

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

RECEIVED

FEB 15 2019

PETITIONER
S.C. SUPREME COURT

SHERRA L. WERKMEISTER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001538

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R. Seeger
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel where he coerced Petitioner into pleading guilty where Petitioner's very meritorious suppression motion had already been heard, but had not yet been ruled on, where plea counsel had Petitioner's father play on Petitioner's emotions to convince her to plead guilty, and where plea counsel scared Petitioner into pleading guilty citing the civil counsel's alleged political clout?

STATEMENT

During the June 2014 term, the Spartanburg County Grand Jury indicted Petitioner for felony DUI resulting in death, reckless homicide, and felony DUI resulting in great bodily injury. App. 237 – 242.

On September 19 – 20, 2016, Petitioner proceeded to trial in front of the Honorable J. Derham Cole. App. 1. Andrew J. Johnston and Andra Julia Tat represented Petitioner. Id. Lindsey Heger Overby and Spencer Holloran Smith represented the state. Id. Thomas W. Traxler was the attorney for one of the complaining witnesses. Id.

Petitioner made a pretrial suppression motion that showed the police improperly took a blood sample from her without a warrant and without any exigent circumstance necessary to bypass the warrant requirement. App. 18, l. 13 – 20, l. 17. After the pretrial suppression motion on September 19, 2016, the lower court recessed for the day. App. 87, l. 14. On the morning of September 20, 2016, prior to Judge Cole making a final decision on the pretrial suppression motion, Petitioner pled guilty. App. 88, l. 19 – 89, l. 5; App. 85, l. 3 – 96, l. 11.

Judge Cole sentenced Petitioner to ten years' imprisonment for felony driving under the influence where death resulted, the balance suspended upon service of seven years. App. 144, ll. 15 – 22. Judge Cole sentenced Petitioner to seven years' imprisonment for felony driving under the influence resulting in great bodily injury. App. 145, ll. 1 – 3.

On May 11, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 147 – 156. On December 5, 2017, the state filed its return. App. 157 – 164.

On February 2, 2018, Petitioner's PCR hearing was held in front of the Honorable Grace Gilchrist Knie. App. 166. Susannah C. Ross represented Petitioner. Id. Valerie Giovanoli represented the state. Id.

On May 11, 2018, Judge Knie filed an order of dismissal denying Petitioner's PCR application. App. 225–235. Judge Knie found that Petitioner's guilty plea was voluntarily made. App. 234. Judge Knie found that the plea colloquy was thorough, and that Petitioner expressed her willingness to forego trial. Id.

ARGUMENT

Plea counsel provided ineffective assistance of counsel where he coerced Petitioner into pleading guilty where Petitioner's very meritorious suppression motion had already been heard, but had not yet been ruled on, where plea counsel had Petitioner's father play on Petitioner's emotions to convince her to plead guilty, and where plea counsel scared Petitioner into pleading guilty citing the civil counsel's alleged political clout.

Relevant Facts

On October 11, 2013, Petitioner, a chiropractor, got into a severe and unfortunate automobile accident. App. 90, l. 24 – 91, l. 7. The state alleged that Petitioner drove her car while under the influence of alcohol and/or some other drug. *Id.* While driving under the influence, Petitioner caused an accident on S.C. 290 that resulted in the death of Arrie Lee Lowry. App. 91, ll. 8 – 14; App. 106, l. 24 – 107, l. 3. The state also alleged that the same accident caused great bodily injury to Patricia S. Rice. App. 92, ll. 10 – 20.

After a pretrial hearing to determine the admissibility of the blood sample police officers took from Petitioner, Petitioner pled guilty. App. 88, l. 19 – 89, l. 5. Police officers at the scene ordered a blood sample without a warrant. App. 17, ll. 1 – 10. According to defense counsel there were many errors with how the police handled obtaining Petitioner's blood sample. App. 18, l. 13 – 20, l. 17. Petitioner's pretrial motion to suppress the blood sample showed that there was no exigency sufficient to allow the police to bypass the warrant requirement to take the blood sample and that obtaining a warrant would have been easily accomplished in this case. *Id.*

While discussing the guilty plea with Petitioner, plea counsel urged Petitioner's father, Charles Richard, to persuade Petitioner to plead guilty. App. 185, l. 19 – 187, l. 2. Richard played on Petitioner's emotions by saying he'd be dead by the time she got out of prison if she

went to trial and was found guilty, but he would still be alive when she got out of prison if she pled guilty. Id.

