

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Florence County

S.C. Supreme Court

D. Craig Brown, Circuit Court Judge

KESHA GRANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001395

JOHNSON PETITION FOR WRIT OF CERTIORARI

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The lower court erred in denying Petitioner relief where plea counsel provided ineffective assistance by failing to review the autopsy report with Petitioner in this homicide by child abuse case, which forced Petitioner to enter a guilty plea without a full understanding and appreciation of the evidence against her resulting in an unknowing, involuntary, and unintelligent guilty plea. 4

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QUESTION PRESENTED

Did the lower court err in denying Petitioner relief where plea counsel provided ineffective assistance by failing to review the autopsy report with Petitioner in this homicide by child abuse case which forced Petitioner to enter a guilty plea without a full understanding and appreciation of the evidence against her resulting in an unknowing, involuntary, and unintelligent guilty plea?

STATEMENT

A Florence County grand jury indicted Petitioner for homicide by child abuse (2012-GS-21-00886) on July 19, 2012. App. 76-77. Petitioner entered a guilty plea without recommendation or negotiation on October 18, 2012 before the Honorable Michael G. Nettles. Ed Clements represented the state, and Scott P. Floyd represented Petitioner. App. 1. Judge Nettles sentenced Petitioner to imprisonment for twenty-seven years. App. 29, lines 17-21; App. 78. Petitioner did not appeal her guilty plea or sentence. App. 69.

On May 16, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 31-37. An evidentiary hearing on the matter convened on April 15, 2015 before the Honorable D. Craig Brown. Frank C. Swaggard represented Petitioner, and Croom Hunter represented the state. App. 44. By an order filed on June 11, 2015, Judge Brown denied Petitioner relief from her conviction and sentence. App. 68-75.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

The lower court erred in denying Petitioner relief where plea counsel provided ineffective assistance by failing to review the autopsy report with Petitioner in this homicide by child abuse case, which forced Petitioner to enter a guilty plea without a full understanding and appreciation of the evidence against her resulting in an unknowing, involuntary, and unintelligent guilty plea.

Relevant facts

Guilty plea hearing

On October 18, 2012, Petitioner entered a guilty plea to homicide by child abuse without negotiation or recommendation. App. 3, lines 2-7; App. 11, line 24 – App. 12, line 8. She faced a minimum sentence of twenty years' imprisonment and a maximum sentence of life imprisonment. See S.C. Code Ann. § 16-3-85(C)(1). Petitioner, who had a ninth grade education, had no criminal history and had never been “in trouble.” App. 20, lines 23-24; App. 23, line 1-5; App. 24, lines 15-19.

The solicitor's factual basis explained that Minor was in the custody of Petitioner's mother, who was also Petitioner's co-defendant in the case. App. 5, lines 20-23. Minor suffered burns, which were treated at home with narcotics that had been prescribed for another person. App. 6, lines 1-11. The solicitor provided the judge with a copy of the autopsy report to supplement the oral recitation of the factual basis. App. 6, lines 6-7. According to the solicitor, the cause of death was the toxic effects of the drugs “along with [] full thickness scald burns of the pelvic, groin and buttocks regions,” which resulted in sepsis. App. 6, lines 8-15.

The plea judge permitted an investigator to give unsworn statements regarding her investigation and her opinions about the case. Plea counsel failed to object to the judge receiving the unsworn evidence and improper opinions. In describing Petitioner's alleged conduct as “horrific

acts,” the investigator referred to the “ten page forensic autopsy report.” App. 8, lines 20-25. The investigator used the autopsy report and the words contained therein, to give her opinion that the injuries to Minor were not caused by an accident. She opined the injuries were the result of intentional conduct. App. 8, line 25 – App. 9, line 2. She also told the judge that she believed Minor was injured because she was an “inconvenience.” App. 9, lines 1-2. The investigator asked the judge to impose the maximum sentence – life imprisonment. App. 10, lines 12-17.

