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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Thomas A. Russo, Circuit Court Judge

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OCT 14 2016

S.C. SUPREME COURT

GREGORY PENCILLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000412

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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South Carolina Commission on Indigent 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 failure to advise Petitioner that the guilty plea to criminal sexual conduct could subject Petitioner to civil confinement, after the service of the criminal sentence, pursuant to the Sexually Violent Predator Act?

STATEMENT

In 2008, the Horry County Grand Jury indicted Petitioner for criminal sexual conduct first degree and kidnapping, indictments #2008-GS-26-4686, 4687. On August 9, 2010, Petitioner appeared before the Honorable Larry B. Hyman and pled guilty to criminal sexual conduct first degree. In exchange for the guilty plea, the State dismissed the kidnapping charge as well as two other charges from 2001, indictments #2009-GS-26-5014, 5015. (App. p. 11, line 18 – p. 12, lines 1-24). G. Scott Bellamy represented Petitioner at the guilty plea. Candice A. Lively prosecuted the case. Pursuant to the recommendation by the State, Judge Hyman sentenced Petitioner to thirty (30) years in prison. A timely motion to reconsider sentence was filed on August 10, 2010[1]. (App. p. 28). On March 14, 2012, a hearing was held before Judge Hyman on the motion to reconsider sentence. In a written order signed April 3, 2012, Judge Hyman denied the motion to reconsider sentence. (App. pp. 47-48). A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals dismissed the appeal on June 5, 2013. Sate v. Pencille, Op. No. 2013-UP-235 (S.C. Ct.App. filed June 5, 2013).

On November 8, 2013, Petitioner filed an application for post-conviction relief [PCR]. On November 9, 2015, an evidentiary PCR hearing was held before the Honorable Thomas A. Russo. Daniel Selwa represented Petitioner at the PCR hearing. J. Croom Hunter represented the State. In a written order filed January 25, 2016, Judge Russo denied relief and dismissed the application. A timely notice of intent to appeal was served on February 24, 2016. This petition for writ of certiorari follows.

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[1] The notice of intent to appeal was filed on the same day but dismissed pending resolution of the motion to reconsider sentence.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by plea counsel's failure to advise Petitioner that the guilty plea to criminal sexual conduct could subject Petitioner to civil confinement, after the service of the criminal sentence, pursuant to the Sexually Violent Predator Act.

Petitioner pled guilty to criminal sexual conduct first degree. During the plea colloquy the trial judge did not advise Petitioner that criminal sexual conduct first degree was a sexually violent offense as defined in S.C. Code §44-48-30 of the Sexually Violent Predator Act. During the PCR hearing Petitioner testified that plea counsel did not discuss the implications from a conviction for a sexually violent offense. (App. p. 140, lines 22-24). When asked if Petitioner had any understanding of the Sexually Violent Predator Act Petitioner testified, "None at all. I knew that there was such a thing as Predator Act, but I did not know how you were, I will say eligible for or what the conditions for it were." (App. p. 141, lines 2-5). Petitioner further testified that his classification officer at the South Carolina Department of Corrections explained the Sexually Violent Predator Act but plea counsel did not. (App. p. 141, lines 6-12). Plea counsel testified at the PCR hearing. Plea counsel, however, did not testify that he provided advice to Petitioner in regard to the Sexually Violent Predator Act.

The PCR judge denied relief and dismissed the application. In the order of dismissal the PCR judge wrote:

> Applicant testified at his PCR hearing that plea counsel did not thoroughly prepare him for his guilty plea. Specifically, Applicant alleged he did not understand what sentence he was potentially facing by pleading guilty. This Court finds Applicant's testimony to be not credible. The plea colloquy is clear; the plea judge went over Applicant's right to trial as well as Applicant's potential exposure as a result of pleading guilty. Furthermore, Applicant told the plea judge he understood he was facing a maximum sentence of thirty years, rather than life imprisonment, by pleading guilty. Applicant specifically told the plea judge he did not wish to have a jury trial, and he wanted to give up that right and enter a plea of guilty. Additionally, plea counsel testified that he went over all of those things with Applicant prior to his guilty plea.

(App. pp. 167-168). The PCR judge erred. During the plea colloquy the plea judge did not advise Petitioner that he was pleading to a sexually violent offense subjecting him to the Sexually Violent Predator Act. Petitioner testified that plea counsel did not advise him in regard to the Sexually Violent Predator Act and plea counsel's testimony at the PCR hearing did not contradict Petitioner's testimony in this regard. Plea counsel was ineffective in failing to advise Petitioner in regard to the Sexually Violent Predator Act.

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).

Plea counsel was ineffective in failing to advise Petitioner in regard to the consequences of pleading guilty to criminal sexual conduct, a sexually violent offense as defined in S.C. Code §44-48-30 of the Sexually Violent Predator Act. Petitioner was unaware that his guilty plea could result in involuntary civil confinement, after service of the criminal sentence, pursuant to the Sexually Violent Predator Act. There is a reasonable probability that if Petitioner had been

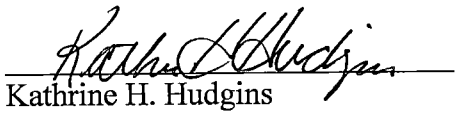
properly advised in regard to the implications of pleading to a sexually violent offense and the Sexually Violent Predator Act, he would not have pled guilty, but would have insisted on going to trial.

The collateral consequence analysis discussed in Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005), is questionable in light of the United States Supreme Court's decision in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). Padilla was decided on March 31, 2010. Petitioner pled guilty to criminal sexual conduct on August 9, 2010. In Padilla the United States Supreme Court wrote, "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland, 466 U.S., at 689, 104 S.Ct. 2052." 599 U.S. at 365, 130 S.Ct. at 1481. The Court did not decide if the distinction between direct and collateral consequences was an appropriate distinction because deportation, the penalty at issue in Padilla, is unique and severe.

Given that the United States Supreme Court has never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under Strickland, this Court should not make that distinction, especially in regard to involuntary civil confinement, after service of the criminal sentence, that could result in the equivalent of a life sentence, a unique and severe consequence. See People v. Hughes, 983 N.E.2d 439 (Ill. 2012).

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of October, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gregory Pencille 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 Thomas A. Russo, which was held on November 9, 2015, 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 Gregory Pencille.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of October, 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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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 Gregory Pencille, #312332, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 14th day of October, 2016.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of October, 2016.

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