STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable Frank R. Addy, Circuit Court Judge

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S.C. SUPREME COURT

JOSHUA BROOKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001592

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in denying Petitioner relief where Petitioner pled guilty to five offenses but neither he nor his attorney had reviewed the complete discovery materials for four of the offenses due to the solicitor's policy of withholding discovery until each separate case was placed on the trial docket?

STATEMENT OF THE CASE

Indictments and Guilty Plea

On October 9, 2014, the York County grand jury indicted Petitioner Joshua Brookins for one count of possession with intent to distribute ("PWID") methamphetamine, two counts of distribution of methamphetamine, and one count of trafficking methamphetamine. App. 324 – 325; App. 327 – 328; App. 330 – 331; App. 333 – 334. Brookins was also charged with an additional count of distribution of methamphetamine, for which he waived presentment to the grand jury. App. 336 – 337. The offenses arose from several undercover drug purchases allegedly made by a confidential informant on December 6, 2013, February 28, 2014, March 21, 2014, on March 27, 2014.

Following pre-trial motions and selection of the jury on December 2-3, 2015, Brookins appeared before the Honorable Alexander Macaulay and entered a plea of guilty to all offenses on December 4, 2015. Brookins was represented by Melissa Inzerillo, and the state was represented by assistant solicitors Jennifer Colton and Misti Shelton. App. 1; App. 188 – 229. Judge Macaulay sentenced Brookins to concurrent terms of ten years for the PWID offense and fifteen years suspended upon the service of ten years, followed by five years probation, on each of the other offenses. App. 228 – 229.

Direct Appeal

On December 9, 2014, plea counsel filed a Notice of Appeal and Rule 203(B), SCACR, explanation with the Court of Appeals. App. 232 – 237. By order dated February 13, 2015, the direct appeal was dismissed. App. 238. The Remittitur was issued on March 10, 2015. App. 239.

Post-Conviction Relief Application and Evidentiary Hearing

On February 24, 2015, Brookins filed an application for post-conviction relief ("PCR"). App. 241. The State filed its Return on December 22, 2015. App. 249. On April 19, 2016, an evidentiary hearing was held before the Honorable Frank R. Addy. Brookins was represented by Tommy Thomas, and the state was represented by assistant attorney general Justin Hunter. App. 255. Brookins and plea counsel Melissa Inzerillo both testified.

The solicitor's original plea offer was fifteen years for all offenses, which were charged as second offenses based on Brookins' prior simple possession of marijuana conviction. App. 190, ll. 2-4; App. 274, ll. 2-16; App. 286, l. 4 – 287, l. 23. According to plea counsel, the drug task force would routinely conduct multiple buys from a targeted individual. The solicitor's office would then threaten to take each offense to trial separately in order to subject the defendant to additional enhancements, in an effort to induce the defendant into a guilty plea. Additionally, the solicitor's office had a policy of withholding discovery on the offenses until they were docketed for trial. Thus, a defendant must decide to accept or reject the solicitor's offer of a "packaged plea" to multiple offenses with only partial discovery, presumably on the strongest case, having been provided. App. 287, l. 24 – 302, l. 3.

In this case, Brookins rejected the state's initial offer. The solicitor then set the first case for trial on indictment 2014-GS-46-3002, for the offense allegedly committed on February 28, 2014. App. 4, ll. 7-8; App. 7, ll. 5-9. Plea counsel made a pre-trial motion for joinder and requested that she be provided the complete discovery from the other cases. Judge Macaulay initially denied the motion for joinder. App. 7, l. 5 – 37, l. 22; App. 71, l. 25 – 73, l. 4; App. 87, l. 7 – 89, l. 20. However, on the morning of trial, plea counsel told the plea court that Brookins was willing to plead "straight up" to all pending charges as first offenses. Plea counsel explained

