent for attempted murder. App. 20, ll. 3-5.

Petitioner filed a *pro se* notice of appeal, but failed to timely serve the notice of appeal upon the solicitor or the attorney general. As a result, the Court of Appeals dismissed his appeal pursuant to Rule 221(b), SCACR. App. 22-23.

On February 28, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 25-33. The state filed a return to this application dated August 22, 2014. App. 34-39. On September 5, 2014, Petitioner filed a *pro se* Memorandum in Support of Post-Conviction Relief. App. 40-45. The matter proceeded to an evidentiary hearing on December 16, 2014 before the Honorable Eugene C. Griffith, Jr. App. 46. Assistant Attorney General Karen C. Ratigan represented the state, and Caroline M. Horlbeck represented Petitioner. App. 46. By order dated February 10, 2015, Judge Griffith denied Petitioner relief. App. 90-98.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to challenge the assistant solicitor's improper contact with two potential defense witnesses before Petitioner pled guilty.

Guilty Plea

The assistant solicitor informed the court that Petitioner was pleading guilty to attempted murder and first degree burglary as indicted. App. 3, ll. 5-8. Judge Verdin then advised Petitioner that, as part of his "willingness to plead" guilty, "the State has taken away its intent to seek life without the possibility of parole against [him]." During a routine colloquy, the court advised Petitioner of the sentencing range for each offense and his constitutional rights, including his right to remain silent and his right to a jury trial. App. 4, l. 5 – 5, l. 12. With knowledge of his constitutional rights, Petitioner stated he wished to plead guilty to both charges. App. 5, ll. 13-15.

The assistant solicitor then told the court the state's version of the facts. He explained that Petitioner and Mary Darnell first met when Petitioner stopped by her home and asked if he could cut her grass. Petitioner later performed other odd jobs for Darnell and over time the two developed a romantic relationship. Petitioner eventually moved into Darnell's mobile home. The solicitor maintained that after months of living together, Darnell "began to feel trapped" in the relationship and asked Petitioner to move out of her home. However, after moving out, Petitioner continued to call Darnell and often accused her of being with someone else. This caused Darnell to "cut off all phone contact" with Petitioner.

The solicitor maintained that on December 2, 2011, Petitioner went to Darnell's mobile home at three o'clock in the morning, forced open the front door, and chased her into the backyard where he "dowse[d] her with gasoline" and set her on fire. App. 7, l. 1 – 9, l. 5. The solicitor

further claimed that about thirty minutes later Petitioner walked into a convenience store, told the clerk he had set his girlfriend on fire, and asked the clerk to call 911. Petitioner allegedly told the 911 operator that his girlfriend “put me down for her sister’s boyfriend, and I just couldn’t take it, so I set her on fire.” App. 9, l. 6 – 10, l. 6.

When the solicitor concluded, Petitioner’s counsel informed the court that Petitioner disagreed with some of the facts as recited by the state, but that none of his disagreements “would implicate the elements of the offense.” App. 11, ll. 1-4. Judge Verdin ultimately found a substantial factual basis for the plea and accepted Petitioner’s guilty plea as being freely and voluntarily made. App. 12, ll. 7-11. The court sentenced Petitioner to thirty-five years imprisonment for first degree burglary and thirty years concurrent for attempted murder. App. 20, ll. 3-5.

PCR Hearing

At his PCR hearing, Petitioner testified that before he pled guilty the assistant solicitor contacted several witnesses that were listed on the defense witness list by letter and told them they needed to report to the solicitor’s office for a meeting in reference to Petitioner’s case. Petitioner said the solicitor never informed Petitioner or his trial counsel of this meeting. App. 61, l. 17 – 62, l. 3. He maintained that these witnesses, who he never identified, were supportive of his decision to proceed to trial before they met with the solicitor, but after their meeting with the solicitor they were concerned and believed Petitioner should plead guilty. Petitioner testified his witnesses were influenced by the solicitor who informed them that if Petitioner was found guilty at trial, he would be sentenced to life without parole. App. 62, ll. 4-11.

