

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Doyet A. Early, Circuit Court Judge

TRAVARIS WALKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001490

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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S.C. SUPREME COURT

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ISSUE PRESENTED

Was the guilty plea rendered involuntary by trial counsel's failure to obtain and review with Petitioner the video surveillance tape from the Total Wine store to establish alibi?

STATEMENT

In October of 2012, the Charleston County Grand Jury indicted Petitioner Walker for murder, indictment #2012-GS-10-5821. On January 27, 2014, Petitioner appeared before the Honorable Roger M. Young and pled guilty to the lesser included charge of voluntary manslaughter. Beattie Butler represented Petitioner at the plea. Pursuant to negotiations with the State, Judge Young sentenced Petitioner to thirty (30) years. Petitioner did not appeal his conviction and sentence.

On October 31, 2014, Petitioner filed an application for post-conviction relief (PCR). The State filed a return on June 2, 2015. On April 20, 2016, an evidentiary hearing was held before the Honorable Doyet A. Early, III. James K. Falk represented Petitioner at the PCR hearing. J. Rutledge Johnson represented the State. In a written order filed July 5, 2016, Judge Early denied relief and dismissed the application. A timely notice of intent to appeal was filed on July 14, 2016. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea was rendered involuntary by trial counsel's failure to obtain and review with Petitioner the video surveillance tape from the Total Wine store to establish alibi.

During the PCR hearing Petitioner testified that he told his lawyer that he was at the Total Wine store in the West Ashley area of Charleston at the time the deceased was shot in Lincolntonville. (App. pp. 34-35). Petitioner testified that video surveillance from Total Wine would have established an alibi defense. (App. p. 35, lines 9-16). When asked if trial counsel obtained the video from Total Wine Petitioner testified:

He told me he hired a private eye to go get it and then he told me that he did have it. So when he visit me at the county jail and I asked him about it so we could have went over it he was fumbling through like he was looking for it saying he left it at his office on file. So when I got out on bond I called again and I asked him about, you know, I want to come down and see it so I could let him know who I been an d who the other guy been, you know what I'm saying? He kept giving me the runaround saying he had it, it been on file, but he never presented it to me. Nobody who was concerning me, you know what I'm saying?

(App. p. 35, line 24 – p. 36, lines 1 – 13). Petitioner testified that his lawyer obtained and Petitioner viewed a video from Norm's Pizza in downtown Charleston but in order to establish alibi he needed the video from Total Wine, before he went to Norm's. (App. p. 36, lines 16 – p. 37, lines 1-22).

PCR counsel asked plea counsel why he did not obtain the video surveillance from Total Wine. (App. p. 50, lines 3-4). Plea counsel answered:

He is wrong about that. Here is what I am having trouble recalling. Part of the problem, Judge, is I don't have the file. I don't work at the PD's office anymore. But I can tell you that what I recall is that we tried to get evidence from Total Wine. I can't recall whether we got the video or not. What I recall is his frustration that we couldn't get what he said he had to sign something and show his ID when he went in. I don't know if that was Total Wines procedure for verifying that they had sold somebody who was of age or not.

But my recollection is that that never panned out. That my investigator, she wasn't a private investigator, she was my investigator, Cecilia Wilson, subpoenaed documents and that they said no such thing existed or something like that. Whether there was a video or not, I cannot independently recall right now whether there was.

(App. p. 50, lines 5-23). Plea counsel again testified that he did not remember if there was a video from Total Wine. (App. p. 51, lines 1-5).

In the order of dismissal the PCR judge wrote, "Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance of counsel under prevailing professional norms. The applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant." (App. p. 70). The PCR judge erred. Counsel was ineffective in failing to obtain and review with Petitioner the surveillance tape from Total Wine.

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 obtain the surveillance tape from Total Wine to establish alibi. There is a reasonable probability that, but for counsel’s deficient performance, Petitioner would not have pled guilty but would have insisted on going to trial. Petitioner is entitled to relief in the form of a new trial.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue. Alternatively, the case should be remanded to the PCR court to allow trial counsel to review the file from the public defender office to determine the status of video surveillance tape from Total Wine.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of December, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Travaris Walker 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 Doyet A. Early, which was held on April 20, 2016, 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 Travaris Walker.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender

This 6th day of December, 2016.

ATTORNEY FOR PETITIONER

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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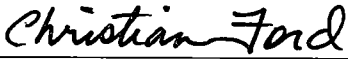
RESPONDENT

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 Alicia Olive, 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 Travaris Walker, #358642, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 6th day of December, 2016.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of December, 2016.

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