

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

KEITH ADGER SMYTH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000894

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether petitioner's guilty plea was involuntary?

STATEMENT

On April 21, 2015, petitioner appeared before the Honorable J. Derham Cole in Spartanburg County and pled guilty to multiple counts of criminal sexual conduct with a minor in the first degree and one count of criminal sexual conduct with a minor in the second degree. He was sentenced to twenty-five (25) years on the first degree counts and to twenty (20) years on the second degree count. Timothy M. Ray, Esq. was plea counsel. Anthony C. Leibert, Esq. was the assistant solicitor.

Petitioner filed an application for post-conviction relief on August 7, 2015. Respondent filed a return and motion for a more definite statement on February 12, 2016. Petitioner filed an amended application on October 12, 2016.

On November 8, 2016, an evidentiary hearing was held before the Honorable Frank R. Addy, Jr. Petitioner was present and was represented by Rodney Richey, Esq. Respondent was represented by Alicia A. Olive, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing.

On March 9, 2017, Judge Addy issued an order denying and dismissing the application for post-conviction relief.

This petition follows.

ARGUMENT

Petitioner's guilty plea was involuntary.

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. 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 or failure to investigate. 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); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007); Stalk v. State, *supra*. The post-conviction relief court will normally consider the guilty plea transcript as well as the evidence presented at the post-conviction relief hearing in looking at guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the voluntariness of the plea. The difference "between a valid guilty plea and a invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). 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. The Court went on to note:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Mallory v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed 2d 653. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. Third, is the right to confront one’s accusers. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923. We cannot presume a waiver of these three important federal rights from a silent record.

395 U.S. at 243, 89 S. Ct. 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.

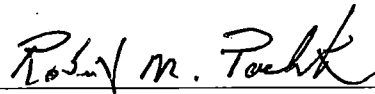
In this case petitioner’s competence was drawn into question several times. In June of 2012 he was found incompetent to stand trial by the testimony of Dr. Tora Brawley. Then in December of 2013 he was found competent to stand trial. (App. p. 6, lines 8-16). Petitioner had severe impairments across the board. His full scale I.Q. was at 61. He was severely impaired on verbal memory. (App. p. 10, lines 1-17). His frontal lobe testing was very impaired. (App. p. 12, lines 16-17).

Dr. Amanda Salas testified that petitioner “was totally off topic and not understanding what we were trying to accomplish.” (App. p. 17, lines 9-10) She said petitioner “is not competent to stand trial and that this is due to an intellectual deficiency that is not going to be remedied through a restoration period.” (App. p. 22, lines 20-22). She further said they “don’t have medications that we can treat him with that will make improvement in those regards.” (App. p. 23, lines 23-24).

At the actual guilty plea petitioner denied the charges against him. He was told he could contest the voluntariness of his statement at which point he said, “What’s voluntariness?” (App. p. 86, line 8- p. 87, line 2) I guess if you can prop a defendant up in a witness chair at trial and he doesn’t fall over he is competent. Petitioner’s plea in this case was not voluntary.

CONCLUSION

Petitioner's guilty plea should be vacated.

Handwritten signature of Robert M. Pachak in cursive script.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of August, 2017.

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IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

KEITH ADGER SMYTH,

PETITIONER

V.

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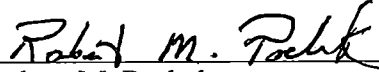
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Keith Adger Smyth 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 Frank R. Addy, which was held on November 8, 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 Keith Adger Smyth.

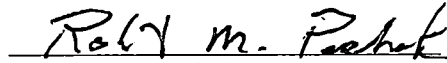
Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of August, 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 24th day of August, 2017.

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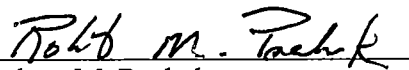
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STATE OF SOUTH CAROLINA,

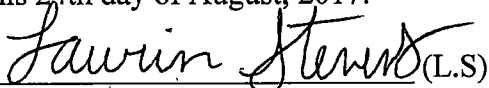
RESPONDENT

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 Valerie Garcia Giovanoli, 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 Keith Adger Smyth, #363756, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 24th day of August, 2017.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of August, 2017.


Notary Public for South Carolina
My Commission Expires: July 5, 2027.