After meeting with the assistant solicitor, these witnesses visited Petitioner at the local detention center where he was incarcerated and discussed with Petitioner whether he should plead guilty to the charges or proceed to trial. Petitioner said his witnesses told him he should plead guilty

because of the risk of being sentenced to life without parole if he proceeded to trial and that he ultimately decided to plead guilty based on his witnesses' advice. App. 62, ll. 12-24.

Moreover, Petitioner explained that once he found out the solicitor had met with his witnesses, he discussed the matter with his trial counsel. He said his counsel told him the solicitor was permitted to speak with any defense witness and refused to file any sort of motion alleging prosecutorial misconduct based on the solicitor's actions. App. 62, l. 25 – 63, l. 12.

In support of his PCR application, Petitioner called Dr. James Richardson as a witness. Dr. Richardson first met Petitioner about two years before he was incarcerated on these charges. Petitioner had worked as a caregiver for Richardson's elderly mother-in-law and it was through this relationship that Richardson and his wife got to know Petitioner. Richardson testified Petitioner "was exceptionally kind and gentle" with his mother-in-law and that he and his wife were "very impressed with his character." App. 70, l. 24 – 72, l. 4.

On December 20, 2012, Richardson and his wife received a letter from the Thirteenth Circuit Solicitor's Office. The letter stated that Richardson and his wife were to meet with Assistant Solicitor Fretwell for a pre-trial conference regarding Petitioner's case. See App. 89. Richardson testified that he and his wife complied with the letter and met with Mr. Fretwell on the scheduled date. During this meeting, Fretwell told Richardson "that he felt . . . if he [Petitioner] went to trial, he was, essentially, sure to get life in prison." App. 72, l. 14 – 73, l. 21. Fretwell also said "he felt that . . . to plead guilty was probably his [Petitioner's] only good option to avoid life in prison." App. 74, ll. 2-4. Richardson explained that while Assistant Solicitor Fretwell did not specifically ask him to speak with Petitioner about pleading guilty, "clearly, the implication was there." App. 74, ll. 5-9.

After meeting with Fretwell, Richardson and his wife visited Petitioner at the jail. During this visit, Richardson explained to Petitioner what Assistant Solicitor Fretwell told him and his wife during the pre-trial conference. Specifically, Richardson told Petitioner that if he proceeded to trial, with all likelihood, he would be spending the rest of his life in prison. App. 74, l. 11 – 75, l. 11. Richardson denied trying to encourage or pressure Petitioner into pleading guilty. He “simply presented him [Ppetitioner] with what we were told.” App. 75, ll. 12-19.

Petitioner’s trial counsel, James Bannister, testified that Petitioner “was served pretty early in the case” with notice from the state of its intent to seek a sentence of life without parole based on his prior record. App. 78, l. 24 – 79, l. 6. Bannister said he explained to Petitioner that the LWOP notice meant if he was convicted, “he would automatically” be sentenced to life imprisonment. App. 79, ll. 9-12. Despite the LWOP notice, Bannister testified Petitioner always wanted to proceed to trial. It was not until Petitioner’s case was called to trial and a jury selected that Petitioner ultimately decided to plead guilty. App. 82, ll. 18-23.

Bannister explained that during his representation of Petitioner, he had numerous conversations with Assistant Solicitor Fretwell about Petitioner’s “reluctance to plead guilty.” Fretwell had offered to recommend a sentence of fifteen years imprisonment if Petitioner agreed to plead, but Petitioner consistently refused to do so. Bannister believed Fretwell contacted Dr. Richardson and his wife, Gail Richardson, who were listed on the defense witness list, in an effort to use them to help convince Petitioner to plead guilty.¹ Bannister testified that this was a practice he often used as well (contacting family members and friends) to help convince his clients to plead guilty. While he maintained he was not fond of the solicitor contacting potential defense witnesses,

¹ Bannister testified that he listed James and Gail Richardson as potential character witnesses “for the purpose of talking about how . . . Harold [Petitioner] had done with the Richardsons’ mother.” App. 86, ll. 12-15.

