STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable G. Thomas Cooper, Circuit Court Judge

ERIVA YOUMOUS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001889

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
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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 failed to challenge and/or seek to dismiss Petitioner's kidnapping charge where Petitioner did not have the requisite intent to commit the crime?

STATEMENT

On September 3, 2013, Petitioner pled guilty under North Carolina v. Alford[1] to kidnapping, two counts of assault and battery, failure to stop for a blue light, resisting arrest, three counts of financial transaction fraud, and grand larceny less than ten thousand dollars before the Honorable DeAndra G. Benjamin in Richland County. App. 4 ll. 2 – 9; App. 11 l. 16 – App. 14 l. 12. The parties negotiated a term of imprisonment of twenty-five years. App. 3 ll. 7 19. Luck Campbell and Meghan Walker represented the State. Petitioner was represented by Mark Sawyer and Stephen Krzyston.

The facts alleged at the guilty plea by law enforcement are as follows:

On January 6, 2013, police officers responded to a carjacking call as a gas station in Richland County. Upon arrival, the alleged victim notified officers that a man jumped into her car while she was returning a Redbox movie. She told law enforcement that her child was still in the car. According to a subsequent investigation, it was determined that Petitioner purportedly went to Church's Chicken and purchased food before dropping the child off at a hotel on Two Notch Road. After officers observed the alleged victim's car, a traffic stop was initiated. Petitioner got out of the car and fled into a nearby neighborhood before being caught. According to Deputy Short, who testified at Petitioner's guilty plea, Petitioner confessed. App. 8 – 10. Petitioner did not mention anything in his alleged confession about the intent to kidnap anyone. App. 76 ll. 5 – 7.

Soon thereafter, a Richland County Grand Jury indicted Petitioner for failure to stop for a blue light, resisting arrest, two counts of assault and battery in the first degree, three counts of

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1 400 U.S. 25, 28, 91 S. Ct. 160, 162, 27 L. Ed. 2d 162 (U.S. 1970)

financial transaction card fraud, and kidnapping. App. 103 – 122. Notably, an indictment for grand larceny was never presented to the grand jury. App. 101.

During the plea colloquy, Petitioner told Judge Benjamin that he could not affirmatively state that plea counsel had done that he "could have done or should have done". App. 15 ll. 13 – 16. Mr. Sawyer spoke up and opined that Petitioner was dissatisfied with the amount of time which was negotiated. Although Petitioner stated that was one of his main concerns, he never offered additional commentary regarding his dissatisfaction. App. 16 ll. 2 – 16.

Judge Benjamin accepted Petitioner's guilty plea and sentenced him to twenty-five years' imprisonment on the kidnapping charge, five years on the grand larceny charge, ten years for the assault and battery charges, three years for failure to stop for a blue light, one year for the resisting arrest charge, and one year for the financial transaction fraud charges. The sentences were to run concurrent with one another. App. 18 l. 18 – App. 19 l. 8; App. 20 l. 20 – App. 21 l. 17.

Petitioner's appeal to the South Carolina Court of Appeals was dismissed. State v. Youmous, Appellate Case No. No. 2013-001913 (S.C. Ct. App. filed November 14, 2013).

Petitioner then filed a timely application for post-conviction relief on September 8, 2014. App. 23 – 39. Petitioner's application contained over thirty allegations, including ineffective assistance of counsel, an involuntary guilty plea, and claims of constitutional violations. The State made its Return on or about March 10, 2015.

An evidentiary hearing was conducted on March 29, 2016 before the Honorable G. Thomas Cooper. App. 46. Jonathan Waller represented Petitioner, and the State was represented by Clay Mitchell. Petitioner and plea counsel testified during the hearing.

On July 22, 2016, Judge Cooper issued his Order Granting Relief In Part and Denying Relief in part. App. 94 – 102. Specifically, Judge Cooper found Petitioner's plea was freely, voluntarily, and intelligently made, that allegations of failure to seek dismissal of the kidnapping charge were improper for this forum, and that Petitioner failed to prove that plea counsel was ineffective regarding the failure to interview Petitioner's codefendant.[2] However, Judge Cooper did grant relief regarding the grand larceny indictment; Petitioner pled guilty to the charge but the indictment was never presented to the grand jury. App. 100 – 101.

