

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable William P. Keesley, Circuit Court Judge

STEPHEN B. WILHITE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001166

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Chief 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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Defense counsel was ineffective for advising petitioner to plead guilty to temporary use of a vehicle without permission, where petitioner and his father testified at the PCR hearing that petitioner purchased the motorcycle and owned it, since defense counsel admitted at the PCR hearing that if petitioner owned or was co-owner of the motorcycle, he could not be guilty of this charge brought by his estranged girlfriend5

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ISSUE PRESENTED

Was defense counsel ineffective for advising petitioner to plead guilty to temporary use of a vehicle without permission, where petitioner and his father testified at the PCR hearing that petitioner purchased the motorcycle and owned it, since defense counsel admitted at the PCR hearing that if petitioner owned or was co-owner of the motorcycle, he could not be guilty of this charge brought by his estranged girlfriend?

STATEMENT

Petitioner was indicted at the April 2015 term of the Aiken County Grand Jury for the offense of temporary use of a vehicle without permission. App. 62 – 63. He appeared on April 23, 2015, before the Honorable Doyet Early and entered a plea of guilty. David Hayes represented petitioner. Deputy Solicitor David Miller represented the state. App. 1; App. 3, ll. 2-15.

Deputy Solicitor Miller told the judge that Candie Hite told the police she loaned her 2000 Honda CBR motorcycle to petitioner. Hite maintained that petitioner told her he would return the motorcycle by 4:30 in the afternoon. Petitioner did not return the motorcycle to Hite at that time.

Defense counsel Hayes noted that Hite and petitioner were “boyfriend and girlfriend.” They had an argument, so petitioner decided to go see his father, and he rode over there on the motorcycle. The criminal charge in this case was brought in this case out of vindictiveness. App. 8, l. 13 – 9, l. 17.

Judge Early sentenced petitioner to the maximum one- year prison sentence, and he revoked his probation, three years, in full. App. 10, ll. 4-11.

Petitioner filed an application for post-conviction relief on September 21, 2016. App. 12 – 22. He asserted, inter alia, that Defense Counsel Hayes told him he would get “time served” if he pled guilty. App. 20. The state filed a return to this application dated December 29, 2017. App. 23 – 27.

An evidentiary hearing was convened on January 25, 2018. Arthur Aiken represented petitioner. Christian Saville was the assistant attorney general. App. 29.

Petitioner testified at the PCR hearing that he owned the motorcycle at issue. Petitioner only met with Hayes one time at the detention center prior to his guilty plea. App. 39, ll. 16-18.

Further, plea counsel Hayes never explained to petitioner if he was the owner, or co-owner, of the motorcycle with his girlfriend that he could not be guilty of temporary use of that motorcycle without permission, a charge brought by the alleged girlfriend co-owner of the motorcycle. App. 37, ll. 7-15.

Petitioner's father, fifty-eight-year-old Robert Wilhite, Jr., testified he worked at Gregg Park Supercenter in Graniteville, South Carolina. He testified that petitioner had purchased the motorcycle at issue. Mr. Wilhite recalled that petitioner called him because the motorcycle "broke down over off the bypass right off Huntsman Drive." Mr. Wilhite paid to get the motorcycle repaired, and he would not have done so if petitioner did not own the motorcycle. "I don't throw money into a deep dark black hole, you know what I mean." App. 42, l. 1 – 43, l. 8.

Plea counsel Charles David Hayes said his notes revealed that he visited petitioner in jail on April 21, 2015. The guilty plea occurred two days later. Hayes said he discussed with petitioner that the solicitor would dismiss a kidnapping charge if petitioner would plead guilty to the temporary use of a vehicle without permission indictment. Hayes claimed he also told petitioner that is probation may be revoked. "He wanted me to talk to probation and talk to the agent to find out for sure." There was no evidence Hayes ever did that. App. 44, ll. 12-20.

On cross-examination, Hayes said petitioner and his girlfriend purchased the motorcycle together, but it was put in her name. Counsel admitted if petitioner was a co-owner of the motorcycle, that he had an absolute defense to the charge. App. 46, l. 21 – 47, l. 25; App. 49, ll. 5-14.

