STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Aiken County

Honorable R. Scott Sprouse, Circuit Court Judge

LEON M. DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001283

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was the guilty plea to homicide by child abuse rendered involuntary by plea counsel's failure to hire an expert to counter the State's theory that Petitioner struck the child multiple times?

STATEMENT

In July of 2014, the Aiken County Grand Jury indicted Petitioner, Leon M. Davis, for homicide by child abuse, indictment #2014-GS-02-1049. On November 9, 2015, Petitioner appeared before the Honorable Doyet A. Early, III, and pled guilty as charged. Barry Thompson represented Petitioner. Ashley Hammack prosecuted the case. Judge Early sentenced Petitioner to thirty (30) years in prison. A notice of intent to appeal was not filed on Petitioner's behalf.

On June 27, 2016, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 19, 2017. An amended application was filed on May 2, 2018. On May 7, 2018, an evidentiary hearing was held before the Honorable R. Scott Sprouse. Arthur Aiken represented Petitioner at the PCR hearing. Julie Coleman represented the State. In a written order filed June 11, 2018, Judge Sprouse denied relief and dismissed the application. A timely notice of intent to appeal was served on July 10, 2018. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea to homicide by child abuse was rendered involuntary by plea counsel's failure to hire an expert to counter the State's theory that Petitioner struck the child multiple times.

On the day that the case was scheduled to go to trial Petitioner instead pled guilty to homicide by child abuse involving Petitioner's two-year old step son. (App. p. 54, lines 21-25; p. 71, lines 15-19). During the plea colloquy the State told the judge about the injuries sustained by the child and then stated, "The reason this is significant is because the doctors would testify that in order to cause those types of injuries, that this would require violent, repetitive, nonaccidental trauma; that this could not have resulted from a single strike, but from repeated trauma." (App. p. 17, line 25 – p. 18, lines 1-5). The State alleged that Petitioner told the police that, "[T]he child was crying for no reason and that he was whining, and that the child was standing between his legs and he stood up, said why are you crying, came down with both fists, and struck the child on the top of the head." (App. p. 17, lines 3-7).

In contrast, plea counsel told the judge, "The only part of this he'd dispute in anyway would be the idea of him ever raising a fist. He represented both to me and on the video confession that he made that this was kind of an open-hand kind of thing." (App. p. 25, lines 5-9). Petitioner told the plea judge, "And, like I said, it wasn't – it wasn't most – I never hit my child most of the times. It was one hit and he fell and hit his head on the table. But it wasn't something that I – you know, it wasn't no repeated swinging. It was just one hit. When I turned and tried to walk away, I slung my hands down. And he was just real fussy that morning and he wanted to be picked up." (App. p. 27, lines 5-12). Earlier during the guilty plea when the judge asked Petitioner if he inflicted injury causing the child's death Petitioner responded, "Yes, sir,

but it wasn't intentional." (App. p. 14, lines 11-12). During the plea counsel informed the judge of an earlier incident when the child hit his head. When the child began vomiting Petitioner and the child's mother took the child to the pediatrician and then to the emergency room where they were told there was nothing wrong with the child. (App. p. 23, lines 1-16).

In the PCR application Petitioner alleged that counsel was ineffective for failing to provide "any results from the expert he said he hired." (App. p. 35). In the amended application Petitioner alleged that, "Plea counsel never discussed the findings of the State's expert witnesses and the defense expert witness with Davis." (App. p. 47). During the PCR hearing, however, plea counsel admitted that he did not hire an expert. When asked if he consulted or hired an expert, plea counsel answered:

> Did not hire. I consulted with a doctor and because I was – I was trying to explore the possibility of whether or not to go ahead and hire a medical expert. And before I did that, I wanted to make sure that I understood the medical evidence first. So I had a doctor sit down and explain – we laid all of this stuff out and went through it page by page and line by line, and the problem was that the medical evidence more supported the State's case of multiple strikes to the head. And I didn't want an expert to generate any kind of reports on that because I'm trying not to create evidence against my client.

(App. p. 70, line 20 – p. 71, lines 1-7).

It is unclear if the doctor with whom plea counsel purportedly consulted was provided the information about the earlier incident where the child hit his head and was taken for medical attention. Plea counsel also testified that the autopsy of the child revealed that he suffered from brain cancer which would have caused severe headaches. (App. p. 66, line 15 – p. 67, lines 1-5). Plea counsel testified that, "They had – they had taken child to the doctor a couple of times and could not get any relief because, for whatever reason, the doctors at the time did not – did not detect and understand what was happening with the child." (App. p. 67, lines 1-5). It is unclear if the consulting doctor was provided with this information.

In the order of dismissal the PCR judge wrote, "He [plea counsel] testified he investigated the case and consulted with a doctor to review the medical records to establish a defense, but the doctor's findings supported the State's case and harmed Applicant's, so Trial Counsel made a valid strategic decision not to have the doctor generate a report." (App. p. 85). The order of dismissal concludes writing, "Therefore, this Court finds the plea court correctly found Applicant's plea was freely, voluntary, and intelligently made. Accordingly, this allegation must be denied and dismissed." (App. p. 87). The PCR judge erred.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203

(1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> In order to establish prejudice when challenging a guilty plea, a defendant 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). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

In the present case there is a reasonable probability that, if counsel had hired a medical expert, Petitioner would not have pled guilty but would have insisted on going to trial.

In State v. McKnight, 352 S.C. 635, 644, 576 S.E.2d 168, 172–73 (2003), the South Carolina Supreme Court wrote, "Under S.C.Code Ann. § 16–3–85(A), a person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." If plea counsel had hired rather than simply consulted an expert and provided that expert with the information in regard to the prior head injury and brain cancer, the expert may have opined that the injuries to the child were the result of the prior head injury and/or the brain cancer rather than any action by Petitioner. Based on that expert opinion, the jury could have determined that Petitioner's actions did not constitute circumstances manifesting an extreme indifference to human life required for homicide by child abuse.

Plea counsel was ineffective in failing to hire an expert to counter the State's theory that Petitioner struck the child multiple times. Plea counsel's deficient performance affected the outcome of the plea process. There is a reasonable probability that if counsel had hired an expert who could testify at trial that the fatal injuries were the result of the prior head injury and brain cancer rather than actions of the Petitioner, Petitioner would not have pled guilty and instead would have insisted on exercising his right to a trial by jury.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of January, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Leon M. Davis 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. Scott Sprouse, which was held on May 7, 2018, 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 Leon M. Davis.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of January, 2019.

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."

Kathrine H. Hudgins
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ATTORNEY FOR PETITIONER

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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 Megan Harrigan Jameson, 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 Leon M. Davis, #359221, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 11th day of January, 2019.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of January, 2019.

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