

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Robert E. Hood, Circuit Court Judge

ORIGINAL

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MAY 23 2018

S.C. SUPREME COUF

BRYAN MICHAEL HOWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002022

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
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether there was sufficient evidence to uphold the PCR judge's findings that plea counsel was not ineffective in his representation of petitioner?

STATEMENT

On January 5, 2012, petitioner appeared before the Honorable Diane S. Goodstein in Dorchester County and pled guilty to the following offenses and was sentenced as follows:

Armed Robbery	15 years
Carjacking	15 years
Failure to stop for a blue light	90 days
Leaving the scene of an accident with injury	30 days
Burglary in the second degree, violent	15 years
Burglary in the second degree, non-violent, 3 counts	10 years

Mitchell E. Farley, Esq. was plea counsel. Russell D. Hilton, Esq. was the solicitor, (App. p. 1-p. 79).

Petitioner filed an application for post-conviction relief on November 27, 2013. (App. p. 80-p. 86). Respondent filed a return dated March 14, 2014. (App. p. 88-p. 92). An evidentiary hearing was held on May 24, 2017, before the Honorable Robert E. Hood. Petitioner was present and was represented by Rodney Davis, Esq. Respondent was represented by Rushton W. Neely, Assistant Attorney General. Both Petitioner and plea counsel testified at the hearing. (App. p. 93-p. 133). Judge Hood issued an order denying and dismissing the application for post-conviction relief, (App. p. 134-p. 140).

This petition follows.

ARGUMENT

There was insufficient evidence to support the PCR judge's findings that plea counsel was not ineffective in his representation of petitioner.

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

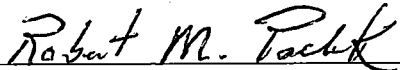
accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure 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 Mitchell Farley was appointed to represent him. Seven to eight months passed between the time he was arrested and the time he pled guilty. He met three times with his attorney. The first meeting was just an introductory visit. Plea counsel did not have the discovery yet. On the second meeting they talked about a ten year plea. (App. p. 103, line 3- p. 104, line 25). The third meeting was at the courthouse on the day of the plea. Petitioner said he was advised to take a fifteen year plea deal. (App. p. 106, lines 1-12). There was never a discussion by counsel of preparing for trial. (App. p. 107, lines 8-14). Counsel told him because he gave a statement it was best to take a plea. (App. p. 107, lines 22-23).

It is obvious that all counsel wanted to do was to get petitioner to take a plea. The PCR court should not have found that counsel provided effective assistance. 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.

CONCLUSION

Petitioner's guilty plea should be vacated.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Robert E. Hood, Circuit Court Judge

BRYAN MICHAEL HOWELL,

PETITIONER

V.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bryan Michael Howell 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 Robert E. Hood, which was held on February 27, 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 Bryan Michael Howell.

Respectfully Submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of May, 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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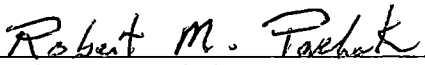
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STATE OF SOUTH CAROLINA,

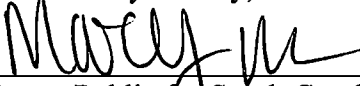
RESPONDENT

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 Christian Saville, 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 Bryan Michael Howell, #353433, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 23rd day of May, 2018.


Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

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

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