

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge

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S.C. SUPREME COURT

BERNARDO J. EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000604

JOHNSON PETITION FOR WRIT OF CERTIORARI

John H. Strom
Appellate Defender

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 Sixth Amendment rights were violated when plea counsel pressured Petitioner into entering into a guilty plea despite Petitioner having no memory of the incident from which his charges arose and despite plea counsel not reviewing the State's evidence with Petitioner?

STATEMENT

Indictment and Guilty Plea

Petitioner was charged with armed robbery and assault and battery of a high and aggravated nature (ABHAN). App. 3, ll. 4-16. Petitioner waived presentment of the charges and on October 7, 2016 Petitioner pled guilty before the Honorable Benjamin Culbertson. *Id.*

Petitioner was represented by Johnny McCoy and the State was represented by Martin D. Spratlin. Judge Culbertson sentenced Petitioner to ten years for the armed robbery and fifteen years for the ABHAN. App. 26, l. 15 - 27, l. 3.

Post-Conviction Relief and Evidentiary Hearing

Petitioner filed an application for post-conviction relief on January 27, 2015. App. 30 - 39. The State filed a Return on August 28, 2015. App. 40 - 45.

On February 11, 2016, a hearing was held before the Honorable D. Craig Brown. App. 46 - 81. James Falk represented Petitioner and Assistant Attorney General represented the State. The PCR court denied Petitioner's application. App. 80, ll. 12-25. This petition follows.

ARGUMENT

Petitioner's Sixth Amendment rights were violated when plea counsel pressured Petitioner into entering into a guilty plea despite Petitioner having no memory of the incident from which his charges arose and despite plea counsel not reviewing the State's evidence with Petitioner.

Relevant Facts

On March 16, 2013, Petitioner, armed with a taser and box cutter, entered a Horry County Scotchman convenience store. App. 10, l. 6 - 12, l. 19. The entire robbery was caught on the store's surveillance cameras. Petitioner was high on what he later believed was a mixture of crystal meth and cocaine. App. 64, l. 20 - 65, l. 23. He testified at the PCR hearing that he has no memory of the robbery. *Id.*

Once he entered the Scotchman, Petitioner pretended to shop, waiting until all of the other customers left. App. 10, l. 6 - 12, l. 19. After it was just him and the store's clerk, he walked to the bathroom. He then informed the clerk that there was no toilet paper in the bathroom. When the clerk went to check, Petitioner pushed her in the bathroom with him and locked the door. *Id.*

According to the State, while in the bathroom, Petitioner threatened the clerk with a taser and forced her to perform fellatio on him. *Id.* Petitioner then demanded money out of the cash register. *Id.* Once the cash register was emptied, Petitioner had the clerk come with him to the back room and demanded more money from her. *Id.* The clerk was eventually able to flee from Petitioner and call police from a nearby camp ground. *Id.*

Based on the video footage, police announced on the local news that they were looking for Petitioner. Petitioner's mother told him that law enforcement was looking for him. At the advice of his plea counsel, who was also a life-long friend, Petitioner turned himself into police the next day. App. 61, ll. 3-23.

Guilty Plea

Petitioner struggled with the decision to plead guilty. He had no independent recollection of the robbery. Prior to the relapse that led to the robbery, Petitioner had been sober for several years. After he was released on bond, Petitioner successfully completed outpatient rehabilitation and remained drug free during the pendency of his case. App, 17, l. 1 - 21, l. 13. Despite struggling with drug addiction earlier in life, he had no criminal record until this incident. App. 14, l. 16 - 15, l. 24.

At the guilty plea the State outlined the facts of the robbery and assault. When asked by the Court whether the State's facts were accurate, Petitioner demurred, "[a]s far as just the armed robbery and the assault." App. 12, ll. 14-25. Before he could answer any further, plea counsel interjected that Petitioner was only pleading guilty to ABHAN and armed robbery. *Id.* The State had agreed not to file any criminal sexual conduct charges. Judge Culbertson sentenced Petitioner to fifteen years for ABHAN and ten years for attempted murder. App. 26, l. 15 - 27, l. 6.

PCR Evidentiary Hearing

At the PCR hearing, plea counsel testified that the robbery and assault were clearly captured on video. App. 49, l. 13 - 51, l. 24. Petitioner did not wear a mask and was easily identified. *Id.* Plea counsel recalled that he was relieved that the State had agreed not to indict Petitioner for criminal sexual conduct because the clerk had been raped and "her family was pretty public about finding" Petitioner guilty. *Id.*

While the video did not show the sexual assault, it did show Petitioner forcing the clerk, who made three suicide attempts in the months between the robbery and the guilty plea, into the bathroom and then the clerk leaving the bathroom while zipping up her pants. *Id.* Plea counsel

believed that pleading guilty to the robbery and ABHAN was the best possible option and that the evidence was overwhelming. App. 52, l. 12 - 55, l. 22.

