

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

ANTHONY DARNELL BRIGGS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002105

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
Appellate Defender

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

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether PCR counsel was ineffective in advising petitioner that if he pled guilty to assault with intent to commit criminal sexual conduct in the first degree that he would not be required to have GPS monitoring?

STATEMENT

On October 9, 2013, petitioner appeared before the Honorable Frank R. Addy, Jr., in Spartanburg County and pled nolo contendere pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970) to assault with intent to commit criminal sexual conduct in the first degree. He was sentenced to fifteen (15) years imprisonment. R. Scott Davis, Esq. was plea counsel. Petitioner also pled guilty to two (2) counts of indecent exposure and was sentenced to three (3) years on those charges. James Cheek, Esq. represented petitioner on those charges. Whitney Welborn was the assistant solicitor. (App. p. 1- p. 30).

On August 14, 2014, petitioner filed an application for post-conviction relief. (App. p. 31- p. 43). Respondent filed a return dated February 19, 2015. (App. p. 44- p. 49). An evidentiary hearing was held on February 2, 2017, before the Honorable Edward W. Miller. Petitioner was present and was represented by Tommy A. Thomas, Esq. Respondent was represented by Caitlin B. Hastings, Assistant Attorney General. Petitioner testified in his own behalf and presented the testimony of Willie Briggs and Sharneka Stevenson. Scott Davis, Esq. testified for respondent. (App. p. 50- p. 98). On September 6, 2017, Judge Miller issued an amended order denying and dismissing petitioner's application for post-conviction relief. Originally, PCR was granted but respondent made a motion to alter or amend and the court granted respondent's motion and reversed its decision granting PCR. (App. p. 99- p. 109).

This petition follows.

ARGUMENT

PCR counsel was ineffective in advising petitioner that if he pled guilty to assault with intent to commit criminal sexual conduct in the first degree that he would not be required to have GPS monitoring.

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 testified that ankle monitoring for GPS information was a big concern and it costs \$100 a week. The charge he pled guilty to was assault with intent to commit criminal sexual conduct did not require GPS monitoring. (App. p. 63, line 17-p. 65, line 4). This was explained to petitioner by plea counsel during the guilty plea. (App. p. 5, lines 7-13). The South Carolina Department of Corrections, however, told petitioner that he had to be monitored on the charge he pled guilty to. (App. p. 69, lines 21-25). Petitioner testified that it was his understanding there would be no GPS monitoring. (App. p. 70, lines 16-19).

Plea counsel testified that petitioner did not want to be on an ankle monitor and that is why he chose the charge he did plead guilty to. (App. p. 84, line 10-22). On cross-examination by post-conviction relief counsel, plea counsel again testified that petitioner was concerned about GPS monitoring and that was why he pled the way he did. (App. p. 88, line 21- p. 90, line 17).

The PCR judge granted relief from the bench. (App. p. 96, lines 18-23). This was followed by a written order granting post-conviction relief that was dated June 26, 2017. (Supp. App. p. 1-p. 8).

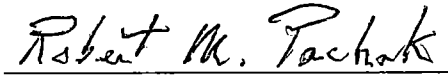
On July 13, 2017, respondent filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC. (Supp. App. p. 9- p. 19). On September 6, 2017, Judge Miller issued an order of dismissal denying petitioner's application for post-conviction relief.

That order was in error. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) a plea counsel was held ineffective when he erroneously advised a defendant that he would be parole eligible in 10 years for pleading to "common law" murder as opposed to statutory murder which provided for parole eligibility in 20 years. At the time there was no distinction between common law murder and statutory murder. In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991) plea counsel was ineffective in telling petitioner that he would be subject to life without parole if he went to trial on two armed robbery charges. In fact, petitioner would have only faced 10 to 75 years.

In this present case, petitioner was promised that if he pled guilty to assault with intent to commit criminal sexual conduct in the first degree he would not be subject to wearing a GPS monitor. That advice was incorrect.

CONCLUSION

Petitioner's guilty plea should be vacated.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of March, 2018.

STATE OF SOUTH CAROLINA
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Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

ANTHONY DARNELL BRIGGS,

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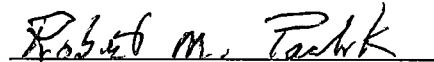
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Darnell Briggs 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 Edward W. Miller, which was held on February 2, 2017, 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 Anthony Darnell Briggs.

Respectfully Submitted,

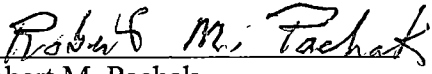


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of March, 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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STATE OF SOUTH CAROLINA

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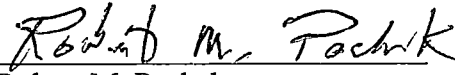
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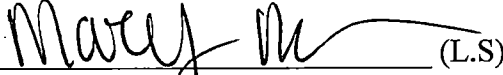
RESPONDENT

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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 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 Anthony Darnell Briggs, #267080, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 12th day of March, 2018.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of March, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.