ORIGINAL

RECEIVED
JUN 16 2016
SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Thomas A. Russo, Circuit Court Judge

DAVID L. BARNES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000194

JOHNSON PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where he pled guilty before trial only because plea counsel failed to conduct a proper investigation, interview potential witnesses, and subpoena those witnesses to testify at trial thereby violating Petitioner's constitutional right to the effective assistance of counsel?

STATEMENT

A Horry County Grand Jury indicted Petitioner at the May 30, 2013 term of General Sessions for first degree burglary, and at the June 27, 2013 term for a second count of first degree burglary. App. 111-114. Petitioner pled guilty to one count of second degree burglary (violent) on March 11, 2014 before the Honorable Larry B. Hyman, Jr. He also pled guilty to a second count of second degree burglary (violent) pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) on that same date. App. 4, ll. 3-14. Assistant Solicitor Lauree Richardson appeared on behalf of the state, and W. Thomas Floyd represented Petitioner. App. 2. Petitioner was sentenced by Judge Hyman to ten years' imprisonment on the first count of second degree burglary (violent) and seven years consecutive on the other count. The aggregate sentence was seventeen years' imprisonment. App. 21, ll. 6-11. He did not appeal.

On June 3, 2014, Petitioner filed an application for post-conviction relief (PCR) raising the issue argued in this petition. App. 23-30. The state filed a return to this application dated January 26, 2015. App. 31-36. The matter proceeded to an evidentiary hearing on November 12, 2015 before the Honorable Thomas A. Russo. App. 37. Assistant Attorney General Jessica Kinard represented the state, and Steven Fowler represented Petitioner. App. 37. By order dated December 21, 2015, Judge Russo denied Petitioner relief. App. 103-110.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty before trial only because plea counsel failed to conduct a proper investigation, interview potential witnesses, and subpoena those witnesses to testify at trial thereby violating Petitioner's constitutional right to the effective assistance of counsel.

Guilty Plea

The assistant solicitor informed the court at the beginning of the hearing that Petitioner was indicted for two counts of first degree burglary, but was pleading guilty to two counts of the lesser included offense of second degree burglary (violent). The solicitor clarified that Petitioner was pleading to one count under North Carolina v. Alford, 400 U.S. 25 (1970). The state's sentence recommendation consisted of consecutive sentences of ten and seven years' imprisonment. App. 4, ll. 3-22.

The court explained to Petitioner his constitutional rights, including his right to a jury trial and his right to remain silent, along with the consequences of pleading guilty. App. 5, l. 16 – 9, l. 14. After this standard plea colloquy, the solicitor explained the state's version of the facts.

According to the solicitor, on February 14, 2013 and March 18, 2013, Petitioner entered two separate houses and stole various items, including a safe that contained weapons from the first house and a television and other weapons from the second residence. App. 15, ll. 11-24. The solicitor maintained that Petitioner had two prior burglary convictions that allowed the state to charge him with first degree burglary. App. 15, l. 25 – 16, l. 4.

The court found there was a substantial factual basis for the plea and that the plea was freely, voluntarily, knowingly, and intelligently made. App. 19, ll. 2-7. After accepting the plea,

the court sentenced Petitioner to an aggregate sentence of seventeen years imprisonment. App. 21, ll. 6-11.

PCR Hearing

Petitioner testified at the PCR hearing that he is illiterate and cannot read or write. App. 41, ll. 4-7. However, while he was incarcerated pretrial, his roommate wrote several letters to plea counsel, Thomas Floyd, on Petitioner's behalf requesting counsel investigate his case. These letters, which were marked as exhibits, were dated September 25, 2013, October 3, 2013, October 10, 2013, October 23, 2013, and February 19, 2014. App. 42, l. 12 – 50, l. 2; App. 97-102. In these letters, Petitioner asked plea counsel to obtain surveillance footage from the courthouse at the time of the alleged burglary on March 18, 2013. He testified this footage would have verified his alibi, namely that he was in court on that date for matters related to child support. App. 50, l. 8 – 52, l. 4.

Petitioner also asked plea counsel to contact several witnesses, who would have established an alibi for both alleged burglaries. These witnesses included Harvey Prince, Petitioner's adopted brother, who would have verified that Petitioner was at Prince's house when the burglary on February 14, 2013 took place. Plea counsel never contacted Prince. Petitioner also asked counsel to interview Jeannie Adams, Petitioner's cousin. Petitioner went to court with Adams on March 18, 2013 and she, in addition to the surveillance footage, would have confirmed Petitioner's alibi for the second burglary. App. 52, l. 19 – 55, l. 2. In addition to Prince and Adams, Petitioner also asked counsel to contact Robin Markham and Sheila Prince. App. 55, ll. 9-15. Counsel failed to subpoena all four potential witnesses. App. 55, ll. 9-22.

Petitioner testified that he was transported to the courthouse before his guilty plea and, at that time, "still was going to go to trial." However, plea counsel "came to me at the last minute and said that my witnesses didn't want nothing to do with my trial. And if I went to trial with this

without no witness, [he] said I could probably get life in prison because of my back past." App. 56, ll. 14-24. Because of counsel's lack of preparation and investigation, Petitioner felt "coerced" into pleading guilty. App. 59, l. 15 – 60, l. 4; App. 63, ll. 2-9. He also felt "threatened" because the solicitor "scared" him and said because of his prior record if he went to trial she would "make sure [he] got life in prison." App. 65, l. 19 – 66, l. 18. This is why Petitioner ultimately pled guilty.

