ORIGINAL

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001062
Lower Court Case No. 2013-CP-42-02352

JAMES EDWARD JOHNSON, JR. #353643

PETITONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the PCR court erred in denying relief to Petitioner when the court erroneously found counsel was not ineffective for failing to provide adequate advice concerning the State's ability to prove "intent to permanently deprive."

II. Whether the PCR court erred in denying relief to Petitioner when the court erroneously found that counsel was not ineffective for failing to challenge the validity of the armed robbery indictments before advising Petitioner the plead guilty to said indictments.

III. Whether the PCR court erred in denying relief to Petitioner, when the court erroneously found that counsel's failure to research/investigate possible defenses had no impact on the intelligent and voluntary nature of the plea.

STATEMENT OF THE CASE

The Petitioner, James Edward Johnson, Jr., was indicted at the August 2012[1] term of the Spartanburg County Grand Jury for Four (4) Counts of Kidnapping, Three (3) Counts of Armed Robbery, Two (2) Counts of Attempted Armed Robbery, One (1) Count of Failure to Stop for A Blue Light Without Injury or Death, First Offence and One (1) Count of Unlawful Possession of a Stolen Pistol.

The Petitioner was also before the plea court for a hearing on his probation violation stemming from warrant number W-42-120311. The Petitioner was placed on probation on January 11, 2008, before Judge Hayes for the offense of Attempted Armed Robbery and was sentenced to fifteen (15) years imprisonment suspended to time served and five (5) years of probation. The Petitioner was also under special probation conditions, including restitution, fines, fees and other obligations- random alcohol and drug testing, no possession of a firearm, and no contact with the victim. At the hearing, the plea court revoked the Petitioner's probation in full and imposed the Petitioner's active sentence of fifteen (15) years imprisonment.

The Petitioner was represented by Andrea Leah Price, Esquire. On December 18, 2012, the Petitioner pled guilty as indicted to all charges. The Honorable J. Derham Cole sentences the Petitioner as follows: Four (4) Counts of Kidnapping to Twenty (20) years each concurrent, Three (3) counts of Armed Robbery to Thirty (30) years each concurrent, Two (2) counts of Attempted Armed Robbery to Twenty (20) years each concurrent, One (1) Count of Failure to Stop for a Blue Light Without Injury or Death, First Offense to Three (3) years concurrent and One (1) count of Unlawful Possession of a Stolen Pistol to Five (5) years concurrent. The

[1] [1] The State's return mistakenly states that the Petitioner was indicted in 2010. See App p.49 The Petitioner was actually indicted in 2012. See Ap. p. 145-166. Numerous filings in the case refer to that occurring.

Petitioner's Thirty (30) year sentence on One (1) count of Armed Robbery was consecutive to Petitioner's probation violation revocation. The Petitioner's Co-Defendant Jalek Jonques Miller, likewise pled guilty and was sentenced during the Petitioner's hearing. The Petitioner did not appeal his plea, sentences, or probation revocation.

In his PCR application, the Petitioner alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of Counsel
2. Involuntary Guilty Plea
3. Due Process Violation

This application was filed April 29, 2013. Respondents made the return on or about June 27, 2014. An evidentiary hearing into the matter was convened on January 12, 2015 before the Honorable Deadra L Jefferson, presiding Circuit Court Judge. The Petitioner was represented at this proceeding by J Brandt Rucker, Esquire. On March 31, 2015, the PCR Court filed an Order of Dismissal which denied relief on all the Petitioner's claims. Notice of Appeal was timely served and filed. The Petitioner now seeks a Writ of Certiorari.

STANDARD OF REVIEW:

In a long line of cases including, but not limited to Powell v. Alabama 287 US 45 (1932) Johnson v. Zerbst 304 US 459 (1938) and Gideon v. Wainwright 372 US 335 (1963) the US Supreme Court has recognized that the Sixth Amendment right to Counsel exists, and is necessary, in order to protect the fundamental right to a Fair Trial. The Constitution guarantees a Fair Trial through the Due Process Clauses, but defines the basic elements of a Fair Trial largely

through several provisions of the Sixth Amendment including the Counsel Clause, which reads as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public Trial by an impartial Jury of the state and district. Wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of Counsel for his defense."

