

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Florence County

Honorable D. Craig Brown, Circuit Court Judge

DONSHAY EUGENE SEARLES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000101

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether plea counsel was ineffective in not giving petitioner accurate sentencing advice?

STATEMENT

On October 5, 2011, petitioner appeared before the Honorable William H. Seals in Florence County and pled guilty to burglary and carjacking. He was sentenced to fifteen (15) years for carjacking and to ten (10) years for burglary. Wallace H. Jordan, Esq. was plea counsel. John Jepertinger, Esq. was the assistant solicitor. (App. p.1- p.15)

Petitioner filed an application for post-conviction relief on October 3, 2012. (App. p.16-p. 22). An amended application was filed on January 23, 2014. (App. p. 23- p. 26) Respondent filed a return dated December 14, 2012. (App p. 27-p. 31). An evidentiary hearing was held on November 9, 2016, before the Honorable D. Craig Brown. Petitioner was present and was represented by Jonathan Waller, Esq. Respondent was represented by Lindsay McAllister, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App p.32- p.70). On December 21, 2016, Judge Brown issued an order denying and dismissing the application for post-conviction relief. (App. p.71- p.78).

This petition follows.

ARGUMENT

Plea counsel was ineffective in not giving correct sentencing advice.

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).

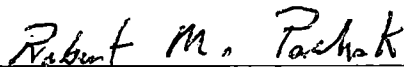
Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; 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.

In this case petitioner alleged in his application for post-conviction relief that plea counsel gave him incorrect sentencing advice. (App. p. 18) At the evidentiary hearing petitioner said he was only attacking his carjacking conviction and sentence. (App p. 40, lines 16-20). He said he pled guilty because of his mother. He was young being only sixteen (16) at the time. He did not know anything. Plea counsel told him he was not going to get a lot of time. (App p. 42, line 20- p.43, line 8) As mentioned above, giving incorrect sentencing advice constitutes ineffective assistance of counsel.

CONCLUSION

Petitioner's guilty plea to carjacking should be vacated.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of May, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donshay Eugene Searles 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 D. Craig Brown, which was held on November 9, 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 Donshay Eugene Searles.

Respectfully Submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th 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 Donshay Eugene Searles, #348058, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of May, 2017.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of May, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023

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