ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

NICHOLAS NESMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000968

JOHNSON PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Was trial counsel's failure to advise Petitioner that his entry of guilty pleas to the charged offenses would waive his ability to challenge the transfer of jurisdiction of his case as well as waive any challenge to his arrest and subsequent interrogation ineffective and render Petitioner's guilty pleas involuntary and unknowing?

STATEMENT

On September 15, 2008, Sergeant Ryan Wilson of the Irmo Police Department charged fifteen-year old Petitioner with burglary in the first degree, strong arm robbery, kidnapping, and assault and battery of a high and aggravated nature (ABHAN). App. 487. The solicitor moved to transfer jurisdiction to the Court of General Sessions. App. 489. On September 16, 2008, the Family Court judge ordered the pre-waiver evaluation to be conducted by the Department of Juvenile Justice (DJJ). App. 489-490. Thereafter, DJJ evaluated Petitioner. App. 465-496. On February 24, 2009, Petitioner, represented by Mitzi Campbell-Williams and Joanna Haynes, went before the Honorable Roger E. Henderson concerning the state's motion to transfer jurisdiction. App. 1. L. Eden Hendrick represented the state. App. 1. On February 25, 2009, Judge Henderson transferred jurisdiction to the Court of General Sessions. App. 456-459.

On March 11, 2009, a Richland County grand jury indicted Petitioner for ABHAN (2009-GS-40-1707), burglary in the first degree (2009-GS-40-1713), kidnapping (2009-GS-40-1714), and strong arm robbery (2009-GS-40-1715). App. 557-558; App. 560-561; App. 563-564; App. 566-567. On August 9, 2010, the state, represented by Hendricks, Luck Campbell, and Joanna McDuffie, called the case for trial before the Honorable G. Thomas Cooper, Jr. App. 167; App. 169, lines 15-22. Jerry Finney represented Petitioner. App. 167. On that date, Finney moved for a continuance. App. 169, lines 12-13; App. 178, lines 15-19. Judge Cooper ordered that a jury would be picked the following day and the trial would start the day after. App. 185, lines 7-8. On August 11, 2010, Petitioner appeared before Judge Cooper to enter guilty pleas to the charged offenses in exchange for a negotiated sentencing range of twenty to twenty-five years. App. 186, line 9 – App. 195, line 21. Judge Cooper deferred sentencing. App. 194, lines 3-4; App. 195, lines 10-13.

On September 1, 2010, Petitioner appeared before Judge Cooper for sentencing. App. 195, lines 22-23. At the conclusion of the hearing, Judge Cooper sentenced Petitioner to ten years' imprisonment for ABHAN, fifteen years' imprisonment for strong arm robbery, twenty-two years' imprisonment for kidnapping, and twenty-two years' imprisonment for burglary in the first degree. App. 258, lines 2-15; App. 559; App. 562; App. 565; App. 568. He ordered the sentences to be served concurrently. App. 258, line 25 – App. 259, line 3; App. 559; App. 562; App. 565; App. 568. Petitioner did not file a notice of appeal.

On January 21, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 261-265. Through counsel, Tricia A. Blanchette, Petitioner amended his application on April 5, 2013. App. 273-275. The matter proceeded to a hearing on March 19, 2014 before the Honorable Alison Renee Lee. App. 276. Blanchette represented Petitioner, and Megan E. Harrigan represented the state. App. 276. In an order filed on March 2, 2015, Judge Lee denied relief. App. 497-524. Petitioner moved for entry of new judgment and/or to alter or amend on March 11, 2015. App. 525-548. By an order filed on March 25, 2015, Judge Lee denied the motion. App. 556.

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

ARGUMENT

Trial counsel's failure to advise Petitioner that his entry of guilty pleas to the charged offenses would waive his ability to challenge the transfer of jurisdiction of his case as well as waive any challenge to his arrest and subsequent interrogation was ineffective and rendered Petitioner's guilty pleas involuntary and unknowing.