As the Supreme Court stated in Strickland v. Washington 466 US 668 (1984) a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The 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 afford defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Mindful of the vital nature of Counsel's assistance the Supreme Court has held that, with certain exceptions, a person accused of a Federal or State crime has the right to have Counsel appointed, if retained Counsel cannot be obtained. The fact that a person, who happens to be a lawyer is present at trial alongside the accused, however is not enough to satisfy the Constitutional command. The Sixth Amendment recognizes the right to assistance of Counsel "because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results." Strickland. An accused is entitled to the assistance of an attorney, whether retained of appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that the "Right to Counsel" is the right to effective assistance of counsel. Government violates the right to effective assistance when it interferes with Counsel's ability to make independent decisions about how to conduct the

defense. See e.g. Geders v. United States 425 US 80 (1976), Herring v. New York 422 US 853 (1975), Brooks v. Tennessee 406 US 605 (1972), Ferguson v. Georgia 365 US 570 (1961) Counsel however can also deprive a defendant of the right to effective assistance by simply failing to render " adequate legal assistance " Cuyler v. Sullivan 446 US at 344 (actual conflict of interest adversely affecting lawyers performance renders assistance ineffective).A fair assessment of attorney performance dictates that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances from Counsel's challenged conduct, and to evaluate the conduct from Counsel's perspective at the time. Due to the difficulties inherent in evaluating any case, courts must indulge in a strong presumption that Counsel's conduct falls within the wide range of reasonable professional assistance.

That is in order to prevail, the defendant must overcome the presumption that under the circumstances the, challenged action "might be considered sound trial strategy". Since there are countless ways to provide effective assistance in any given case, even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases 58 N.Y.U.L. Rev. 299.343 (1983). Therefore a court deciding an actual ineffective claim must judge the reasonableness of Counsel's challenged conduct on the facts of each particular case. In making a claim of an ineffective assistance of Counsel, a Petitioner must identify Counsel's act or omissions that are alleged to not have been the result of reasonable professional judgement. The court must then determine whether in light of all the circumstances, the identifiable acts or omission were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that Counsel's function, in accordance with prevailing professional norms,

is to make the adversarial testing process work in the particular case. In certain Sixth Amendment contexts, prejudiced is presumed. That is actual or constructive denial of Counsel altogether is legally presumed to result in prejudice. The same is true for various kinds of state interference with Counsel's assistance. In these circumstances prejudice is so likely that a case-by-case inquiry into whether it exists is not worth the cost. Moreover, circumstances that involve impairments of the Sixth Amendment right are easily identifiable and, since the prosecution is directly responsible, are easy for the government to prevent. In order to meet the test for prejudice the defendant must show that there is reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill, 474 U.S. at 52, 106 S. Ct. at 366; Roscoe, 345 S.C. at 20, 546 S. E. 2nd at 419 (citing Hill, 474 U.S. at 52, 106 S. Ct. at 366; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000) Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v State, 314 S.C. 46, 443 S.E.2d 805 (1994). To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (citing State v Hazel, 275 S.C. 392, 394, 271 S.E.2d 602, 602 (1980). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009) (citing Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 650 (2000).

See Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). "Specifically, the voluntariness of a guilty plea is not determined but 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." Roddy v. State, 336 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "In order for a defendant to knowingly and voluntarily plead guilty, he must have full understanding of the consequences of the plea." Id. (citing Dover v. State, 304 S.C> 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A defendant's knowing and voluntary wavier of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." By a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993). "Under the procedure, a defendant, before his guilty plea may be accepted, is examined under oath on the voluntariness of his plea, including particularly its freedom from coercion by threat." Edmonds, 546 F.2d at 567. When a defendant pleads guilty on the advice of counsel, the plea may be attacked through only a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (1999))

ARGUMENTS:

I. The PCR Court erred in denying relief to Petitioner when the Court erroneously found Counsel was not ineffective for failing to provide adequate advice concerning the State's ability to prove "Intent to Permanently Deprive."

