

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED

OCT 08 2018

S.C. SUPREME COURT

TRAVIS NAPOLEON DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000077

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
Appellate Defender

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

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel by allowing him to plead guilty to trafficking crack cocaine when the State could only reach the minimum ten gram threshold amount by combining powder cocaine with crack cocaine?

STATEMENT

On August 22, 2013, a Spartanburg County grand jury indicted petitioner for possession of marijuana, possession with intent to distribute cocaine, trafficking in cocaine base, and possession with intent to distribute heroin. App. 77-89. On July 17, 2014, the grand jury indicted petitioner for failure to stop for a blue light, manufacturing cocaine base, two counts of possession of a firearm by a person convicted of a violent crime, and possession with intent to distribute heroin. App. 91-104. On June 16, 2015, petitioner pled guilty pursuant to a negotiated sentence before the Honorable Roger L. Couch. App. 1. App. 3, ll. 7 – 14. On the drug offenses, petitioner pled guilty to second offenses. App. 3, ll. 7 – 14. Sam Bass represented the State. App. 1. Candace Lapham represented petitioner. App. 1. Petitioner received consecutive sentences totaling fifteen years' imprisonment. App. 22, l. 19 – 24, l. 7.

On March 7, 2016, petitioner filed a PCR application. App. 26. On June 28, 2017, the Honorable Robin B. Stilwell held a hearing. App. 40. Rodney Richey represented petitioner. App. 40. Valerie G. Giovanoli represented the State. App. 40. On October 4, 2017, Judge Stilwell denied petitioner's application. App. 69. This petition follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. A PCR court's findings of fact will be upheld if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Questions of law are reviewed de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Trial counsel provided ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel by allowing him to plead guilty to trafficking crack cocaine when the State could only reach the minimum ten gram threshold amount by combining powder cocaine with crack cocaine.

On the advice of counsel, petitioner pled guilty to trafficking crack in an amount greater than ten grams even though he only possessed 8.27 grams of crack. App. 16, l. 18 – 17, l. 4. App. 55, l. 24 – 56, l. 15. App. 44, l. 20 – 47, l. 19. The State combined 2.1 grams of powder cocaine with the 8.27 grams of crack to meet the threshold amount for trafficking crack. App. 16, l. 18 – 17, l. 4. App. 16, l. 18 – 17, l. 4. Petitioner argued at the PCR hearing that combining powder cocaine and crack cocaine to meet the threshold for trafficking crack was illegal and trial counsel performed deficiently in allowing him to plead guilty to this offense. App. 55, l. 24 – 56, l. 15. App. 60, l. 8 – 62, l. 16.

Under cross-examination by the Attorney General at the PCR hearing about combining the two amounts, petitioner answered, “You cannot combine the substances due to the trafficking statute.” App. 61, ll. 11 – 14. Petitioner then cited the trafficking statute and referred the Attorney General to the definitional sections of the drug code. App. 61, l. 15 – 62, l. 14. The Attorney General then said she would “move along.” App. 62, ll. 11 – 16. Plea counsel testified that combining crack and powder cocaine is “legal.” App. 48, ll. 19 – 21. The PCR court accepted the assertion, without citation to any authority, that powder cocaine and crack can be combined. App. 74. The PCR court performed no legal analysis and cited no authority, but called petitioner's argument “simply an incorrect statement of the law.” App. 74.

Petitioner was indicted under section 44-53-375 of the South Carolina Code for “Trafficking in Cocaine Base and/or Crack Cocaine.” App. 85. The indictment only mentions crack cocaine and does not mention powder cocaine. App. 85. In addition to his other charges, he pled guilty to trafficking 10-28 grams, second offense. App. 8, l. 24 – 9, l. 4. Judge Couch, pursuant to a negotiated plea, sentenced petitioner to fifteen years’ imprisonment for trafficking. App. 23, ll. 11 – 13. App. 3, ll. 15 – 18.

Section 44-53-375 deals with methamphetamine and cocaine base. S.C. Code Ann. § 44-53-375. To define “cocaine base,” the statute specifically references the definitions contained in section 44-53-110 of the drug code. S.C. Code Ann. § 44-53-375(A). Section 44-53-110 defines “cocaine base” as “an alkaloidal cocaine or freebase form of cocaine, which is the end product of a chemical alteration whereby the cocaine in salt form is converted to a form suitable for smoking. Cocaine base is commonly referred to as ‘rock’ or ‘crack cocaine.’” S.C. Code Ann. § 44-53-110(9). “Cocaine” is not separately defined in the definitional statute, section 44-53-110. S.C. Code Ann. § 44-53-110. Derivatives of coca leaves are a schedule II controlled substance. S.C. Code Ann. § 44-53-210(b)(4).

