

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

APR 09 2018

Honorable Grace Gilchrist Knie, Circuit Court Judge S.C. SUPREME COURT

THOMAS E. FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002335

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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Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective in promising petitioner a concurrent sentence of 3 to 6 years if he pled guilty to child neglect?

STATEMENT

On March 30, 2016, petitioner appeared before the Honorable J. Mark Hayes, II in Spartanburg County and pled guilty to child neglect. He was sentenced to ten (10) years imprisonment to run consecutive to other charges he was serving. Michael Morin, Esq. was plea counsel. Spencer Smith, Esq. was the assistant solicitor. (App. p. 1-p. 27)

Petitioner filed an application for post-conviction relief on July 21, 2016 (App. p. 29-p. 35). Respondent filed a return dated February 6, 2017. (App. p. 36-p.3 9). An evidentiary hearing was held on September 19, 2017, before the Honorable Grace Gilchrist Knie. Petitioner was present and was represented by Susannah C. Ross, Esq. Respondent was represented by Valerie Giovanoli, Assistant Attorney General. Both Petitioner and plea counsel testified at the hearing. Petitioner argued his attorney promised him a sentence of 3 to 6 years which would run concurrent to his other charges. (App. p. 40-p. 92). On October 31, 2017, Judge Knie issued an order denying and dismissing petitioner's application for post-conviction relief. She also found that petitioner was not promised a 3-6 year sentence range. (App. p. 93- p. 103).

This petition follows.

ARGUMENT

Plea counsel was ineffective in promising petitioner a concurrent sentence of 3 to 6 years if he would plead guilty to child neglect.

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. In 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. 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).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. 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. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's

accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 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 alleged in his application for post-conviction relief that plea counsel told him he would get a sentence of 3 to 6 years and it would be concurrent to his other charges. (App. p. 31). He explained at the evidentiary hearing that plea counsel said he had a deal for him if he would plead guilty. Counsel said the solicitor told him he was willing to drop all the other charges if he would plead guilty, and he wrote down in front of the judge that he would get 3 to 6 years. (App. p. 54, lines 15-20).

As noted above giving a client incorrect sentencing advice constitutes ineffective assistance of counsel.

CONCLUSION

Petitioner's guilty plea should be vacated.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of April, 2018.

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IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

THOMAS E. FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

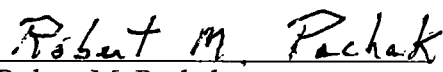
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas Earl Foster 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 Grace Gilchrist Knie, which was held on September 19, 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 Thomas Earl Foster.

Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of April, 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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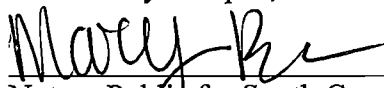
CERTIFICATE OF SERVICE

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 Megan Harrigan Jameson, 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 Thomas Earl Foster, #269961, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 9th day of April, 2018.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of April, 2018.

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