Petitioner pled guilty to three (3) Armed Robbery indictments which alleged cell phones as the property taken. However Petitioner presented evidence at the PCR hearing in the form of a police reports and victim statements. . (See Appendix p 125 and 126) as well as his own sworn testimony which collectively prove that Petitioner was not in possession of the victim's personal property when he left the scene. In fact the record proves that the victim's personal property was later found at the scene. (See. Appendix p. 102 line 23-25, p 103 line 1) with this being the case these Armed Robbery Indictment should have been dismissed and it was poor professional judgement on Counsel's behalf to advise her clients to plead guilty to charges that the State could not prove all elements to. In South Carolina the law is clear:

"Animus Furandi", is simply the Latin term for the intent to steal. See Wayne R Lafave, "Substantive Criminal Law § 8.00 (1986)" The meaning at common law of the words "Felonious" and "Felonious intent" means a criminal intent or more specifically, an intent to steal." See. 50Am. Jur. 2d Larceny §41 (1995). Thus, the phrase used (i.e. "did feloniously take") alleged a taking of property with the intent to steal. The intent to steal is the intent to permanently deprive the owner of possession of his property. See. McAnnich and Fairey. The Criminal Law of South Carolina. Third Edition, Offenses against Property, at page 257. The intent to permanently deprive the victim of the property would be part and parcel of the felonious intent.

In Kerrigan v. State, 304 SC 561, 406 S.E2d 160 (1991), this court stated that Larceny is the felonious taking of the goods of another without the consent of the other. The court went on to state that an intent by the offender to permanently deprive the owner of possession by converting the property to the offenders own use is implicit in the definition of larceny. Id. In Broom v. State 351 SC 219 (2002). This Court stated: "Similarly the intent to permanently deprive is also implicit in the definition of armed robbery.

In the present case Petitioner did not take the property by converting it to his own use. Petitioner did not flee with the property. In fact the record is pretty clear as to what happened. The victim placed her call phone on the ground and the male at the register kicked the phone. (See. Appendix p.70 lines 5-14). Such actions lack the required "Animus Furandi" and in absence of such element the State could not have satisfied its burden of proof. Thus Counsel's advice to plead guilty to these indictments were not considered sound trial strategy. Petitioner was prejudiced by her deficient performance in as much as had she properly and adequately advised Petitioner as to the States inability to prove the "intent to permanently deprive". Petitioner would not have pled guilty to these charges, but would have insisted on a trial and could have requested a lesser included offense. This Court should grant the Writ of Certiorari on this issue.

II. The PCR Court erred in denying relief to Petitioner when the court erroneously found that Counsel was not ineffective for failing to challenge the validity of the Armed Robbery indictments before advising Petitioner to plead guilty to said indictments.

Petitioner plead guilty to three (3) Armed Robbery Indictments. Two (2) out of Three (3) Indictments charge that Petitioner robbed the Family Dollar Store for money as well as robbed two (2) of its' employees for cellphones (Ms. Smith and Family Dollar in one indictment and Ms. Hughes and Family Dollar) in one indictment.

Petitioner argues that by including both victims (Ms. Smith and Family Dollar and Ms. Hughes and Family Dollar) in a one count Indictment. The indictment becomes Duplicitous because it charges two (2) separate offenses in the one (1) count indictment, thus rendering said indictments defective as an Indictment of Duplicity. See. State v. Samuels 743 S.E. 2d 773 (2013)

Petitioner's Counsel was ineffective for failing to challenge the indictment on this ground and also violating SC code ann 17-19-90, Counsel's deficient performance did in fact prejudice the Petitioner in as much that, first the Petitioner could not plead guilty to arm robbery of the store and not guilty to arm robbery of the victims cell phones, or vice versa on a one count indictment, second the notice document provided insufficient notice by informing Petitioner that he was charged with robbing the store twice, or from a different point, the cell phone theft should have been dropped to a lesser charge of attempted armed robbery and received a maximum sentence of twenty (20) years opposed to thirty (30) for armed robbery. This misinformation could have played a vital role in inducing Petitioner to plead guilty. One would be quicker to take a chance at trial for one (1) robbery, but would hesitate to do so when he is being accused of robbing a store not once, but twice. Such accusations implies a heavier punishment if found guilty. This is why it was so important for Counsel to correct the error in the notice document. Had the Petitioner known of this error he

would have insisted it to be corrected or not pled guilty. Writ of Certiorari should be granted on this issue.

