

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Berkeley County

Honorable G. Thomas Cooper, Circuit Court Judge

DAMON T. BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001635

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

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

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ISSUE PRESENTED

Whether Petitioner's guilty plea was knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's erroneous advice that he was indicted for distribution of cocaine, third offense, and trafficking cocaine base, third offense, where his prior record only supported an enhancement to a second offense pursuant to S.C. Code Ann. § 44-53-470, and where Petitioner was prejudiced because if he would have known his charges could not be enhanced to a third offense he would have proceeded to trial?

STATEMENT OF THE CASE

A Berkeley County Grand Jury indicted Petitioner on June 13, 2012 for distribution of cocaine and trafficking cocaine base. App. 105-108. Petitioner initially retained Eduardo Curry to represent him. App. 53, ll. 12-21. Curry obtained a plea offer from the assistant solicitor in which the state would allow Petitioner to plead guilty to distribution of cocaine, second offense, and trafficking cocaine base, second offense, with a sentencing range of five to thirty years. App. 55, ll. 1-11. Petitioner planned to accept this offer until “at the last moment” Curry told Petitioner “not to take the plea” because it “was his feeling that [Petitioner] was going to receive [be sentenced to] over 15 or 20 years.” App. 55, ll. 13-25.

After Petitioner turned down the initial plea offer, Counsel Curry “asked that he receive more funds” in order to obtain a better offer from the state. App. 56, ll. 4-15. After Petitioner paid Curry an additional fee, the assistant solicitor eventually offered to allow Petitioner to plead guilty to distribution of cocaine, second offense, and trafficking cocaine base, second offense, in exchange for a sentence recommendation of fifteen years. However, Petitioner refused this offer and ultimately retained new counsel, Steve Davis. App. 57, ll. 5-17.

Based on Petitioner’s prior record, Davis advised Petitioner to accept the state’s initial offer to plead guilty to distribution of cocaine, second offense, and trafficking cocaine base, second offense, without any sentencing negotiations or recommendations. The possible sentencing range under this offer was five to thirty years. However, Davis told Petitioner that “he could get [him] less than 15 years” through mitigation if he pled guilty “straight up.” App. 58, ll. 5-16.

Counsel Davis reviewed with Petitioner his prior record and the offenses Davis believed were correctly used by the state to enhance his charges to a third offense. App. 60, ll. 7-25.

Davis advised Petitioner that, due to his prior record, pleading to a second offense “was the best that could be done.” App. 65, ll. 12-16.

On October 3, 2013, Petitioner pled guilty before the Honorable R. Markley Dennis. App. 1. Assistant Solicitor Michael Patterson represented the state, and Steve Davis represented Petitioner. App. 1. Petitioner was sentenced to fourteen years for each offense. App. 31, ll. 3-7. The sentences were ordered to be served concurrently. App. 31, ll. 3-7.

At the evidentiary hearing, Petitioner testified that he had no prior trafficking convictions and, consequently, that he did not believe his charges were properly enhanced to a third offense. App. 62, ll. 4-21. Importantly, Petitioner asserted that he would not have pled guilty if he would have known his sentence could not be enhanced as a third offense. Instead, he would have proceeded to trial. App. 84, l. 22 – 85, l. 9.

On May 5, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 33-41. The state filed a return to this application dated April 16, 2015. App. 42-46. With the assistance of counsel, Petitioner filed an amended application on December 8, 2015 raising the claimed argued in this petition. Supp. App. 1-2. An evidentiary hearing was convened on December 9, 2016 before the Honorable G. Thomas Cooper. Assistant Attorney General Ruston Neely represented the state, and Rodney Davis represented Petitioner. App. 47.

At the conclusion of the evidentiary hearing, PCR counsel argued, “By looking through [Petitioner’s] record and applying that to the statutes [S.C. Code Ann. §§ 44-53-370; 44-53-375; and 44-53-470], there’s no prior trafficking in his record. And a review of his record does not support the threat that he was facing a higher drug charge [enhanced sentence for a third offense] if he had gone to trial. So the advisement of how his record applied to enhance the punishment of each of these charges was in error.” App. 75, ll. 7-20. Counsel asserted that based on the

advice from plea counsel, Petitioner erroneously “believed he was facing more time if he did not accept the plea.” App. 75, ll. 25. As to prejudice, counsel argued that if Petitioner “had been given correct advice, he would not have pled to these charges. He would have requested a trial.” App. 76, ll. 5-7.

