

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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JAN 26 2018

LA'QUAN DAMON BRYAN,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001698

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to advise petitioner that if he went to trial he could have requested a charge on the lesser included offense of first-degree assault and battery which would only have carried a sentence of up to ten (10) years imprisonment?

STATEMENT

On October 13, 2015, petitioner appeared before the Honorable W. Jeffrey Young in Charleston County and pled guilty to attempted murder and possession of a firearm. He was sentenced to twenty (20) years for attempted murder and to five (5) consecutive years for possession of a weapon. Charles Cochran, Esq. was plea counsel. Richard Waring, Esq. was the assistant solicitor. (App. p. 1- p. 30).

Petitioner filed an application for post-conviction relief on April 18, 2016. Respondent filed a return dated July 28, 2016. (App. p. 31-p. 43). An evidentiary hearing was held on April 21, 2017, before the Honorable Brooks P. Goldsmith. Petitioner was present and was represented by James K. Falk, Esq. Respondent was represented by Alicia Olive, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 44- p. 100). On July 28, 2017, Judge Goldsmith issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 101- p. 113).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to advise petitioner that if he went to trial he could have requested a jury charge on the lesser included offense of first-degree assault and battery which only would have carried a sentence of up to ten (10) years imprisonment.

The standard for discussing whether plea counsel is ineffective in advising a client to plead guilty was discussed in Bennett v. State, 371 S.C. 198, 638 S.E.2d 673 (2006):

There is a two prong test for evaluating claims of ineffective assistance of counsel. The first prong of the test requires that a defendant show that his counsel's performance was deficient such that it falls below an **objective** standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Alexander v. State*, 303 S.C. 539, 402 S.E.2d 484 (1991). The second part of the test requires a defendant to show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Alexander v. State, supra*. Furthermore, "[a] defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." *Richardson v. State*, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993).

Plea counsel testified at the evidentiary hearing that their defense was that a firearm was discharged but petitioner was not intending to kill anyone. (App. p. 52, lines 6-16). If they would have gone to trial, counsel was considering assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense. ABHAN, however, requires an injury and there was no injury. (App. p. 56, line 1- p. 58, line 8). He failed to tell petitioner about the lesser included offense of assault and battery in the first degree which carried a sentence of up to ten (10) years and was classified as a nonviolent offense. Counsel said he was flat out wrong in his advice to

petitioner. If he had known about assault and battery in the first degree it would have drastically changed his advice on whether to plead guilty or go to trial. (App. p. 58, line 12- p. 60, line 13).

Petitioner testified that if he had known about the lesser included offense of assault and battery in the first degree and its maximum ten (10) year nonviolent sentence, he would have gone to trial. (App. p. 82, line 12- p. 83, line 4).

In Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985), the Supreme Court of the United States wrote:

“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.’” North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970).

Petitioner did not have a voluntary and intelligent choice because his attorney failed to advise him of the lesser included offense of assault and battery in the first degree.

CONCLUSION

Petitioner's guilty plea should be vacated.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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LA'QUAN DAMON BRYAN,

PETITIONER

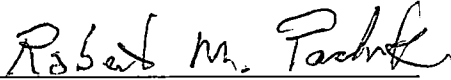
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STATE OF SOUTH CAROLINA,

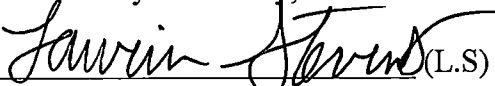
RESPONDENT

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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Rasheeda Cleveland, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on La'Quan Damon Bryan, #365656, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of January, 2018.


Robert M. Pachak
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 26th day of January, 2018.


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