

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Thomas A. Russo, Circuit Court Judge

DEAN HENRY COLE,

V.

STATE OF SOUTH CAROLINA,

PETITIONER
S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO 2016-000557

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where plea counsel provided ineffective assistance of counsel which resulted in an involuntary guilty plea where counsel failed to adequately explain the trial and plea process with Petitioner?

STATEMENT

On May 30, 2013, a grand jury in Horry County indicted Petitioner for trafficking over 400 grams of cocaine. App. 110 – 111. Petitioner pled guilty to trafficking an amount between 28 and 100 grams of cocaine before the Honorable Larry B. Hyman on August 7, 2013. App. 14 ll. 12 – 19. M. Travis Hyman represented the State, and J. Eric Fox represented Petitioner.

The facts presented at the guilty plea by the prosecution were as follows:

On April 14, 2012, members of Horry County law enforcement received a tip from an informant that a silver four-door Dodge Charger was going to park behind a hotel in Myrtle Beach. App. 12 ll. 18 – 25. A drug canine positively alerted to the detection of narcotics in the car, and officers then searched the car. App. 13 ll. 2 – 9. Cocaine was located under the passenger seat cushion where Petitioner had been sitting. App. 134 ll. 9 – 17. Out of the three occupants from the Charger, Petitioner was closest in proximity to the drugs. App. 13 ll. 17 – 20.

Petitioner pled guilty to a trafficking between 28 and 100 grams of cocaine. App. 14 ll. 12 – 19; App. 110 – 111. Judge Hyman accepted his plea and sentenced Petitioner to ten years' imprisonment based on a recommendation from the prosecution. App. 8 ll. 13 – 19; App. 18 ll. 4 – 8; App. 20 ll. 1 – 2.

Petitioner did not file an appeal following the entry of his guilty plea. He filed a timely application for post-conviction relief on April 21, 2014. App. 22 – 26. It contained allegations of ineffective assistance of counsel, including claims that he “never got to confront witness[es] or codefendants to prove [his innocence]” and that he never received “proper counseling” from his attorney App. 24.

The State made its Return on or about December 17, 2014. App. 30 – 35. An evidentiary hearing was conducted on November 12, 2015 before the Honorable Thomas A. Russo. App. 37. Steven Fowler represented Petitioner, and the State was represented by J. Croom Hunter. App. 37. Petitioner and Counsel Fox testified during the hearing.

On January 7, 2016, Judge Russo issued his order denying Petitioner relief. App. 102 – 109. In particular, he found that Petitioner failed to show that Counsel Fox's performance fell below an objective standard of reasonableness. App. 107. Additionally, Judge Russo's Order of Dismissal denied Petitioner's allegation that his plea was not entered freely, knowingly, and voluntarily. App. 106.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance of counsel which resulted in an involuntary guilty plea where counsel failed to thoroughly explain the trial and plea process with Petitioner.

Minutes before Judge Hyman accepted Petitioner's guilty plea, Petitioner was still unsure of the details surrounding his negotiated plea. In particular, Petitioner was unaware of the sentencing range. App. 6 ll. 14 – 18. Secondly, Petitioner believed that he was going to plead to a nonviolent sentence when in actuality he received a violent sentence. App. 58 ll. 12 – 18; App. 76 ll. 5 - 15.

Counsel did not discuss either the length or type of sentence, according to Petitioner. App. 73 ll. 5 – 8. Plea counsel's failed to advise Petitioner of the details surrounding the plea. App. 49 ll. 5 – 17; App. 50 ll. 13 – 16. According to plea counsel, Petitioner, age 56, had never been convicted of any other crimes before this one. App. 18 ll. 10 – 14. His lack of experience with the judicial system also meant that he was unaware of the logistics of a jury trial. App. 9 ll. 20 – 23. In fact, the trial court had to explain to Petitioner how a jury trial would have progressed. App. 9 l. 24 – App. 10 l. 14. Prior to the plea, Counsel had never explained the process to Petitioner. App. 52 ll. 6 – 8.

Petitioner correctly asserted that Counsel was ineffective, because he did not provide sufficient information regarding Petitioner's guilty plea prior to it being accepted by the court. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was

deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

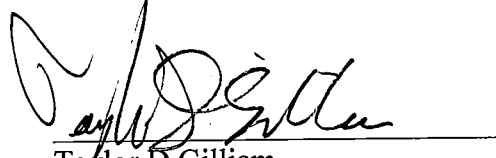
In this regard, Counsel failed to consult with Petitioner regarding the logistics behind the recommendations attached to the plea as well as the procedure behind a jury trial. Counsel never advised Petitioner that he was going to plead guilty to a violent crime. App. 59 ll. 1 – 6. Counsel never requested information regarding the informant, according to Petitioner. App. 61 l. 21 – App. 62 l. 5. Petitioner’s testimony indicated that Counsel did not go over the sentencing range; Petitioner was unsure whether it could go any lower. Such conduct falls within the gamut of deficiency.

“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). As evident from Petitioner’s testimony, the prejudice in his case manifested itself in his plea which was made without full knowledge of the sentencing range and would not have been entered had Petitioner been provided that information. App. 64 ll. 8 – 15.

Petitioner testified that the failure to advise him of the details surrounding the guilty plea constituted a deficiency. App. 50 ll. 17 – 19. If Petitioner had been provided a different attorney, his case “might have turned out differently.” App. 64 ll. 8 – 11. Petitioner characterized Counsel’s representation as deficient and testified that Counsel did not perform to “the best of his ability.” App. 64 ll. 4 – 15. As a result of Counsel’s failure to advise Petitioner of all the facts and law surrounding his case, Counsel’s assistance was deficient and Petitioner’s guilty plea was not entered knowingly.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari and allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Thomas A. Russo, Circuit Court Judge

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dean Henry Cole 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 Thomas A. Russo, which was held on November 12, 2015 (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 as counsel for Dean Henry Cole.

Respectfully Submitted,

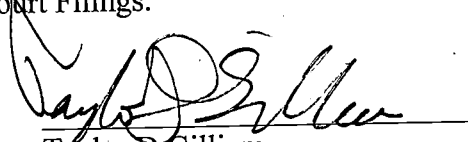


Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of March, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of 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."



Taylor D Gilliam
Appellate Defender

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ATTORNEY FOR PETITIONER

This 10th day of March, 2017.

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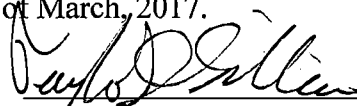
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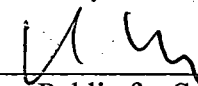
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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Caitlin Hastings, 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 Dean Henry Cole, #081665, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 10th day of March, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of March, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2025