

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Florence County

RECEIVED

Honorable Jocelyn J. Newman, Circuit Court Judge

MAY 03 2017

THOMAS ELBERT VANHOOSE,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001602

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 holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered in light of Petitioner's testimony that he and plea counsel never discussed the elements of criminal sexual conduct coupled with the fact that Petitioner was under the impression that counsel could not cross-examine minor witnesses?

STATEMENT

On September 6, 2013, Petitioner pled guilty under Alford¹ to two counts of lewd act on a minor child before the Honorable D. Craig Brown in Florence County. Patricia Parr appeared on behalf of the State, and Michael Bell represented Petitioner.

The facts presented at the guilty plea were as follows: In October 2010, Petitioner allegedly fondled and/or penetrated his two minor children while they were staying with him at his mother's house. App. 11 – 13. The children's mother contacted law enforcement, and Petitioner was arrested. App. 11 – 13.

Petitioner was subsequently indicted on July 12, 2012 for two counts of lewd act on a minor child, criminal sexual conduct with a minor first degree, and criminal sexual conduct with a minor second degree. App. 85 – 87. Counsel Bell was appointed to Petitioner, and the two met for a total of thirty minutes to an hour during Counsel's entire representation of Petitioner. App. 40 ll. 19 – 24.

He pled guilty to the two counts of lewd act on a minor child. App. 13 l. 18 – App. 14 l. 7. Judge Brown accepted Petitioner's guilty plea. App. 14 ll. 8 – 14. The guilty plea was subject to a negotiated sentence of ten years and resulted in the dismissal of the two criminal sexual conduct charges. App. 5 ll. 1 – 11. Judge Brown accepted Petitioner's plea and sentenced him to ten years' imprisonment on each charge, with the sentences to run concurrent. App. 19 ll. 4 – 8.

Petitioner did not seek an appeal. He filed a timely application for post-conviction relief on November 18, 2013. App. 21 – 27. Petitioner's application contained allegations of

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S. 1970)

ineffective assistance of counsel and maintained that he was coerced into pleading guilty. App. 22 – 23. The State made its Return on April 25, 2014. App. 28 – 32.

An evidentiary hearing was conducted on June 1, 2016 before the Honorable Jocelyn J. Newman. App. 33. Jonathan Waller represented Petitioner, and Croom Hunter appeared on behalf of the State. App. 33. Petitioner and plea counsel testified during the hearing.

On July 22, 2016, Judge Newman issued her order denying Petitioner relief. App. 78 – 84. In particular, she found that Petitioner failed to demonstrate that plea counsel was deficient and that Petitioner was not prejudiced. App. 80 – 82. Judge Newman also found that Petitioner was not coerced, that it was his decision to plead guilty, and that his plea was entered knowingly, intelligently, and voluntarily. App. 82 – 83.

This Petition follows.

ARGUMENT

The PCR Court erred in holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered in light of Petitioner's testimony that he and plea counsel never discussed the elements of criminal sexual conduct coupled with the fact that Petitioner was under the impression that counsel could not cross-examine minor witnesses.

From the time that Petitioner first spoke with Counsel to the entry of his guilty plea, Petitioner was under the impression that the two minor children were immune from cross-examination. App. 42 l. 21 – App. 43 l. 9; App. 47 ll. 2 – 20. Had Counsel been able to cross-examine the minors while presenting defenses on behalf of Petitioner, he would have gone to trial. App. 47 l. 25 – App. 48 l. 6. Furthermore, Petitioner and Counsel never discussed the elements of the crimes for which Petitioner was indicted. App. 39 ll. 8 – 22.

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 jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). 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 by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

During Counsel's entire representation of Petitioner, the two met six or seven times for a period of five or ten minutes each time. App. 40 ll. 9 – 24. Although Petitioner was advised of the right to cross-examine witnesses by Judge Brown at the time of his guilty plea, he remained under the impression that Counsel was barred from questioning the minor witnesses at trial. App. 53 ll. 7 – 23. In particular, Petitioner testified that Counsel told him that "he wouldn't be able to cross-examine [the children] because they were under 18 years of age." App. 43 ll. 6 – 9. The plea judge's remarks regarding the ability to cross-examine witnesses were ineffective, because Petitioner "thought that was it." App. 53 ll. 18 – 23. Had Petitioner recognized his right to cross-examine the minors and presented a defense on his behalf, he would have gone to trial. App. 47 l. 21 – App. 48 l. 6.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable

professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Counsel testified that he did not remember specifically whether he discussed any details behind the protections afforded to minors in criminal sexual conduct cases. App. 66 ll. 12 - 22. The following exchange occurred during the evidentiary hearing in Petitioner's case, on cross examination of Counsel:

Q: Did you discuss [the issues of impeachment and cross-examination] with Petitioner?

A: I think it's - - I mean, he was the one who was telling me these other people were saying things.

Q: All right.


A: I mean, obviously, it was on the table. I mean, you can present your witnesses to try to impeach.

App. 67 ll. 15 - 20.

Petitioner was unable to state affirmatively that he discussed the issues of cross-examination and impeachment of the minor witnesses with Petitioner. This conduct can be characterized as deficient, and paired with Petitioner's testimony that he would have elected to go to trial had he he known of his right to cross-examine witnesses, it is clear that Petitioner was prejudiced.

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 3rd day of May, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas E. Vanhooose 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 Jocelyn J. Newman, which was held on June 1, 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 Thomas E. Vanhooose.

Respectfully Submitted,

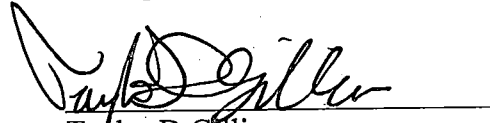


Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of May, 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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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 Lindsey McCallister, 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 Thomas E. Vanhooose, #292642, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512 this 3rd day of May, 2017.




Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of May, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 3, 2023