The offenses of trafficking cocaine base and trafficking cocaine are in two different statutes. Compare S.C. Code Ann. § 44-53-375(C)(1) (cocaine base) with S.C. Code Ann. § 44-53-370(e)(2) (cocaine). Defining cocaine base as a different substance than powder cocaine and criminalizing trafficking in these substances in two different statutes indicates the Legislature’s intent that they cannot be combined for purposes of the trafficking statute.

Closer examination of the cocaine base trafficking statute further demonstrates the inability to combine the two because the statute references specific code sections concerning mixtures of methamphetamine, but declines to reference specific code sections regarding

derivatives of coca leaves from the same code section. S.C. Code Ann. § 44-53-375(C). Section 375(C) references the previously cited definition for cocaine base in section 44-53-110. It then references two specific definitions in section 44-53-210, the Schedule II controlled substances statute. Both of these specific code sections deal with mixtures of methamphetamine, not cocaine base. S.C. Code Ann. § 44-53-210(d)(1) (“Amphetamine, its salts, optical isomers, and salts of its optical isomers”); S.C. Code Ann. § 44-53-210(d)(2) (“Methamphetamine, its salts, and salts of isomers.”).

Had the Legislature intended to include powder cocaine in the definition of cocaine base for purposes of the trafficking statute, it would have referenced the same statute that describes coca leaves and their derivatives. S.C. Code § 44-53-210(b)(4). The Legislature’s inclusion of specific items with respect to methamphetamine, but exclusion of the specific description of coca leaves and their derivatives that are not classified as cocaine base demonstrates the Legislature’s intent that only cocaine base can be used to meet the threshold trafficking amount.


The specific inclusion of some items shows the Legislature’s intent to exclude other items. See Hodges v. Rainey, 341 S.C. 79, 86-87, 533 S.E.2d 578, 582 (2000). In Rainey, this Court found that the enumeration of exclusions from a statute meant that the statute applied to other cases not specifically excluded. Id. Had the Legislature meant to include and punish powder cocaine as if it were crack cocaine, it could easily have done so by referencing the definition of coca leaves or stating, as it did for methamphetamine, that any mixture would qualify. See State v. Johnson, 410 S.C. 10, 23-27, 763 S.E.2d 36, 43-45 (Ct. App. 2014) (interpreting section 44-53-375(C) in the context of a mixture of methamphetamine). From these principles and the plain language of the statute, it is clear that powder cocaine and crack cocaine cannot be combined in the trafficking cocaine base statute.

As a result, plea counsel performed deficiently by allowing petitioner to plead guilty. Petitioner's guilty plea was unknowing and unintelligent because he relied on the erroneous advice of his attorney. "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). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (internal quotations omitted).

The PCR court also erred in showing that petitioner could not prove prejudice because he got "the deal of a lifetime." App. 74. Simply because petitioner's plea on this charge which the State could not prove was part of a global negotiation of his charges does not prevent petitioner from proving that his guilty plea was involuntary. The PCR court's decision should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and reverse petitioner's conviction.

A handwritten signature in black ink, appearing to read 'DAVID ALEXANDER', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of October, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

TRAVIS NAPOLEON DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

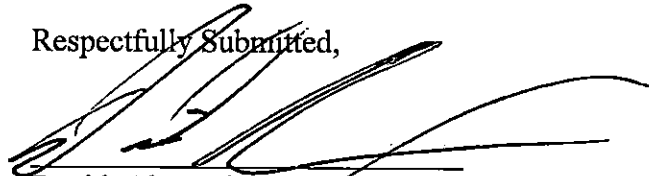
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Travis Napoleon Davis states:

1. He is an 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 post-conviction relief hearing before Judge Robin B. Stilwell, which was held on June 28, 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 Travis Napoleon Davis.

Respectfully Submitted,

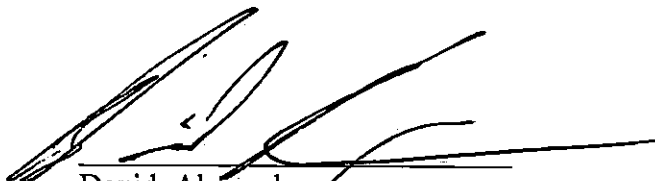


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of October, 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."

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

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

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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 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 Travis Napoleon Davis, #313423, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of October, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of October, 2018.

Country Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.