

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Florence County

Honorable Paul M. Burch, Circuit Court Judge

RECEIVED

KELVIN O'NEAL,

MAY 14 2018

PETITIONER
SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000020

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

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ISSUE PRESENTED

Whether plea counsel was ineffective in advising petitioner that if he pled guilty to possession with intent to distribute cocaine base and to accessory after the fact of murder without a recommendation he would probably get probation when he was actually sentenced to 12 years on both charges?

STATEMENT

On July 16, 2014, petitioner appeared before the Honorable Michael G. Nettles in Florence County and pled guilty to possession with intent to distribute cocaine base and accessory after the fact of murder. He was sentenced to twelve (12) years on both charges. Chevron Scott, Esq. was plea counsel. Edward L. Clements, III, Esq. was the solicitor.

(App. p. 1-p. 18)

Petitioner filed an application for post-conviction relief on November 3, 2014. (App. p. 19-p. 25) Respondent filed a return dated September 16, 2016. (App. p. 26-p. 29). An evidentiary hearing was held on March 14, 2017, before the Honorable Paul M. Burch. Petitioner was present and was represented by Jonathan D. Waller, Esq. Respondent was represented by Lindsey A. McCallister, Assistant Attorney General. Petitioner testified on his own behalf and called Chevron Scott, Esq. to testify. Ed Clements, Esq. testified for the respondent. (App. p. 30-p. 70). On December 11, 2017, Judge Burch issued an order denying and dismissing the application for post-conviction relief. (App. p. 71-p. 79).

This petition follows.

ARGUMENT

Plea counsel was ineffective in advising petitioner that if he pled guilty to possession with intent to distribute cocaine base and to accessory after the fact of murder without a recommendation he would probably get probation when he was actually sentenced to 12 years on both charges.

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 had plea recommendations by the solicitor of ten (10) years and seven (7) years. He turned down the ten year recommendation because a co-defendant got probation. Plea counsel told him the seven year offer was non-violent but he still wanted to try for probation. After plea counsel talked to the solicitor, petitioner was advised to try to plea straight up with the possibility of getting probation! (App. p. 37, line 4-p. 40, line 7). Petitioner said he knew the sentencing range was 0-15 years, but with the recommendation of 7 years, he thought if he were to plea his sentence would be between 0 and 7 and he never explicitly rejected the 7 year offer. (App. p. 42, lines 5-15). He said plea counsel told him there was a 95% chance he could get probation. He said the other 5%, he thought would be 7 years or less. (App. p. 46, lines 11-14).

Plea counsel testified that he "wished" for probation for his client. (App. p. 51, line 14-p. 52, line 19). He said that he lost a lot of sleep over this case because he did not feel that he prepared petitioner for the sentence that he got! (App. p. 52, line 21-p. 53, line 7).

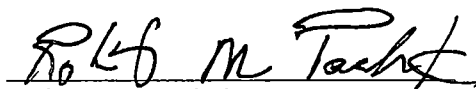
On cross examination plea counsel admitted that he did not do a good job of presenting all of the facts that he needed to present to the judge. (App. p. 54, line 25-p. 55, line 20).

Solicitor Clements testified to the facts of the case and said the plea judge decided to give the co-defendant probation because he co-operated with the state in full, (App. p. 61, line 5- p. 65, line 8).

Plea counsel in this case lacked good judgement as how to advise his client.

CONCLUSION

Petitioner's guilty plea should be reversed.

A handwritten signature in black ink, appearing to read "Robert M. Pachak", written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of May, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

Honorable Paul M. Burch, Circuit Court Judge

KELVIN O'NEAL,

PETITIONER

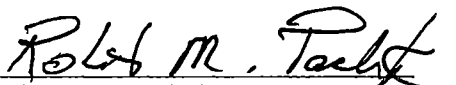
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RESPONDENT

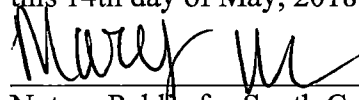
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Kelvin D. O'Neal, #360657, at Darlington County Prison, 200 Camp Road, Darlington, SC 29532, this 14th day of May, 2018.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of May, 2018.

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