

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Saluda County

Honorable R. Keith Kelly, Circuit Court Judge

RECEIVED

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S.C. SUPREME COURT

KENDAL SUDDUTH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000955

JOHNSON PETITION FOR WRIT OF CERTIORARI

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South Carolina Commission on Indigent Defense
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ISSUE PRESENTED

Whether the PCR court erred in finding petitioner's guilty plea was freely, knowingly, and voluntarily tendered where petitioner was in the third day of trial and counsel agreed petitioner was under tremendous pressure as he was only given ten minutes to decide whether he should accept a plea bargain with a cap of fifteen years or face the rest of his natural life in prison, since counsel did not request any additional time to consult with petitioner?

STATEMENT

A Saluda County Grand Jury indicted petitioner for the offenses of second degree sexual exploitation of a minor; third degree sexual exploitation of a minor; and contributing to the delinquency of a minor. App. 197 – 202. Petitioner pleaded guilty on July 17, 2013, to the above offenses three days into his trial before the Honorable J. Michael Baxley and a jury. App. 1; App. App. 5, ll. 19-20. Petitioner was represented by Paul Andrew “Andy” Anderson (counsel). App. 1. The state was represented by Suzanne Mayes and Kate W. Usry. App. 1.

Petitioner was charged in eighty-four indictments¹ based on the same underlying case but proceeded to trial on five. App. 155, l. 3 – 156, l. 5; App. 91, ll. 9-11. He was thirty-six years old at trial, and in addition to being tried for the three charges he ultimately pleaded guilty to, petitioner was on trial for one count of first degree criminal sexual conduct with a minor and one count of second degree criminal sexual conduct with a minor. App. 92, ll. 2-6; App. 203 - 205. He faced verdicts on these five charges which could put him in prison for the rest of his life.²

The state alleged petitioner had sexual contact with his stepdaughter while she was age seven to seventeen and showed her and another minor child pornography. App. 27, l. 25 – 28, l.

¹ It was undisputed that there was “something personal” between petitioner and the solicitor who handled the case prior to Ms. Mayes and Ms. Usry. App. 147, ll. 17-20. Counsel testified that because the prior solicitor “had a beef with” petitioner, Ms. Mayes “took the case over at the very end,” and was “trying to clean up what she felt had been done wrong on their end.” App. 149, l. 20 – 150, l. 2. Counsel said Ms. Mayes “boiled it down” to five indictments. App. 155, ll. 8-11. As a result, the state faxed new indictments shortly before trial, and petitioner proceeded to trial on the five indictments. App. 155, ll. 12-17; App. 148, l. 23 – 149, l. 8; App. 91, ll. 6-16.

² The penalty for first degree criminal sexual conduct changed July 1, 2006. Prior to the change, the sentencing range was ten to thirty years. The penalty was raised, increasing sentence exposure to a minimum of twenty-five years and a maximum of life. Second degree criminal sexual conduct with a minor carried up to twenty years. S.C. Code Ann. § 16-3-655 (1976) (amended 2012). Petitioner was thirty-six years old at the time of trial and regardless of whether he was charged prior to or after July 1, 2006, he faced the possibility of spending the rest of his life in prison if convicted. App. 203 – 205.

6; App. 30, l. 25; App. 99, l. 15 – 101, l. 7. According to counsel, while there was “no doubt that there was child porn on the computer,” there were “substantial issues with who [the child porn] belonged to . . .” as the computer was not password protected and there was a lot of “traffic” in the home. App. 137, ll. 22-23; App. 47, ll. 11-14; App. 135, ll. 14-19. Counsel also said the stepdaughter’s forensic interview was “bad” for the state. App. 44, l. 7 – 45, l. 5.

Prior to trial, petitioner rejected a plea offer by the state to dismiss the remaining indictments if he pleaded guilty to one count of contributing to the delinquency of a minor, with a maximum exposure of three years. App. 147, l. 14 – 148, l. 18. The case proceeded to trial—a jury was selected and sworn, and witnesses testified. App. 91, l. 24 – 92, l. 10. However, petitioner pleaded guilty pursuant to a plea bargain on the third day of trial. App. 90, ll. 9-13; App. 5, ll. 19-20.