By order filed June 12, 2017, the PCR judge denied Petitioner relief. App. 96-104. The judge found Petitioner had at least two prior qualifying drug offenses that would allow for the enhancement to a third offense pursuant to S.C. Code Ann. § 44-53-470. App. 102. Therefore, the judge found plea counsel correctly advised Petitioner concerning the state’s offer to allow Petitioner to plead guilty to a second offense as opposed to a third offense in order to receive a lesser sentence. App. 102. The judge concluded Petitioner failed to meet his burden to prove counsel rendered ineffective assistance. App. 102.

Because Petitioner only pled guilty due to plea counsel’s erroneous advice that he was indicted for distribution of cocaine, third offense, and trafficking cocaine base, third offense, as opposed to only a second offense, and since Petitioner was prejudiced because if he would have known his charges could not be enhanced to a third offense he would have proceeded to trial instead of pleading guilty, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was not knowingly, intelligently, and voluntarily made where he pled guilty due to plea counsel's erroneous advice that he was indicted for distribution of cocaine, third offense, and trafficking cocaine base, third offense, where his prior record only supported an enhancement to a second offense pursuant to S.C. Code Ann. § 44-53-470, and where Petitioner was prejudiced because if he would have known his charges could not be enhanced to a third offense he would have proceeded to trial.

Plea counsel erroneously advised Petitioner that he was indicted for distribution of cocaine, third offense, and trafficking cocaine base, third offense, when Petitioner's prior record did not support such an enhancement. Petitioner was prejudiced by counsel's erroneous advice because if you would have known the state could not enhance his charges to a third offense, he would not have pled guilty. Instead, he would have proceeded to trial.

The difference “between a valid guilty plea and an 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 longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984), to claims of the same against plea counsel).

“The voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59.

“[T]he voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Holden v. State, 393 S.C. 565, 572-574, 713 S.E.2d 611, 615 (2011) (citing Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)).

Here, plea counsel’s performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Specifically, plea counsel was ineffective because he erroneously advised Petitioner that the state could enhance his charges to a third offense and that, due to his prior record, pleading guilty to a second offense “was the best that could be done.” App. 65, ll. 12-16. However, a review of Petitioner’s prior record clearly establishes that Petitioner’s charges could only be enhanced to a second offense, not a third. See App. 88-93. Because of counsel’s erroneous advice, Petitioner was prevented from making a voluntary and intelligent choice among the alternative courses of action available to him rendering his plea invalid. See Hill v. Lockhart, 474 U.S. at 56.


Moreover, Petitioner was undisputedly prejudiced. He asserted at the evidentiary hearing that he would not have pled guilty if he would have known his sentence could not be enhanced to a third offense. Instead, he would have proceeded to trial. App. 84, l. 22 – 85, l. 9. Consequently, there is a reasonable probability that, but for counsel’s ineffective assistance, Petitioner would not have pleaded guilty and would have insisted on going to trial.

As a result of the invalid plea and the resulting prejudice, Petitioner’s convictions should be reversed, and respectfully, this Court should grant him a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable G. Thomas Cooper, Circuit Court Judge

DAMON T. BROWN,

PETITIONER

V.

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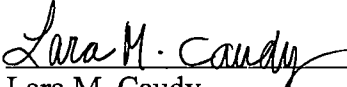
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Damon T. Brown states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on December 9, 2016 before the Honorable G. Thomas Cooper, and, in her opinion, seeking certiorari from the order of dismissal is without merit.
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 the Court relieve her as counsel for Damon T. Brown.

Respectfully Submitted,

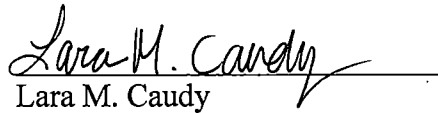

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of February, 2018.

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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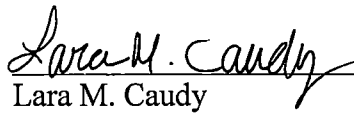
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CERTIFICATE OF SERVICE

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 have been served upon Rasheeda Cleveland, 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 upon Damon T. Brown, #357300, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 6th day of February, 2018.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of February, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027.