Petitioner testified that he did not want to accept the guilty plea, but that he was totally reliant on the advice of plea counsel as he had never been arrested before and had no memory of the robbery and ABHAN. App. 64, l. 10 - 65, l. 25. Petitioner explained that in the days leading up to the robbery he had relapsed into his drug addiction. *Id.*

Petitioner stated that he initially did not want to review the video, but prior to pleading guilty asked plea counsel to show him the video. App. 61, l. 23 - 62, l. 5. Plea counsel did not have the video at his office and Petitioner ultimately pled guilty without reviewing it. App. 66, l. 18 - 67, l. 15.

After pleading guilty, Petitioner viewed the surveillance footage and determined that the person in the footage looked similar to him, but that the person's identity was not entirely clear. App. 61, l. 23 - 62, l. 5. Petitioner believed that plea counsel, who had been his lifelong friend, was simply too inexperienced at the time to adequately represent him. App. 67, ll. 20-25.

Discussion

Plea counsel was ineffective and pressured Petitioner into entering into a guilty plea despite Petitioner having no memory of the incident from which his charges arose and without Petitioner having the opportunity to review the surveillance footage of the robbery, the key evidence against him. *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding that the difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea”).

Involuntary and Unknowing Guilty Plea

This rendered petitioner's guilty plea unknowing and involuntary. *See Boykin v. Alabama*, 395 U.S. 238 (1969) (provides that a defendant's decision to plead guilty must be knowingly and voluntarily made); *see also State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (provides that the record must reflect that the defendant freely and intelligently waived his constitutional trial rights and had a full understanding of the consequences of the plea).

"The longstanding test for determining the validity of a guilty 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). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted).

The South Carolina Supreme Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In *Hinson v. State*, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. *Id.* at 457-58, 377 S.E.2d at 339. *Hinson* found such advice deficient and reversed the PCR court. *Id.*; *see also Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing); *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988) (petitioner pled guilty upon assurance that solicitor would not oppose probation, which the State ultimately vigorously opposed).

Here, plea counsel's failure to review the video footage with Petitioner prior to the guilty plea resulted in Petitioner pleading guilty without having any knowledge of the crimes to which he was admitting guilt. *See Cobbs v. State*, 305 S.C. 299, 408 S.E.2d 223 (1991) (provides that failure to investigate possible defenses constitutes ineffective assistance of counsel); *see also Praylow v. Martin*, 761 F.2d 179 (4th Cir. 1985) (provides that a defendant's stated interest in pleading guilty does not counsel of his duty to investigate possible defenses). Petitioner could have gone to trial and argued that the person in the video was not him. App. 61, l. 23 - 62, l. 5.

Prejudice

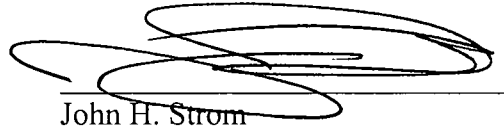
Petitioner can also prove prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). To prove prejudice in a plea context, "a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S.Ct. at 1384. "[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S.Ct. at 1485.

The focus remains on whether petitioner's plea was involuntary and that he would not have otherwise pled guilty. *Lockhart*, 474 U.S. at 56-57. In *Lockhart*, the Court noted that prejudice could be shown if it would have caused plea counsel to change his recommendation. *Id.* at 59.

Petitioner testified that he "wanted to go to trial. I didn't want to take a plea." App. 65, ll. 5-12. Given that the video was not as conclusive as to his identity as plea counsel had led him to believe, this would have been a rational decision. Therefore, petitioner has demonstrated prejudice under *Strickland* and *Lafler*.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and granting him a new trial.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of September, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bernardo J. Evans 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 D. Craig Brown, which was held on February 11, 2016 (Evidentiary hearing), 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 Bernardo J. Evans.

Respectfully Submitted,



John H. Strom

Appellate Defender
ATTORNEY FOR PETITIONER

This 26th 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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ATTORNEY FOR PETITIONER

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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 Caitlin Hastings, 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 Bernardo J. Evans, #361706, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of September, 2016.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of September, 2016.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025