In exchange for his mid-trial guilty plea, the state negotiated a cap of fifteen years for second degree sexual exploitation of a minor; third degree sexual exploitation of a minor; and contributing to the delinquency of a minor. App. 27, ll. 2-11. When petitioner had to decide whether to plead guilty, he was facing the possibility of conviction at trial on those charges as well as first and second degree criminal sexual conduct with a minor, and as discussed below, he was forced to decide in only about ten minutes whether to accept the plea offer.

The court sentenced petitioner to ten years’ incarceration for second degree sexual exploitation of a minor; a consecutive five-year term for third degree sexual exploitation of a minor; and a concurrent three-year term for contributing to the delinquency of a minor. App. 58, ll. 5-20. No direct appeal was taken.

On November 18, 2013, petitioner filed an application for post-conviction relief (PCR). App. 62 – 73. The state made its return April 29, 2014. App. 74 – 78. On October 27, 2016,

petitioner filed an amended application. App. 79-81. A hearing was held November 8, 2016, before the Honorable R. Keith Kelly. App. 82. Kristy Goldberg represented petitioner and Johanna Valenzuela represented the state. App. 82.

Petitioner, his ex-wife, and his counsel testified. App. 83. The PCR court would later find petitioner's testimony was not credible but find "counsel's testimony credible and persuasive on all matters." App. 182.

Petitioner testified that during a break in the trial, counsel came into the holding room "and he made the comment that the judge said the jury is gonna find me guilty, I better take a plea." App. 92, ll. 15-18. "I felt like I was under duress to take the plea." App. 92, l. 13. "[H]e asked the judge to hold on a minute and then he sat there and kept talking to me and finally he—got me to take the plea." App. 92, ll. 20-23.

At the PCR hearing, petitioner explained that he changed his plea to guilty "because of the statement [counsel] made to me, that the judge said the jury was gonna find me guilty. I was scared." App. 114, ll. 14-20. "I didn't know if the judge was persuading the jury or what was going on. I just knew I was scared." App. 122, ll. 14-16.

Andy Anderson testified he has been practicing criminal law for about twenty-five years. App. 135, ll. 11-24. Counsel said, "I didn't think it was going very well and the judge I will say was—I've never been treated exactly that way by a judge." App. 145, ll. 2-4 (emphasis added). "[H]e was against us. I mean, I don't know. I don't want to say anything improper. I felt like he was against us out of the gate and it was—it was rather stressful. App. 145, ll. 11-14 (emphasis added).

Counsel, whose testimony the PCR court found credible, said, "It was very stressful and I don't doubt that he felt, you know, pressured." App. 152, ll. 21-22. In addition to pressures of the

trial itself, counsel said petitioner was pressured in his decision to plead guilty by the “whole setting and the judge was impatient.” App. 152, l. 25 – 153, l. 4.

Counsel said he recommended petitioner plead guilty but said he did not believe his “level of persuading” rose to the level of coercion. App. 150, ll. 8-14. “I don’t believe that it was coercion, but I did—I did recommend that he do it. I mean, I thought that it was going bad, that the judge was definitely against us.” App. 150, ll. 13-15. Counsel did not specifically recall “saying *per se* the judge said the jury’s gonna convict . . .” but testified, “I’m sure I said something akin to that . . .” App. 150, ll. 15-17; App. 153, ll. 5-8.

Although counsel testified that it was petitioner’s decision to plead guilty, he said, “I would say that it was very stressful. It was—and what made it worse was that the judge was so impatient.” App. 151, ll. 10-11. “So the prosecutor and I were talking about working the case out and the judge said—and I forget the exact period of time he gave us, but it was like I’ll give you ten minutes, but in ten minutes we’re starting . . . and the ten minutes or whatever it was was up and he’s like all right, we’re gonna go.” App. 151, ll. 12-18. The state asked counsel if he thought petitioner would have pleaded guilty if he had more time to discuss the plea with counsel, and counsel did not unequivocally agree. “I think so. I mean, I think so.” App. 152, ll. 8-15. Counsel said that in addition to petitioner feeling pressured, he did too. App. 152, l. 22.

