

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Roger L. Couch, Circuit Court Judge

RECEIVED

JUL 17 2018

S.C. SUPREME COURT

JAMES DAWKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001534

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where plea counsel provided ineffective assistance by failing to discuss with Petitioner the possibility of suppressing evidence which was obtained through an invalid search warrant?

STATEMENT

On March 14, 2011, Petitioner pled guilty to assault and battery with intent to kill before the Honorable J. Mark Hayes, II. In Cherokee County. App. 1. The plea was made without negotiation or recommendation. App. 5 ll. 2 – 7. Sean Giovanetti represented Petitioner, and Kim Leskanic represented the State.

The facts presented at the guilty plea by Assistant Solicitor Leskanic were as follows:

On April 13, 2010, Petitioner and his brother, co-defendant Gary Dawkins, were the victims of a robbery. App. 11 l. 15 – App. 14 l. 3. The duo gave John Hickerson between \$150 and \$300 in order for him to procure a gun on their behalf. Id. John “took that money, went into an abandoned house and walked out the back door with their money, never bringing them their money or the gun.” Id.

The Dawkins brothers called John’s brother, Michael. Id. Michael agreed to help them try and locate his brother; the three got in a car together and began searching. Id. Gary asked to hold Michael’s cell phone in order to call John. Id. Gary informed Michael that he would not return the phone until he received his money or they found John. Id. The three men then got out of the car, and Petitioner shot Michael. Id.

Law enforcement located the Dawkins brothers in Union. Id. They provided statements admitting that they were present with Michael and that he was shot. Id. Petitioner was indicted by a Cherokee County grand jury on June 10, 2010 for assault and battery with intent to kill. App. 89.

At the time of his plea, Petitioner was twenty years old. App. 6 l. 25 – App. 8 l. 2. He was a sophomore in college, and he worked two jobs. Id. Judge Hayes accepted Petitioner’s

guilty plea. App. 16 ll. 10 – 23. Petitioner was sentenced to twenty years' incarceration. App. 28 ll. 23 – 24. He did not appeal his guilty plea or sentence.

Petitioner filed three applications for post-conviction relief which are relevant to this matter. The first was filed on October 27, 2011. App. 31. It contained allegations of ineffective assistance of counsel, including claims that counsel failed to preserve claims, failed to investigate the case, and failed to challenge arrest warrants. App. 32 – 33.

The State filed its Return on or about July 18, 2012. An evidentiary hearing was held before the Honorable J. Derham Cole on January 9, 2013. App. 43. R. Patrick Martin represented Petitioner, and Suzanne H. White appeared on behalf of the State. Petitioner and plea counsel testified during the hearing.

On April 8, 2013, Judge Cole issued his order denying Petitioner relief. App. 63 – 69. In particular, he found that counsel's conduct did not fall below the objective standard of reasonableness. App. 67.

On August 29, 2013, Petitioner filed his second application for post-conviction relief. App. 70. He alleged ineffective assistance of PCR counsel for failing to appeal the denial of his PCR application. App. 77. An evidentiary hearing was held before the Honorable Roger L. Couch. Supplemental Appendix 1 – 5.

On April 20, 2015, the Honorable Roger L. Couch issued a consent order granting an appeal pursuant to Austin v. State.¹ App. 78. According to the Order, the State consented because prior PCR counsel "left his firm and never received a copy of the signed and filed Order of Dismissal." App. 79. The Court found that Petitioner "did not voluntarily waive his right to

¹ 305 S.C. 453, 409 S.E.2d 395 (1991).

appeal the post-conviction relief court's denial and dismissal of his post-conviction relief action." App. 80.

On May 2, 2016, Petitioner filed his third application for post-conviction relief. App. 81 – 84; Supp. App. 6 – 12. In it, he alleged that “counsel missed the filing deadline for a Notice of Appeal.” Id.

A second consent order granting an appeal pursuant to Austin v. State, supra, was issued by Judge Couch on or about June 26, 2017. App. 85. Once more, the State consented to allow Petitioner belated review of his original PCR. App. 87.