Thomas Floyd, Petitioner's plea counsel, testified that Petitioner was indicted for "two different burglary charges." App. 73, l. 14. According to Floyd, Petitioner maintained that he was at the courthouse during one of the burglaries, but he had confessed to the other burglary. Floyd attempted to obtain the security footage from the courthouse, but was "told it had been taped over." App. 73, ll. 12-23.

Floyd explained that, at some point, the solicitor offered to allow Petitioner to plead guilty to two counts of second degree burglary (nonviolent) with a sentence recommendation of ten years' imprisonment, but Petitioner "repeatedly turned it down" and "focused on going to trial . . . on the case that involved him being at the courthouse." However, according to Floyd, "that wasn't the case that the State was going to try." The state was going to try Petitioner for the first degree burglary indictment in which Petitioner had given a confession. When Floyd told Petitioner that this burglary indictment had been placed on the trial docket, Petitioner allegedly said, "[W]e can't go to trial on that case, I did that." App, 73, l. 24 – 74, l. 10. Because Petitioner did not want to proceed to trial, Floyd ultimately obtained a second plea offer from the state and Petitioner ended up pleading guilty. App. 74, ll. 11-18. Floyd thought this second plea offer was "a little steep," but "the alternative [of life without parole] was a lot steeper." App. 74, ll. 19-22.

Floyd admitted Petitioner mentioned Harvey Prince and Tammy Parrott as potential witnesses, but Floyd never contacted either. App. 78, l. 15 – 79, l. 6. Moreover, Floyd admitted he

never interviewed Bradley Cook, who was Petitioner's son and co-defendant, about either indictment. Lastly, Floyd maintained that he was aware Jeannie Adams was a potential alibi witness for the indictment in which Petitioner stated he was at the courthouse during the burglary, but Floyd never contacted her because the state did not intend to try Petitioner for that indictment. App. 77, l. 14 – 78, l. 14.

Order of Dismissal

The PCR court found Petitioner failed to meet his burden of proving plea counsel rendered ineffective assistance of counsel. App. 107. The court found plea counsel conducted a proper investigation and was "thoroughly competent in his representation." App. 107-108. Moreover, the court ruled Petitioner could not prove prejudice because he failed to call any of the potential trial witnesses to testify at the PCR hearing. App. 108.

Discussion

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty before trial only because plea counsel failed to conduct a proper investigation, interview potential witnesses, and subpoena those witnesses to testify at trial thereby violating Petitioner's constitutional right to the effective assistance of counsel. Petitioner was prejudiced because he would have proceeded to trial instead of pleading guilty if counsel would have properly investigated his case and had been prepared to call witnesses in his defense.

"The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel." Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) (citing U.S. Const. amend. VI and Strickland v. Washington, 466 U.S. 668 (1984)). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A PCR applicant must show that (1) counsel's performance

was deficient, and that (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). "The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland, 466 U.S. 668, to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59. "[T]he voluntariness of a guilty plea is not determined by 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." Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

Here, Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he only pled guilty because plea counsel failed to conduct a proper investigation. Specifically, counsel failed to interview potential witnesses, including Jeannie Adams, Harvey Prince, Sheila Prince, and Robin Markham, who would have testified favorably towards Appellant, and to subpoena those witnesses to testify at trial. Moreover, counsel failed to obtain a copy of the security footage from the courtroom on the date of the first alleged burglary despite repeated requests from Petitioner. This footage could have verified Petitioner's alibi that he was in court that day for matters related to child support. Counsel's deficient performance violated Petitioner's Sixth Amendment right to the effective assistance of counsel.

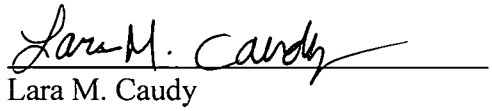
Petitioner was prejudiced by counsel's deficient performance because he would have proceeded to trial instead of pleading guilty if counsel would have properly investigated his case and had been prepared to call witnesses in his defense. Petitioner testified that he was transported to the courthouse before his guilty plea and, at that time, "still was going to go to trial." It was not until plea counsel told him "at the last minute" that he had not interviewed or subpoenaed any witnesses that Petitioner decided to plead guilty. App. 56, ll. 14-24.

Based on counsel's deficient performance and the resulting prejudice, this Court should reverse the order of the PCR court and remand for a new trial.

CONCLUSION

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

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of June, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
THOMAS A. RUSSO, CIRCUIT COURT JUDGE

DAVID L. BARNES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000194

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David L. Barnes 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 November 12, 2015. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She 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 her as counsel for David L. Barnes.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of June, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Thomas A. Russo, Circuit Court Judge

DAVID L. BARNES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000194

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 Johanna C. Valenzuela, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and David L. Barnes, #266974, at Turbeville Correctional Institution, P.O. Box 252, Turbeville, SC 29162, this 16th day of June, 2016.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of June, 2016.

Maria Hendrick (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.