PCR counsel Aiken reminded the PCR judge in closing that petitioner and his father had testified he was the owner or co-owner of the motorcycle. His plea attorney, Hayes, admitted “he could not possibly have been guilty of temporary use without permission [if he was the co-owner], and his lawyer should have advised him he should not plead guilty to that charge.” Petitioner testified had he been properly advised, he would have pled not guilty. App. 50, ll. 6-19.

Assistant attorney general Saville argued that the testimony of petitioner, which was corroborated by the testimony of petitioner’s father that petitioner owned or co-owned the motorcycle was not sufficient evidence to establish petitioner was the owner or co-owner. App. 51, ll. 7-23.

An order of dismissal dated May 22, 2018, was issued. App. 54 – 61. The order noted that petitioner’s father testified that petitioner owned the motorcycle. The order found that plea counsel testified petitioner told him the title of the motorcycle was in the name of his girlfriend, although petitioner was the co-owner. The order found that S.C. Code § 56-3-20(21), defines “owner” as a person having a title to a vehicle or a person “entitled to the use and possession of the vehicle subject to a security interest in another person . . .” App. 59.

The order nonetheless found that petitioner failed to present any evidence that plea counsel was deficient. The order found that if petitioner would not have pled guilty he would have faced a potential sentence of thirty years imprisonment for kidnapping. App. 60.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243, SCACR.

ARGUMENT

Defense counsel was ineffective for advising petitioner to plead guilty to temporary use of a vehicle without permission, where petitioner and his father testified at the PCR hearing that petitioner purchased the motorcycle and owned it, since defense counsel admitted at the PCR hearing that if petitioner owned or was co-owner of the motorcycle, he could not be guilty of this charge brought by his estranged girlfriend.

It was undisputed in this case that petitioner, at a very minimum, had the right to use the motorcycle he purchased with his girlfriend as a co-owner. Petitioner and his father both testified at the PCR hearing that petitioner purchased the motorcycle. Petitioner's father testified he would not have paid to have the motorcycle repaired if petitioner did not own it.

At the guilty plea proceeding, it was said that petitioner's girlfriend gave him permission to use the motorcycle. His girlfriend apparently became angry with petitioner following an argument, and she alleged he did not return the motorcycle on time. Regardless, as a co-owner of the motorcycle or person entitled to use and possess the motorcycle pursuant to S.C. Code § 56-3-20(21), petitioner could not have been guilty of temporary use of the vehicle without permission pursuant to S.C. Code § 16-21-60. This was simply not a case where petitioner took the vehicle of another without permission. Cf. Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991).

Consequently, defense counsel was ineffective for failing to advise petitioner he had an absolute defense to this charge. Since petitioner testified he would not have pled guilty had he been properly advised, he has shown prejudice and his guilty plea should be vacated. See Hill v. Lockhart, 474 U.S. 52, 56 (1985). Petitioner proved by a preponderance of the evidence that

defense counsel was ineffective for advising him to plead guilty to this charge. See Hill v. Lockhart, 474 U.S. 52 (1985).

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 28th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

Honorable William P. Keesley, Circuit Court Judge

STEPHEN B. WILHITE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

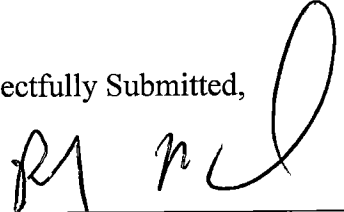
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Stephen Brett Whilhite 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 William P. Keesley, which was held on January 25, 2018, 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 Stephen Brett Whilhite.

Respectfully Submitted,

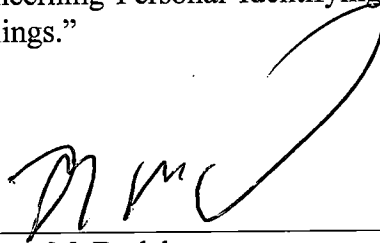


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 28th 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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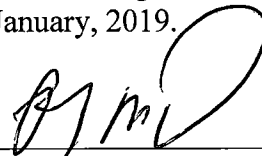
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RESPONDENT

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 Janell Gregory, 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 Stephen Brett Whilhite, #339350, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 28th day of January, 2019.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of January, 2019.

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