Relevant facts

Officers responded to a burglary call on September 14, 2008 around 10:15 p.m. App. 5, lines 15-20. One of the officers drove around the neighborhood looking for potential suspects. App. 8, lines 9-20. He encountered Petitioner's older brother, Victor Nesmith, and two others. App. 9, lines 12-18. The three claimed no knowledge of the burglary. App. 10, lines 7-10. Subsequently, the officer learned Petitioner was a suspect. App. 10, lines 21-22. As a result, the officer went to Petitioner's home, which was in the same neighborhood as the burglarized home. App. 10, line 25 – App. 11, line 5. While outside of Petitioner's home, the officer heard a noise that sounded like someone jumping over a chain link fence. App. 12, lines 9-16. The officer found Petitioner, alone, walking down the road behind his home. App. 13, lines 8-12. The officer instructed Petitioner to approach, and Petitioner complied. App. 13, lines 17-21. Petitioner immediately told the officer he had made "a bad mistake." App. 13, lines 22-23.

Thereafter, the officer advised Petitioner of his rights. App. 14, lines 7-8. Petitioner then admitted to officers that he and an older male, Gregory Hardy, were involved in the burglary and told the officers where to find the stolen items. App. 15, line 1 - App. 16, line 6. The police arrested Petitioner, retrieved the stolen items, and transported Petitioner to the police station. App. 16, line 21 - App. 17, line 8; App. 20, line 4-7. At 2:30 a.m., the police interrogated

Petitioner again regarding the burglary. App. 83, line 17 – App. 96, lines 13; Applicant's #1.[1] Petitioner admitted that he and Greg burglarized the home at the insistence and instigation of a local gang, the M.O.B. App. 89, lines 3-23. Thereafter, Petitioner was transported to the detention center. App. 96, lines 9-13.

Transfer of Jurisdiction Hearing

Petitioner was only fifteen-years old at the time of the charged offenses. App. 456-457. Thus, he was charged as a juvenile. However, the state moved to transfer jurisdiction. The state presented the investigating officers as witnesses, who testified regarding the crime scene and Petitioner's interrogation. Petitioner presented witnesses from the detention center to testify. James E. Churchill, a corrections officer, testified to Petitioner's exemplary behavior at the detention center. App. 113, line 14 - App. 117, line 21. Mary Houck, a teacher at the detention center, testified to Petitioner's positive behavior in class, his "very good grades," and his conscientious effort to perform well. App. 135, line 15 - App. 137, line 4. Another teacher, Linda Pope Jones, testified similarly, explaining Petitioner was respectful and completed assigned tasks. App. 140, line 23 - App. 141, line 25. Further, the judge had the pre-waiver evaluation conducted by DJJ. App. 465-496.

Ultimately, the judge transferred jurisdiction to the Court of General Sessions based primarily upon the nature of the offenses. App. 457. The judge noted that although Petitioner had successfully completed probation four times previously, the judge surmised Petitioner had not taken advantage of the services provided to him by DJJ and continued to commit new

[1] The DVD of the interrogation was submitted as an exhibit during the PCR hearing. Applicant's #1 is on file with this Court.

offenses. App. 458. Finally, the judge determined rehabilitation would be difficult because Petitioner had difficulty articulating empathy with the victims. App. 458.

Guilty Plea Hearing

When the state called the case for trial on August 9, 2010, plea counsel moved to continue the case. App. 179, lines 13-14. Plea counsel told the judge that he received discovery in the case just the week prior. App. 172, lines 12-14. According to plea counsel, he "gave [his] secretary a to do list, and one of the things was to contact the solicitor's office to schedule this plea this week." App. 173, lines 5-8. Additionally, plea counsel "sent [his] associate, Adam Whitsett" to court "to cover some appearances." App. 173, lines 9-10. When the associate met with the solicitor "about another case ... about scheduling that plea," the solicitor told the associate that Petitioner's plea was scheduled for that day at 2 p.m. App. 173, lines 10-17. Thereafter, plea counsel began working "to try to get in touch with his parents and get everything else who was involved in this case for the guilty plea" to court. App. 173, lines 18-21. At the call of the case, plea counsel was unable to do so. App. 173, line 22.

One hour before the scheduled guilty plea hearing, plea counsel met with Petitioner in the holding cell to discuss entering a guilty plea and requesting deferred sentencing. App. 173, line 25 – App. 174, line 3. According to plea counsel, Petitioner refused to pled guilty and insisted on a trial. App. 174, lines 4-5. Plea counsel then told the judge that Petitioner had been evaluated by a mental health specialist, whom plea counsel wanted to testify, but plea counsel was unaware of the specialist's availability except to the extent that she was not available. App. 174, line 16 – App. 175, line 18. Further, plea counsel told the judge that Petitioner's father was to be admitted to the hospital the following day for cancer treatment. App. 176, lines 5-8. Finally, and most telling, plea counsel informed the court there were "at least two correctional

officers that are employed at Alvin S. Glenn Detention Center that [he] also would be interested in calling as witnesses in this case for a *plea* or a trial." App. 178, lines 5-9 (emphasis added). Despite wanting those witnesses present for a guilty plea or trial, plea counsel had made no arrangements to secure their presence as he was checking on their availability at that moment. App. 178, lines 9-10.