This Petition and a petition for writ of certiorari pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) follow.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance by failing to discuss with Petitioner the possibility of suppressing evidence which was obtained through an invalid search warrant.

Counsel was appointed to Petitioner. App. 46 l. 25 – App. 47 l. 2. Petitioner wanted to go to trial, but counsel informed him that he would receive a lenient sentence if he pled guilty. App. 48 ll. 10 – 23. Specifically, counsel suggested that Petitioner could expect to receive between ten and fifteen years. App. 49 l. 22 – App. 50 l. 11.

At the evidentiary hearing, Petitioner alleged that counsel was ineffective for failing to object to any of the warrants in his case. App. 47 l. 3 – App. 48 l. 5. The warrant was not signed by Petitioner, and it did not contain a judge code. Id. Counsel neither discussed this with Petitioner nor explained the law surrounding search warrants. Id. Petitioner believes the search warrant was invalid. Id. There were not any exhibits introduced at the guilty plea or the evidentiary hearing.

Petitioner stated at the PCR hearing that he had “a couple of mental issues as far as anger and stuff like that.” App. 48, ll. 24 – 24. He confirmed that he was not in his “right state of mind” at the time of the shooting due to stress and pressure that he was under. App. 48 l. 19 – App. 49 l. 2. He informed counsel of this, and counsel indicated that he would bring this information to the judge’s attention. App. 49 ll. 3 – 17.

Counsel testified that he did not see “any issues” in a search or arrest warrant that he needed to raise. App. 58 ll. 15 – 17. As a result, Petitioner received ineffective assistance of counsel, and it made a difference in his case. App. 50 ll. 18 – 23.

Petitioner correctly asserted that Counsel was ineffective, because he did not communicate with Petitioner regarding details of the warrant. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, Counsel failed to consult with Petitioner regarding certain defenses which were available prior to the plea. Petitioner’s testimony, as outlined above, indicates that Counsel did not go over the warrant issues in his case. Because Petitioner was unfamiliar with the law, he was unaware at the time that the warrant was invalid. App. 52 ll. 6 – 17.

“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). As evident from Petitioner’s testimony, the

prejudice in his case manifests itself in his plea which was made without full knowledge of possible defenses available to him.

“The Fourth Amendment to the United States Constitution protects the people’s right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; *cf.* S.C. Const. art. I, § 10.” State v. Robinson, 410 S.C. 519, 526, 765 S.E.2d 564, 568 (2014). At its core, the Fourth Amendment “stands [for] the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” Id. (citing Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). Petitioner was not made aware of the potential Fourth Amendment violations that existed with his case, and therefore he was unable to make an informed decision regarding his plea.

Plea counsel did not investigate or communicate any of the alleged deficiencies regarding the warrants. Petitioner was not made aware of possible defenses which would have affected the evidence used against him.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Roger L. Couch, Circuit Court Judge

JAMES DAWKINS,

PETITIONER

V.

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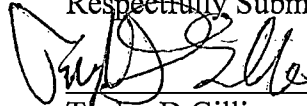
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Dawkins 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 Roger L. Couch, which was held on January 9, 2013, 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 James Dawkins.

Respectfully Submitted,



Taylor D Gilliam

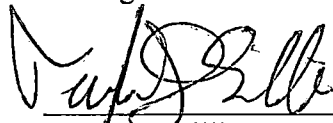
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 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."



Taylor D Gilliam
Appellate Defender

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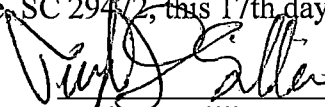
V.

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 Supplemental Appendix in the above referenced case has been served upon Jordan Cox, 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 James Dawkins, #345172, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 17th day of July, 2018.

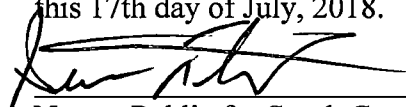


Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of July, 2018.



Notary Public for South Carolina

(L.S)
My Commission Expires: 10/30/2022