

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

RECEIVED

SEP 30 2016

S.C. SUPREME COURT

JOHNNY JAMES EDWARDS, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000319

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by plea counsel's advice to Petitioner to plead, pursuant to Alford, to burglary second degree of a mobile home when the owner gave Petitioner permission to enter the mobile home?

STATEMENT

In July of 2012, the Pickens County Grand Jury indicted Petitioner Edwards for burglary first degree, criminal domestic violence of a high and aggravated nature [CDVHAN], child endangerment, unlawful conduct toward a child, resisting arrest and failure to stop for a blue light, indictments #2012-GS-39-0742, 0743, 0744, 0745, 0747, 1266. On June 25, 2013, Petitioner appeared before the Honorable Letitia Verdin and pled, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to the lesser included charge of burglary second degree and pled guilty to the other charges as indicted. Cameron G. Boggs represented Petitioner at the plea. Doug Richardson prosecuted the case. Judge Verdin sentenced Petitioner to fourteen (14) years for burglary, ten (10) years for CDVHAN, eighteen (18) months for child endangerment, ten (10) years for unlawful conduct toward a child, one (1) year for resisting arrest and three (3) years for failure to stop for a blue light, all sentences to run concurrently. Petitioner did not file a notice of intent to appeal.

In May of 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return in October of 2014. Petitioner filed an amended application for post-conviction relief on January 9, 2015. On December 14, 2015, an evidentiary PCR hearing was held before the Honorable Perry H. Gravely. R. Mills Arial represented Petitioner at the PCR hearing. Karen Ratigan represented the State. In a written order signed January 26, 2016, Judge Gravely denied relief and dismissed the application. A timely notice of intent to appeal was served on February 16, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by plea counsel's advice to Petitioner to plead, pursuant to Alford, to burglary second degree of a mobile home when the owner gave Petitioner permission to enter the mobile home.

Petitioner only alleged ineffective assistance of counsel in regard to the burglary charge. (App. p. 82, line 14 – p. 83, lines 1-2). Petitioner was accused of breaking into Stacy Ridden's mobile home where Petitioner's estranged wife and child were staying. Plea counsel told the judge:

Stacy owned the place where they were and told him to go over there, gave him permission. He disputes the fact that he broke in to commit a crime. However, he's pleading under *Alford* because he realizes that he committed a crime while he was there and that is assaulting his wife. When he got there and she invited him in, he went to change the baby's diaper and noticed that it was – the child was severely chaffed on the front on his penis and he had severe diaper rash. And he became enraged. And it doesn't justify anything. But that as the impetus. He lost it.

(App. p. 29, lines 11-21).

During the PCR hearing Petitioner testified that he had permission from Stacy Ridden to go in the mobile home. (App. p. 84, lines 7-25). When asked why he entered a plea, petitioner testified, "I was instructed by my attorney that an *Alford* plea would be the best route to go because even though I didn't do it, the State would make it look like I did. I didn't want fifteen-to-life on first degree burglary. I've got three small children." (App. p. 85, lines 8-12). Stacy Riden testified at the PCR hearing, "He come and asked if he could go check on the baby and – I called Jacqueline [Petitioner's estranged wife] to verify that she was okay with it and there was nothing – I wasn't home, I was working. She had my kids in her care. So I told him that it was fine for him to go to the house, and that's it." (App. p. 91, lines 112-18).

Plea counsel was asked during the PCR hearing what discussions he had with Petitioner in regard to the fact that Stacy Riden gave him permission to enter the mobile home. (App. p. 110, line 18 – p. 111, lines 1-2). Plea counsel testified, “I told him that it was an issue for trial. That if he wanted to go to trial, that was fine but there were ramifications about going to trial, and there was a resident of the house – not the owner but a resident – that was the victim of the crime, who told police that he was not welcome. He told me that he was on trespass notice – trespass order.” (app. p. 111, lines 3-11).

In the order of dismissal the PCR judge wrote, “This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective. Plea counsel testified he was aware of the Applicant’s contention that he had permission to be in the residence that was the location of the burglary. Plea counsel testified they discussed the Applicant’s version of events, the elements of the charges, and the sentence ranges.” (App. p. 122). The PCR judge erred in finding that Petitioner failed to prove that plea counsel was ineffective.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the

voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and 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.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

Petitioner pled, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to burglary second degree. S.C. Code §16-11-312 provides:

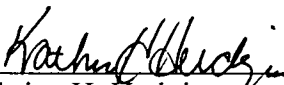
- (A) A person is guilty of burglary in the second degree if the person enters a dwelling **without consent** and with intent to commit a crime therein.
- (B) A person is guilty of burglary in the second degree if the person enters a building **without consent** and with intent to commit a crime therein, and either:
 - (1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
 - (a) Is armed with a deadly weapon or explosive; or
 - (b) Causes physical injury to any person who is not a participant in the crime; or
 - (c) Uses or threatens the use of a dangerous instrument; or
 - (d) Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
 - (2) The burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
 - (3) The entering or remaining occurs in the nighttime.

(emphasis added).

Plea counsel was ineffective in advising Petitioner to plead pursuant to Alford when the State could not prove that the entry was without consent, an element of burglary second degree. The guilty plea was rendered involuntary by counsel's deficient performance. There is a reasonable probability that, but for counsel's errors, Petitioner would not have pled guilty, but would have insisted on going to trial.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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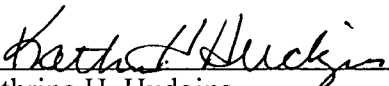
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny James Edwards, Jr. states:

1. SHE is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. SHE has reviewed the record of petitioner's trial before Judge Perry H. Gravely, which was held on December 14, 2015 (Evidentiary Hearing), and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. SHE 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 her as counsel for Johnny James Edwards, Jr..

Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of September, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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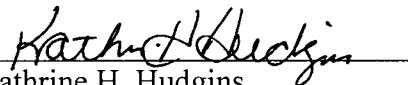
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APPELLATE CASE NO. 2016-000319

—————
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 Karen Ratigan, 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 Johnny James Edwards, Jr., #233803, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 23rd day of September, 2016.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of September, 2016.

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