Plea counsel told the judge that he needed "reasonable time to digest the discovery" in light of Petitioner's request for a jury trial. App. 184, lines 8-9. Thus, plea counsel moved to continue the case for "the discovery reasons [and] the unavailability of ...witnesses." App. 178, lines 15-19. The judge granted the request in part by ordering jury selection to occur on the following day and the trial to start the day thereafter. App. 185, lines 7-8.

During the discussion of the continuance, plea counsel told the court that Petitioner was "looking at a total of somewhere north of 40 years" in terms of a sentence. App. 178, line 24 – App. 179, line 1. Two solicitors piped up that he was looking at a sentence of "[l]ife plus." App. 179, liens 2-3. Thereafter, plea counsel and the court agreed. App. 179, lines 4-5. However, one of the solicitors noted that Petitioner was not eligible for a life sentence because of his age. App. 179, lines 15-18.[2]

On August 11, 2010, Petitioner entered a guilty plea in exchange for a negotiated sentencing range of twenty to twenty-five years. App. 186, line 9 – App. 195, line 21. The judge deferred sentencing not to exceed thirty days. App. 195, lines 10-13. During the guilty plea, the judge advised Petitioner that he would have ten days from the date of sentencing to file

[2] The Eighth Amendment to the United States Constitution forbids the sentencing of juveniles to life imprisonment without the possibility of parole in non-homicide cases. Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010).

a notice of intent to appeal in order to raise issues on appeal concerning the guilty plea proceeding or the judge's ruling. App. 194, lines 5-9.

Sentencing Hearing

On September 1, 2010, the parties reconvened for sentencing. The state presented statements by several of the law enforcement officers, who talked principally regarding gang activity in the community and the impact of the crime on the community. App. 216, line 18 – App. 218, line 7; App. 219, line 13 – App. 220, line 17. Additionally, the woman who was physically assaulted during the burglary, Hazel Bennett, and her two children addressed the judge. App. 222, line 18 – App. 231, lines 7.

Plea counsel presented Churchill, the officer who testified at the transfer of jurisdiction hearing, to tell the judge about Petitioner's exemplary behavior and his attainment of a GED. App. 238, line 3 – App. 239, line 3. Additionally, plea counsel asked Petitioner's pastor and mother to speak on his behalf. App. 239, lines 10-23; App. 240, line 2 – App. 246, line 19.

Finally, Dr. Schwartz-Watts informed the judge of her findings following her evaluation of Petitioner. According to Dr. Schwartz-Watts, Petitioner was involved in a gang, which was the impetus for this crime. Earlier in the evening, he was forced to fight a cousin. During the fight, Petitioner showed mercy and was beaten by other gang members because he showed mercy. App. 248, lines 1-23. Additionally, Dr. Schwartz-Watts explained that Petitioner's father was physically abusive of him and his mother. App. 249, lines 2-5. Petitioner's father was a drug dealer, who was robbed at gunpoint in connection to his drug dealing. The robber broke into the family home and held the family hostage while beating Petitioner's father. App. 249, lines 11-14. Petitioner was hospitalized numerous times for psychiatric disorders.

According to Dr. Schwartz-Watts, he "definitely" had symptoms of post-traumatic stress disorder. App. 249, lines 15-20.

There was no discussion of Petitioner's right to file a notice of appeal, as had occurred at the conclusion of the guilty plea, and there was no notice of appeal filed by plea counsel.

PCR Hearing

Petitioner's mother, Chrise Nesmith, testified that the police failed to contact her after Petitioner was taken into custody. She explained that she worked the night shift at the hospital when the police charged Petitioner. App. 283, lines 17-21. She first received a message from her older son around midnight that Petitioner had been arrested and taken to the detention center. App. 283, line 25 – App. 284, line 3; App. 296, lines 10-15. Thereafter, her husband called the detention center, but was informed Petitioner was not there. App. 284, lines 3-8. It was not until 3 a.m. when Petitioner called her husband that Petitioner had any contact with his parents. App. 284, lines 8-10. The following morning, Petitioner's mother contacted the arresting officer and learned about the pending charges and the anticipated court date. App. 284, line 23 – App. 285, line 12.

