

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 19 2018
S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Thomas A. Russo, Circuit Court Judge

BILL BOYD BOOKER II

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000732

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
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

Did the PCR Court err in denying Petitioner relief where plea counsel failed to follow up on a competency evaluation requested by prior counsel and where plea counsel only spent ten to twelve hours on Petitioner's case?

STATEMENT

A Charleston County grand jury indicted Petitioner with one count of armed robbery, one count of attempted armed robbery, and two counts of strong armed robbery between May 12, 2014 and December 2015. App. 98 – 104. Petitioner pled guilty under North Carolina v. Alford¹ following negotiations between his plea counsel, Russell Hilton, and the assistant solicitor, Charles Condon. App. 1. He pled guilty before the Honorable Deadra Jefferson on January 27, 2016. App. 10 l. 8 – App. 11 l. 5.

The facts presented by the assistant solicitor were as follows: Between the evening of January 5 and the morning of January 6, 2012 four businesses in Charleston County were robbed. App. 12 l. 3 – App. 15 l. 5. The Charleston Police Department found a car matching the description of the one driven by the man who robbed the gas stations and bars. App. 14 ll. 11 – 17. The driver fled after crashing the car. Id. Petitioner was then seen walking near the crashed car, and because he matched the descriptions provided by the clerks and bartender, he was placed into custody. App 14 ll. 11 – 24.

According to the State, surveillance was obtained from all four locations. App. 14 ll. 8 – 10. Petitioner was interviewed and admitted that he was the one visible in the surveillance photographs. App. 14 l. 25 – App. 15 l. 2.

Judge Jefferson found a substantial factual basis for each plea and noted that Petitioner entered his pleas freely, voluntarily, knowingly, and intelligently. App. 19 ll. 19 – 25. The court accepted each plea. Id. Subject to the negotiated plea which rescinded the State's life without parole notice, Petitioner received twenty-five years on the armed robbery, twenty years on the

¹ North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

attempted armed robbery, and fifteen years on each of the strong armed robbery charges. App. 4
1. 6 – App. 5 l. 17; App. 20 ll. 9 – 18. The sentences were crafted to run concurrently. Id.

On January 19, 2017, Petitioner filed an application for post-conviction relief. App. 25 –
31. It contained allegations of ineffective assistance of counsel, including claims that Petitioner
was coerced into pleading guilty, counsel did not advise Petitioner “of certain rights,” and
“certain issues were not raised.” App. 27. The State made its Return on or about July 7, 2017.
App. 32 – 40.

An evidentiary hearing was held on February 28, 2018 before the Honorable Thomas
Russo. App. 41. Rasheeda Cleveland appeared on behalf of the State, and Chris Murphy
represented Petitioner. Petitioner and plea counsel testified during the hearing. A letter from
Petitioner to the assistant solicitor was made State’s Exhibit 1. App. 74; App. 85 – 88.

An Order of Dismissal was issued on April 12, 2018. App. 89 – 97. Judge Russo found
that Petitioner failed to carry his burden of proof and was unable to prove deficiency or
prejudice. App. 96.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where plea counsel failed to follow up on a competency evaluation requested by prior counsel and where plea counsel only spent ten to twelve hours on Petitioner's case.

At the outset of his legal proceedings, Petitioner was originally represented by Mary Ford. App. 44 l. 23 – App. 45 l. 25. Because one of the complainants in Petitioner's case was represented by Ford on unrelated matters, a conflict arose and Ford was relieved. Id.

Ford ordered mental health competency evaluation before she was relieved. App. 48 l. 25 – App. 50 l. 15. Petitioner remembered being seen by a doctor on two occasions. Id. Petitioner never saw the results of the evaluation. App. 52 ll. 3 – 8. He discussed with plea counsel the possibility of an additional evaluation. App. 52 ll. 9 – 11. Petitioner stated that he was unsure whether he was competent at either the guilty plea or the evidentiary hearing. App. 52 ll. 21 – 25.

Plea counsel was appointed by the court. App. 46 ll. 1 – 18; App. 61 l. 20 – App. 62 l. 14. Petitioner recalled meeting with counsel approximately three times. Id. During these meetings, plea counsel “kept on pushing, pushing the 25 years at [Petitioner] saying that Mr. Condon wasn't going to come [any] lower than that.” App. 47 ll. 10 – 14. Petitioner had been served a notice of life without parole on Christmas Eve. App. 47 ll. 15 – 25.