III. The PCR court erred in denying relief to Petitioner, when the court erroneously found that Counsel's failure to research / investigate possible defenses had no impact on the intelligent and voluntary nature of the plea.

During the PCR hearing the Petitioner testified that the main reason he entered a plea of guilty was because his Counsel told him that he had no defenses. Petitioner also testified that if he would have been able to present his defenses he would not have plead guilty. See. (Appendix p 72lines 16-20). Petitioner testified that he believed his charge should not have been armed robbery and that because of Counsel's advice of the statement from the victim. (Ms. Williams) wherein she stated that her phone was kicked away. See. (Appendix 103, lines 10-13) Counsel also testified that she was aware of the report which stated that the phone had been found, two (2) of them in the back of the store. See (Appendix p 102, line 23 and p 103, line 1) Counsel testified that she was not aware of any evidence showing that they (Petitioner or Co- Defendant) transported, picked up and or put the phones in the trash. See. (PCR Appendix p 50, lines 11-14) Counsel testified that she reviewed the store video and that there is no evidence of the Petitioner ordering any people within the Family Dollar Store to do anything. See. (Appendix p 113 lines 5-8) Counsel also testified that one indictment for attempted armed robbery, the Petitioner was simply charged with the theft from the victim because she was merely present, and that the State could not prove a cell phone existed. See. (Appendix p 109: 9-111:16) Counsel also testified that it was proper for the

Petitioner to be charged twice for arm robbery of the Family Dollar Store because there was two employees present at the time of the robbery, but could not provide the court with any South Carolina legal precedent to support that conclusion. See (Appendix p 111:20- p112:25)

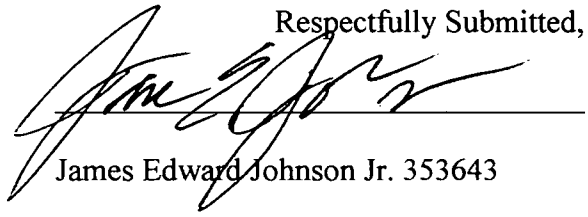
In light of all of the above facts it is hard to fathom why Counsel would advise her client to plead guilty and tell him he has no defense. In fact Counsel could not come up with any present case law or legal precedent in South Carolina to support her statement that under the facts. Petitioner has no defense. See (Appendix p 104, line 5, p 105, lines 1-2, p 112, lines 19-25). It is clear that Counsel's lack of research and investigation into the case, coupled with her lack of knowledge of the applicable laws in relation to the facts all demonstrates that Counsel was ineffective and her performance falls outside of the wide range of professional conduct. See .Woodard v. Collins 898 F.2d 1027 (5th Cir. 1990)

A court generally must strongly presume that counsel has exercised reasonable professional conduct. Strickland. 466 U.S. at 690, 104 S. Ct. at 2065 and Samples, 897 F.2s at 196. No such presumption, however, is warranted when a lawyer advises his client to plea to an offense which the attorney has not investigated. Such conduct is always unreasonable. A lawyer must be familiar with the laws and the facts of a case in order to provide effective assistance of Counsel. United States v. Burton 575 F Sup. 1320 (ED Texas 1983). Petitioner argues that he would not have pled guilty but for Counsel Errors, rather he would have insisted on going to Trial. Writ of Certiorari should be granted on this issue as well.

CONCLUSION

Petitioner's petition for Writ of Certiorari should be granted and PCR Courts order denying relief should be reversed and remanded back for a new trial.

Respectfully Submitted,



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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
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JAMES EDWARD JOHNSON, JR.

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RESPONDENT

APPELLATE CASE # 2015-001062

CERTIFICATE OF SERVICE

I certify that a true copy of the pro se cert petition in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of March, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of March, 2016.

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