Judge Cole specifically asked Petitioner if she knew that he had not made a decision on the pretrial hearing and that she was pleading guilty before the decision on the pretrial motion. App. 95, l. 3 – 96, l. 11.

Petitioner entered into a negotiated plea where the state agreed, “that any sentence imposed on those two felony driving under the influence charges be run concurrently and that they not exceed ten years in jail.” App. 101, ll. 12 – 25.

Judge Cole accepted Petitioner’s guilty plea as knowingly, voluntarily, and intelligently made. App. 115, ll. 10 – 13. Judge Cole sentenced Petitioner to ten years’ imprisonment for felony driving under the influence resulting in death and seven years’ imprisonment for felony driving under the influence resulting in great bodily injury. App. 144, l. 15 – 145, l. 3.

On May 11, 2017, Petitioner filed a post-conviction relief application alleging that her guilty plea was involuntary because plea counsel coerced her into pleading guilty. App. 147 – 156. On December 5, 2017, the state filed its Return. App. 157 – 164.

On February 2, 2018, Petitioner’s PCR hearing was held before the Honorable Grace Gilchrist Knie. App. 166. Susannah C. Ross represented Petitioner. Id. Valerie Giovanoli represented the state. Id.

Petitioner testified at her PCR hearing that she initially turned down the state’s plea offer. Id. However, at the outset of the second day of trial, plea counsel *strongly* advised that Petitioner take the plea. Id. Petitioner stated, “in my own heart, I wanted to go to trial.” Id.

Plea counsel, Andrew Johnston, testified at Petitioner’s PCR hearing as well. App. 189, l. 16. Plea counsel stated that he never coerced Petitioner into pleading guilty. App. 202, ll. 17 – 19.

Plea counsel denied the allegation that he told Petitioner's father, Charles Richard, to convince Petitioner to plead guilty, but admitted that he told Richard it was in Petitioner's best interest to plead guilty. App. 209, l. 21 – 210, l. 2. Johnston told Richard to persuade Petitioner into pleading guilty because Richard's opinion carried weight with Petitioner. Id.

Petitioner's father also testified at the PCR hearing. App. 183, l. 11. Charles Richard stated, “[Plea counsel]... presented the plea. We [were] all pretty well upset, and [plea counsel] said that the civil lawyer on the other side was a high-ranking person in the... Republican party and had a lot of power.” App. 185, ll. 19 – 25. Richard stated that he felt politics were injected into Petitioner's trial by plea counsel as an intimidation tactic. App. 185, l. 21 – 186, l. 2. The logical conclusion for plea counsel warning about civil attorney, Traxler's, alleged political clout, was that if Petitioner went to trial Traxler would use that clout to get Petitioner a severe sentence and that Petitioner would likely lose all of her assets at a civil hearing.

Richard opined that he felt, “[plea counsel] was intimidated and caved in.” App. 186, ll. 3 – 4. Since Richard believed that plea counsel had given up, Richard thought there was no way Petitioner could win at trial and pressured her to plead guilty. App. 186, ll. 15 – 22. Further buttressing Petitioner's reluctance to plea, Richard testified that Petitioner fought him on the decision and wanted to go to trial. App. 186, l. 23 – 187, l. 2. Richard admitted that when he told Petitioner to plead guilty, “I just got intimidated myself... and caved in also.” App. 187, ll. 1 – 2.

In an order filed on May 11, 2018, Judge Knie denied Petitioner's PCR allegation that her guilty plea was involuntary. App. 225 – 235. Judge Knie found that the plea colloquy was thorough as to Petitioner's understanding of her right to a trial and her willingness to forego trial. App. 234.

