ORIGINAL

RECEIVED
NOV 15 2018
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

LARRY JUNIOR COLES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000513

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred in finding defense counsel provided effective representation where counsel admitted he did not attempt to explain to petitioner that he had a valid defense to the burglary charge -- when petitioner wanted to plead guilty -- where petitioner ran into an abandoned house to hide from the police, where petitioner had no intent to commit a crime inside the abandoned house, and counsel's reasoning that petitioner did not respect him or adequately listen to him did not relieve counsel of his duty to explain what counsel himself admitted was a "valid defense" before petitioner pled guilty 4

Relevant Facts 4
Discussion 7

CONCLUSION 9

PETITION TO BE RELIEVED AS COUNSEL 10

ISSUE PRESENTED

Did the PCR court err in finding defense counsel provided effective representation where counsel admitted he did not attempt to explain to petitioner that he had a valid defense to the burglary charge – when petitioner wanted to plead guilty -- where petitioner ran into an abandoned house to hide from the police, where petitioner had no intent to commit a crime inside the abandoned house, and counsel's reasoning that petitioner did not respect him or adequately listen to him did not relieve counsel of his duty to explain what counsel himself admitted was a "valid defense"?

STATEMENT

Petitioner was indicted at the January 8, 2015, term of the Florence County Grand Jury for the offense of burglary in the second degree. App. 194 – 195. Petitioner's case was called to trial on March 23, 2015, before the Honorable D. Craig Brown, and a jury. Vic Meetze represented petitioner. David Richardson was the assistant solicitor. App. 1.

After a jury was selected and excused for lunch, defense counsel Meetze told the judge petitioner wished to talk with the judge. Petitioner then requested a continuance "because I am in the process of getting a paid attorney." App. 26, l. 6 – 27, l. 17.

Petitioner told the judge that he had gone to prison when Meetze represented him on a prior charge. Petitioner further explained to the judge that when counsel saw him in the county jail on this charge: "He told me that he was going to make sure I go back up the road." App. 27, l. 15 – 28, l. 12. Defense counsel Meetze said: "Your Honor, I never said to him that I was going to see to it that he goes back to prison on this charge." App. 28, ll. 13-17.

Judge Brown told petitioner: "I do not believe that he would have made such a comment to you. I do not believe that." App. 28, ll. 18-25.

Judge Brown added that he understood Meetze had represented petitioner in the past, and that petitioner had filed a PCR alleging Meetze was ineffective. The judge said since the trial was going to begin that afternoon that petitioner could either represent himself or have defense counsel Meetze represent him. App. 28, l. 17 – 31, l. 24.

After the testimony of six witnesses for the state, petitioner entered a plea of guilty to the charge of burglary in the second degree. The solicitor told the judge that this crime carried a sentence of "zero to ten years . . . there are no negotiations or recommendations." App. 104, ll. 5-10.

It would later be disclosed that petitioner had rejected a three-year plea offer prior to trial. Judge Brown sentenced petitioner to 100 months or eight years and four months in jail, with credit for 181 days. App. 119, ll. 19-22.

Thereafter, petitioner filed an application for post-conviction relief on April 30, 2015. App. 127 – 133. Petitioner alleged he was ineffectively represented. App. 129.

To this application, the state filed a return dated August 17, 2016. App. 134 – 139.

An evidentiary hearing was convened on November 16, 2017, before the Honorable Michael G. Nettles. Jonathan Waller represented petitioner. Lindsay McCallister was the assistant attorney general. App. 140. Petitioner and defense counsel Meetze both testified during the evidentiary hearing. App. 141.

An order of dismissal was filed on March 8, 2018, which concluded petitioner was not ineffectively represented, and therefore not entitled to relief. App. 183 – 193.

This petition for a writ of certiorari follows.

ARGUMENT

The PCR court err in finding defense counsel provided effective representation where counsel admitted he did not attempt to explain to petitioner that he had a valid defense to the burglary charge – when petitioner wanted to plead guilty -- where petitioner ran into an abandoned house to hide from the police, where petitioner had no intent to commit a crime inside the abandoned house, and counsel's reasoning that petitioner did not respect him or adequately listen to him did not relieve counsel of his duty to explain what counsel himself admitted was a "valid defense"

Relevant Facts

The PCR judge found defense counsel Meetze's testimony credible. App. 189. Meetze remembered that once petitioner was approved "for the public defender's office" that Scott Floyd, the circuit defender, "assigned Mr. Coles' case to me." App. 162, ll. 15-22. Meetze represented petitioner on one prior case which ended up in petitioner "going to the Department of Corrections." App. 162, l. 25 – 163, l. 2.

