

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

JERRY STEWART,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002305

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for not requiring the State to meet its burden of establishing that the probation violation offense was the offense upon which the State relied to enhance the charge from a first to a second offense?

STATEMENT

In April of 2015, the Greenville County Grand Jury indicted Petitioner for manufacturing methamphetamine, indictment #2015-GS-23-2626. On January 14, 2016, Petitioner appeared before the Honorable J. Cordell Maddox and pled guilty. John Crangle represented Petitioner at the guilty plea. Kayce McCall prosecuted the case. Judge Maddox sentenced Petitioner to ten (10) years suspended upon the service of three (3) years with six (6) months of probation. Petitioner did not appeal the sentence or conviction.

On April 1, 2016, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return and partial motion to dismiss on August 29, 2016. An evidentiary hearing was held before the Honorable John C. Hayes, III, on October 25, 2016. Brian P. Johnson represented Petitioner at the PCR hearing. Patrick L. Schmeckpeper represented the State. In a written order signed October 26, 2016, Judge Hayes denied relief and dismissed the application. A timely notice of intent to appeal was served on November 8, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for not requiring the State to meet its burden of establishing that the probation violation offense was the offense upon which the State relied to enhance the charge from a first to a second offense.

Petitioner pled guilty to manufacturing methamphetamine. At the beginning of the guilty plea the clerk advised the judge that Petitioner was pleading to a second offense. (App. p. 4, lines 2-5). At the same time as the guilty plea, the judge also handled a probation violation. The probation agent advised the judge that Petitioner was on probation for possession of methamphetamine. (Tr. p. 9, lines line 21-24). Plea counsel advised the judge that Petitioner had two prior possession offenses (App. p. 4, lines 21-22). The State, however, never specified which offense qualified as an enhancement. During the guilty plea the State simply advised the judge, “The Defendant does have a prior record.” (App. p. 11, line 20).

Petitioner alleged in the PCR application that counsel failed to object to the enhancement to a second offense. (App. p. 32). During the PCR hearing Petitioner admitted that he had a prior conviction for possession of methamphetamine. (App. p. 65, lines 2-4). Plea counsel testified at the PCR hearing that the State threatened to try the case as a third offense but offered to allow Petitioner to plead as a second offense. (App. pp. 70-71). During the guilty plea, however, plea counsel never required the State to specify what prior offense qualified as an enhancement. The judge knew, based on the probation violation, that Petitioner had a prior conviction for possession of methamphetamine. The burden was on the State, however, to establish and notify the judge that this particular prior offense was the offense upon which the State relied as an enhancement. The State failed to meet that burden by simply advising the judge that Petitioner had a prior record.

In the order of dismissal the PCR judge wrote:

Second, Applicant alleges that his charge was improperly enhanced from a possession of methamphetamine, first offense to a possession of methamphetamine, second offense. Applicant bolstered this allegation by pointing to changes made in pen on the indictment at issue. These changes and Applicant's allegations about them are discussed further below. As this is solely a sentencing matter, it is not an appropriate ground for post-conviction relief. However, it is worth noting that this offense would actually have been Applicant's third offense, as he has other drug convictions on his record and was on probation for one of those convictions at the time the indictment in the present case was issued by the Grand Jury. As such, Applicant's allegations of improper enhancement do not serve as adequate grounds for relief.

The PCR judge erred. There was no evidence introduced by the State in regard to a third offense. As for the probation violation offense, the State failed to meet its burden of establishing that this particular offense was the offense upon which the State relied for enhancement. In DeWitt v. S.C. Dep't of Highways & Pub. Transp., 274 S.C. 184, 187, 262 S.E.2d 28, 29–30 (1980) the South Carolina Supreme Court wrote:

When the State is prosecuting a person for an offense that carries an enhanced penalty on a conviction of a second or subsequent offense, the State is not required to prove the legality of the prior conviction, nor does it have to show the facts surrounding that conviction. It is only necessary for the State to prove that a previous conviction exists, that the conviction was for an offense which occurred prior to the commission of the offense for which the defendant is being tried, and that the defendant was the subject of that prior conviction. 24B C.J.S. Criminal Law s 1965.

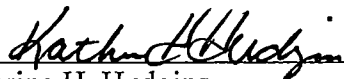
In the present case the State failed to prove that a previous conviction exists because the State failed to specify which prior offense qualified as an enhancement. Plea counsel was ineffective for not requiring the State to meet its burden of establishing that the probation violation offense was the offense upon which the State relied to enhance the charge from a first to a second offense. Petitioner was prejudiced by the deficient performance.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Plea counsel was deficient in not requiring the State to meet its burden of establishing that the probation violation offense was the offense upon which the State relied to enhance the charge from a first to a second offense. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of June, 2017.

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V.

STATE OF SOUTH CAROLINA,


RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jerry Stewart states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. She has reviewed the record of petitioner's trial before Judge J. Cordell Maddox, which was held on October 25, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
 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 Jerry Stewart.


Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of June, 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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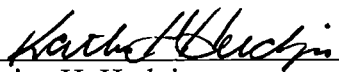
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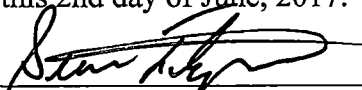
CERTIFICATE OF SERVICE

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 Jerry Stewart, #265973, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 2nd day of June, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of June, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022