that Brookins was charged with second offenses, but that the defense challenged the enhancement because his prior charge was a simple possession of marijuana. App. 188, l. 7 – 189, l. 3. The solicitor agreed that enhancement of the marijuana charge was precluded because it was uncounseled. While the solicitor had no objection to Brookins pleading on the charge set for trial, per her office's policy she could not negotiate on the other offenses since the initial offer was rejected. App. 188, l. 19 – 190, l. 13; App. 196, ll. 9-14. Judge Macaulay then reversed his ruling on joinder. App. 190, ll. 14 – 193, l. 21. After a recess, the parties came back on the record and the solicitor said that Brookins would be pleading "straight-up" to three counts of distribution of methamphetamine, one count of PWID methamphetamine, and one count of trafficking methamphetamine. App. 193, l. 21 – 195, l. 23. Brookins waived presentment on one of the distribution counts, which was not yet indicted because the drug testing results were still pending. App. 196, ll. 1-25; see App. 36, l. 14 – 37, l. 19.

When Judge Macaulay asked plea counsel if the state could produce sufficient evidence such that conviction at trial would be most probable, she responded with a qualified "I do." Counsel explained that for the two March cases, she had reviewed the state's videos but Brookins had not because the solicitor did not provide her with hardcopies. She also noted that the drug analysis was not completed for the December case and no video had been provided. Plea counsel said she had discussed the lack of discovery with Brookins, but that he wished to plead guilty and that she "would concur in that." App. 198, ll. 5-20. Assistant solicitor Shelton said her involvement in the case had been limited but that it was her "understanding" that all written discovery had been provided and that counsel viewed the audio and video recordings. App. 198, l. 24 – 199, l. 7; App. 207, l. 7 – 208, l. 7.

During the ensuing colloquy, Brookins told the plea court that he was twenty-six years old, earned his G.E.D., and had never been in criminal court before. App. 200, l. 21 – 201, l. 12. Brookins answered "yes" to the plea court's questions: "And you're relinquishing any rights to discovery that has not been provided in order to dispose of all these cases today?" and "You do that knowingly and intelligently?" App. 208, ll. 8-13. The solicitor then set forth the following allegations of facts that she intended to prove at trial:

> Your Honor, the three distributions and the trafficking all occurred as buys set up from the same confidential informant who was working with the York County Multi-jurisdictional Drug Enforcement Unit. That informant per the Unit calls he was searched and wired prior to the buys. The buys were set up with the defendant. The informant had prior contact with the defendant, knew him before setting up the buys. The buys were monitored, all four buys were monitored through the Drug Unit. The first one occurred on December 6th of 2013. The informant met with the defendant at . . . which is Fort Mill and at that time purchased a quantity of methamphetamine from him.
>
> The second buy occurred on February 28th of 2014. This was for a seventy dollar buy. The informant met with the defendant at . . . which is in York – which is in Rock Hill in York County. That was for a seventy dollar quantity of meth. The third buy occurred on . . . March 21st of 2014. The informant met with the defendant at . . ., purchased a quantity of methamphetamine from him at that time.
>
> And then the fourth buy occurred on March 27th of 2014. The informant met with the defendant at . . . which is also in York County. This was for the trafficking deal. He purchased approximately fourteen grams of methamphetamine for twelve hundred dollars from the defendant. This was a buy bust. The defendant was arrested immediately after the buy and an additional quantity of methamphetamine was found in his pocket. That was the PWID charge.

App. 212, l. 13 – 213, l. 21. The plea judge found that there was a substantial factual basis for the plea and sentenced Brookins to concurrent terms, giving him an active sentence of ten years with five years suspended. App. 214, l. 6-17; App. 228, l. 4 – 229, l. 16.

At the PCR hearing, Brookins testified that he did not understand that there were portions of the discovery that his plea attorney had not even reviewed herself. App. 283, ll. 2 – 284, l. 1. Brookins said that had he seen the complete discovery, he would not have pled guilty

but instead have gone to trial. App. 275, l. 24 – 276, l. 11; App. 284, ll. 2-8. Had he gone to trial, he does not believe that the state could have proven his guilt. App. 281, ll. 11-14.

