

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————
Certiorari to Orangeburg County

Maité Murphy, Circuit Court Judge
—————

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S.C. SUPREME COURT

KENTRELL LIBURD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001449

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JOHNSON PETITION FOR WRIT OF CERTIORARI
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Lara M. Caudy
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel failed to properly investigate and advise Petitioner after it was determined that his co-defendant, who implicated Petitioner in a written statement, was incompetent to stand trial thereby violating Petitioner's constitutional right to the effective assistance of counsel?

STATEMENT

Petitioner was only sixteen years old when he was charged with murder and an unrelated armed robbery. The events occurred about a month after his sixteenth birthday. The state alleged that Petitioner and two other young men, who were both older than Petitioner, attempted to burglarize a “camper” where three Hispanic males lived. However, as the young men attempted to break in, the decedent “started fighting” and during the struggle “the gun [carried by one of the assailants] went off.” The decedent died from a single gunshot wound to the chest. App. 8, l. 24 – 10, l. 8.

The state’s case against Petitioner was based in large part on a statement given to law enforcement by his co-defendant, Gregory Foye. However, shortly before Petitioner pled guilty, his counsel, Margaret Hinds, learned Foye had been found incompetent to stand trial and that his statement would not be admissible against Petitioner at trial. App. 55, ll. 6-19. Nevertheless, Hinds did not communicate this significant fact to Petitioner before he agreed to plead guilty and had signed a plea agreement form. App. 44, ll. 2-23. She also did nothing to further investigate the nature of Foye’s incompetency. Significantly, Counsel Hinds was also aware that the state could not locate the two Hispanic male witnesses, who were both “illegal immigrants.” App. 42, l. 13 – 43, l. 3. These circumstances clearly weakened the state’s case against Petitioner, yet counsel still advised Petitioner that he should plead guilty.

If Petitioner would have known that Foye was found incompetent to stand trial before he agreed to plead guilty and that Foye’s statement implicating Petitioner in the murder would not be admissible against him at trial, Petitioner would not have pled guilty. Instead, he “would have went to trial.” App. 48, ll. 9-14.

Petitioner was indicted by an Orangeburg County Grand Jury in June 2012 for murder, and in December 2012 for armed robbery. App. 67-70. Based on the advice of his counsel, he ultimately pled guilty to armed robbery and the lesser included offense of voluntary manslaughter on October 22, 2013 before the Honorable Edgar W. Dickson. App. 1. Assistant Solicitor Harrison Bell represented the state, and Margaret Hinds of the First Circuit Public Defender Office represented Petitioner. App. 1. Judge Dickson sentenced the teenaged Petitioner to twenty-five years imprisonment for voluntary manslaughter and ten years consecutive for armed robbery based on a sentence recommendation from the state. App. 3, ll. 10-13; App. 18, ll. 10-17. The aggregate sentence was thirty-five years imprisonment.

On June 12, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 21-28. The state filed a return to this application dated January 29, 2015. App. 29-33. An evidentiary hearing was convened on May 21, 2015 before the Honorable Maité Murphy. App. 34. Assistant Attorney General J. Clayton Mitchell represented the state, and Jonathan D. Waller represented Petitioner. App. 34. By order filed August 26, 2015, Judge Murphy denied Petitioner relief. App. 60-66.

Counsel Hinds maintained at the evidentiary hearing that she advised Petitioner to plead guilty despite the fact that Foye was found incompetent to stand trial and that his statement implicating Petitioner would have been inadmissible at a trial because she believed “there was plenty of other evidence” against Petitioner. This evidence supposedly included a statement Petitioner gave to law enforcement. App. 55, ll. 6-19.

Noting that Hinds claimed she was aware that Foye had been found incompetent before she advised Petitioner to plead guilty and that she did not believe this fact was helpful to Petitioner, the PCR court found Petitioner failed to prove Hinds’ performance was deficient. The

court emphasized Hinds' claims that there was plenty of other evidence of Petitioner's guilt, and that Petitioner "fully admitted his guilt to the plea court." App. 64. Consequently, the court denied Petitioner relief.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to plea counsel's ineffective assistance for failing to investigate and properly advise Petitioner after his co-defendant Gregory Foye was found incompetent to stand trial, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel failed to properly investigate and advise Petitioner after it was determined that his co-defendant, who implicated Petitioner in a written statement, was incompetent to stand trial thereby violating Petitioner's constitutional right to the effective assistance of counsel.

Before the then seventeen year old Petitioner pled guilty, plea counsel was aware that his co-defendant Gregory Foye was found incompetent to stand trial and that, consequently, the statement Foye gave to law enforcement implicating Petitioner would not be admissible against Petitioner at trial. Surprisingly, counsel was also aware that the state could not locate the two Hispanic male witnesses to the murder which made it unlikely that the men would testify against Petitioner at trial. Despite knowledge that Foye was incompetent, plea counsel failed to investigate the nature of his incompetency or properly advise Petitioner of this fact before he agreed to plead guilty and signed the plea agreement form. Counsel's actions constituted deficient performance and violated Petitioner's Sixth Amendment right to the effective assistance of counsel. Petitioner was prejudiced because if he would have known Foye was found incompetent before he agreed to plead guilty, he "would have went to trial." App. 48, ll. 9-14.

"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)).

“[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

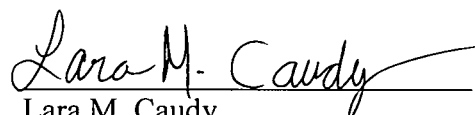
Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)) (internal quotation marks omitted). “[A]t a minimum, counsel has the duty to interview potential witnesses and to make an *independent* investigation of the facts and circumstances of the case.” Id. at 331-332, 642 S.E.2d at 597 (quoting Troedel 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 when plea counsel failed to properly investigate the nature of Foye’s incompetency and how it affected Petitioner in violation of Petitioner’s Sixth Amendment rights. Counsel also failed to properly advise Petitioner that Foye was found incompetent before he agreed to plead guilty, which prevented him from making a knowing and intelligent decision about whether he should proceed to trial. Petitioner was prejudiced by counsel’s deficient performance because if he would have known Foye had been found incompetent to stand trial, he “would have went to trial.” App. 48, ll. 9-14.

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.

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

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
Maité Murphy, Circuit Court Judge

KENTRELL LIBURD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kentrell T. Liburd states:

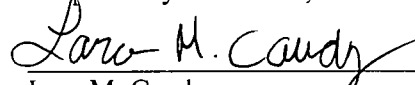
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on May 21, 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 an arguable legal issue that arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Kentrell T. Liburd.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maité Murphy, Circuit Court Judge

KENTRELL LIBURD,

PETITIONER

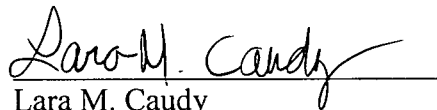
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

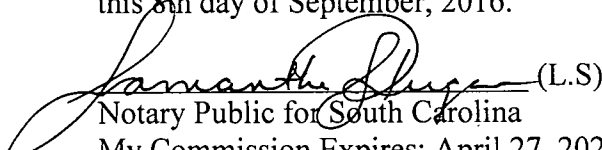
I certify that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Johanna C. Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Kentrell T. Liburd, #357498, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of September, 2016.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of September, 2016.



(L.S)

Notary Public for South Carolina

My Commission Expires: April 27, 2026.