

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable R. Ferrell Cothran, Circuit Court Judge

RECEIVED

MAR 10 2017

S.C. SUPREME COURT

ERIC Q. TINDAL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001692

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

Lara M. Caudy
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

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made when plea counsel advised Petitioner to plead guilty despite later admitting Petitioner had a strong defense to first degree burglary and where counsel threatened Petitioner that he would be sentenced to life without parole if he proceeded to trial thereby violating Petitioner's right to the effective assistance of counsel?

STATEMENT OF THE CASE

Petitioner was accused of assaulting his girlfriend in the home they shared with their three children. A Clarendon County Grand Jury ultimately indicted Petitioner on January 26, 2011 for first degree burglary and attempted murder. App. 155-156. Despite the fact that there was ample evidence Petitioner was living at the home with his girlfriend at the time of the alleged assault, he pled guilty to both first degree burglary and attempted murder based on the advice of counsel on July 12, 2011 before the Honorable Howard P. King. App. 1. Assistant Solicitor Amy Land represented the state, and Scott L. Robinson represented Petitioner. App. 1. Judge King sentenced Petitioner to twenty-two years' imprisonment based on a sentence recommendation from the state. App. 28, l. 17 – 29, l. 7.

Counsel Robinson admitted during the evidentiary hearing that the burglary indictment was “a charge we could have beaten.” However, because he could not guarantee a not guilty verdict at trial, he advised Petitioner to plead guilty because the offense carried a potential sentence of life without parole. App. 90, ll. 10-23.

Petitioner likewise testified that Robinson told him “not to worry about the burglary charge” and that if he went to trial he would likely be acquitted of that offense. App. 74, ll. 8-16. Petitioner had numerous witnesses who “were willing to testify that I was living at that house with the alleged victim at the time they claim I broke into the house.” App. 75, ll. 18-21. Despite the fact that Petitioner had a strong defense to the first degree burglary indictment, counsel advised Petitioner to accept the state's plea offer on the eve of trial. App. 74, ll. 11-16.

Petitioner always wanted a jury trial. App. 79, ll. 7-8. However, he felt coerced into pleading guilty based on counsel's threat that he would be sentenced to life without parole if he went to trial and the fact that counsel had done little to investigate his case and was unprepared for

trial. App. 74, l. 23 – 75, l. 5. Petitioner exclaimed, “He [Robinson] told me to plead guilty or else I would get a life sentence. He told my mother and brother the same thing.” App. 77, ll. 15-18. Petitioner reiterated, “The only reason why I pled guilty [is] because Scott Robinson told me if I didn’t plead guilty and [went] to trial [instead], I would get a life sentence. So I felt under duress to accept the plea offer because I [knew] he wasn’t prepared for trial.” App. 77, ll. 21-25.

On November 23, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 41-62. The state filed a return to this application dated February 14, 2012. App. 63-68. The matter proceeded to an evidentiary hearing on December 14, 2012 before the Honorable R. Ferrell Cothran. App. 69. Assistant Attorney General Walt Whitmire represented the state, and James Brian O’Connor represented Petitioner. App. 69. By order dated January 23, 2013, Judge Cothran denied Petitioner relief. App. 94-100.

Despite emphasizing plea counsel’s testimony that Petitioner “had a strong defense” to the first degree burglary charge, the PCR court found “counsel pursued a valid plea strategy.” App. 97. The court noted, “Plea counsel stated [Petitioner] was facing a potential life sentence. As a result, plea counsel obtained a favorable plea bargain for [Petitioner] where Petitioner’s sentences would run concurrently under the thirty year maximum term of imprisonment he was facing for the attempted murder charge.” App. 97. The court found Petitioner failed to present any evidence that counsel was ineffective in investigating the case or advising him to plead guilty. App. 97-98.

For whatever reason, PCR Counsel O’Connor did not file a notice of appeal from the order of dismissal.

