

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Jocelyn J. Newman, Circuit Court Judge

KEVIN BACKUS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001609

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
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

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S.C. SUPREME COURT

INDEX

INDEX..... i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 3

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL..... 8

ISSUE PRESENTED

Whether there was sufficient evidence to uphold the PCR judges findings that petitioner failed to set forth a prima facie case for relief?

STATEMENT

On June 13, 2013, petitioner appeared before the Honorable William H. Seals, Jr. in Florence County and pled guilty to distribution of cocaine base, second degree assault and battery, and threatening the life of a public official. Respective sentences of eleven (11) years, three (3) years, and five (5) years were imposed. Marshall S. Weaver, Esquire was plea counsel. Emily Crayton, Esquire was the assistant solicitor. (App. pp. 1-13)

Petitioner filed an application for post-conviction relief on September 26, 2013. (App. pp. 14-20) Respondent filed a return dated May 6, 2014. (App. pp. 21-25) An evidentiary hearing was held before the Honorable Jocelyn J. Newman on June 1, 2016. Petitioner was present and was represented by Jonathan D. Waller, Esquire. Respondent was represented by Croom Hunter, Assistant Attorney General. Petitioner testified at the hearing. (App. pp. 26-48) On July 18, 2016, Judge Newman issued an order denying and dismissing the application for post-conviction relief. (App. pp. 49-54)

This petition follows.

ARGUMENT

There was insufficient evidence to uphold the PCR judges findings that petitioner failed to set forth a prima facie case for relief.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, supra. This means 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. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client or failure to investigate. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007); Stalk v. State, supra. The post-conviction relief court will normally consider the guilty plea transcript as well as the evidence presented at the post-conviction relief hearing in looking at guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the voluntariness of the plea. 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 United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that “a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.” 395 U.S. at 242-243, 89 S. Ct. at 1712. The Court went on to note:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Mallory v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Third, is the right to confront one’s accusers. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923. We cannot presume a waiver of these three important federal rights from a silent record.

395 U.S. at 243, 89 S. Ct. 1712.

In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

In this case petitioner alleged in his application for post-conviction relief that counsel was ineffective and he failed to investigate and present substantial mitigating evidence during sentencing. (App. p. 16) At the evidentiary hearing petitioner stated that Mr. Weaver was a good lawyer when he first got him but he just felt like he started

working with the State. (App. p. 39, ll. 8-10) The PCR judge asked him why he thought his attorney was working with the State. (App. p. 39, ll. 24-25) Petitioner answered:

MR. BACKUS: Because like I say before last time I saw him before he said the ten years, he been like he still gone get me off. You gone beat this case, that's all he kept saying Terry stop, you know what I'm saying, Terry Act. They follow me three destinations without having a right to even follow me at all. They had no reason to follow me at all. They follow me three different destinations. One of the officers been like, yeah, we see a red Camry on this area be on the look. That basically telling the other officer stop me for no reason. You know what I'm saying, he telling the officer he did and this did that. But you just telling him to stop me when you see me, that what he pointed out. So I went and did my own research, you know what I mean, while I was in the county jail. And I seen it, you know what I'm saying, so I was just trying to pursuit it. And I was trying to figure out why he trying to say ten years when you keep telling me I'm going to beat the case. That's all.

(App. p. 40, ll. 1-18)

Respondent moved for summary dismissed under Rule 41(b), SCRPC. (App. p. 43, ll. 21-25) The PCR judge quoted the rule in her order of dismissal:

Rule 41 (b), SCRCP, states that, "For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without having to waive his right to offer evidence in the event that the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

(App. p. 51)

The Court concluded by stating, "Applicant's testimony failed to set forth any specific allegations of ineffective assistance of counsel for this Court to make such a finding, and as such, Respondent's motion to dismiss is granted."

This Court has previously held that it will not uphold the findings of a PCR judge if there is no probative evidence to support those findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). The decision of the PCR judge in this case should not be upheld.

CONCLUSION

Petitioner's guilty plea should be vacated.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of January, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Jocelyn J. Newman, Circuit Court Judge

KEVIN BACKUS,

PETITIONER

V.

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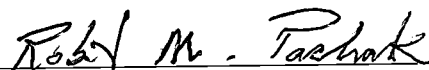
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin J Backus 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 Jocelyn J. Newman, which was held on June 1, 2016 (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 Kevin J Backus.

Respectfully Submitted,



Robert M. Pachak

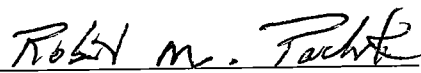
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of January, 2017.

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."


Robert M. Pachak
Appellate Defender

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ATTORNEY FOR PETITIONER

This 30th day of January, 2017.

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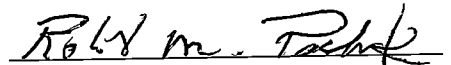
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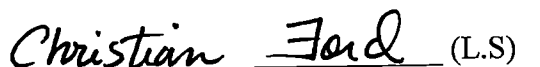
RESPONDENT

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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 Lindsey McCallister, 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 Kevin J Backus, #296578, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 30th day of January, 2017.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of January, 2017.

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