

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Jean H. Toal, Circuit Court Judge

TIMOTHY L. TOWNSEND,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000956

JOHNSON PETITION FOR WRIT OF CERTIORARI

VICTOR R. SEEGER
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel where he failed to inform Petitioner that he was pleading guilty to ABHAN and not the original charge of assault and battery in the first degree, and where Petitioner would not have pled guilty to ABHAN if he knew that was the ultimate charge at the guilty plea proceeding?

STATEMENT

During the May 2014 term, the Charleston County Grand Jury indicted Petitioner for strong arm robbery and assault and battery of a high and aggravated nature (ABHAN). App. 68 – 73.

On February 12, 2015 Petitioner pled guilty in front of the Honorable Roger M. Young. App. 1. Jason Thomas King represented Petitioner. Id. Scarlett A. Wilson represented the state. Id.

Judge Young found Petitioner entered his guilty plea freely, voluntarily, and intelligently. App. 5, ll. 11 – 12. Petitioner was evaluated by MUSC for competency and found competent. App. 11, ll. 3 – 5. Judge Young sentenced Petitioner to twenty years' imprisonment for ABHAN and fifteen years' imprisonment for strong arm robbery. App. 16, ll. 15 – 19.

Petitioner filed an application for post-conviction relief (PCR) on June 30, 2015. App. 18 – 23. Petitioner alleged that his attorney provided ineffective assistance of counsel because he did not tell Petitioner that his conviction was changed to ABHAN before Petitioner pled guilty. App. 20. The state filed its Return on January 26, 2016. App. 25 – 28. ABHAN has a maximum sentence of twenty years' imprisonment, whereas assault and battery in the first degree has a maximum sentence of ten years' imprisonment. S.C. Code Ann. § 16-3-600(B)(2); § 16-3-600(C)(2).

Petitioner's PCR hearing was held on September 12, 2016 in front of the Honorable Jean H. Toal. App. 30. Christopher Murphy represented Petitioner. Id. James Rutledge Johnson represented the state. Id.

The PCR court denied Petitioner's PCR application. App. 56, l. 12 – 57, l. 13. The PCR court found that the plea transcript and the testimony at the PCR hearing indicated Petitioner was

aware of the consequences to which he pled guilty. App. 27, ll. 14 – 20. On April 6, 2018, an order of dismissal was filed denying Petitioner’s PCR allegations. App. 60 – 67.

ARGUMENT

Plea counsel provided ineffective assistance of counsel where he failed to inform Petitioner that he was pleading guilty to ABHAN and not the original charge of assault and battery in the first degree, and where Petitioner would not have pled guilty to ABHAN if he knew that was the ultimate charge at the guilty plea proceeding.

Relevant Facts

The state alleged the facts as follows. On February 18, 2014, Petitioner knocked a woman over and took her purse. App. 5, ll. 13 – 25. Some third-party individuals followed Petitioner on bicycles. Id. Law enforcement picked Petitioner up several blocks away. Id.

Petitioner was identified by a witness as the person who committed the robbery. App. 6, ll. 8 – 9. Petitioner's DNA was found on the complaining witness's hat. App. 6, ll. 10 – 15. Petitioner was originally charged with assault and battery in the first degree and strong-arm robbery. App. 6, ll. 20 – 21.

Petitioner testified at his PCR hearing that he never knew his conviction was changed from assault and battery in the first-degree to ABHAN until he arrived in court to plead guilty. App. 37, ll. 1 – 9.

Plea counsel testified at the PCR hearing as well. App. 43, l. 10. He stated that Petitioner's assault and battery in the first-degree charge was changed when the solicitor presented an ABHAN indictment to the grand jury on May 12, 2014. App. 51, ll. 13 – 24. He alleged to have discussed with Petitioner that this was a matter than involved both strong-arm robbery and ABHAN in the nine months from the time of the change in May 2014 until the guilty plea hearing in February 2015. App. 52, l. 25 – 53, l. 4. Plea counsel stated that in his opinion Petitioner understood he was pleading guilty to ABHAN. App. 53, l. 16 – 54, l. 2.

Discussion

At the evidentiary hearing, Petitioner stated that he did not know that his charge for assault and battery in the first degree was changed to ABHAN. App. 37, ll. 1 – 9. Therefore, Petitioner’s guilty plea was not knowingly and voluntarily entered. See Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991) (finding ineffective assistance of counsel when plea counsel erroneously advised the defendant about his potential sentence prior to his guilty plea); see also Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991) (finding defendant’s guilty plea was not intelligently and voluntarily made based on plea counsel’s erroneous sentencing advice). Thus, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 56, l. 12 – 57, l. 13; App. 60 – 67; See Hill v. Lockhart, 474 U.S. 52 (1985) (applying the Strickland v. Washington, 466 U.S. 668 (1984) standard to guilty plea challenges based on ineffective assistance of counsel).

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); see also Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

Furthermore, “[a] defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but


for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (citing Hill, 474 U.S. at 57-59).

In this case, an “unsound result” occurred because plea counsel failed to inform Petitioner that his assault and battery in the first-degree charge changed to ABHAN, thereby giving Petitioner erroneous sentencing advice that created an unreasonable expectation, which hindered Petitioner’s ability to fully understand the sentencing consequences of his guilty plea. See Boykin, 395 U.S. 238. It was Petitioner’s understanding that he was pleading guilty to assault and battery in the first degree. App. 37, ll. 1 – 9. He was unaware his charges changed, until the day he pled guilty. Id. Therefore, Petitioner’s guilty plea was not knowingly, intelligently, and voluntarily made. See Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991) (finding defendant’s guilty plea was not intelligently and voluntarily made in light of the erroneous advice given by plea counsel).

Accordingly, the PCR court erred in finding Petitioner knowingly, voluntarily, and intelligently pled guilty when “there is a reasonable probability that, but for counsel’s errors, [Petitioner] would not have pled guilty and would have insisted on going to trial.” App. 60 – 67; Hill, 474 U.S. at 57-59; See Boykin, 395 U.S. 238 (1969).

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests this Court to grant certiorari to allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of January, 2019.

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IN THE SUPREME COURT

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Honorable Jean H. Toal, Circuit Court Judge

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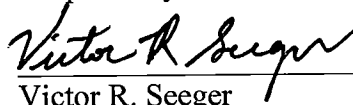
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Timothy L. Townsend 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 Jean H. Toal, which was held on September 12, 2016, 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 Darnell Khan.

Respectfully Submitted,

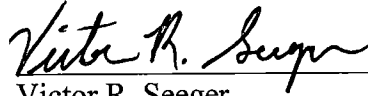


Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of January, 2019.

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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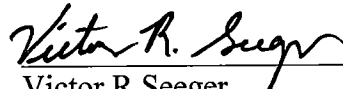
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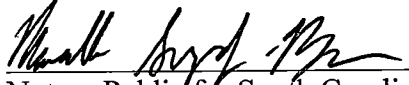
CERTIFICATE OF SERVICE

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 Timothy Lamar Townsend, #289418, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 10th day of January, 2019.



Victor R Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 14th day of January, 2019.



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