

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable Jean H. Toal, Circuit Court Judge

RECEIVED

APR 23 2018

OCTAVIOUS LEON CARR,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002328

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT
 There was insufficient evidence to support the PCR judge findings
 that petitioner was not entitled to post-conviction relief.3

CONCLUSION.....5

PETITION TO BE RELIEVED AS COUNSEL.....6

ISSUE PRESENTED

Whether there was any evidence to support the PCR judge's findings that petitioner was not entitled to post-conviction relief?

STATEMENT

On April 30, 2015, petitioner appeared before the Honorable Kristi Lea Harrington in Charleston County and pled guilty to the following charges and received sentences as follows:

Forgery (2 counts)	335 days
Resisting arrest	335 days
Possession of a firearm	335 days
Armed robbery	25 years
Entering a financial institution with intent to steal	25 years

Annie E. Andrews, Esq. was plea counsel. Richard Warring, Esq. was the assistant solicitor.

(App. p. 1-p. 29)

Petitioner filed an application for post-conviction relief on November 6, 2015. (App. p. 30- p. 37). Respondent filed a return dated June 7, 2016. (App. p. 38-p. 42). An evidentiary hearing was held on September 12, 2016, before the Honorable Jean H. Toal. Petitioner was present and was represented by Christopher Murphy, Esq. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Petitioner testified at the hearing. (App. p. 43-p. 64). On September 21, 2017, Judge Toal issued an order denying and dismissing the application for post-conviction relief. (App. p. 65-71).

This petition follows.

ARGUMENT

There was insufficient evidence to support the PCR judge findings that petitioner was not entitled to post-conviction relief.

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 testified at the evidentiary hearing that he only met with plea counsel three to four times for ten to fifteen minutes each at the Charleston County Detention Center. He said he understood the charges and the elements of each charge and the possible sentences. (App. p. 47, lines 1-25). The day before his plea he met with plea counsel for ten to fifteen minutes. He said his understanding of the plea was that it was going to be a negotiated 15 year sentence but that he could get more time. (App. p. 48, lines 1-23). Petitioner then said he had no understanding of what his sentence would be under a negotiated sentence. (App. p. 49, lines 4-7). He said he was trying to reduce his potential sentence by pleading guilty. (App. p. 50, lines 8-14).

As can be seen from petitioner’s own testimony he did have a realistic picture of his sentencing alternatives. This Court has previously held that it will not uphold the findings of a PCR judge if there is no probative evidence to support those findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). The decision of the PCR judge in this case should not be upheld.

CONCLUSION

Petitioner's guilty plea should be vacated.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of April, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jean H. Toal, Circuit Court Judge

OCTAVIOUS LEON CARR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

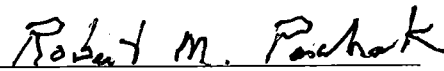
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Octavious Leon Carr 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 Jean H. Toal, which was held on September 12, 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 Octavious Leon Carr.


Respectfully Submitted,


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd 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."


Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 23rd day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jean H. Toal, Circuit Court Judge

OCTAVIOUS LEON CARR,

PETITIONER

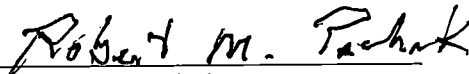
V.

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 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 on Octavious Leon Carr, #313818, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 23rd day of April, 2018.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of April, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027.