

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
Honorable Frank R. Addy, Circuit Court Judge

DEITRICH FUNCHESS

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000493

JOHNSON PETITION FOR WRIT OF CERTIORARI

John H. Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL

RECEIVED

OCT 26 2016

S.C. SUPREME COURT

INDEX

INDEXi

ISSUE PRESENTED1

STATEMENT2

ARGUMENT3

CONCLUSION8

PETITION TO BE RELIEVED AS COUNSEL.....9

ISSUE PRESENTED

Did the PCR court err in finding that Petitioner knowingly, voluntarily, and intelligently pled guilty when Petitioner felt pressured into pleading guilty based solely on the results of the SLED kit DNA test where Petitioner asserted that the sexual encounter at issue was consensual?

STATEMENT

Indictment and Guilty Plea

On September 9, 2013, the Orangeburg County Grand Jury indicted Petitioner for kidnapping and criminal sexual conduct first degree. App. 74 - 77. On December 11, 2013, Petitioner pled guilty before the Honorable Edgar W. Dickson. App. 1 - 19.

Peggy Hinds represented Appellant, and Assistant Solicitor Thomas Scott, III represented the State. Judge Dickson accepted the guilty plea and sentenced Petitioner to a total of seventeen years imprisonment. App. 17, ll. 8-13. Petitioner did not appeal his guilty plea.

Post-Conviction Relief Action

On July 23, 2014, Petitioner filed an application for post-conviction relief. App. 19 - 25. On June 17, 2015, the State filed a Return. App. 26-32. An evidentiary hearing was held before the Honorable Frank R. Addy, Jr. App. 33 - 63. Jonathan Waller represented Petitioner and Assistant Attorney General J. Clayton Mitchell represented the State.

Plea Counsel Hinds and Petitioner both testified at the hearing. On January 8, 2016, Judge Addy denied Petitioner's application in a written order of dismissal. App. 64 - 69. On January 29, 2016, Petitioner filed a "Motion Pursuant to Rule 59(e), SCRPC, to Amend". App. 70 - 71. The State did not file a response. Judge Addy denied Petitioner's Motion to Amend by written order dated February 19, 2016. App. 72 - 73.

This petition follows.

ARGUMENT

Did the PCR court err in finding that Petitioner knowingly, voluntarily, and intelligently pled guilty when Petitioner felt pressured into pleading guilty based solely on the results of the SLED kit DNA test where Petitioner asserted that the sexual encounter at issue was consensual?

Relevant Facts

On January 26, 2013 at around 3:00 a.m., Robert Jones was walking in the Golf Avenue area of Orangeburg from one relative's house to another when a black car pulled up next to him. App. 9, l. 4 - 13, l. 12. The driver asked if Jones needed a ride. Jones declined.

The driver then pulled out a handgun and again asked if Jones needed a ride. *Id.* Jones "got into the vehicle against his will." App. 9, ll. 12-21. The driver then forced Jones to perform oral sex on him and, later, the driver sodomized Jones. App. 10, ll. 4-23.

The driver then left Jones on the side of a road outside of Orangeburg. Jones ran to a nearby residence where the occupant called police. App. 10, l. 20 - 11, l. 25. Jones was taken to the hospital where a "rape protocol kit" was administered. *Id.*

In conjunction with police, Jones' family canvassed the neighborhood where the driver kidnapped him. Jones' family believed that the car was owned by someone in the neighborhood. *Id.* Petitioner's sister came forward based on the description of the car Jones provided. *Id.*

Jones later identified Petitioner in a photo-lineup. *Id.* DNA results taken from the rape protocol kit also matched Petitioner, as did a condom found on the side of the road near where Jones alleged he was raped. App. 12, ll. 1-15.

Guilty Plea

Petitioner pled guilty on December 11, 2013. Mid-way through the plea colloquy, after the State had provided their factual basis for the plea, Judge Dickson asked Petitioner if he

agreed with the State's recitation of the facts. App. 12, l. 18 - 13, l. 12. Petitioner replied that he did not agree with the State's facts. *Id.*

Before Petitioner could explain further, Counsel Hinds interrupted, "We would -- he would agree with the gist of the story . . . or the -- I mean, that's why he's here taking responsibility. There are some details, that do not affect his guilt or innocence, that he would say did not occur exactly as the solicitor stated." App. 13, ll. 2-12.

Counsel Hinds then briefly conferred with Petitioner. Judge Dickson then led Petitioner through the language of each indictment. App. 13, l. 20 - 14, l. 23. Petitioner affirmed that he was pleading guilty to both crimes. *Id.* Judge Dickson then accepted Petitioner's guilty pleas and sentenced him two concurrent sentences of seventeen years imprisonment. App. 15, l. 14 - 17, l. 11.

