

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

DEMOSSIO MONTAE VALENTINE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000996

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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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred in denying Petitioner relief, where counsel provided ineffective assistance by failing to review audio and video tapes of an alleged drug sale supposedly involving Petitioner, where counsel's belief that Petitioner would be convicted at trial would have been fully informed had he obtained the tapes, and where Petitioner would have gone to trial if plea counsel would have further investigated his case?

STATEMENT

Petitioner was indicted by a Pickens County grand jury on February 21, 2012 for distribution of cocaine base. App. 82 – 83. On September 15, 2014, he pleaded guilty before the Honorable G. Edward Welmaker. App. 1. John DeJong represented Petitioner, and D. Graham Buckner appeared on behalf of the State.

The facts offered by the State during the guilty plea were as follows: On November 23, 2010, Petitioner allegedly sold .19 grams of crack cocaine to an informant working with law enforcement. App. 6 ll. 2 – 8. This was Petitioner’s third offense. App. 9 ll. 18 – 20.

Judge Welmaker accepted the plea after making a finding that there was a substantial factual basis for the plea and that it had been made freely, voluntarily, knowingly, and intelligently. App. 8 l. 25 – App. 9 l. 5. He sentenced Petitioner to fifteen year and nine months’ incarceration. App. 15 ll. 19 – 21.

Petitioner filed an application for post-conviction relief on or about January 11, 2017. App. 17 – 23. It contained allegations of ineffective assistance of counsel, including a claim that counsel failed “to help produce a defense in the case” which caused Petitioner to plead guilty. App. 19. The State filed its Return and Motion for a More Definite Statement on or about June 22, 2017. App. 24 – 29.

An evidentiary hearing was held on October 25, 2017 before the Honorable Letitia Verdin. App. 30. R. Mills Ariail represented Petitioner, and Rasheda Cleveland appeared on behalf of the State. Petitioner and plea counsel testified at the hearing. Judge Verdin allowed Petitioner one month after the conclusion of the hearing to submit additional information. App. 69 l. 25 – App. 70 l. 7. On or about May 15, 2018, Judge Verdin issued an Order of Dismissal. App. 72 – 81. She found Petitioner failed to prove that counsel was deficient. App. 79.

This petition follows.

ARGUMENT

The PCR court erred in denying Petitioner relief, where counsel provided ineffective assistance by failing to review audio and video tapes of an alleged drug sale supposedly involving Petitioner, where counsel's belief that Petitioner would be convicted at trial would have been fully informed had he obtained the tapes, and where Petitioner would have gone to trial if plea counsel would have further investigated his case?

Relevant facts

Petitioner indicated that he did not wish to plead guilty. App. 39 l. 7 – App. 40 l. 5; App. 48 ll. 3 – 16. He professed his innocence and noted that he did not have an option to go to trial with plea counsel. Id.

Plea counsel never sent subpoenas to any of the witnesses whose names Petitioner provided. App. 39 l. 25 – App. 39 l. 6; App. 40 ll. 6 – 19. These witnesses, according to Petitioner, would have testified that Petitioner never sold any drugs. App. 40 l. 20 – App. 41 l. 21. However, plea counsel did not speak with any of them. App. 42 ll. 2 – 7.

Petitioner explained that he told the plea judge that he was guilty because he was “illiterate to the law” and believed he would not receive a lengthy sentence if he pleaded. App. 46 l. 22 – App. 47 l. 23.

Notably, plea counsel testified that neither he nor Petitioner had copies of any audio or video tapes of the alleged drug purchase which resulted in Petitioner's arrest. App. 51 l. 18 – App. 52 l. 6. Counsel admitted that he may not have even listened to the tapes at the solicitor's

office. App. 52 ll. 1 – 6. He only had the informant’s statements which were provided in the discovery package. App. 52 ll. 7 – 10.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). Appellate courts give great deference to the PCR court’s findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). When reviewing a PCR court’s decision, a reviewing court “is concerned only with whether any evidence of probative value exists to support the decision.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional

errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

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, plea counsel failed to view important evidence in the case, namely any tapes from the alleged purchase. Counsel's testimony, as outlined above, indicated that he did not review the tapes or discuss them with Petitioner. Such conduct falls within the gamut of deficiency.

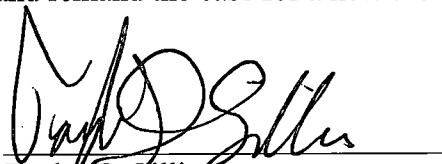
"The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 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 the evidence and any applicable defenses which may have been available to him.

Petitioner testified that he spoke with plea counsel about the facts of the case "three or four days" before his plea. App. 35 ll. 10 – 18; App. 46 ll. 9 – 14. However, the conversation regarding the facts and evidence could not have been fully informed if plea counsel had not viewed all of the evidence in the case. As a result, Petitioner pleaded guilty without an awareness of the potential defenses following deficient performance by his counsel. The prejudice prong is satisfied by Petitioner's testimony, namely that he was innocent and did not wish to plead guilty. Had he

elected to go to trial following a complete review of the evidence that would be used against him, he may have been found not guilty.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

DEMOSSIO MONTAE VALENTINE,

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V.

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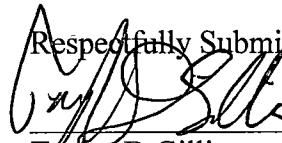
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demossio Montae Valentine 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 Letitia H. Verdin, which was held on October 25, 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 Demossio Montae Valentine.

Respectfully Submitted,

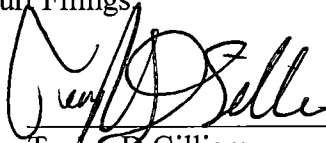


Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th 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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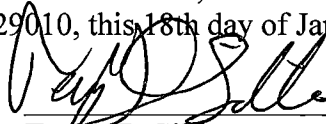
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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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 Demossio Montae Valentine, #242226, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 18th day of January, 2019.



—————
Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of January, 2019.

Mary Allegre (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027