

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable John C. Hayes, Circuit Court Judge

KELVIN BERNARD SMITH,

RECEIVED

FEB 20 2018

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001641

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance by failing to obtain a more favorable plea deal, where plea counsel never informed Petitioner that the State controlled the plea offers?

STATEMENT

After being indicted for kidnapping, burglary in the first degree, and criminal sexual conduct in the first degree by a Pickens County grand jury during its September 2014 term, Petitioner pled guilty as indicted before the Honorable Edward W. Miller on December 14, 2014. App. 4 ll. 6 - 9; App. 55 – 60. Brandi Hinton served as the assistant solicitor, and Teal Johnson represented Petitioner. The facts presented by the prosecution at the guilty plea were as follows:

On January 25, 2014, a female individual was collecting trash within her house and saw Petitioner, who was an ex-boyfriend, standing on the back porch. App. 14 l. 22 – App. 16 l. 5. Petitioner allegedly entered her residence and came into her bedroom armed with a knife. Id. According to the State, Petitioner raped her and then supposedly confessed to “everything that he’s done” before getting into a verbal stand-off with law enforcement. Id.

Petitioner negotiated a plea for twenty years on all three charges. Id. The State dismissed a possession of a weapon during a violent crime charge. App. 18 ll. 3 – 4. Judge Miller sentenced Petitioner to twenty years on all charges, concurrent. App. 18 ll. 7 – 8.

Petitioner filed a timely application for post-conviction relief. App. 20 – 24. His application contained allegations of ineffective assistance of counsel as well as claims that his guilty plea was not made freely and voluntarily. App. 21 – 22.

The State made its Return on January 12, 2016. App. 27 – 31. An evidentiary hearing was conducted on December 9, 2016 before the Honorable John C. Hayes, III. App. 33. R. Mills Ariail, Jr. represented Petitioner. Patrick Schmeckpeper appeared on behalf of the State. Petitioner and plea counsel testified during the hearing.

On December 14, 2016, Judge Hayes issued his order denying Petitioner relief. App. 49 – 54. He found that counsel provided reasonable representation to Petitioner. App. 53. This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance by failing to obtain a more favorable plea deal, where plea counsel never informed Petitioner that the State controlled the plea offers.

On January 25, 2014, Petitioner allegedly entered a dwelling unlawfully, engaged in sexual battery, and kidnapped an individual. App. 8 l. 4 – App. 9 l. 2. At the time of his guilty plea, Petitioner alerted the court to the fact that he had been treated for mental illness. App. 6 l. 7 – App. 7 l. 4; App. 60. At the time, however, he was under the influence of multiple medications. App. 22. Therefore, Petitioner alleged that he was not competent to answer any questions from the court, at the time of his guilty plea, regarding charges against him. App. 22.

Plea counsel did not bring this fact to the court’s attention and thereby “failed to fully evaluate [the] condition of [Petitioner] as to his understanding of the law and facts.” App. 22. The particular allegations leveled against plea counsel can be found in Petitioner’s post-conviction relief application:

Applicant [did] not freely and voluntarily enter a guilty plea due to being heavily medicated at the time... Applicant at [the] time of guilty plea was taking [D]epakote and [Remeron] and [Risperdal]. Counsel [was] ineffective for allowing Applicant to plead guilty.

App. 21 – 22.¹

Plea counsel was appointed to Petitioner and the two met twice before Petitioner’s guilty plea. App. 37 l. 18 – App. 38 l. 1. His main grounds for ineffective assistance were that plea counsel did not adequately negotiate for a lesser plea. App. 38 l. 20 – App. 39 l. 10. He

¹ Upon information and belief, Depakote is used to treat seizures and bipolar disorder; Remeron is an antidepressant; Risperdal is an antipsychotic medication.

indicated that he “just felt like [plea counsel] could have [gone] back to the State and got [him] a lesser plea.” App. 39 l. 21 – App. 40 l. 3.

Plea counsel did not inform Petitioner that it was up to the State to decide what sentence to offer. App. 40 ll. 4 – 6. Petitioner concluded his testimony at the evidentiary hearing by stating that his claim of ineffective assistance of counsel revolved around plea counsel’s failure to obtain a better plea offer. App. 40 ll. 15 – 17.

Petitioner correctly asserted that Counsel was ineffective, because he was not fully aware of the facts and circumstances surrounding his guilty plea. 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 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

A defendant who pleads guilty on the advice of counsel may collaterally attack the voluntariness of his plea only by showing that (1) counsel was ineffective and that (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by

counsel. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). The Court will uphold the PCR court's findings if there is any evidence of probative value to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, plea counsel failed to inform Petitioner that the State controlled guilty plea offers. As a result, Petitioner did not receive a satisfactory guilty plea.

“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The prejudice in Petitioner’s case manifested itself in the form of a guilty plea accompanied by a sentence which exceeded Petitioner’s desires.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of February, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County

Honorable John C. Hayes, Circuit Court Judge

KELVIN BERNARD SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

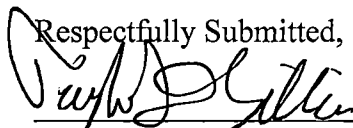
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kelvin Bernard Smith 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 John C. Hayes, which was held on December 9, 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 Kelvin Bernard Smith.

Respectfully Submitted,



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of February, 2018.

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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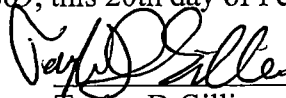
V.

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 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 Kelvin Bernard Smith, #268079, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 20th day of February, 2018.

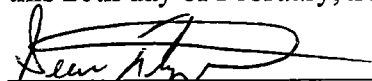


Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of February, 2018.



(L.S)

Notary Public for South Carolina

My Commission Expires: 10/30/2022.