Concerning the waiver hearing, Petitioner's mother noted that Petitioner would have benefited from the juvenile justice system in ways not available in the adult system. App. 288, lines 1-4. Based on Petitioner's age, maturity level, and intellectual functioning, Petitioner belonged in the juvenile justice system and the transfer of jurisdiction was improper. App. 288, lines 5-19.

Petitioner's mother explained that during the week that Petitioner entered the guilty plea, she was on vacation at the beach. She believed plea counsel was waiting on discovery and the case was not going forward. App. 291, lines 1-10; App. 293, line 22 – App. 294, line 2. On the

day Petitioner entered his guilty plea, she received a call from plea counsel in the early morning informing her that Petitioner was expected "to make a plea bargain" that day. She left the beach immediately, but was unable to get to Columbia in time for the guilty plea. App. 291, line 11 – App. 292, line 7; App. 302, lines 8-13. Plea counsel told her that Petitioner was reluctant to enter the guilty plea and plea counsel wanted his parents there to assist him with the case. App. 302, lines 14-18. If she had notice of the guilty plea, she would have been present and advised her son regarding the wisdom of entering such a plea. App. 292, lines 16-22.

Petitioner testified that when he was arrested, his parents were at work. App. 306, lines 14-15. However, when the police requested permission from Petitioner to search the home he shared with his parents, he gave it. App. 306, lines 9-11; App. 306, lines 20-21. Petitioner agreed to waive his rights and speak to law enforcement. App. 306, line 22 – App. 307, line 6; Applicant's #1. However, immediately before the video-recorded interrogation, Petitioner requested to call his parents. This request was denied by law enforcement. App. 309, lines 14-17. Petitioner testified that he needed his parents to guide him as it was obvious he did not understand what was happening. App. 309, line 23 – App. 310, line 5. At the end of the interrogation, Petitioner asked to go home because he had no idea he was going to jail. App. 309, lines 1-7; App. 311, lines 5-13.

When Petitioner appeared in court he was frightened because plea counsel did not appear prepared to represent him in light of plea counsel's complaints of incomplete disclosures from the state and Petitioner's parents not being present for the guilty plea. App. 328, line 10 – App. 332, line 5; App. 333, line 3-8. According to Petitioner, he and plea counsel never discussed his ability to appeal the transfer of jurisdiction, the legality of his arrest, and the admissibility of his statement or the waiver of those appellate rights as a result of a guilty plea. App. 335, line 18 –

App. 336, line 10. During the PCR hearing, the state cautioned Petitioner that he faced a life sentence for burglary in the first degree if his PCR were successful and he were convicted after a trial. App. 360, lines 1-7. This compounded the error that occurred during the continuance hearing when the judge, state, and defense counsel agreed that Petitioner faced "life plus" and the error that occurred during the guilty plea proceeding when the judge warned that burglary carried "an indeterminate amount of years." See App. 187, line 24 – App. 188, line 5.

At the PCR hearing, plea counsel testified that when the case was called for trial, he had the discovery, but requested a continuance in order to allow him to "digest it." App. 417, line 1 – App. 418, line 7. This continuance was necessary because previously Petitioner had indicated a desire to plead guilty, but on the date the case was called, Petitioner exercised his right to a trial. App. 418, lines 8-15. Plea counsel's testimony to this effect contradicted his later testimony that he advised Petitioner's parents that the case would be called on August 9 and that he planned to move for a continuance on that date "on the discovery issues." App. 421, lines 13-19; App. 423, lines 3-5; App. 444, lines 10-23. Plea counsel told Petitioner that if he were convicted at trial, he "could probably be sentenced to somewhere around life" reflecting plea counsel's misunderstanding or lack of information concerning the Eighth Amendment jurisprudence surrounding juvenile sentencing. App. 422, line 25 – App. 423, line 2; App. 436, line 9. Further, plea counsel claimed he discussed the impact of a guilty plea on his appellate rights. App. 432, line 13 – App. 433, line 7.