On May 14, 2018, the court filed an order of dismissal denying petitioner post-conviction relief. App. 171 – 196. The order of dismissal reflects that the PCR court found petitioner “pled guilty freely, knowingly, and voluntarily.” App. 187.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding petitioner's guilty plea was freely, knowingly, and voluntarily tendered where petitioner was in the third day of trial and counsel agreed petitioner was under tremendous pressure as he was only given ten minutes to decide whether he should accept a plea bargain with a cap of fifteen years or face the rest of his natural life in prison, since counsel did not request any additional time to consult with petitioner.

Counsel was ineffective in failing to request more time to consult with petitioner about pleading guilty. Petitioner felt understandably coerced, since he only had about ten minutes in the middle of his trial to make this momentous decision. Requesting more time from the court would have taken minimal effort by counsel.

In *Gustine v. State*, 325 S.C. 123, 129, 480 S.E.2d 444, 446 (1997), this Court found a PCR applicant's guilty plea to be voluntary, knowing, and intelligent, where he had "full understanding of the consequences of his plea and of the charges against him." There, Gustine and his attorney had discussed the plea offer "many times," and Gustine had "'some weeks' to think about the offer, and he did think about it 'really for a long time.'" *Id.* at 126, 480 S.E.2d at 445.

A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). The Due Process Clause requires guilty pleas be entered into voluntarily, knowingly, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969).

Counsel credibly and persuasively testified petitioner felt “pressured,” that the situation was “stressful,” and the court had only allowed about ten minutes for petitioner to decide whether to accept the plea bargain. Petitioner said he pleaded guilty because counsel told him that the judge said the jury was going to find him guilty. While counsel could not remember “*per se*” whether he so advised petitioner, counsel testified, “I’m sure I said something akin to that . . .” App. 153, ll. 5-8.

Unlike the defendant in *Gustine*, whose plea was found voluntary and intelligent where he had “some weeks” to consider the plea offer, petitioner only had about ten minutes, and counsel agreed he conveyed the impression to petitioner that the judge felt the jury would find him guilty. Counsel was deficient for failing to ask for additional time to consult with petitioner. Such a request would have taken minimal effort by counsel and provided time to clear up petitioner’s misconception that the judge would convince the jury to find petitioner guilty.

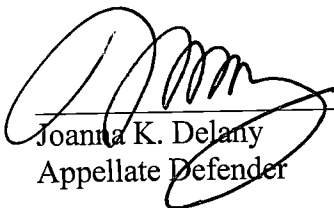
The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). “In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel’s deficient performance prejudiced the applicant’s case.” *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008).

“[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill*, 474 U.S. at 58. To establish prejudice when challenging a guilty plea, a PCR applicant must prove “there is a reasonable probability that, but for, counsel’s errors, the defendant would not have pled guilty, but would have gone to trial.” *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004).

Petitioner was prejudiced, as demonstrated by the fact that he had already proceeded to trial, and was mid-trial when he was coerced into pleading guilty by the tremendous pressure placed on him to make a decision in such a short time period. Absent counsel's deficiency in failing to request more time to consult with petitioner to discuss the plea, petitioner would have continued with trial.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2018.

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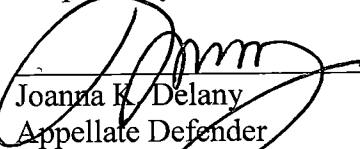
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kendal Carol Sudduth states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Keith Kelly, which was held on November 8, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 that the Court relieve her as counsel for Kendal Carol Sudduth.

Respectfully Submitted,

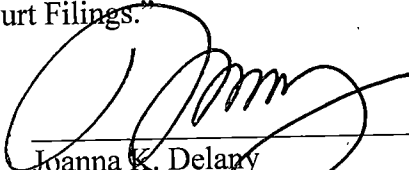


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of November, 2018.

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."



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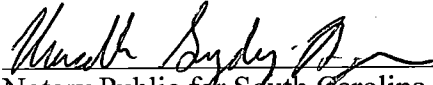
CERTIFICATE OF SERVICE

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 Kelly Oppenheimer, 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 Kendal Carol Sudduth, #356184, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 13th day of November, 2018.



Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of November, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028