Meetze also recalled that after that prior case that petitioner filed a PCR application alleging he was ineffective. Meetze understood that application "was eventually withdrawn. It never actually went to court to where we did the testimony." App. 163, ll. 3-14.

Meetze said he was unsure if petitioner filed a grievance against him. "I'd have to look to see. I looked for his file in the office and I couldn't find it . . . I'm pretty positive he did." App. 163, ll. 3-21.

Meetze considered a client filing a PCR application involving him "part of the job" and, "It doesn't bother me." App. 163, l. 25 – 164, l. 21. Meetze testified that petitioner did not seem to like to listen to what Meetze had to say because he either didn't respect Meetze or he did not

want him as his attorney. Meetze did not ask that Circuit Defender Floyd to reassign petitioner's case to another public defender given the animus between them. App. 164, l. 23 – 165, l. 3.

As to the facts of the present burglary case, Meetze said that the Florence police were seeking to question petitioner, and there was a chase where petitioner ended up going into an abandoned house to hide. App. 165, ll. 14 – 20. Meetze explained at PCR that the defense he intended to present for petitioner was a "valid defense." It was that petitioner ran into the abandoned house to hide but he did not have the intent to commit a crime within the unoccupied house, which was an element of burglary in the second degree. The only thing the state could allege on that element of burglary was that possibly some dishtowels were missing from the unoccupied house, which apparently did not even have a front door at the time. However, Meetze explained that even if the petty theft allegation that was true, his defense was still that petitioner did not have the intent to commit a crime when he entered the house. App. 166, l. 4 – 168, l. 20.

Meetze said when petitioner told him he wanted to plead guilty during the trial, he did not try to explain to petitioner that he was waiving a valid defense. "I didn't try to talk him out of it or have any conversation with him about it. It's his decision to either have a trial or to plea." App. 168, l. 24 – 169, l. 21.

Meetze admitted he had "communication issues" with petitioner and he understood that their investigator, Mr. McKenzie, often communicated better with clients better since he had been in law enforcement, he had been in the county for a long time, and he had known a lot of people, including petitioner, for a long time. App. 173, ll. 5-22.

Petitioner testified that Meetze had represented him on a prior occasion, and petitioner had filed a grievance against him, and a PCR. App. 146, l. 14 – 147, l. 23.

Petitioner said he met one time with Meetze prior to trial for about three or four minutes when Meetze brought him his "Rule 5 discovery." Petitioner was finally able to make bond, and he recalled defense counsel calling his fiancé to ask if petitioner would take the three-year offered plea bargain. When petitioner refused to accept the offer, Meetze told his fiancé that petitioner should be ready for trial Monday morning. App. 148, l. 1 – 149, l. 18.

Petitioner confirmed that he entered an abandoned or unoccupied house while running from the police: "I just ran in the house through the front door because they got no door on the house." No one was living in the house, and there was some construction going on. App. 156, ll. 1-15.

Petitioner said Meetze told him burglary in the second degree carried a sentence of zero to ten years imprisonment. If Meetze would have explained that there was a valid defense – and that his actions did not constitute burglary -- "I would have continued on with my trial." App. 156, l. 16 – 157, l. 3. Petitioner remembered that investigator McKenzie told him not to take the plea but that defense counsel Meetze did not seem to care. App. 156, l. 13 – 158, l. 16.

At the conclusion of the hearing, the judge asked PCR counsel for petitioner and the attorney general to send him proposed orders. App. 180, ll. 22-24.

The order of dismissal stated that petitioner said that he never discussed potential defenses with defense counsel even though petitioner thought he had a valid defense because he was hiding from the police, and that he did not intend "to burgle it." App. 189. The order concluded that defense counsel thought petitioner had a valid defense, but that petitioner made the decision to plead guilty "straight up" without a recommendation from the state. App. 188-189.