Order Denying Relief

The PCR judge held Petitioner failed to establish his required burden of proof concerning his allegation that plea counsel "was ineffective for advising [Petitioner] to plead guilty, thereby waiving his ability to challenge his arrest, statement, or waiver on appeal." App. 523.

According to the order, plea "[c]ounsel testified that he advised [Petitioner] of his appellate rights, including his ability to challenge his arrest, statement, and waiver to General Sessions if he proceeded to trial." App. 523. The order declared the PCR court was "confident" that Petitioner was "well advised of his various appellate rights following this representation by three respected and well-seasoned criminal defense attorneys throughout his case." App. 523. Thus, the PCR judge held Petitioner failed to establish any deficiency on the part of plea counsel as to this claim.

Further, the PCR court held Petitioner had not established prejudiced regarding this claim. The judge found "challenges" to Petitioner's "arrest and statement would not likely be successful, either as pre-trial motions or on appellate review." App. 523. Regarding Petitioner's allegation concerning the illegality of his arrest, the PCR court found that Petitioner's mother testified that she was notified by her adult son that Petitioner had been taken into police custody at midnight, which was less than two hours after law enforcement first approached Petitioner regarding the incident. App. 515. Also, the police permitted Petitioner to call his mother at approximately 3 a.m. App. 515. The PCR court noted that section 63-19-810(A) of the South Carolina Code requires law enforcement to notify the parent, guardian or custodian of a child "as soon as possible" when the child is taken into custody. App. 515. In light of the statute's failure to give a specific time limit, the PCR judge looked to case law for guidance. App. 515. The court was persuaded by In re Williams, 265 S.C. 295, 298-299, 217 S.E.2d 719, 721 (1975), in which this Court held notification of a parent within five hours of arrest complied with the statute. Additionally, the PCR court noted that Petitioner's older brother, who was eighteen-years old at the time and listed as Petitioner's guardian on the Juvenile Petition, was notified shortly after Petitioner's arrest. App. 515.

The PCR court was not persuaded that Petitioner's statement was involuntary due to the "lack of parental presence." App. 521. According to the court, the video provided "strong support that the statement was freely and voluntarily given." App. 521. The court noted that Petitioner did not ask the interrogating officer to speak with his parents. App. 517. Further, the court explained "[t]he detention was not lengthy and there was not prolonged or lengthy questioning" of Petitioner. App. 517. The judge found no evidence that Petitioner was deprived of any physical comforts. App. 521. Thus, the court was not persuaded that Petitioner's statements would have been suppressed. App. 517.

Concerning the transfer of jurisdiction, the court found that Petitioner "would not likely have been successful on appeal." App. 523. The judge noted that appellate courts review transfer of jurisdiction cases using an abuse of discretion standard. App. 523. The PCR judge reviewed the order and found it was sufficient to demonstrate the statutory requirement for a full investigation was met and that the question received full and careful consideration by the family court. App. 523. Thus, the PCR judge concluded Petitioner had not demonstrated that a challenge of his waiver would have been successful on appeal, and as a result, Petitioner had not demonstrated prejudice. App. 523.

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).

Admissibility of Statement

Plea counsel failed to advise Petitioner that if he entered guilty pleas to the charged crimes, then Petitioner would be unable to challenge the admissibility of his statement to police. See State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985)(holding that a guilty plea admits all elements of the charged offense and "leaves open for review only the sufficiency of the indictment and waives

all other defenses"); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)(holding that a defendant may not enter a conditional guilty plea, which preserves constitutional issues, because the guilty plea waivers all prior claims of constitutional rights or deprivations); State v. Tucker, 376 S.C. 412, 411, 656 S.E.2d 403, 406 (Ct. App. 2008)(holding that a defendant's guilty plea waived any and all defects regarding his return to state custody under the Interstate Agreement on Detainers); State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000)(holding that guilty pleas "generally act as a waiver of all non-jurisdictional defects and defenses).

In Jackson v. Denno, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." To introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 426 (1966). State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996); State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007); State v. Compton, 366 S.C. 671, 680, 623 S.E.2d 661, 666 (Ct. App. 2005); State v. Crawley, 349 S.C. 459, 463, 562 S.E.2d 683, 685 (Ct. App. 2002).

The waiver has two distinct dimensions. It must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986); see also State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). It is not enough that the interrogator advised the suspect of his rights and the suspect made an uncoerced statement. The

prosecution must show that the accused understood the rights. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (citing Colorado v. Spring, 479 U.S. 564, 573-575 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987)).

