

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable Edgar W. Dickson, Circuit Court Judge

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OCT 17 2016

ALAN BRUCE CARRUTHERS,

PETITIONER,
S.C. SUPREME COURT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000685

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
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 Court err in denying Petitioner relief where plea counsel provided ineffective assistance by failing to discuss with Petitioner the possibility of suppressing evidence which was obtained as a result of a warrantless search?

STATEMENT

On February 28, 2008, Petitioner pled guilty to criminal sexual conduct with a minor, first degree (Indictment 2006-GS-32-3422) in front of the Honorable G. Thomas Cooper, Jr. in Lexington County. Samuel R. Hubbard, III served as the Assistant Solicitor. Petitioner was represented by Ralph S. Kennedy, Jr.

The facts presented at the guilty plea by Solicitor Hubbard are as follows: Petitioner's alleged acts of malfeasance took place beginning in May 2004. App. 13 lines 24-25. He took the alleged victim to an abandoned building on his property and photographed her. App. 14 lines 6-24. The child disclosed in June 2004. App. 15 lines 10-11. A search warrant was executed on Petitioner's property, and law enforcement located a mattress and dolls in the abandoned building where Petitioner had allegedly taken the child. App. 16 lines 15-24. The Solicitor presented photographs which depicted the scenes from Petitioner's property as well as evidence obtained as a result of the search warrant. The child's mother spoke as well. App. 23 line 1 – App. 24 line 1.

Judge Cooper sentenced Petitioner to 30 years' imprisonment. App. 33 lines 22-24. Petitioner's plea and sentence were affirmed. No. 2010-UP-301 (Filed June 8, 2010).

Petitioner filed a timely application for post-conviction relief on March 7, 2011. App. 36. Petitioner's application contained allegations of ineffective assistance of counsel, including misrepresentation of evidence and conditions of the plea. App. 38. The State made its Return on or about December 16, 2011. App. 43. An evidentiary hearing was conducted on August 14, 2013 before the Honorable Edgar W. Dickson. App. 50. Catherine Johnson represented Petitioner, and J. Walt Whitmire represented the State. Petitioner and plea counsel testified during the hearing. On January 24, 2014, following the hearing but prior to receiving an

Order, Petitioner submitted a Memorandum in Support of his Application for Post Conviction Relief. App. 160. Petitioner then filed an Amended Application for Post-Conviction Relief on March 14, 2014. App. 131.

On September 18, 2015, Judge Dickson issued his order denying Petitioner relief. App. 131. The Order was filed September 23, 2015. Petitioner filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on November 5, 2015. App. 145. The State filed its Return on December 4, 2015. App. 179. A hearing on that motion was held on December 15, 2015 in front of Judge Dickson, with the same attorneys who had appeared at the evidentiary hearing. App. 183. An order denying that motion was signed by the Honorable Edgar W. Dickson on February 26, 2016 and filed on March 7, 2016. This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance by failing to discuss with Petitioner the possibility of suppressing evidence which was obtained as a result of a warrantless search.

During Petitioner's guilty plea, the Solicitor offered background some facts giving rise to the indictment. In particular, he stated that Petitioner brought the minor child to a building on his property which he described as "an abandoned - - I called it a house, but it's more of an abandoned building that was kind of like a frame facility, but it was like a little house." App. 14 lines 9 – 12. Following the minor child's disclosure of the alleged acts, law enforcement procured a search warrant and searched the abandoned house which Petitioner was using and his residence. App. 16 lines 15-20.

At the evidentiary hearing in his PCR case, Petitioner was asked about the search warrant and testified as follows:

Q: Okay, let's move on to the next issue. Did your attorney ever go over the search warrant with you?

A: No.

Q: Never one time. What's your knowledge of the facts surrounding the search warrant?

A: My knowledge is that I did finally in 2009 [see] the search warrant. That was after my guilty plea. I noticed that it was earmarked only for the property and the residence. And the outbuilding that's closest to the residence. And the outbuilding that's closest to the road, that was not mentioned at all as something authorized by the Court that they should search.

App. 111 lines 4-15.

Included in the description of premises to be searched was Petitioner's home, namely "[t]he residence located at 199 Pallet Dr. further described as a single dwelling double wide

moble [sic] home cream in color with green shitters and white trim with the numbers 199 displayed on the dwelling next to the front door. This residence is located off Pallet Dr. in the West Columbia area of Lexington County, S.C.” App. 176. Whether evidence was obtained at the other abandoned building not listed in the search warrant is uncontroverted, yet plea counsel never sought to contest its admissibility or even communicate with Petitioner any defenses which may have been available.