Plea counsel testified that between receiving and responding to letters from Petitioner, jail visits, and discussing the discovery with Petitioner, he spent between ten to twelve hours on the case. App. 63 ll. 11 – 16. He was unaware of the prior competency evaluation. App. 63 l. 17 – App. 64 l. 4. He indicated that Petitioner “took responsibility for the strong arm robberies.”

App. 68 l. 14 – App. 69 l. 4. However, during the course of his representation, plea counsel never spoke with any witnesses about the alleged crimes. App. 70 ll. 17 – 24.

At the conclusion of the evidentiary hearing, PCR counsel summarized Petitioner's position: "There [were] several charges that were testified to, yet there's only about 10 to 12 hours of time devoted to these charges which you thin would be deficient as a matter of law looking at the seriousness of them." App. 77 ll. 2 – 21. The State responded, and the PCR court made a lengthy ruling thereby denying the application. App. 77 l. 24 – App. 83 l. 3.

Petitioner correctly asserted that plea counsel was ineffective, because he did not spend an adequate amount of time investigating Petitioner's case, interviewing witnesses, or communicating with Petitioner. 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).

Before a defendant may plead guilty, it must be established that the defendant is competent and that the defendant's decision to plead guilty is a knowing and voluntary one. Sims v. State, 313 S.C. 420, 423–24, 438 S.E.2d 253, 254–55 (1993) (citing Godinez v. Moran, 509 U.S. 389, 398–401, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993)). The test for competency is the same whether a defendant pleads guilty or goes to trial—namely, "whether the defendant has the present ability to consult with his attorney with a reasonable degree of rational understanding"

and the requirement that the defendant “have a rational as well as a factual understanding of the proceedings against him.” Id. at 422–23, 438 S.E.2d at 254.

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 interview any witnesses in Petitioner case. In particular, he could have interviewed the attendant from the Scotchman gas station, Shantasia Lemmon. App 13 ll. 11 – 23; App. 71 ll. 5 – 20. Plea counsel noted that Petitioner took responsibility for the charges but disputed the involvement of a knife. Counsel failed to interview Lemmon; he could have inquired in detail about whether a knife was brandished or observed. The failure to do so resulted in Petitioner's plea to more severe charges.

Although PCR counsel did not inquire whether plea counsel received any information regarding a prior competency evaluation when he received Mary Ford's file, this information could have been gleaned from in-depth conversations with Petitioner. Petitioner noted at the guilty plea that he had been treated for a mental health illness when he was a child. App. 9 ll. 10 – 24. Petitioner was also under the impression that he was going to be parole eligible after serving sixty-five percent of his sentence. App. 50 l. 20 – App. 52 l. 2.

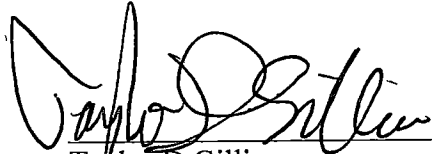
“The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 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).

Petitioner pled guilty because he was not confident about going to trial with the attorney he was appointed. App. 58 ll. 18 – 24. Plea counsel admitted that he was not prepared to go to trial at the time of the plea. App. 72 ll. 1 – 16. The resulting prejudice manifested itself within Petitioner's plea and lengthy sentence.

As a result of counsel's failure to spend an adequate amount of time on Petitioner's case, he failed to familiarize himself with the file such that he would have become aware of the prior mental health evaluation. Plea counsel failed to advise Petitioner of the detailed sentencing intricacies. Counsel's assistance was deficient, and Petitioner's guilty plea was the result of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, 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 19th day of October, 2018.

STATE OF SOUTH CAROLINA
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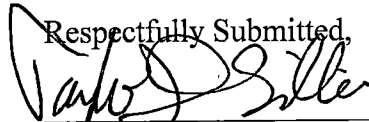
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bill Boyd Booker II 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 Thomas A. Russo, which was held on February 28, 2018, 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 Bill Boyd Booker II.

Respectfully Submitted,



Taylor D Gilliam

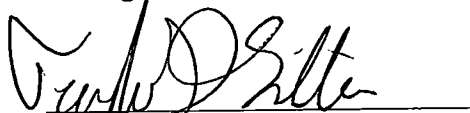
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th 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."



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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 has been served upon Benjamin Limbaugh, 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 Bill Boyd Booker II, #228462, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of October, 2018.



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of October, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: 05/12/2027