This Petition follows.

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2 Upon information and belief, the failure to interview Petitioner's codefendant section of the Order was included by mistake. Petitioner was unmarried and did not have a codefendant. App. 7 ll. 14 – 15.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel failed to challenge and/or seek to dismiss Petitioner's kidnapping charge where Petitioner did not have the requisite intent to commit the crime.

Because Petitioner did not have the requisite intent to kidnap a child, plea counsel should have sought dismissal of that charge prior to the guilty plea. Petitioner was unaware that a child was inside the car when he stole it. App. 52 ll. 17 – 22; App. 76 ll. 8 - 20. Upon discovering the child in the car, Petitioner "[i]mmediately got the child out of the vehicle" and dropped him off at a motel on Two Notch Road which was located "a minute or two away" from where Petitioner allegedly stole the car. App. 52 l. 23 – App. 53 l. 6. This motel was the first safe location where Petitioner could drop off the child. App. 76 ll. 21 – 22. Petitioner brought this issue to counsel's attention, but was informed that the kidnapping charge was still proper. App. 53 ll. 9 – 23.

In South Carolina, kidnapping originally required the lesser degree of mental culpability of "knowledge." In 1937, the additional element of "holding for ransom" was required which indicated that the actor must have had a "purpose" or "desired result." Act No. 106, 1937 S.C.Act 137. This element, however, was deleted in 1976, clearly indicating the legislature intended to lower the standard of culpability required to hold one liable for the crime of kidnapping. Act No. 684, 1976 S.C.Act 1787. Therefore, South Carolina courts have found a clear legislative intent to require a lesser *mens rea* than "purpose" and have found no evidence of legislative intent to make the crime of kidnapping a crime of strict liability. State v. Jefferies, 316 S.C. 13, 18–19, 446 S.E.2d 427, 430 (1994); see also State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990).

Petitioner correctly asserted that Counsel was ineffective, because he did not seek dismissal of Petitioner's kidnapping charge. 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 was found to be deficient in allowing his client to plead guilty to an indicted charge which was never presented to the grand jury; similarly, he never sought dismissal of a crime that could not be proven. App. 100 - 101. In fact, the kidnapping charge yielded the lengthiest sentence—Counsel should have contested it before suggesting that his client plead guilty. 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). The prejudice in Petitioner's case manifested itself in the resulting guilty plea and accompanying sentence.

Petitioner testified that counsel was not prepared to challenge the kidnapping charge even though it was a possible strike against his record. App. 70 ll. 19 – 22; App. 74 ll. 13 – 18. Had Petitioner not been convicted of kidnapping, the State would not have had grounds to seek life without the possibility of parole.[3] App. 74 ll. 19 – 22. Counsel testified that he did not see any means of challenging the kidnapping charge at a preliminary hearing prior to trial or a guilty plea. App. 78 l. 19 – App. 79 l. 17.

However, Petitioner candidly admitted to stealing the vehicle in this case. He stated under oath that he did not realize a child was in the car. Once he discovered the child's presence, he safely delivered the child at the first location he encountered—a motel. At the outset, he did not have any knowledge that the vehicle was occupied, and he therefore could not have been convicted of kidnapping. He nonetheless pled guilty based on the advice of counsel who should have requested a hearing in order to contest the sufficiency of the evidence.

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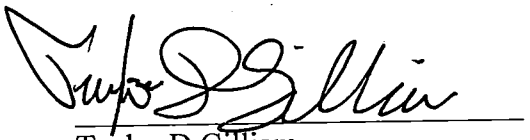
3 Petitioner was convicted of armed robbery in 1996. App. 74 ll. 9 – 12.

CONCLUSION

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



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of April, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Eriva Youomous 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 G. Thomas Cooper, which was held on March 29, 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 Eriva Youomous.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th 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."

Taylor D Gilliam
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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 Jessica Kinard, 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 Eriva Youomous, #231443, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th day of April, 2017.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of April, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025