

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge

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AUG 9 2016

SC SUPREME COURT

GERARD WATTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2016-000960

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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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 and interview a key witness, thereby violating Petitioner's constitutional right to the effective assistance of counsel?

STATEMENT

Petitioner's convictions arise from a shooting at a nightclub in Myrtle Beach. Plea counsel, who was retained, never contacted and interviewed Adrian Lane, the man who was shot at the club. Lane would have told counsel that Petitioner did not shoot him. App. 67, l. 16 – 69, l. 6. Counsel said he did not interview Lane because he did not have enough money to hire a private investigator to locate Lane. Moreover, counsel inexplicably never moved to declare Petitioner indigent to obtain the needed funds to hire an investigator. App. 71, ll. 10-14. Consequently, Petitioner was ultimately forced to plead guilty despite his desire to proceed to trial. App. 55, ll. 7-15; App. 57, ll. 3-22.

Petitioner was indicted by a Horry County Grand Jury in May 2013 for attempted murder and possession of a weapon during the commission of a violent crime. App. 93-96. He suffered from a drug addiction and his prior record consisted almost exclusively of drug related convictions. App. 22, ll. 19-22; App. 24, ll. 14-17. This was the first time he had ever been accused of a violent crime. Petitioner pled guilty to the lesser included offense of assault and battery of a high and aggravated nature (ABHAN) and the weapons offense on September 5, 2013 before the Honorable Larry B. Hyman, Jr. App. 1. Assistant Solicitor Brad Richardson represented the state, and Jonathon McCoy represented Petitioner.¹

Petitioner's sentencing was deferred until September 11, 2013. App. 7. He was ultimately sentenced to thirteen years' imprisonment for ABHAN and five years concurrent for possession of a weapon during the commission of a violent crime. App. 26, l. 22 – 27, l. 1.

¹ Petitioner also pled guilty to possession with intent to distribute heroin and threatening the life of a public employee on this date. App. 4, l. 18 – 5, l. 3. He was represented by J.M. ("Buddy") Long, III on these unrelated charges. App. 1. Petitioner does not challenge these convictions.

On May 15, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 32-38. The state filed a return to this application dated December 18, 2014. App. 39-46. An evidentiary hearing was convened on February 10, 2016 before the Honorable D. Craig Brown. App. 47. Assistant Attorney General Jessica Kinard represented the state, and Daniel Selwa represented Petitioner. App. 47.

Plea Counsel McCoy admitted at the evidentiary hearing that Petitioner asked him to contact Adrian Lane, the man who was shot at the club, and told him that Lane was “not going to say I [Petitioner] shot him.”² According to McCoy, he unsuccessfully “tried to personally track down Adrian [Lane].” He partly blamed his inability to locate and interview Lane on his lack of resources to hire a private investigator. McCoy admitted that “a private investigator probably could have” located Lane. App. 67, l. 16 – 69, l. 6. For whatever reason, McCoy failed to request a funding order from the court or seek other means to hire an investigator when Petitioner could not afford to pay the fee. App. 71, ll. 10-14.

Petitioner said that if McCoy had conducted a proper investigation he would not have pled guilty “because [he] wasn’t the one who shot the person [Lane] at the club that night.” App. 55, ll. 7-15. Petitioner asserted, “I never discharged my gun that night . . . If the man [Lane] got shot by me, he would have gotten shot by a .22, that is the gun I had on me. I admitted that. I admitted I had a gun on me. I never shot the person [Lane].” App. 57, ll. 3-7. While the bullet that struck Lane was never recovered, law enforcement found both .380 and 9mm shell casings at the scene. The 9mm bullets were discharged by an armed security guard at the club. App. 23, ll. 13-15. Lane was presumably shot by a .380 caliber bullet. This evidence corroborates Petitioner’s testimony that he did not fire his weapon that night.

² Lane was referred to as “Lang” in the PCR hearing transcript.

Petitioner said he only accepted the plea offer from the state because McCoy “wasn’t putting effort to go talk to my victim [Lane].” He maintained that if McCoy would have talked to Lane, he would “have never gotten convicted of the charge.” Petitioner said Lane admitted to Petitioner’s family that Petitioner did not shoot him and that Petitioner was “in jail for nothing.” App. 57, ll. 3-22. Petitioner believed Lane “was going to stand up and talk in my hearing,” but the assistant solicitor “told him not to, because” the solicitor knew Lane “was going to tell the truth of what happened with the” shooting. App. 59, ll. 9-13.

