STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

KEVIN WAYNE MCDANIELS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001414

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Was the Alford plea rendered involuntary by plea counsel's failure to interview and subpoena alibi witnesses?

2. Did the PCR judge err in finding that Petitioner's actual innocence claim was not cognizable under the Post-Conviction Procedure Act?

STATEMENT

In March of 2008, the Spartanburg County Grand Jury indicted Petitioner McDaniels for one count of burglary first degree, one count of burglary second degree and two counts of grand larceny, indictments #2008-GS-42-1743, 1744, 1745, 1746. On August 26, 2008, Petitioner appeared before the Honorable R. Markley Dennis, Jr. and entered pleas pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) to all four charges. Robert Hall represented Petitioner at the plea. Barry Barnette and Marie Thompson prosecuted the case. Pursuant to negotiations with the State, Judge Dennis sentenced Petitioner to fifteen (15) years for burglary first degree, fifteen (15) years concurrent for burglary second degree and five (5) years concurrent for each grand larceny charge. Judge Dennis also ordered that the State sentences were to be served concurrently with a federal sentence Petitioner was serving. Petitioner did not appeal his sentence.

On June 16, 2009, Petitioner filed an application for post- conviction relief. 2009-CP-42-3350. The State filed a return on October 30, 2009. Petitioner filed a second application on April 22, 2010. 2010-CP-42-3350. This second application was treated as an amendment. On November 5, 2010, the State filed an amended return and motion to dismiss because Petitioner was incarcerated outside the State of South Carolina. On November 5, 2010, the Honorable J. Derham Cole signed an order of dismissal without prejudice.

On February 10, 2014, Petitioner filed a third application for post- conviction relief. 2014-CP-42-506. The State filed a return on September 9, 2014. In January 11, 2016, an evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. John Brandt Rucker represented Petitioner at the PCR hearing. Alicia A. Olive represented the State. In a written

order signed April 29, 2016, Judge Cothran denied relief and dismissed the application. A timely notice of intent to appeal was served on June 21, 2016. This petition for writ of certiorari follows.

ARGUMENTS

1. The Alford plea was rendered involuntary by plea counsel's failure to interview and subpoena alibi witnesses.

On August 26, 2008, Petitioner entered pleas, pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to one count of burglary first degree, one count of burglary second degree and two counts of grand larceny. Petitioner filed a timely application for post-conviction relief on June 16, 2009. Petitioner filed an amended application on April 22, 2010. On November 5, 2010, the Honorable J. Derham Cole signed an order of dismissal without prejudice because, at the time, Petitioner was incarcerated outside the State of South Carolina. (App. pp. 54-55). In both the initial and amended applications, Petitioner asserted actual innocence and alleged that the pleas were coerced. (App. p. 36, p. 43). Petitioner filed his final PCR application on February 10, 2014. He again asserted actual innocence and alleged that the pleas were coerced. (App. pp. 57-58). Petitioner additionally submitted affidavits from sixteen witnesses who indicated that Petitioner was in Florida at the time the homes were burglarized in South Carolina. (App. pp. 82-95). Petitioner also asked for the help of a private investigator to assist with the investigation into the actual innocence claim. (App. p. 77).

Petitioner was not physically present at the PCR hearing but testified by phone. During the PCR hearing plea counsel admitted that Petitioner advised him about numerous alibi witnesses. (App. pp. 136-137). Plea counsel admitted that although he had given the prosecution information about alibi witnesses, he had no documentation that alibi notice had been formally served. (App. p. 141, lines 14-22). Rule 5(e)(1), SCRCrimP provides, "Upon written request of the prosecution stating the time, date and place at which the alleged offense

occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi." Petitioner testified that plea counsel failed to subpoena many of the alibi witnesses. (App. p. 110, lines 17-22).

In the order of dismissal the PCR judge wrote, "Applicant has failed to show that Counsel's performance was deficient in any regard, or that any alleged deficiency prejudiced him. The record reflects that applicant's plea was entered freely, voluntarily, knowingly and intelligently. Therefore, this Court finds Applicant has failed to show that his plea was involuntary, and this claim is denied and dismissed with prejudice." (App. p. 161). The PCR judge erred. Plea counsel was ineffective in failing to interview and subpoena alibi witnesses. There is a reasonable probability that if counsel had interviewed and served the alibi witnesses with subpoenas to compel attendance at trial, Petitioner would not have entered an Alford plea and instead would have gone to trial.