Plea counsel Inzerillo testified: "In this county with this particular solicitor, because it dealt with a confidential informant, no videos or discovery was turned over while a plea was -- while an offer was pending." App. 288, ll. 3-6. Rather, she was provided with still shots from whatever portion of the video that the solicitor thought was relevant. Please counsel said that she reviewed those with Brookins but explained that **any offer would be conditioned on the fact that they not receive any additional discovery.** App. 288, ll. 6-11. According to plea counsel, she only received a confidential packet with the video and information on the confidential informant, which was reviewed with Brookins, on the one charge that was set for trial. App. 288, ll. 11-14. Plea counsel said that she was not given discovery on any of the other cases but was aware of Brookins' desire to take care of everything if he was going to enter a plea, so she made the motion for joinder in the hope of getting the discovery on the remaining charges. App. 288, l. 14 – 289, l. 3.

On cross-examination, plea counsel explained that the York County solicitor's office routinely makes "package" plea offers without providing discovery with the understanding that a failure to accept the offer will result in consecutive trials for the offenses. Once one of Brookins' cases was noticed for trial, the only discovery provided to her from the other cases was a statement by Brookins when he was arrested for trafficking that the solicitor wanted to use at trial. App. 292, l. 7 – 293, l. 24. Plea counsel was not provided with the written statement later obtained from Brookins because the solicitor decided it related only to the trafficking offenses. App. 17, ll. 3-11; App. 19, l. 20 – 21, l. 24; App. 86, ll. 16-20; App. 89, l. 21 – 90, l. 19. Plea counsel agreed that this was a "pattern of behavior" from the solicitor's office and not the result

of any specific animus toward Brookins. App. 294, ll. 11-16; App. 297, ll. 3-21. Plea counsel also agreed that the failure to provide complete discovery on all of the charges limits her ability to evaluate the benefit of a plea offer. App. 294, l. 24 – 295, l. 14. Even so, she claimed that Brookins was "getting a good benefit from being allowed to plea and wrap up his entire case as firsts." App. 296, ll. 14-21.

In response to the PCR court's questions, plea counsel explained that even when an offer is accepted, she is not given a chance to view the discovery with the exception of still photographs. Depending on the case, that may or may not be adequate to apprise the defense of the relative strength of the state's case. Plea counsel said that, in Brookins' case, she could not tell if she got all of the information. App. 300, l. 1 – 301, l. 17.

Order of Dismissal

On April 25, 2016, Judge Addy filed a Form 4 Order, in which he found that Brookins was not entitled to post-conviction relief and ordered the Attorney General's office to prepare a formal Order of Dismissal. App. 304 – 305. An initial Order of Dismissal was filed on May 27, 2016. App. 306 – 314.

On June 22, 2016, Judge Addy filed an Amended Order of Dismissal. App. 315 – 323. He denied relief under both ineffective assistance of counsel and involuntariness of the guilty plea. App. 320 – 322. The PCR court found "that Counsel was not ineffective for allowing Applicant to waive viewing discovery on one distribution charge because the plea court made sure Applicant was well aware of the consequences of waiving presentment on this charge." App. 320. The court further found that Brookins failed to prove prejudice because he did "show that he would not have pled guilty but would have gone to trial but for Counsel's actions." App. 320 – 321. Regarding involuntariness, the PCR court found that Brookins was "fully advised of the rights he was giving up by pleading guilty, including challenging the evidence against him." App. 321.

ARGUMENT

The PCR court erred in denying Petitioner relief where Petitioner pled guilty to five offenses but neither he nor his attorney had reviewed the complete discovery materials for four of the offenses due to the solicitor's policy of withholding discovery until each separate case was placed on the trial docket.

