STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable William Jeffrey Young, Circuit Court Judge

DAVID A. PATE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001261

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Did the PCR judge err in failing to find that the guilty plea was rendered involuntary by plea counsel's failure to move for a speedy trial?

STATEMENT

In February of 2014, the Lancaster County Grand Jury indicted Petitioner Pate for murder, indictment #2014-GS-29-221. On April 9, 2015, Petitioner appeared before the Honorable Daniel D. Hall and pled guilty to murder. Michael H. Lifsey represented Petitioner at the plea. Randy E. Newman prosecuted the case. Judge Hall sentenced Petitioner to life in prison. Petitioner did not appeal the conviction or sentence.

On October 6, 2015, Petitioner filed an application for post-conviction relief. The State filed a return on March 1, 2016. On January 11, 2017, an evidentiary hearing was held before the Honorable William Jeffrey Young. Nathan Sheldon represented Petitioner at the PCR hearing. Patrick Schmeckpeper represented the State. In a written order signed May 10, 2017, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on May 30, 2017. This appeal follows.

ARGUMENT

The PCR judge erred in failing to find that the guilty plea was rendered involuntary by plea counsel's failure to move for a speedy trial.

Petitioner pled guilty to murder without any negotiations or recommendation from the State. (App. p. 7, lines 21-23; p. 44). During the plea counsel acknowledged that Petitioner had a criminal history and acknowledged that the facts of the present case were bad but asked for a thirty-five (35) sentence in light of the fact that Petitioner was entering a guilty plea, saving family members from the ordeal of a jury trial. (App. p. 34, lines 2-25). The judge sentenced Petitioner to life in prison.

During the PCR hearing Petitioner testified that he rejected the only plea offer extended for a sentence of no less than forty (40) years. (App. p. 67, line 22 – p. 68, lines 1-8). Plea counsel testified that Petitioner wanted a speedy trial. (App. p. 75, lines 21-23). Plea counsel testified:

> And then my client – I think he wrote me – I know talking to him at one time he discussed wanting to have a speedy trial, which was very unusual because I had not – that had not been an issue, so I remember talking and I said, "Why do you want a speedy trial ?" And he said, "I'm tired of being out here in the county. I know I've got to do a bunch of time, I want to get on down the road to SCDC." And I'm like, "Well, if that's what you want to do we can plead guilty to the case if your goal is to get on down the road." And I spoke to the solicitor about it and the only – once again, there wasn't much of a plea offer. The concession was they let us pick a judge.

(App. p. 75, line 21 – p. 76, lines 1-8). At the time of the guilty plea Petitioner had been incarcerated for sixteen (16) months. (App. p. 30, lines 1-2). Plea counsel was ineffective in failing to file a speedy trial motion, as requested by Petitioner.

In the order of dismissal the PCR judge wrote, "Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would

require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice." (App. p. 91). The PCR judge erred. Plea counsel was ineffective for refusing to file a speedy trial motion. The guilty plea was rendered involuntary by counsel's failure to file a speedy trial motion.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full

understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999), the South Carolina Supreme Court wrote:

> Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. id.

In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the

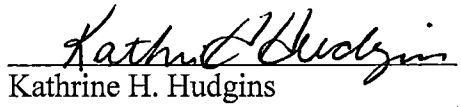
defendant.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970))). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59, 106 S.Ct. 366.

In the present case plea counsel's deficient performance affected the outcome of the plea process. Petitioner received no benefit from entering a guilty plea. There is a reasonable probability that if counsel had moved for a speedy trial, the State would have extended a plea offer allowing Petitioner to receive a sentence of less than the (40) year minimum sentence offered.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of December, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for David A. Pate 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 William Jeffrey Young, which was held on January 11, 2017, 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 David A. Pate.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of December, 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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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 David A. Pate, #341659, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 11th day of December, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of December, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.