STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

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S.C. SUPREME COURT

FITZGERALD RAYSEAN MCDUFFIE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000519

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Was Petitioner's guilty plea involuntary due to plea counsel's ineffective assistance where counsel failed to review with Petitioner, and provide Petitioner with, a full copy of his discovery materials, and where Petitioner was prejudiced since the outcome of his case would have been different if he had been given a complete copy of his discovery to review and, consequently, been aware of the state's evidence against him?

STATEMENT OF THE CASE

After grocery shopping at a Food Lion in Myrtle Beach, two unidentified men were walking home through a wooded path carrying their groceries when they were approached by two armed individuals and held at gunpoint. One of the shoppers tried to run and was shot in the thigh. The other was held down by one of the armed men while the other robber rummaged through his pockets. App. 13, l. 23 – 14, l. 15. Neither of the shoppers were seriously injured. App. 14, ll. 12-15.

Petitioner, who was sixteen years old, and his eighteen year old brother were ultimately identified as suspects. Tr. 15, l. 14; Tr. 16, ll. 4-20. However, the evidence against Petitioner was entirely circumstantial. He was not arrested at the location of the armed robbery nor was he ever identified in a photographic lineup. Law enforcement never recovered the weapon allegedly used in the robbery. The state merely had witnesses who would have testified that they saw Petitioner in the area of the armed robbery, but did not see him actually commit the crime. For example, the "grounds keeper" would have testified that he knew Petitioner and his brother, heard gunshots, and saw the boys running from the direction of the gunshots within seconds of shots being fired. App. 48, ll. 10-20; App. 60, l. 19 – 61, l. 7.

A Horry County Grand Jury indicted Petitioner on June 19, 2014 for attempted murder, armed robbery, and possession of a weapon during the commission of a violent crime. App. 77-78; App. 86-87. At his arraignment on February 17, 2015, despite consistently maintaining his desire for a jury trial and the limited circumstantial evidence against him, Petitioner unexpectedly decided to plead guilty. App. 1; App. 5, l. 21 – 6, l. 20. The state agreed to allow Petitioner to plead guilty to armed robbery with a sentence "cap of fifteen years." App. 3, ll. 4-16. This offer was set to expire after Petitioner's arraignment. App. 64, l. 19 – 65, l. 1.

At the time, Petitioner also had several other pending charges stemming from two unrelated armed robberies the state claimed Appellant committed. App. 3, l. 4 – 5, l. 7; App. 7, l. 7 – 8, l. 11. Specifically, in addition to the charges stemming from the robbery near Food Lion to which Petitioner pled guilty, Petitioner also had pending indictments for armed robbery, possession of a weapon during the commission a violent crime, and attempted murder related to a second alleged robbery, and indictments for armed robbery and possession of a weapon during the commission of a violent crime related to a third alleged robbery. App. 7, l. 7 – 8, l. 11. The state agreed to dismiss all of Petitioner's pending charges in exchange for his guilty plea to a single count of armed robbery. App. 4, ll. 15-17.

Before pleading guilty, Petitioner consistently maintained his desire for a jury trial. App. 65, ll. 5-7. Petitioner, who was only seventeen when he pled guilty, testified at the evidentiary hearing that he "switched it up at the last minute" and decided to plead guilty only because he was "scared." He asserted, "I didn't know what to do. I really was just scared. And so I just signed the plea because I didn't want to go to trial back to back three times gambling with my life." App. 44, l. 12 – 45, l. 8. Petitioner said plea counsel told him "they was going to give me basically life," because, if sentenced consecutively, he was facing over one hundred and sixty years. App. 45, ll. 1-4.

Petitioner ultimately pled guilty to armed robbery before the Honorable Benjamin H. Culbertson on February 17, 2015. App. 1. Assistant Solicitor Monica Wooten represented the state, and Dean Mureddu represented Petitioner. App. 1. Judge Culbertson sentenced Petitioner to twelve years imprisonment, which was the same sentence Petitioner's older brother received for his involvement in the armed robbery. App. 21, ll. 11-21.

On December 1, 2015, Petitioner filed an application for post-conviction relief. App. 23-29. The state filed a return to this application on February 21, 2017. App. 30-38. An evidentiary hearing was convened on November 30, 2017 before the Honorable William H. Seals. App. 39. Assistant Attorney General Johnny E. James, Jr. represented the state, and Steven Fowler represented Petitioner. App. 39.

Petitioner testified at the evidentiary hearing that his counsel did not review with him or provide him with a complete copy of the state's response to his motion for discovery despite his request. He said counsel only gave him "a bunch of . . . police reports." App. 49, ll. 6-14. Petitioner explained, "[H]e [counsel] said he didn't want to give me my whole motion [all of his discovery materials] because he said that someone else could have gotten my motion in [the] county [jail] to read through my stuff and use that against me in court." App. 50, ll. 1-6. Petitioner asserted that if he would have received a complete copy of his discovery the outcome of his case would have been different because he would have read and seen all the evidence, or lack thereof, against him. App. 50, l. 10 – 51, l. 4; See App. 48, l. 2 – 49, l. 14.

