STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

CARLOS J. KEMP,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001719

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel failed to properly advise Petitioner of the lesser included offenses of murder, specifically voluntary and involuntary manslaughter, or develop a viable defense strategy to utilize at trial, where counsel erroneously focused on "accident" which was not a viable defense, thereby violating Petitioner's constitutional right to the effective assistance of counsel?

STATEMENT OF THE CASE

Petitioner was indicted by an Orangeburg County Grand Jury on October 21, 2013 for the offense of murder after an altercation with his girlfriend, Ebony Bryant, led to her death. App. 80-81. In a statement to law enforcement before his arrest, Petitioner said he and Bryant engaged in a verbal argument that eventually turned physical. App. 62, ll. 5-8. During the argument, Bryant hit Petitioner and Petitioner struck Bryant. At some point, Bryant fell to the ground and hit her head. After the argument, the two went to bed. When Petitioner woke the next morning, Bryant was no longer breathing. He panicked and buried her body in the woods. Months later, after a missing persons investigation, Petitioner led police to her body. The body was too decomposed to determine a cause of death. App. 9, ll. 8-17; App. 47, ll. 18-23; App. 52, l. 21 – 53, l. 16. The skull was also missing. App. 67, ll. 4-7.

Petitioner explained during the evidentiary hearing that Bryant was "alive" and "fine" when he went to sleep and that, if he would have known she was injured, he "would have called an ambulance." App. 53, ll. 4-16. He was adamant that he did not murder Bryant. App. 48, ll. 8-9

On January 13, 2014, Petitioner ultimately pled guilty to murder before the Honorable Edgar W. Dickson and was sentenced to thirty years' imprisonment. App. 13, ll. 20-25. He was represented by Margaret Hinds of the First Circuit Public Defender Office. App. 1. Donald Sorenson was the Assistant Solicitor. App. 1.

Petitioner asserted during the evidentiary hearing that he only pled guilty because plea counsel failed to advise him of the lesser included offenses of murder or develop any sort of reasonable defense strategy. App. 43, ll. 10-25; App. 48, ll. 2-9. Petitioner was adamant that he "didn't murder her [Bryant]," but said he "didn't feel comfortable going to trial" with plea

counsel as his attorney. App. 48, ll. 8-9; App. 55, ll. 18-19. Petitioner had "no choice" but to plead guilty because he "couldn't go to trial with her [plea counsel]." App. 52, ll. 1-20.

On September 16, 2014, Petitioner filed an application for post-conviction relief (PCR) raising the issue argued in this petition. App. 16-23. The state filed a return dated September 17, 2015. App. 24-29. An evidentiary hearing was convened on February 25, 2016 before the Honorable Maite Murphy. App. 30. Assistant Attorney General J. Clayton Mitchell represented the state, and Glenn Walters represented Petitioner. App. 30. By order dated May 23, 2016, Judge Murphy denied Petitioner relief. App. 71-79.

At the evidentiary hearing, plea counsel, Margaret Hinds, claimed she advised Petitioner about "the different degrees and what the elements were for murder, voluntary manslaughter, [and] involuntary [manslaughter]." She said she "had many [plea] negotiations with Don Sorenson [the assistant solicitor]" and "had hoped to be able . . . to work something out in the voluntary range," but "the solicitor's office was just not open to that." Hinds claimed Sorenson "was not open to anything less than murder." App. 66, ll. 1-17.

Significantly, Hinds admitted that this "certainly" was not "a premeditated murder." App. 67, ll. 22-23. She said if Petitioner chose to proceed to trial, she would have argued it was "an accident" or attempted to "stretch" it to involuntary manslaughter. However, Hinds acknowledged that Petitioner's statement to police was inconsistent with both of these theories.[1] App. 67, l. 14 – 68, l. 10.

The PCR court ultimately found Petitioner failed to meet his burden of proof. The court found counsel's intent to argue "the incident was an accident" if the case went to trial was

[1] Involuntary manslaughter and the defense of accident were inconsistent with Petitioner's statement because Petitioner stated he struck Bryant after their verbal argument turned physical and Bryant hit him.

"reasonable under the circumstances" despite the fact that Petitioner's "confession was inconsistent with that strategy."[2] App. 77. Further, the court found "[c]ounsel cannot be held ineffective just because the State had a very strong case against [Petitioner]." App. 77. The court ultimately denied Petitioner relief. App. 79.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to plea counsel's ineffective assistance for failing to properly advise Petitioner of the lesser included offenses of murder, specifically voluntary and involuntary manslaughter, or develop a viable defense strategy, this Petition for Writ of Certiorari follows.

