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

CLISTON JOHN BELLAMY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000279

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 provide discovery to Petitioner, where counsel never showed Petitioner the video of the bar fight resulting in his arrest, where counsel never advised Petitioner of his right to assert self-defense, and where the preceding failures resulted in an unknowing guilty plea?

STATEMENT

Petitioner was indicted by an Horry County grand jury on September 17, 2015. App. 88 – 89. On May 17, 2016, Petitioner pleaded guilty to voluntary manslaughter before the Honorable Thomas W. Cooper. App. 1; App. 5 ll. 22 – 23. Stephen Grooms appeared on behalf of the State, and Johnny McCoy represented Petitioner.

The facts presented at the guilty plea by the State were as follows: On or about May 4, 2014, a bar brawl occurred at Smokehouse Billiards. App. 7 l. 6 – App. 8 l. 14. Petitioner allegedly shot and killed a man from a rival gang. Id.

Judge Cooper accepted the plea; Petitioner pleaded guilty to a negotiated sentence of twenty years. App. 2 ll. 4 – 10; App. 10 ll. 2 – 5. Judge Cooper sentenced Petitioner to twenty years' incarceration. App. 11 ll. 6 – 11.

On or about October 19, 2016, Petitioner filed an application for post-conviction relief. App. 13 – 23. It contained allegations of ineffective assistance of counsel, including claims that counsel failed to file an appeal, failed to advise him of the right of self-defense, and failed to provide Petitioner with discovery materials. App. 15. The State made its Return on or about August 9, 2017. App. 24 – 31.

An evidentiary hearing took place before the Honorable William H. Seals on September 20, 2017. App. 32. Steven W. Fowler represented Petitioner, and Johnny E. James, Jr. appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.

Judge Seals' Order of Dismissal was filed on January 12, 2018. App. 78 – 87. He found that Petitioner failed to prove any deficiency of plea counsel, and Petitioner's post-conviction relief action was dismissed.

This petition follows.

ARGUMENT

The PCR court erred in denying Petitioner relief, where plea counsel failed to provide discovery to Petitioner, where counsel never showed Petitioner the video of the bar fight resulting in his arrest, where counsel never advised Petitioner of his right to assert self-defense, and where the preceding failures resulted in an unknowing guilty plea.

Relevant facts

Petitioner pleaded guilty without the knowledge of an important defense in his case—self-defense. App. 37 l. 10 – App. 38 l. 19. Relying on plea counsel's familiarity with the law, Petitioner pleaded guilty without a full understanding of how he could have relied on the defense of self-defense at trial. Id. Had Petitioner become aware of this defense, he would not have pleaded guilty. App. 38 ll. 20 – 24.

Petitioner and plea counsel only spoke once before the guilty plea. App. 38 l. 25 – App. 39 l. 3. It took place at the county jail. App. 39 ll. 6 – 7. During this meeting, plea counsel never mentioned the potential applicability of self-defense. App. 40 ll. 2 – 4; App. 41 ll. 3 – 6; App. 41 l. 22 – App. 42 l. 1. Petitioner discovered the defense only after researching it himself. App. 42 l. 24 – App. 43 l. 3.

Similarly, Petitioner was also unaware of the extent of the discovery in his case. Petitioner indicated that he would not have pleaded guilty had he been provided his full and complete discovery:

> Q: All right. Do you think if you'd received your discovery information in October of 2015 that that would've made a difference?
>
> A: Yes, sir. I would've known what I was going up against.

Q: Do you think that may've changed your mind in terms of what you presented to the Court?

A: Yes, sir.

Q: Okay. Do you feel like your plea to the Court at the time was knowingly? I mean, did you know what you were pleading to?

A: No, sir. I couldn't have known what I was pleading to if I didn't have my discovery pack.

Q: So, because he apparently didn't get you your discovery in a year, that kind of prohibited you from knowing the true meaning of what you were pleading to, correct?

A: Yes, sir.

Q: All right. Do you feel like you made an informed decision at the time to plead go the 20 years?

A: I mean, I - - not necessarily.

App. 45 ll. 5 – 23. Petitioner wrote plea counsel on multiple occasions and called on "almost a daily basis." App. 44 ll. 9 – 11. Petitioner and counsel never reviewed the elements of murder. App. 51 ll. 2 – 10. They never reviewed any applicable defenses. Id. They never discussed any potential leads or witnesses. Id.

Plea counsel characterized the decision to plead guilty as "[Petitioner's] and mine." App. 65 ll. 10 – 11. Counsel admitted that he never showed the video footage of the bar fight to Petitioner. App. 71 ll. 8 – 10; App. 72 ll. 10 – 12.

Discussion

Petitioner correctly asserted that Counsel was ineffective, because he did not communicate with Petitioner regarding details of his case, including the elements of murder, applicable defenses, or the discovery in Petitioner's matter. 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).

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 to advise Petitioner regarding the defense of self-defense. Petitioner's testimony, as outlined above, indicates that counsel did not go over any defenses in his case. Such conduct falls within the gamut of deficiency.

"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). As evident from Petitioner's testimony, the prejudice in his case manifests itself in his plea which was made without full knowledge of possible defenses available to him. Had Petitioner been aware of the full nature of his discovery in addition to the all available defenses, he indicated that he would have decided to go to trial rather than plead guilty.

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). This Court has held that, "in addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A plea made in ignorance of its direct consequences is entered in ignorance and is invalid. Hazel, 275 S.C. 392, 271 S.E.2d 602.

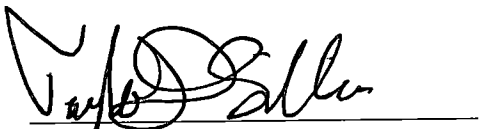
When a defendant is represented by counsel during the plea process and enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Shirley v. State, 306 S.C. 241, 411 S.E.2d 215 (1991). A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing 1) that counsel's representation fell below an objective standard of reasonableness and 2) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill at 56-57, 106 S.Ct. at 369, 88 L.Ed.2d at 208-09.

"That the plea be voluntary is not only a requirement of due process, but a premise of the defendant's meaningful participation in the plea process." United States v. Savinon-Acosta, 232 F.3d 265, 268 (1st Cir. 2000) (citing McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)).

Petitioner was unaware of the possibility of using self-defense at a potential trial. App. 41 ll. 3 – 6. It was not until he undertook researching it himself at the prison law library that he realized that self-defense was a potential bar to his charge. Petitioner testified that he met the elements of self-defense. App. 39 ll. 13 – 19. A reasonable person would have acted the same way Petitioner did during the bar fight. Id. However, because plea counsel never discussed self-defense with Petitioner, he pleaded guilty without knowing the full range of possible defenses at his disposal.

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 his, and remand the case for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of December, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Cliston John Bellamy states:

1. He is 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 William H. Seals, which was held on September 20, 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 Cliston John Bellamy.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of December, 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."

Taylor D Gilliam
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 has 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 on Cliston John Bellamy, #343259, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 10th day of December, 2018.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of December, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2027