In South Carolina, a court must examine the totality of the circumstances surrounding the custodial statement. The examining court must answer the question: did totality of the circumstances surrounding the custodial statement defeat the defendant's will? State v. Moses, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

> Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-514, 702 S.E.2d at 401 (internal citations omitted). The test requires consideration of "'totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" Dickerson v. United States, 530 U.S. 428, 434 (2000)(citations omitted). Consideration of a person's mental capacity is an important factor in determining whether a statement to police was voluntary. State v. Callahan, 263 S.C. 35, 41, 208 S.E.2d 284, 286 (1974) (citing State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965)).

Relying upon Haley v. Ohio, 332 U.S. 596 (1962) and Gallegos v. Colorado, 370 U.S. 49 (1962), this Court held that a juvenile "has the capacity to make a voluntary confession ... out the presence of consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his

statement." State v. Pittman, 373 S.C. 527, 566-567, 647 S.E.2d 144, 164-165 (2008)(internal citation omitted). Nevertheless, juvenile confessions must be evaluated with "special care." In re Gault, 387 U.S.1, 45 (1967). Relevant considerations include "the juvenile's age, experience, education, background, intelligence, and whether he had the capacity to understand the warnings given him, the nature of his Fifth Amendment Rights and the consequences of waiving those rights." Fare v. Michael C., 442 U.S. 707, 725 (1979). The juvenile's ability to consult with a friendly helpful adult is relevant because a juvenile cannot be expected to appreciate the consequences of his statements to the police. See Gallegos v. Colorado, 370 U.S. 49 (1962).

"Juveniles, as a group, often lack the psychosocial maturity and cognitive capacity to waive Miranda right" and understand what happens if he gives a statement, and what happens in the future if he does or does not answer questions. See Kenneth J. King, Waiving Childhood Goodbye: How Juvenile Court's Fail To Protect Children From Unknowing, Unintelligent, And Involuntary Waivers of Miranda Rights, 2006 Wis. L. Rev. 431, 431-432 (2006). "First and foremost in the juvenile's thoughts is what will get him home; talking or remaining silent." Id. at 432 n. 5.

The totality of the circumstances weighed in favor of suppression of the statement provided by Petitioner during his interrogation. Petitioner was only fifteen-years old at the time of the interrogation, had low intelligence, and suffered from mental illness. App. 474 (full scale IQ of 71); App. 249, lines 15-20. He had some involvement with the juvenile justice system, but had never been charged with such serious offenses. Repeatedly, the interrogating officer praised Petitioner for admitting his conduct and promised to consult with the solicitor regarding Petitioner accepting responsibility. The interrogation occurred after midnight and into the early morning hours and when Petitioner was isolated from his parents.

The centrality of Petitioner's statement to police to the prosecution's case required plea counsel warn Petitioner that if he entered guilty pleas to the charged offenses he would waive the ability to challenge admissibility of his statements. The case law supported Petitioner's argument for suppression and would have allowed Petitioner to seek reversal had a conviction resulted from a trial. Thus, Petitioner's guilty plea was involuntary because he lacked vital information to inform his decision to plead guilty – whether the admissibility of his statement could be challenged on appeal. As a result, his guilty pleas should be vacated and his case should be remanded for a new trial.

Legality of Arrest

South Carolina law requires law enforcement to "notify the parent, guardian, or custodian of the child as soon as possible" when the child is taken into custody. S.C. Code Ann. § 63-19-810(A). This Court addressed similar language in a statute that existed prior to the enactment of the Juvenile Justice Code in In re Williams, 265 S.C. 295, 217 S.E.2d 719 (1975). In that case, the statute provided "that when a child is taken into custody for violation of any law the officers shall notify the parent, guardian or custodian of the child as soon as possible." Id. at 299, 217 S.E.2d at 721 (internal quotation omitted). This Court held the record failed to sustain the claim that the parents were not notified of the arrest as soon as possible because the juvenile's father was a participant in the crime for which the juvenile was arrested and the juvenile's mother appeared at the jail within five hours of his arrest. Id. Thus, it is clear this Court was persuaded that the purpose of the statute had been fulfilled principally based upon the juvenile's father's presence at the crime scene. The appearance of the juvenile's mother some five hours later only reinforced this Court's understanding that the juvenile's father was aware of the juvenile's plight due to the father's own criminal conduct.

