

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Greenville County

RECEIVED

Honorable John C. Hayes, Circuit Court Judge

APR 12 2017

BRANDON BARKSDALE,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002429

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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ISSUE PRESENTED

Whether plea counsel was ineffective in advising petitioner that if he would plead guilty he would get a 10 year sentence?

STATEMENT

On August 12, 2015, petitioner appeared before the Honorable D. Garrison Hill in Greenville County and pled guilty to six (6) counts of attempted murder, armed robbery, possession of a weapon, carjacking, and conspiracy. He was sentenced to twenty (20) years on each count of attempted murder, twenty (20) years for armed robbery, twenty (20) years for carjacking, and five (5) years for conspiracy. Ivan Toney, Esq. was plea counsel. Katryna Salisbury was the assistant solicitor. (App. p. 1- p.22).

Petitioner filed an application for post-conviction relief on February 29, 2016. (App. p. 23- p.29). Respondent filed a return dated June 10, 2016. (App.p.30-p.36) An evidentiary hearing was held on October 27, 2016, before the Honorable J. Mark Hayes, III. Petitioner was present and was represented by R. Mills Aniaail, Jr., Esq. Respondent was represented by Valerie Garcia Giovanoli, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 37- p.77). On November 8, 2016, Judge Hayes issued an order denying and dismissing the application for post-conviction relief. (App. p. 78-p.83).

This petition follows.

ARGUMENT

Plea counsel was ineffective in advising petitioner that if he would plead guilty he would get a 10 year sentence.

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. In 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. 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).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. 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. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's

accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 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.

Petitioner testified at the evidentiary hearing that plea counsel told him if he went to trial on his charges he could get a life sentence without parole. But counsel told him not to worry because he could get him 10 years. The 10 years was if he would plea guilty. Petitioner said if he knew he was going to get 20 years he would not have pled guilty. (App. p.48, line 1- p.49, line 14) Plea counsel said just sign the plea and we will get the 10 years. (App. p. 52, lines 3-4) Petitioner repeated his testimony on cross-examination. (App. p.54, line 14-p.56, line 1)

As mentioned above giving incorrect sentencing advice constitutes ineffective assistance of counsel. Hinson v. State; Ray v. State.

CONCLUSION

Petitioner's guilty plea should be vacated.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of April, 2017.

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BRANDON BARKSDALE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

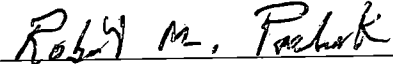
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon Barksdale 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 John C. Hayes, which was held on October 27, 2016, 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 Brandon Barksdale.

Respectfully Submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of April, 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."

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This 12th day of April, 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 DeShawn H. Mitchell, 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 Brandon Barksdale, #365114, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of April, 2017.

Robert M. Pachak
Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of April, 2017.

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