Consistent with Petitioner's testimony, Dean Mureddu, Petitioner's counsel, admitted he discouraged Petitioner from having any of the discovery materials in his possession because he was concerned about the possibility of a "jailhouse informant" obtaining the documents and testifying against Petitioner if he proceeded to trial. App. 58, l. 7 – 59, l. 14. Despite Mureddu's discouragement, Petitioner wanted a copy of his discovery materials. However, rather than providing Petitioner with a complete copy, Mureddu only gave Petitioner "what [he] found to be the relevant discovery, the things that [Petitioner] and [Mureddu] really needed to discuss, and what [Mureddu] [felt] was going to be the key evidence." App. 57, l. 22 – 58, l. 6. While he admitted that he refused to provide Petitioner with a complete copy of all the discovery

materials, Mureddu maintained he reviewed all of the documents with Petitioner in person. App. 57, l. 16 – 58, l. 6.

Significantly, Mureddu acknowledged the state had a weak case against Petitioner. He asserted, "It would have been difficult for the State to put together the case, they would have had [to] put together a big jigsaw puzzle. But they had witnesses and other things that also cut against us." App. 63, ll. 5-8.

The PCR judge ultimately denied Petitioner relief. The judge found "no deficiency on the part of counsel, nor prejudice therefrom." App. 83. He emphasized that counsel reviewed the discovery materials independently, and with Petitioner. App. 83. The judge also found counsel articulated valid reasons, both general and specific to Petitioner's case, as to why he did not provide absolutely all materials to Petitioner who was incarcerated. App. 83.

Because Petitioner's guilty plea was involuntary due to plea counsel's ineffective assistance where counsel failed to provide Petitioner with a complete copy of his discovery materials and where Petitioner was prejudiced because he testified the outcome of his case would have been different if had been aware of all the evidence against him, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's guilty plea was involuntary due to plea counsel's ineffective assistance where counsel failed to review with Petitioner, and provide Petitioner with, a full copy of his discovery materials, and where Petitioner was prejudiced since the outcome of his case would have been different if he had been given a complete copy of his discovery to review and, consequently, been aware of the state's evidence against him.

Petitioner's guilty plea was involuntary due to plea counsel's failure to review with Petitioner, and provide Petitioner with, a complete copy of his discovery materials. Without being aware of the evidence, or lack thereof, against him, Petitioner could not make a voluntary and intelligent decision whether to plead guilty or proceed to trial. Petitioner was prejudiced by counsel's deficient performance because if he would have been aware of the evidence against him, the outcome of his case would have been different, *i.e.*, he would not have pled guilty.

A defendant as the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S.

668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

In the context of a guilty plea, a petitioner must show that counsel was ineffective and there is a reasonable probability that but for counsel's errors, he would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

In Kolle v. State, 386 S.C. 578, 590-591, 690 S.E.2d 73, 79-80 (2010), this Court held "plea counsel was deficient in failing to procure pertinent discovery materials, in particular the

call/dispatch logs and search warrant." This Court explained these materials would have enabled counsel to effectively cross-examine the officers at the suppression hearing, point out time discrepancies, and point out other discrepancies in the documents material to the charges against Kolle. Id. at 591, 690 S.E.2d at 80. According to this Court, had counsel "adequately attacked the credibility of the officers, there is a reasonable probability this would have influenced the trial judge's decision regarding the existence of exigent circumstances, *i.e.*, affected the outcome of the suppression motion." Id.

Here, plea counsel was ineffective because he failed to review all of the discovery materials with Petitioner and admittedly refused to provide Petitioner with a complete copy of the discovery, despite Petitioner's request that he do so. Counsel maintained he gave Petitioner what he found to be the "relevant" materials and the "key evidence" in the case, but refused to give Petitioner the remainder of the documents for fear that a "jailhouse informant" would obtain the materials and testify against Petitioner at a future trial. App. 58, ll. 1-6. This constituted deficient performance in violation of Petitioner's right to the effective assistance of counsel.

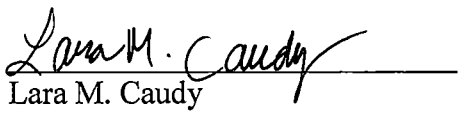
Petitioner was prejudiced by counsel's deficient performance because counsel's failure to review with Petitioner all of the discovery materials, and refusal to provide Petitioner with a complete copy, prevented Petitioner from being aware of all of the evidence, or lack of evidence, against him. Petitioner's testified that if he would have had a complete copy of his discovery, the outcome of his case would have been different because he "would have read things" and "would have seen things" that influenced his decision whether to plead guilty or proceed to trial. App. 50, ll. 7-15. Without being aware of the evidence against him, Petitioner could not make a voluntary and intelligent decision among his alternative courses of action.

Consequently, this Court should reverse the ruling of the PCR judge, find plea counsel was ineffective, vacate Petitioner's conviction, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition and order full briefing on the issue presented. In the event this Court grants the petition but dispenses with full briefing, Petitioner respectfully requests this Court reverse the PCR court, find plea counsel was ineffective, vacate Petitioner's conviction, and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of July, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Fitzgerald Raysean McDuffie states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record and transcript of Petitioner's post-conviction relief hearing, which was held on November 30, 2017 before The Honorable William H. Seals. In her opinion, seeking certiorari from the order of dismissal is without merit.

3. She 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 the Court relieve her as counsel for Fitzgerald Raysean McDuffie.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

This 18th day of July, 2018.

ATTORNEY FOR PETITIONER

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."

Lara M. Caudy

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Appellate Defender

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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 have been served upon Johnny Ellis James, Jr., 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 upon Fitzgerald Raysean McDuffie, #363060, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 18th day of July, 2018.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of July, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.