

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to York County
John C. Hayes, III, Circuit Court Judge

BRODERICK CULP,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000322

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective for failing to investigate?

STATEMENT

On September 16, 2013, petitioner appeared before the Honorable Lee S. Alford in York County and pled guilty to two (2) counts of armed robbery, criminal conspiracy, and possession of a firearm. Concurrent respective sentences of fourteen (14) years, fourteen (14) years, five (5) years and five (5) years were imposed. Phil Smith, Esquire was plea counsel. Misti Shelton, Esquire was the assistant solicitor. (App. p. 1 – p. 27)

Petitioner filed an application for post-conviction relief on September 23, 2014. (App. p. 28 – p. 44) Respondent filed a return and motion to dismiss dated December 30, 2014. (App. p. 45 – p. 49) An evidentiary hearing was held on April 14, 2014, before the Honorable J. Ernest Kinard, Jr. Petitioner was present and represented by Nathan Sheldon, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing as did Tameka Griffin. (App. p. 50 – p. 93) On February 9, 2016, the Honorable John C. Hayes, III issued an order denying and dismissing petitioner's application for post-conviction relief.¹

This petition follows.

¹ Due to Judge Kinard's untimely death, Judge Hayes took over the case.

ARGUMENT

Plea counsel was ineffective in failing to investigate.

Petitioner was served with a life sentence if he were to be convicted at trial. He pled to a negotiated sentence of fourteen (14) years. (App. p. 3 ll. 7 -13) The factual basis for the plea was explained by the assistant solicitor:

MS. SHELTON: Your Honor, these offenses occurred between October 16 and October 17, 2010. The first robbery at the Little Giant BP in Rock Hill occurred before midnight. The other two robberies occurred after midnight. The facts that the State would have gone forward on was that on October 16th, 2010, an individual entered the Little Giant BP in Rock Hill. That person went to the cooler area, got a drink, purchased that drink, and when the register was opened used a gun and asked the cashier for money.

Later that evening around 3 a.m., an individual went into the Crenshaw Gas Station also in Rock Hill, York County, asked for cigarettes, paid for those cigarettes. When the register was open, again, used a small pistol and demanded money and was provided with cash from that robbery.

At 4 a.m. at Kangaroo Express in Fort Mill, South Carolina, York County, an individual again went to the counter and asked for cigarettes, he put his wallet on the counter. The clerk opened the register and then the defendant pulled out a small pistol and demanded money and then left the store but left the wallet there.

Through the investigation, there was identification in that wallet belonging to Mr. Culp. Also, on a video, someone entering the store around the time of the robbery was seen smoking a cigarette right there at the door. That cigarette was found to still be smoking by law enforcement, still burning. That cigarette butt was collected and was processed. There was DNA on that cigarette that matched Mr. Culp.

There was another individual involved who by his statement said that he was the get away driver, and that Mr. Culp was the one that he was driving the car for and Mr. Culp was in the car with him. That individual's name was Antonio Smith.

(App. p. 13, line 14 – p. 15, line 7)

Plea counsel gave a different version:

MR. SMITH: Mr. Culp's version would be that the person they labeled as the get away driver was found on foot within a half hour of leaving the scene with money in his pocket. He would say the roles were reversed, but certainly understands that gives him as much involvement with the three armed robberies had he been the one who entered the store.

THE JUDGE: Is that correct, Mr. Culp?

THE DEFENDANT: That's correct.

(App. p. 15, ll. 12-21)

Petitioner testified at the evidentiary hearing that he wanted counsel to investigate alibi defenses. He explained about one alibi:

A: What I wanted him to know was that every day - - because I work and commute a lot. I stop at the same place every day. I get something to eat at the same place. I smoke. I talk to employees there. They know me, you know. They know my face. They know me by name. That - - I actually, you know, if they had got camera and video stuff, they could - - they could probably see me within days of that, you know, because I stopped out there plenty of times. You know, kicked the bobo or talked with these people, have conversations with these people because I know them and they know me. And I was - - that was my explanation for them talking about they got a cigarette butt from somewhere out there.

(App. p. 71, ll. 10-22)

As to the other alibi petitioner said the following:

Q: Who is Tameka Griffin?

A: She is - - was my baby mother. At the time, she was pregnant.

Q: Was she a potential alibi witness in this case?

A: Yes, she was.

Q: What alibi would she have provided?

A: That I got dropped off at her home and the person left.

(App. p. 75, ll. 4-12)

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*. 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).

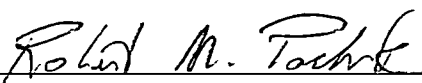
Counsel's failure to investigate may cause someone to plead guilty when he should not. In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) the court wrote that counsel had the duty to interview potential witnesses and to make an independent investigation of the facts and

circumstances of the case, quoting Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987) (emphasis in original).

CONCLUSION

Plea counsel's failure to investigate in this case constituted ineffective assistance of counsel.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of April, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
JOHN C. HAYES, III, CIRCUIT COURT JUDGE

BRODERICK CULP,

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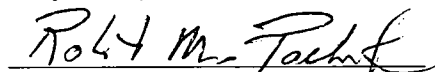
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Broderick Culp 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 April 14, 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 Broderick Culp.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of April, 2016

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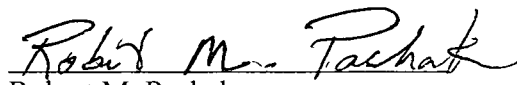
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CERTIFICATE OF SERVICE

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 Justin Hunter, Esquire and Broderick Culp, #175645, at Perry Correctional Institution this 28th day of April, 2016.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of April, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.