[2] At the evidentiary hearing, Petitioner took exception to the state's characterization of his statement as a "confession." He maintained his statement was not a confession. He merely "told them [the police] what happened. I didn't tell them I killed her [Bryant]." App. 52, l. 21 – 53, l. 6.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made since plea counsel failed to properly advise Petitioner of the lesser included offenses of murder, specifically voluntary and involuntary manslaughter, or develop a viable defense strategy to utilize at trial, where counsel erroneously focused on "accident" which was not a viable defense, thereby violating Petitioner's constitutional right to the effective assistance of counsel.

There is no evidence to support the PCR court's finding that plea counsel's intent to argue "the incident was an accident" if the case went to trial was "reasonable under the circumstances" or that "the State had a very strong case against [Petitioner]." See App. 77. Plea counsel's failure to properly advise Petitioner of the lesser included offenses of murder and develop a viable defense, for example, that Petitioner was only guilty of voluntary manslaughter, rendered Petitioner's guilty plea involuntary. If counsel would have advised Petitioner of the elements of voluntary and involuntary manslaughter, and developed a viable defense strategy, Petitioner would not have pled guilty. Instead, he would have exercised his constitutional right to a jury trial. Respectfully, this Court should reverse the ruling of the PCR court and remand for a new trial.

"The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel." Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) (citing U.S. Const. amend. VI and Strickland v. Washington, 466 U.S. 668 (1984)). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). "The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland, 466 U.S. 668, to claims of the same against plea counsel).

First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. at 59. "[T]he 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." Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made because he pled guilty without a full understanding of the lesser included offenses of murder, specifically voluntary manslaughter and involuntary manslaughter, and how these offenses may have applied to

his case. Petitioner said counsel failed to advise him of the lesser included offenses and that, if he would have known of these "lesser crime[s]," he would not have pled guilty to murder because he "didn't murder her [Bryant]." App. 48, ll. 2-9.

Likewise, if plea counsel would have developed a viable defense strategy, for example, that Petitioner was only guilty of voluntary manslaughter, Petitioner would not have pled guilty. Instead, he would have exercised his constitutional right to a jury trial.

Counsel testified that, if the case went to trial, her intent was to argue Bryant's death was "an accident" or that Petitioner was only guilty of involuntary manslaughter. App. 67, ll. 14-25. However, unlike the PCR court found, these strategies were not "reasonable under the circumstances" because they were not viable defenses. See App. 77. First, as counsel recognized, these strategies were inconsistent with Petitioner's statement to law enforcement that he struck Bryant after their verbal argument turned physical. Moreover, the allegations in no way support the defense of accident or a conviction for involuntary manslaughter. See State v. Harris, 382 S.C. 107, 116, 674 S.E.2d 532, 537 (Ct. App. 2009) (citing State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994)) ("In South Carolina, the defense of accident requires showing the harm caused was unintentional, the defendant was acting **lawfully** at the time of the incident, and **due care was exercised** . . .") (emphasis added); see also State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)) ("Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some **unlawful act not amounting to a felony** and **not naturally tending to cause death or great bodily harm**, or (2) the doing of a **lawful act** with a reckless disregard for the safety of others.") (emphasis added). Consequently, it was reasonable for Petitioner to have no confidence in plea counsel and to not "feel comfortable

going to trial" with her as his attorney given counsel's stated defense theory, which, as shown, was clearly not viable. See App. 55, ll. 15-19.

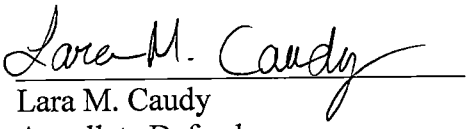
The only reasonable defense strategy, and the one that counsel should have utilized, was that Petitioner was only guilty of voluntary manslaughter. "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." Sams, 410 S.C. at 309, 764 S.E.2d at 514 (citing State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)). A jury could have found Petitioner struck Bryant "in the sudden heat of passion upon sufficient legal provocation" after their verbal argument turned physical and Bryant hit Petitioner. See Id.

Plea counsel's ineffective assistance of counsel prevented Petitioner from making "a voluntary and intelligent choice among the alternative courses of action" available to him and rendered his guilty plea invalid. See Hill, 474 U.S. at 56. He was prejudiced because, if counsel would have properly advised him about the lesser included offenses of murder, most significantly, voluntary manslaughter, he would not have pled guilty. Moreover, if counsel would have developed a viable defense strategy, such as arguing Petitioner was only guilty of voluntary manslaughter, Petitioner would have exercised his constitutional right to a jury trial.

Respectfully, this Court should reverse the ruling of the PCR court and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

CARLOS J. KEMP,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carlos J. Kemp states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on February 25, 2016 before the Honorable Maite Murphy. In her opinion, seeking certiorari from the order of dismissal is without merit.

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 Carlos J. Kemp.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of January, 2017.

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."

Lara M. Caudy
Appellate Defender

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

ATTORNEY FOR PETITIONER

This 9th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

CARLOS J. KEMP,

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 upon Carlos J. Kemp, #305605, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 9th day of January, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of January, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.