This portion of Petitioner’s testimony was corroborated by the record from his plea and sentencing. At the conclusion of Petitioner’s plea hearing, the solicitor told the court that Lane was “at the Department of Corrections right now in the infirmary, Your Honor. We’re going to have him transported back *so he can speak to the Court.*” App. 14, l. 23 – 15, l. 2 (emphasis added). Because Lane was not available on the day Petitioner pled guilty, the court deferred sentencing until six days later to give Lane an opportunity to address the court. However, during the sentencing hearing, the solicitor informed the court, “Mr. Lane is here, and *he doesn’t want to address the court.*” App. 26, ll. 18-19 (emphasis added). This was surprising since apparently the only reason the court deferred sentencing was to allow Lane to speak to the judge.

Petitioner’s testimony at the evidentiary hearing that Lane was going to talk at his plea hearing, but the assistant solicitor “told him not to” because the solicitor knew Lane “was going to tell the truth” about what happened at the nightclub sheds light on why Lane unexpectedly did not address the court during sentencing. App. 59, ll. 9-13.

Significantly, McCoy testified at the evidentiary hearing that if Lane would have spoken at Petitioner’s sentencing “like Mr. Watts [Petitioner] told me he was going to, if he [Lane] would have said the things that I was told he was going to say, Mr. Watts would have probably

gotten a couple of years less shaved off, because his [Lane's] injuries were a big impact on the 13 years." App. 73, ll. 10-24. This testimony also corroborates Petitioner's statement that he expected Lane to address the court during his plea, but the solicitor "told him [Lane] not to."

The PCR judge ultimately found counsel was not ineffective and "was thoroughly competent in his representation." App. 87. The court noted counsel's testimony regarding his difficulty in locating and interviewing Lane and found counsel handled this difficulty "strategically." The court further stated that the possibility of hiring a private investigator "was discussed and ultimately abandoned." App. 90.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to counsel's ineffective assistance for failing to properly investigate and locate and interview Adrian Lane, a key witness in the case, 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 and interview a key witness thereby violating Petitioner's constitutional right to the effective assistance of counsel.

There is no evidence to support the PCR court's finding that Petitioner and plea counsel discussed the possibility of hiring a private investigator, but "ultimately abandoned" the plan. See App. 90. Petitioner said he asked counsel to hire an investigator, but counsel told him he "needed more money." Therefore, while counsel may have decided to "abandon" the possibility of utilizing an investigator because Petitioner could not afford to pay the fee, Petitioner was not a part of that decision. Petitioner fully expected counsel to properly investigate his case and locate and interview Lane, who would have told counsel Petitioner did not shoot him. See App. 57, ll. 3-14 and App. 67, ll. 16-19. Because counsel failed to interview Lane, Petitioner had no choice but to plead guilty.

"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.

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)).

“[A] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)) (internal quotation marks omitted). “[A]t a minimum, counsel has the duty to interview potential witnesses and to make an *independent* investigation of the facts and circumstances of the case.” Id. at 331-332, 642 S.E.2d at 597 (quoting Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla 1986)) (internal quotation marks omitted) (emphasis in original).

Here, Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to counsel's failure to conduct a reasonable investigation. See Ard, 372 S.C. at 331, 642 S.E.2d at 597. Petitioner testified that he requested counsel hire an investigator to locate Lane, and when counsel stated he "needed more money for him to send an investigator," that he fully expected counsel to investigate on his own. However, counsel failed to interview Lane before Petitioner pled guilty. Lane would have told counsel that Petitioner did not shoot him. See App. 57, ll. 3-22 and App. 67, l. 16 – 69, l. 6.

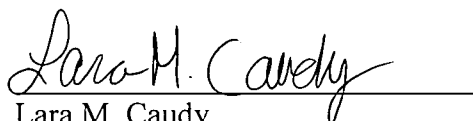
Petitioner was prejudiced by counsel's deficient performance because if counsel would have spoken to Lane, Petitioner would not have pled guilty. Instead, Petitioner "would have went to trial." See App. 58, ll. 1-2. Moreover, counsel admitted that if Lane would have spoken at Petitioner's sentencing, Petitioner would have received a reduced sentence. App. 73, ll. 10-24. This is additional evidence of prejudice.

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,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Honorable D. Craig Brown, Circuit Court Judge

GERARD WATTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gerard Watts states:

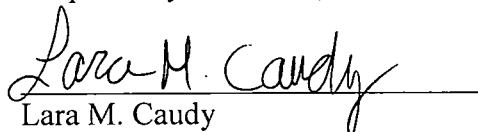
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.

2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing which was held on February 10, 2016. 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 one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Gerard Watts.

Respectfully submitted,


Lara M. Caudy

Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Honorable D. Craig Brown, Circuit Court Judge

GERARD WATTS,

PETITIONER

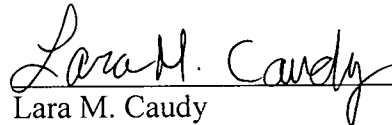
V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

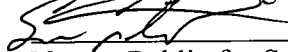
I certify that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Caitlin Hastings, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Gerard Watts, #222851 at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC, 29472, this 9th day of August, 2016.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of August, 2016.



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