On October 14, 2015, Petitioner filed a second application for post-conviction relief seeking the right to a belated appeal of the denial of his original application. App. 122-127. The state filed a return to this application and motion to dismiss dated September 23, 2015. App. 128-132. The

matter proceeded to an evidentiary hearing on November 18, 2015 before the Honorable Tanya A. Gee. App. 133. Assistant Attorney General Daniel Gourley represented the state, and Lance S. Boozer represented Petitioner. App. 133. By order dated December 29, 2015, Judge Gee granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) after finding Petitioner did not voluntarily waive his right to appeal. App. 151-154.

Because Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made due to counsel's ineffective assistance for advising him to plead guilty despite ample evidence that he was not guilty of first degree burglary and by threatening that he would be sentenced to life without parole if he proceeded to trial, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made when plea counsel advised Petitioner to plead guilty despite later admitting Petitioner had a strong defense to first degree burglary and where counsel threatened Petitioner that he would be sentenced to life without parole if he proceeded to trial thereby violating Petitioner's right to the effective assistance of counsel.

Despite ample evidence that Petitioner was not guilty of first degree burglary, counsel advised Petitioner to accept the state's plea offer and plead guilty because he was facing a potential sentence of life without parole if convicted at trial. A competent criminal defense attorney would not have advised a client to plead guilty to an offense he knew the client was not guilty of committing merely because the offense carried a maximum sentence life without parole. Counsel's deficient performance rendered Petitioner's guilty plea involuntary.

"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 that (1) counsel's performance was deficient, and that (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)).

Here, Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made due to counsel’s threat that Petitioner would be sentenced to life without parole if he proceeded to trial. Counsel told Petitioner “to plead guilty or else [he] would get a life sentence.” App. 77, ll. 16-17. Counsel admitted during the evidentiary hearing that Petitioner had a strong defense to burglary and that it was “a charge we could have beaten.” Despite counsel’s belief that Petitioner would be

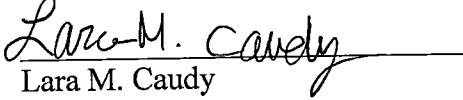
acquitted of burglary if he proceeded to trial, counsel for whatever reason told Petitioner he would receive a life sentence if he did not plead guilty. However, attempted murder only carries up to thirty years' imprisonment so if Petitioner was acquitted of burglary at trial, the most he faced was thirty years. See S.C. Code Ann. § 16-3-29. Moreover, despite knowing that Petitioner was not guilty of burglary, counsel advised Petitioner to accept the state's plea offer and plead guilty. No competent criminal defense attorney would advise a client to plead guilty to an offense he knew he was not guilty of committing.

Petitioner was prejudiced by counsel's deficient performance because but for counsel's errors, Petitioner would not have pled guilty, but instead would have exercised his right to a jury trial. App. 78, ll. 12-13. Petitioner testified that he "wanted a trial," but "felt under duress to accept the plea offer" because of counsel's unpreparedness and threats that Petitioner would receive a life sentence. App. 77, ll. 21-25; App. 79, l. 8.

Respectfully, this Court should reverse the ruling of the PCR court, hold Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made, and grant Petitioner 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 10th day of March, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Clarendon County
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ERIC Q. TINDAL,

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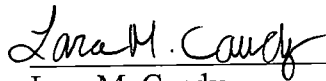
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eric Q. Tindal 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 record and transcript of Petitioner's post-conviction relief hearing which was held on December 14, 2012. 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 Eric Q. Tindal.

Respectfully Submitted,



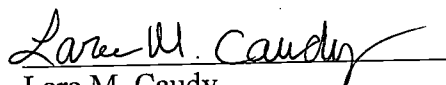
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th 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."



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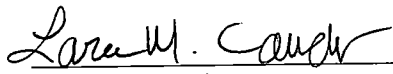
V.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix in the above referenced case have been served upon Julie Coleman, 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 Pursuant to Austin v. State and a copy of the Appendix have been served upon Eric Q. Tindal, #243834, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 10th day of March, 2017.



Lara M. Caudy
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: November 3, 2026.