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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

KENDRICK ALLEN GUDE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001133

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

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

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ISSUE PRESENTED

Whether pleas counsel was ineffective in not giving petitioner correct sentencing advice?

STATEMENT

On July 9, 2012, petitioner appeared before the Honorable Roger L. Couch in Spartanburg County and pled guilty to the following offenses and was sentenced as follows:

1. Possession with intent to distribute marijuana within proximity of a school- ten (10) years
2. Possession with intent to distribute marijuana- five (5) years
3. Possession with intent to distribute marijuana within proximity of a school- ten (10) years
4. Distribution of marijuana- five (5) years
5. Possession with intent to distribute marijuana- five (5) years

The above charges were ordered to be served concurrently. A probation revocation on another charge was ordered to run consecutively to the other charges above. Chad Graham, Esquire was the assistant solicitor. Plea counsel was John Reckenbeil, Esquire. (App. p. 1- p. 32)

Petitioner filed an application for post-conviction relief on May 2, 2013. (App. p. 33- p. 39) Respondent filed a return dated May 13, 2014. (App. p. 40- p. 44) An evidentiary hearing was held on January 13-14, 2015, before the Honorable Deadra L. Jefferson. Petitioner was present and was represented by Fletcher N. Smith, Jr., Esquire. Respondent was represented by Suzanne H, White, Assistant Attorney General. Plea counsel, petitioner and Dana Breckins testified at the hearing. (App. p. 45- p. 96) On March 31, 2015, Judge Jefferson issued an order denying and dismissing petitioner's application for post-conviction relief.

This petition follows.

ARGUMENT

Plea counsel was ineffective in not giving petitioner correct sentencing advice.

Petitioner wrote in his application for post-conviction relief that plea counsel provided him legal advice that he would be serving concurrent sentences of ten years and that he guaranteed him a certain sentence to be imposed to persuade him to plead guilty. (App. p. 35)

At the evidentiary hearing, petitioner was asked with regard to the probation violation if plea counsel ever received a report from the probation office that he discussed with him about the probation violation that he received as a result of the criminal charges that he was pleading guilty to and petitioner replied in the negative. Next, he was asked if plea counsel ever discussed what the consequences would be as a result of his pleading guilty and, at the same time, having a probation revocation hearing. Petitioner replied in the negative. Finally, he was asked if plea counsel ever discussed in detail what the consequences of a sentence, on a consecutive basis would be, with regard to the charges that he was pleading guilty to in July of 2012.¹ Petitioner again responded in the negative. (App. p. 70, lines 6-21)

The standard of review in finding whether an attorney is ineffective:

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.

¹ Plea counsel testified at the evidentiary hearing that both he and petitioner were shocked at the probation revocation was ordered to be consecutive. (App. p. 52, lines 4-7)

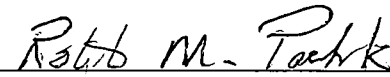
This means that there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice 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).

Petitioner's testimony established that plea counsel was ineffective in not giving correct sentencing advice.

CONCLUSION

Petitioner's writ should be granted and his guilty plea and probation revocation should be revoked.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

KENDRICK ALLEN GUDE,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-001133

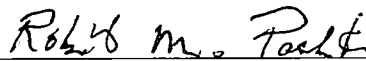
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kendrick Allen Gude 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 13, 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 Kendrick Allen Gude.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of October, 2015

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IN THE SUPREME COURT

Certiorari to Spartanburg County
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KENDRICK ALLEN GUDE,

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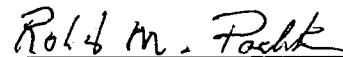
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001133

CERTIFICATE OF SERVICE

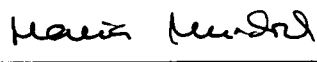
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Kendrick Allen Gude, # 287625, at Livesay Pre-Release Center, this 22nd day of October, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of October, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.