Discussion

In Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991), this Court held that defense counsel provided ineffective representation in a forgery and burglary case. The mother of defendant Cobbs had sworn out warrants for forgery because she believed two of the checks involved belonged to her other sons. The arrest warrants were not served until almost two years later when the magistrate issued and executed arrest warrants against Cobbs for a related burglary charge.

At the PCR hearing in Cobbs it was revealed that defense counsel never contacted the mother of his client, or counsel would have ascertained that she now considered the forgery warrants were issued based on an error in fact. Defense counsel also did not investigate why the forgery warrants were not served for almost two years. An investigation for the PCR hearing showed that the valid defenses to these charges were never explained to the defendant by defense counsel.

This Court found that defense counsel was ineffective in failing to explain the possible valid defenses to Cobbs. This Court found that defense counsel was deficient, and that Cobbs was prejudiced by the failure to explain the valid defenses. See Strickland v. Washington, 466 U.S. 668 (1984).

This Court noted, at that time of the Grady v. Corbin, 495 U.S. 508 (199) "same conduct" test, that petitioner had a valid double jeopardy argument, since the incident that gave rise to the defendant's conviction in magistrate's court was the same incident for which Cobbs later pled guilty in circuit court. Counsel was also ineffective for failing to adequately explain this bar to prosecution double jeopardy argument to Cobbs. This Court found that Cobbs probably would

not have pled guilty and would have insisted on going to trial had the valid defense and bar to prosecution arguments been explained to him. See Hill v. Lockhart, 474 U.S. 52 (1985).

Here, defense counsel correctly thought petitioner had a valid defense to the burglary charge. Petitioner was running from the police when he hid in an abandoned house. No one was living in the house and the house was under construction. It apparently did not even have a front door. The only evidence petitioner may have been guilty of burglary was some alleged wash towels were allegedly removed from the abandoned house. As defense counsel explained at the PCR hearing, even if that was true and petitioner stole them once inside, petitioner still had a defense to burglary because he did not enter the dwelling with the intent to commit a crime.

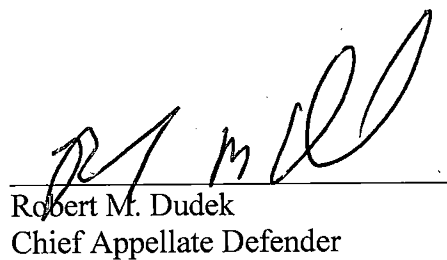
In short, defense counsel recognized that petitioner had a valid defense to the burglary charge, but he thought petitioner did not "respect him" or "listen to him," and it was undisputed that petitioner wanted another lawyer. Regardless, counsel still had an obligation to adequately explain the valid defense to petitioner when petitioner suddenly wanted to plead guilty. It respectfully was not as simple a matter as petitioner indicated his desire to plead guilty, and defense counsel concluded that was the end of the matter.

An attorney has a duty to present a readily available defense or a case in mitigation when one is available to the defendant. A defendant has the right to rely on his attorney's guidance in presenting an available defense, and merely acquiescing to the lay defendant's unsophisticated legal conclusions cannot be deemed adequate or effective representation. See Weik v. State, 409 S.C. 214, 761 S.E.2d 557 (2014).

Petitioner here would not have pled guilty, and he would have insisted on continuing his trial if defense counsel had adequately explained the defense – where it was undisputed -- defense counsel considered it a very "valid defense." See Hill v. Lockhart, supra.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

LARRY JUNIOR COLES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

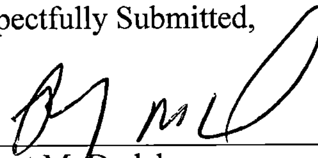
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Larry Junior Coles states:

1. He is Chief 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 Michael G. Nettles, which was held on November 16, 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 Larry Junior Coles.

Respectfully Submitted,

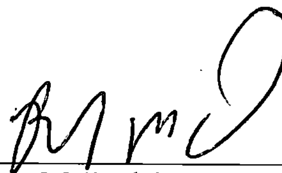


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of November, 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."



Robert M. Dudek
Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

This 15th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

LARRY JUNIOR COLES,

PETITIONER

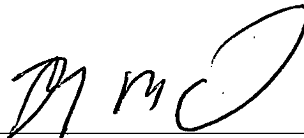
V.

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 Appendix in the above referenced case has been served upon Samuel Key, 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 Larry Junior Coles, #294158, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 15th day of November, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 15th day of November, 2018.

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