The PCR court's denial of relief was premised on a finding that the discovery withheld was only for one charge – the distribution charge on which Brookins' waived presentment. App. 317 – 318; App. 320. However, the plea transcript and plea counsel's testimony at the PCR hearing make clear that *complete* discovery was only provided on the one distribution charge on which Brookins was set for trial. While plea counsel had seen two additional videos, she was not given the remaining discovery materials, including Brookins' written statement following the trafficking arrest. Plea counsel knew that the solicitor's office had a policy of making its "packaged" offer with only partial discovery provided, forcing Brookins and other similar defendants to make an unknowing decision whether to plead guilty. App. 9, ll. 1-24; App. 71, l. 25 – 72, l. 4; App. 86, ll. 7-20; App. 89, ll. 21 – 94, l. 9; App. 198, l. 11 – 199, l. 19; App. 207, l. 7 – 208, l. 13; App. 288, l. 3 – 289, l. 3; App. 292, l. 7 – 297, l. 21; App. 300, l. 1 – 301, l. 17. Thus, both plea counsel and the solicitor were at fault in the entry of Brookins' unknowing and unintelligent guilty plea. Brookins testified that had he seen the complete discovery, he would not have pled guilty to all of the offenses but instead proceeded to trial. App. 275, l. 24 – 276, l. 11; App. 281, ll. 11-14; App. 284, ll. 2-8.

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 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v.

State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). 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).

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. "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). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

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 v. Alabama, 395 U.S. 238 (1969); Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("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.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31(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. 52 at 59. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the 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.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

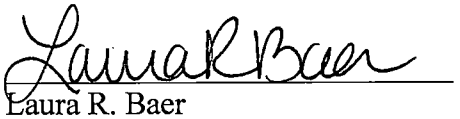
Plea counsel provided ineffective assistance by failing to ensure that she had an opportunity to review the complete discovery for all of Brookins' charges before advising him to plead guilty. Plea counsel's failure in this regard forced Brookins to enter a guilty plea without a full understanding and appreciation of the evidence against him, resulting in an unknowing, involuntary, and unintelligent guilty plea. It was necessary for Brookins to know the entirety of evidence against him so that he could determine if the state had enough evidence to take him to trial. This Court has recognized the countervailing interests of a criminal defendant's access to evidence and the state's protection of the identity and safety of confidential informants, such that a defendant is not always entitled to view the discovery materials personally in such a circumstance. Hyman v. State, 397 S.C. 35, 47, 723 S.E.2d 375, 381 (2012). In Hyman, "the State struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills during negotiations." Id. at 48, 723 S.E.2d at 381. Here, however, there were discovery materials not even disclosed to plea counsel such that she could not possibly have properly

advised Brookins regarding the strength of the state's case as to each offense. Plea counsel's failure to review all of the evidence was deficient performance. Brookins was inexperienced in the criminal justice system and relied upon plea counsel's advice to his detriment. He testified that had he understood that plea counsel had not seen all of the evidence herself, he would not have pled guilty.

Moreover, the entry of Brookins' unknowing, involuntary, and unintelligent guilty plea was the result of the solicitor's improper policy of withholding discovery during plea negotiations. Rule 5 permits inspection of evidence in the State's possession "which [is] material to the preparation of his defense or [is] intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant" upon request by the defendant. Rule 5(a)(1)(C), SCRCrimP. Further, the rules of professional of conduct prohibit a lawyer from failing to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. Rule 3.4(d), RPC, Rule 407, SCACR. The solicitor's policy of withholding evidence, even from plea counsel, prevented Brookins from evaluating the state's evidence before entering a guilty plea. Such gamesmanship by the solicitor's office has no place in the criminal process and works to subvert rather than promote justice.

CONCLUSION

Based on the foregoing, Petitioner Joshua Brookins respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issue raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua Kenneth Brookins 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 Frank R. Addy, which was held on April 19, 2016 (Evidentiary Hearing), 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 Joshua Kenneth Brookins.

Respectfully Submitted,

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of March, 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."

Laura R. Baer
Appellate Defender

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ATTORNEY FOR PETITIONER

This 8th day of March, 2017.

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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 Justin J. Hunter, 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 Joshua Kenneth Brookins, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 8th day of March, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of March, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.