Examining the statute in question in the context of the entire statutory scheme demonstrates the legislature's intent that notification of the parents of a juvenile occurs much sooner than the five hours between custody and notification that occurred in the current case. First, the statute requires notification to DJJ within twenty-four hours when a child is released to a parent. S.C. Code Ann. § 63-19-810(A). Further, when a child is not released to a parent, the statute requires the officer "immediately" notify DJJ, "who shall respond within one hour by telephone or to the location where the child is being detained." S.C. Code Ann. § 63-19-810(B). The second subsection makes clear that the first subsection requires immediate action by the police to notify the parents of a juvenile in police custody. Although the language of the sections is not parallel, the structure of the statute demonstrates a desire by the legislature that parents receive notice at least as quickly as DJJ regarding the detention of a juvenile. Here, the officer failed to comply with the clear terms of the statute. Petitioner's statements were the product of an illegal arrest and should have been suppressed. See generally Murray v. United States, 487 U.S. 533, 536-537 (1988); Wong Sun v. United States, 371 U.S. 471, 488 (1963); State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999); State v. Sachs, 264 S.C. 541, 560, 216 S.E.2d 501, 511 (1975); State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997).

Petitioner's statement to police was critical evidence for the prosecution's case and flowed from Petitioner's detention and arrest. Plea counsel was required to warn Petitioner that if he entered guilty pleas to the charged offenses he would waive the ability to challenge the admissibility of his statements as the product of an illegal detention and arrest. The case law supported Petitioner's argument for suppression of the fruits of the illegal arrest and would have allowed Petitioner to seek reversal had a conviction resulted from a trial. Thus, Petitioner's guilty plea was

involuntary because he lacked vital information to inform his decision to plead guilty – whether he could challenge the legality of his arrest and the statement that flowed from it on appeal. As a result, his guilty pleas should be vacated and his case should be remanded for a new trial.

Transfer of Jurisdiction

The United States Supreme Court delineated eight determinative factors a judge must consider in deciding whether to waive jurisdiction over offenses alleged against a juvenile. Kent v. United States, 383 U.S. 541, 566-567 (1966). The first factor requires consideration of the "seriousness of the alleged offense to the community and whether the protection of the community requires waiver." Id. The second factor examines whether the alleged offense was "committed in an aggressive, violent, premeditated or willful manner." Id. When considering the third factor, whether the alleged offense was against persons or against property, the court gives greater weight to offenses against persons especially if personal injury resulted. Id. Fourth, the court must determine whether an indictment is likely in light of the prosecutor's evidence. Id. Consideration of the desirability of trial and disposition of the entire offense in one court as it relates to co-defendants is the fifth factor. Id. The court must examine "the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living." Id. The seventh factor requires consideration of "[t]he record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions." Id. Finally, the court examines "[t]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile by the use of procedures, services and facilities currently available." Id.

Concerning the sufficiency of transfer orders, this Court held:

> It is the responsibility of the family court to include in its waiver of jurisdiction order a sufficient statement of the reasons for, and considerations leading to, that decision. Conclusory statements, or a mere recitation of statutory requirements, without further explanation will not suffice. The order should be sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received full and careful consideration by the family court. The salient facts upon which the order is based are to be set forth in the order.

In re Sullivan, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980). In fact, this Court has held that the family court "must provide a sufficient statement of the reasons for the transfer in its order." State v. Pittman, 373 S.C. 527, 559, 647 S.E.2d 144, 160 (2008)(citing State v. Avery, 333 S.C. 284, 293, 509 S.E.2d 476, 481 (1998)).

This Court determined the family court did not abuse its discretion where the order demonstrated a full investigation had been conducted, reflected consideration of the testimony from the hearing and the evaluation report, and contained "adequately stated facts" upon which the court's decision was based. Avery, 333 S.C. at 293, 509 S.E.2d at 481.

On the other hand, the Court held a family court's decision to deny transferring jurisdiction was not supported by its own factual findings where the crimes, including two counts each of murder, criminal sexual conduct in the first degree, and burglary in the first degree, were serious and willfully committed, an indictment was likely, and a trial in the same court was desirable (the family court waived jurisdiction over the defendant's co-defendants). State v. Corey D., 339 S.C. 107, 118-119, 529 S.E.2d 20, 26 (2000). The Court held the family court's finding that the defendant's intellectual abilities were superior to his co-defendants and he was more susceptible to rehabilitation than his co-defendants did not overcome the overwhelming evidence in favor of transferring the murder charges. Id. at 119, 529 S.E.2d at 26. Thus, the Court concluded the family court abused its discretion despite an order "specifically consider[ing]" the factors set forth in Kent. Id. at 117, 529 S.E.2d at 25.

