

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Larry B. Hyman, Circuit Court Judge

KENNETH NELSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001066

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether plea counsel was ineffective in giving petitioner incorrect sentencing advice?

STATEMENT

On October 10, 2013, petitioner appeared before the Honorable Roger L. Couch in Spartanburg County and pled guilty to two (2) counts of lewd act on a minor and to two (2) counts of exposure of private parts.¹ He was sentenced to fifteen (15) years on the lewd act charges, suspended upon service of ten (10) years with probation for five (5) years thereafter. On the exposure charge he was sentenced to six (6) months. James Cheek, Esquire was plea counsel. Hillary Welborn, Esquire was the assistant solicitor. (App. p. 1 – p. 31)

Petitioner filed an application for post-conviction relief on April 15, 2014. (App. p. 32 – p. 43) Respondent filed a return dated October 23, 2014. (App. p. 44 – p. 50) An evidentiary hearing was held before the Honorable Larry B. Hyman, Jr. on November 13, 2015. Petitioner was present and was represented by Leah B. Moody, Esquire. Respondent was represented by Alicia A. Olive, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 51 – 97) On May 3, 2016, Judge Hyman issued an order denying and dismissing the petitioner's application for post-conviction relief. (App. p. 98 – 107)

This petition follows.

¹ The plea was pursuant to North Carolina v. Alford, 400 U.S. 25 (1970)

ARGUMENT

Plea counsel was ineffective in giving petitioner incorrect sentencing advice.

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).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243,


89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

At the evidentiary hearing in this case, petitioner testified that he did not want to plead guilty but counsel told him if he would take a plea of time served counsel would talk to the judge. Because of that petitioner signed the plea agreement. (App. p. 59, ll. 3–21); (App. p. 62, ll. 18-20); (App. p. 69, ll. 2–8)

As noted above, giving incorrect sentencing advice constitutes ineffective assistance of counsel.

CONCLUSION

Petitioner's guilty plea should be vacated.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2016.

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Honorable Larry B. Hyman, Circuit Court Judge

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PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001066

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kenneth Wayne Nelson states:

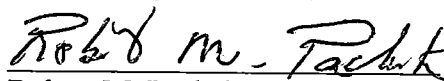
1. HE is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. HE has reviewed the record of petitioner's trial before Judge Larry B. Hyman, which was held on November 13, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. HE has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Kenneth Wayne Nelson.

Respectfully Submitted,



Robert M. Pachak

Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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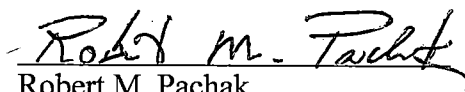
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2016-001066

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, 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 Kenneth Wayne Nelson, #163540, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 23rd day of September, 2016.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of September, 2016.

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