Additionally, Petitioner testified that he would not have pled guilty “knowing there was a problem with the search warrant such that the evidence that was used against [him] ... could have been suppressed.” App. 112 lines 4-9. Petitioner concluded his testimony during direct examination at the evidentiary hearing by agreeing that had it not been for what he saw as plea counsel’s failings as an attorney to advise him, Petitioner would not have pled guilty. App. 120 lines 14-18. Previously, and over objection, plea counsel testified that “everything looked to be in order” with the search warrant, and he believed that he investigated the alleged improper search. App. 89 lines 1 – 12.

Because Petitioner believed that there was no challenge or defense regarding the evidence which was obtained outside the scope of the search warrant, his plea was not voluntarily, knowingly, or intelligently entered. As mentioned, Petitioner would not have pled guilty. Respondent did not offer any evidence to refuse Petitioner’s assertion that plea counsel never discussed the search warrant with him.

Petitioner correctly asserted that Counsel was ineffective, because he did not communicate with Petitioner regarding details of the warrant, including how evidence seized outside its scope could have been suppressed. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const.

amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, Counsel failed to consult with Petitioner regarding certain defenses which were available prior to the plea. Petitioner’s testimony, as outlined above, indicates that Counsel did not go over the Fourth Amendment issues in his case. Such conduct falls within the gamut of deficiency.

“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). As evident from Petitioner’s testimony, the prejudice in his case manifests itself in his plea which was made without full knowledge of possible defenses available to him.

“The Fourth Amendment to the United States Constitution protects the people’s right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; *cf.* S.C. Const. art. I,

§ 10.” State v. Robinson, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). At its core, the Fourth Amendment “stands [for] the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” Id. (citing Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment’s prohibition against unreasonable searches and seizures. State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981). Petitioner was not made aware of the potential Fourth Amendment violations that existed with his case, and therefore he was unable to make an informed decision regarding his plea.

In Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891, (1981), the petitioner pled guilty to housebreaking and grand larceny. On PCR, he alleged ineffective of counsel in failing to move to suppress evidence. Id. The Court found that the petitioner’s admission of guilt, as well as his testimony that he would plead guilty again if granted a new trial, rendered a review of trial error unnecessary. Id. The facts of the case *sub judice* distinguish Petitioner Carruthers from Whetsell, whose rule applies only where the applicant is not prejudiced by any allegations of the PCR application due to the admission of guilt. Similar to the Petitioner in Craddock v. State¹, Mr. Carruthers illustrates prejudice by alleging that plea counsel was ineffective, rendering his guilty plea invalid.

It is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant’s self-serving statement may be sufficient to establish actual prejudice. *See* Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel’s deficient performance in failing to

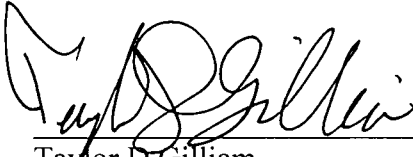
¹ 327 S.C. 303, 491 S.E.2d 251 (1997).

properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) (“The second prong of the ineffective assistance inquiry—prejudice—is shown by demonstrating through objective evidence ... [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Through his own testimony at the evidentiary hearing, Petitioner testified that he was prejudiced as a result of plea counsel’s deficiencies. According to Jackson, supra, Petitioner’s self-serving statements prove that he was prejudiced by the lack of information when it came to a material defense in his case.

“This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable ‘only to the extent that reasonable professional judgment supports the limitations on the investigation.’ ” McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). Counsel's less-than-adversarial approach was unreasonable. By his own admission, plea counsel represented Petitioner for a long time. App. 77 lines 3-7. Plea counsel could have pursued a suppression theory in the pre-trial phase but then changed gears if the evidence was admitted. Clearly, plea counsel could have argued that even if Petitioner was the actual perpetrator, his Fourth Amendment rights were violated as a result of the warrantless search. As it stands, however, Petitioner was not made aware of possible defenses which would have affected the evidence used against him. Therefore, his plea was not knowingly entered.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.


Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of October, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable Edgar W. Dickson, Circuit Court Judge

ALAN BRUCE CARRUTHERS,

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V.

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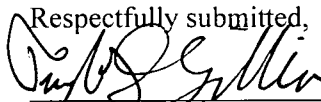
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Alan Bruce Carruthers states:

1. He is an attorney for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on 4/14/2016. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Alan Bruce Carruthers.

Respectfully submitted,

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of October, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Honorable Edgar W. Dickson, Circuit Court Judge

ALAN BRUCE CARRUTHERS,

PETITIONER,

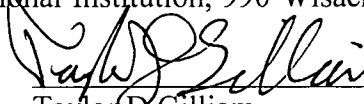
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STATE OF SOUTH CAROLINA,

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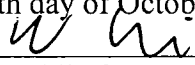
CERTIFICATE OF SERVICE

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 Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Alan Bruce Carruthers, 326809 at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC, 29010, this 17th day of October, 2016.


Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2016.



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