Post-Conviction Relief Proceeding

Petitioner testified at the PCR hearing that he and Counsel Hinds never discussed his case in detail. App. 37, l. 14 - 39, l. 19. Petitioner explained that the sexual encounter with Jones was consensual and that he told Counsel Hinds that she should speak with a Joshua Walk, who could testify that Jones had lied about the nature of their sexual encounter. *Id.*

Petitioner recalled that Counsel Hinds was completely engrossed with the DNA results showing that Jones and Petitioner had had sex. *Id.* By contrast, Petitioner reflected that, "I really -- I didn't have [an] issue because I know my DNA was there." App. 40, ll. 13-19. Petitioner stated that he did not want to plead guilty, but that Counsel Hinds informed him that it was "the best thing to do" in light of the DNA evidence. App. 42, ll. 3-21.

Counsel Hinds averred that she reviewed discovery with Petitioner, including the victim's statement to law enforcement. App. 52, l. 8 - 54, l. 12. According to Counsel Hinds, Petitioner

initially denied having sex with Roberts, but later claimed that the sex was consensual after the DNA results came back. *Id.*

Counsel Hinds claimed that she spoke with Walk, at Petitioner's insistence, but that Walk was unable to do more than "vouch" for Petitioner's character. App. 56, l. 2 - 57, l. 13. Walk was unable to name other any other potential witnesses or to provide any corroborating evidence that would bolster his potential testimony. *Id.*

Counsel Hinds alleged that, until the DNA results returned, Petitioner's case was going to be a credibility battle between Petitioner and Jones. App. 58, l. 12 - 59, l. 25. There were no third party witnesses to the sexual encounter and Petitioner was unable to provide Counsel Hinds with "anything to investigate." *Id.*

Counsel Hinds recollected that "basically, obviously, the DNA was a gamechanger because it corroborated somewhat the victim's story, and the condom was found where the victim said it would be." App. 59, ll. 8-18. From that point forward, Counsel Hinds began negotiating a possible resolution with the solicitor. While maintaining that she advised Petitioner that it was his decision whether to plead guilty or proceed to trial, Counsel Hinds stressed at the evidentiary hearing that she was focused on pushing Petitioner to accept a guilty plea. App. 60, ll. 1 - 18.

Order of Dismissal

The PCR court denied Petitioner application for post-conviction relief via a written order issued on January 8, 2014. The PCR court found that Petitioner's guilty plea was freely and voluntarily entered. App. 67. The court concluded that Petitioner had been advised of the "charges, potential penalties, and of his constitutional rights."

In so ruling, the court specifically found that Petitioner's testimony regarding Counsel Hinds' failure to advise him on the elements of his charges was not credible. App. 68. In contrast, the PCR determined that Counsel Hinds' testimony about her preparation and review of Petitioner's case was credible.

Discussion

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” *Brady v. United States*, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See *Boykin*, 395 U.S. 238; accord *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (finding 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); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (finding the difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea”).

Furthermore, “[i]n determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

In this case, an “unsound result” occurred because the record does not reflect that Petitioner freely and intelligently pled guilty. See *Brady*, 397 U.S. at 758; see also *Boykin*, 395 U.S. 238. Specifically, Petitioner testified that plea counsel insisted that Petitioner plead guilty after the results

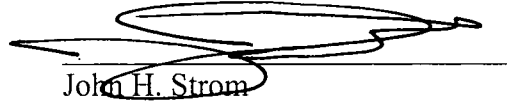
from the SLED “rape protocol kit” showed that Petitioner and Roberts had had sex. App. 42, l. 3 - 44, l. 17.

Petitioner tried to explain that the sexual encounter was consensual, but that plea counsel kept reiterating that it was in Petitioner’s “best interests” to plead guilty. App. 59, l. 6 - 60, l. 14. Petitioner, who had never been in serious legal trouble before, felt overwhelmed by the situation and was totally reliant on the deficient advice of Petitioner. App. 38, l. 3 - 40, l. 16.

Therefore, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty. App. 67-68; *see Boykin*, 395 U.S. 238 (finding a defendant’s decision to plead guilty must be knowingly, voluntarily, and intelligently made).

CONCLUSION

Based on the foregoing reasons, Petitioner Deitrich Funchess' petition for writ of certiorari should be granted to allow full briefing on the issue.

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Frank R. Addy, Circuit Court Judge

DEITRICH FUNCHESS

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Deitrich Funchess 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 Frank R. Addy, which was held on October 27, 2015 (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 Deitrich Funchess.

Respectfully Submitted,




John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of October, 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."



John H. Strom
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 26th day of October, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Orangeburg County

Honorable Frank R. Addy, Circuit Court Judge

—————
DEITRICH FUNCHESS

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

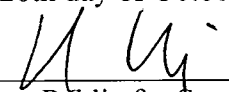
—————
CERTIFICATE OF SERVICE
—————

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 Ruston Neely, 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 Deitrich Funchess, #358169, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of October, 2016.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

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

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