In State v. Kelsey, 331 S.C. 50, 66, 502 S.E.2d 63, 70 (1998), this Court held the family court properly transferred jurisdiction where the order was "detailed" and examined specific facts of the case. Specifically, the order explained the judge was persuaded to waive jurisdiction based upon the following facts: (1) the defendant was charged with the murder of a young girl, a serious and violent offense; (2) the Grand Jury would likely return an indictment against the defendant; (3) the defendant's two co-defendants were going to be tried in General Sessions Court; (4) if convicted of murder as a minor, the defendant would receive less than a six-year sentence, which was not in there community's best interest due to the serious nature of the crime; and (5) the defendant would have less of a chance of rehabilitation in the juvenile system because his sentence under that system would be brief. Id.

In Pittman, 373 S.C. at 560, 647 S.E.2d at 161, this Court found a family court's order waiving jurisdiction sufficiently demonstrated a full investigation occurred though it was not "extremely detailed." This Court went on to conclude that the lower court's decision that the defendant would not benefit from the rehabilitation program at DJJ was supported by the record, which contained some evidence illustrating the defendant was "cooperative and capable of rehabilitation" and other evidence showing the defendant "engaged in escape plans, made shanks, and caused other disruptions at DJJ." Id.

The Court of Appeals held the family court did not abuse its discretion in waiving jurisdiction where the order contained "specific findings" as to each of the eight Kent factors. State v. Jones, 392 S.C. 647, 654, 709 S.E.2d 696, 700 (Ct. App. 2011). Likewise, in State v. Miller, 363 S.C. 635, 646, 611 S.E.2d 309, 314 (Ct. App. 2005), the Court of Appeals held the evidence supported the family court's waiver of jurisdiction over the juvenile. The family court made lengthy and detailed findings as to each factor. Id. at 643-646, 611 S.E.2d at 313-314. The family

court discussed each factor and the evidence in the record supporting its finding as to each factor. Id. The Court determined, however, the record did not support the judge's finding that the defendant could not be successfully rehabilitated because all of the psychological experts as well as a former member of the DJJ parole board testified that the juvenile would benefit from the treatment he would receive at DJJ. Id. at 645-646, 611 S.E.2d at 314. Nevertheless, the Court concluded the evidence in the record supported the judge's "overall decision to waive jurisdiction." Id. at 646, 611 S.E.2d at 314.

The waiver order at issue in Petitioner's case lacked a sufficient statement of the reasons for, and considerations leading to, the waiver decision. The order contained a series of conclusory statements with no further explanation to support the statements. The waiver order made no comment on the sufficiency of the investigation other than to indicate that a pre-waiver evaluation report existed. Most importantly, the waiver order lacked any of the "salient facts upon which the order" was based. Thus, the waiver order fell far short of the requirements. See In re Sullivan, supra.

The family court judge abused his discretion in deciding to waive jurisdiction over Petitioner's case where the order failed to include a sufficient statement of the reasons for, and considerations leading to, the waiver decision, failed to demonstrate that a full investigation occurred, and failed to indicate proper consideration and application of the Kent factors. The case law supported Petitioner's argument for reversing the transfer and would have allowed Petitioner to seek reversal had a conviction resulted from a trial. Thus, Petitioner's guilty plea was involuntary because he lacked vital information to inform his decision to plead guilty – whether the pre-trial determination on transfer of jurisdiction could be challenged on appeal. As a result, his guilty pleas should be vacated and his case should be remanded for a new trial.

CONCLUSION

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

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Alison Renee Lee, Circuit Court Judge

NICHOLAS NESMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nicholas Nesmith 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 PCR hearing which was held on March 19, 2014. 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 PCR process.

Therefore, counsel requests that the Court relieve her as counsel for Nicholas Nesmith.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
ATTORNEY FOR PETITIONER

This 16th day of December, 2015

STATE OF SOUTH CAROLINA

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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 Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Nicholas Nesmith, #342520, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 16th day of December, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of December, 2015.

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