After hearing from the solicitor and the investigator, and engaging in a plea colloquy with Petitioner and plea counsel, the plea judge found (1) there was a factual basis for the plea and (2) that the plea had been entered into knowingly and intelligently with the consent of competent counsel. As a result he accepted the guilty plea. App. 13, lines 19-24.

During the sentencing proceeding, the plea judge expressed his belief that if Petitioner “were to be turned loose today, I doubt she would find herself in this position again. I think that her remorse is indeed real.” App. 28, lines 3-7. Further, he determined Petitioner would “probably not” be a danger to society. App. 28, lines 14-15. Nevertheless, he noted the need for retribution in sentencing and that “sometimes there’s got to be a pound of flesh for the crime that’s being [*sic*] committed.” App. 28, lines 19-21. Thereafter, he sentenced Petitioner to twenty-seven years’ imprisonment. App. 29, lines 17-21; App. 78.

PCR hearing

During the PCR hearing, Petitioner testified that she asked plea counsel to review the autopsy report with her, but plea counsel refused. App. 51, lines 1-5. Petitioner asked to review the autopsy report *every time* she met with plea counsel, which was between fifteen and twenty times prior to entering her guilty plea. App. 51, lines 6-19. Petitioner explained that the autopsy report

would have allowed her to understand “what hand [she] was playing” in order to ensure her guilty plea was knowingly, intelligently, and voluntarily entered. App. 52, lines 1-5.

Plea counsel did not “remember specifically” if Petitioner requested a copy of the autopsy report. However, he claimed that “if she had asked me for anything, I would have given it to her.” App. 60, lines 20-23. He stated he had no record of reproducing his file for Petitioner. App. 60, lines 23-25.

Order denying relief

The PCR judge noted Petitioner’s testimony that she asked plea counsel to review the autopsy report with her and plea counsel’s refusal to do so. App. 70. Further, the PCR judge noted plea counsel’s testimony that he did not recall specifically whether he went over the autopsy report with Petitioner. App. 71. However, the PCR judge also explained that plea counsel testified he reviewed discovery with Petitioner, which presumably included the autopsy report. App. 71. Ultimately, the PCR judge found Petitioner had failed to show plea counsel rendered ineffective assistance or that her guilty plea was involuntary. App. 72.

Discussion

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 upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also 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). 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).

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 jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

Plea counsel provided ineffective assistance by failing to ensure Petitioner had an opportunity to review the autopsy report. Plea counsel's failure in this regard forced Petitioner to enter a guilty plea without a full understanding and appreciation of the evidence against her resulting in an unknowing, involuntary, and unintelligent guilty plea. It was necessary for Petitioner to know the entirety of evidence against her so that she could determine if the state had enough to take her to trial. Therefore, it was deficient performance for plea counsel to fail to ensure Petitioner reviewed the autopsy report in this homicide by child abuse case. Also, it was deficient

performance for plea counsel to permit Petitioner to enter an unknowing, involuntary, and unintelligent guilty plea in light of the autopsy report not being reviewed with Petitioner. Plea counsel's deficient performance prejudiced Petitioner because it prevented Petitioner from evaluating the state's evidence before entering a guilty plea.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of November, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

KESHA GRANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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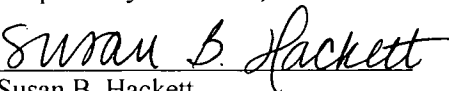
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kesha Grant 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 15, 2015. In her opinion, seeking certiorari from the order of dismissal is without merit.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has 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 Kesha Grant.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of November, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

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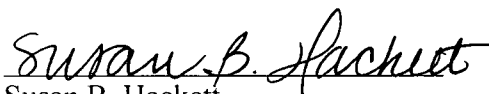
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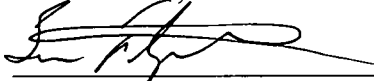
CERTIFICATE OF SERVICE

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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Kesha Grant, #352697, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 3rd day of November, 2015.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of November, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.