Bannister testified that he does not believe the practice is “necessarily unethical.” App. 83, l. 16 – 84, l. 24; App. 86, ll. 5-15.

Order of Dismissal

In the order of dismissal, the PCR court treated Petitioner’s claim as an allegation of ineffective assistance of counsel and found Petitioner failed to prove trial counsel was deficient for failing to challenge or object to the letter Assistant Solicitor Fretwell sent to the Richardsons and the subsequent meeting between the solicitor and the couple. App. 96. The court noted that while Dr. Richardson testified Fretwell told him Petitioner would likely receive a life sentence if he proceeded to trial, the solicitor did not ask him to speak with Petitioner or convince him to plead guilty. The court concluded that Petitioner “failed to demonstrate there was a legitimate, cognizable basis for plea counsel to object to the letter and meeting, and that his case was prejudiced because counsel did not make such an objection.” App. 96.

Discussion

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to challenge Assistant Solicitor Fretwell’s improper contact with the Richardsons before Petitioner pled guilty. The record demonstrates Fretwell met with the Richardsons and told them Petitioner was certain to be sentenced to life without parole if he proceeded to trial in effort to use them to convince Petitioner to plead guilty. It is clear from Petitioner and plea counsel’s testimony at the PCR hearing that Petitioner was extremely reluctant to plead guilty and consistently wanted to proceed to trial. It was likely the Richardsons’ influence on Petitioner that ultimately led him to decide to plead guilty.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

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)).

Plea counsel was ineffective when he failed to challenge the assistant solicitor’s improper contact with the Richardsons before Petitioner pled guilty. The record demonstrates Petitioner was extremely reluctant to plead guilty despite the solicitor’s offer to recommend a sentence of fifteen years imprisonment if he pled guilty. Moreover, plea counsel testified he had numerous conversations with the solicitor about Petitioner’s reluctance. It is obvious the solicitor sought a meeting with the Richardsons and ultimately told them Petitioner was certain to be sentenced to life without parole if he proceeded to trial in an effort to use the Richardsons to convince Petitioner to

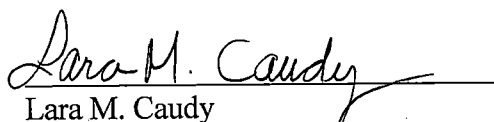
plead guilty when nothing else was working. The solicitor's contact with the Richardsons was improper and trial counsel should have addressed this improper contact with the trial judge before Petitioner pled guilty.

Petitioner was prejudiced by trial counsel's deficient performance because he would not have pled guilty but for counsel's error. Petitioner repeatedly testified that he always wanted to go to trial, but he ultimately pled guilty based on the Richardsons' advice and counsel's error. If plea counsel would have properly challenged the solicitor's improper contact with the Richardsons, who were potential defense witnesses, then it is likely Petitioner would have proceeded to trial as he consistently wanted to do.

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 12th day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
EUGENE C. GRIFFITH, JR., CIRCUIT COURT JUDGE

HAROLD WATTS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000812

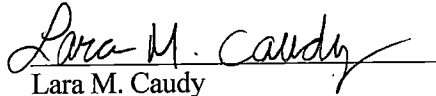
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Harold Watts 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 December 16, 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 one arguable legal issue that arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Harold Watts.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of October, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Eugene C. Griffith, Jr., Circuit Court Judge

HAROLD WATTS, PETITIONER,

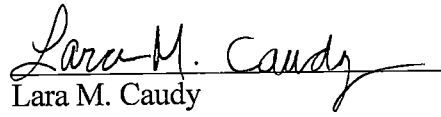
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STATE OF SOUTH CAROLINA, RESPONDENT

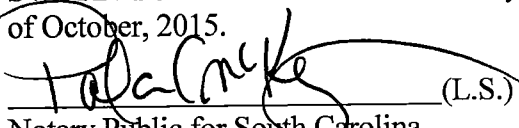
APPELLATE CASE NO. 2015-000812

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 Karen C. Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 2920; and Harold Watts, #127180, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of October, 2015.


Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of October, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.