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).

In Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014), the South Carolina Supreme Court wrote:

> "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991).

During the PCR hearing plea counsel testified about three alibi witnesses; Petitioner's father, step-mother and ex-wife. (App. p. 136, lines 7-12). As discussed above, it does not appear that plea counsel filed the proper alibi notice for these witnesses. Additionally, plea counsel admitted that he received affidavits from other potential alibi witnesses. (App. p. 136, lines 1-7). When asked if at the time of trial the alibi witnesses were present, plea counsel answered, "The majority of them, either the information I had was bad, or they indicated they would not come and testify." (App. p. 147, lines 3-4). There is no indication that plea counsel retained an investigator to help locate witnesses and no indication that any of the witnesses were served with a subpoena to appear in court. The issue was further complicated by the fact that Petitioner's application was not heard until almost eight years following the plea. The Alford plea was rendered involuntary by plea counsel's failure to interview and subpoena alibi witnesses.

2. The PCR judge erred in finding that Petitioner's actual innocence claim was not cognizable under the Post-Conviction Procedure Act.

Petitioner consistently asserts that he is actually innocent of the South Carolina state court burglary and larceny charges. In all three PCR applications Petitioner maintained that he was in Florida at the time of the South Carolina burglaries. (App. p. 36, p. 43, p. 58). During the PCR hearing Petitioner testified that he was in Florida at the time of the South Carolina burglaries. (App. p. 107, lines 20-21; p. 118, lines 19-25). Petitioner testified that he told his lawyers that he was in Florida at the time of the South Carolina burglaries and gave them the names of alibi witnesses. (App. p. 109, lines 10-11; p. 110, lines 19-22; p. 111, lines 1-7; p. 112, line 23). Plea counsel admitted that Petitioner advised him about numerous alibi witnesses. (App. pp. 136-137).

Addressing the actual innocence claim in the order of dismissal the PCR judge wrote, "This Court finds Applicant's claim of actual innocence should be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. code Ann. §17-27-10to – 160 (2003)." (App. pp. 161-162). The PCR judge additionally wrote:

> The allegation presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code §17-27-20(b) (1985). A Post-conviction relief application cannot assert any issues that could have been raided at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Additionally, the PCR court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. §17-27-20(a)(6). The Unifrom Post-Conviciton Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal. Irick v. State, 264 S.C. 632, 216 S.E.2d 545(19750; Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). Therefore, this Court finds this allegation must be denied and dismissed.

(App. pp. 162-163). The PCR judge erred. Petitioner's actual innocence claim should have been addressed by the PCR judge. The actual innocence claim is not a challenge to the

sufficiency of the evidence as in Ashley v. State and Simmons v. State. The claim is not a direct appeal issue as in Irick v. State and Simmons v. State.

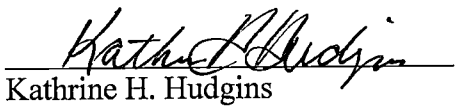
S.C. Code §17-27-20 establishes who may institute post-conviction relief proceedings and provides:

> (A) Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

There is evidence that Petitioner is actually innocent. Actual innocence would require vacation of the conviction and sentence. The actual innocence claim has not been previously presented. Contrary to the finding by the PCR judge, the actual innocence claim could not have been raised on direct appeal. The PCR judge erred in finding that petitioner's actual innocence claim was not cognizable under the Post-Conviction Procedure Act.

CONCLUSION

Based on the argument presented in issue one, this Court should reverse the convictions and sentences and remand for a new trial. Based on the argument presented in issue two, this Court should remand to the PCR court for a full hearing on the actual innocence claim.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin Wayne McDaniels 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 R. Ferrell Cothran, which was held on January 11, 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 Kevin Wayne McDaniels.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of February, 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."

Kathrine H. Hudgins
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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 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 Kevin Wayne McDaniels, #254398, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 22nd day of February, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 22nd day of February, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025