Discussion

“A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack.” Machibroda v. United States, 368 U.S. 487, 493 (1962); See Walker v. Johnston, 312 U.S. 275 (1941). Here, plea counsel coerced Petitioner into pleading guilty when she would have otherwise continued with her trial. App. 173, ll. 5 – 19. The fact that Petitioner’s trial had already progressed through the pre-trial motion stage evidenced Petitioner’s intention to exercise her right to a jury trial. However, plea counsel coerced Petitioner into pleading guilty by improperly using Petitioner’s family against her and by intimidating Petitioner with opposing counsel’s political clout. App. 185, l. 19 – 186, l. 2.

In Missouri v. Frye, 566 U.S. 134 (2012), the United States Supreme Court noted that the, “Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings, [which] . . . include arraignments, postindictment interrogations, postindictment line ups, and the entry of a guilty plea.” Id. at 141 (citations and internal quotation omitted). The Court further emphasized that “[i]n today’s criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” Id. (emphasis added). Accordingly, “[a]nything less [than effective counsel during plea negotiations]... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” Id. at 1408 (citing Massiah v. United States, 377 U.S. 201 (1964) (quotation citation omitted).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v.

Washington, 466 U.S. 668, 685 (1984) (quoting Adams v. United States ex. rel. McCann, 317 U.S. 269, 275 (1942)). Additionally, a guilty plea that was entered by one fully aware of the direct consequences “must stand *unless* induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises).” Brady v. United States, 397 U.S. 742, 755, (1970) (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (1957)).

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, at 686. To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687 – 688. Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694.

The difference, “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (internal quotations omitted) (applying the two-part test for

claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Hill, at 56. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000)

In the instant case, Petitioner was coerced by plea counsel into pleading guilty. App. 173, ll. 5 – 19. Plea counsel had Petitioner’s father appeal to Petitioner’s emotions, at the most stressful period of her life, to convince Petitioner to plead guilty. App. 185, l. 15 – 187, l. 2. Plea counsel brought up the specter of the political clout, from civil attorney Traxler, to make Petitioner believe she had no chance of winning and, if she went to trial and lost, Traxler would use his political clout to get Petitioner a severe sentence. Id.

Moreover, Petitioner’s pre-trial suppression motion was meritorious. The suppression motion presented the fact that the police failed to get a warrant. App. 18, l. 13 – 20, l. 17. It showed that there was no exigent circumstance that would have necessitated bypassing the warrant requirement to obtain a blood sample from Petitioner. Id. Additionally, that the police could have easily obtained a warrant from a magistrate that very night. Id.

Therefore, plea counsel provided ineffective assistance of counsel when he wrongfully coerced Petitioner into pleading guilty to felony driving under the influence where death resulted and felony driving under the influence resulting in great bodily injury. App. 173, ll. 5 – 19. That ineffective assistance prejudiced Petitioner because she received ten years’ imprisonment after she pled guilty, and she would not have pled guilty but for coercion by plea counsel. Id.

CONCLUSION

By reason of the foregoing arguments Petitioner respectfully requests that this court vacate her guilty plea and remand her case to the circuit court for a new trial.

Victor R. Seeger

Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of February, 2019.

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SHERRA L. WERKMEISTER,

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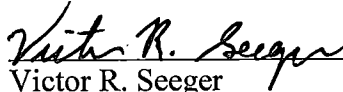
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sherra L. Werkmeister 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 Grace Gilchrist Knie, which was held on February 2, 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 Sherra L. Werkmeister.

Respectfully Submitted,

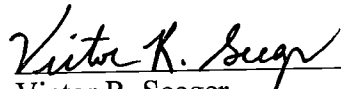

Victor R. Seeger

Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of February, 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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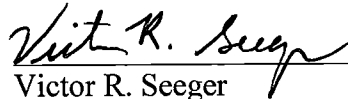
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STATE OF SOUTH CAROLINA,

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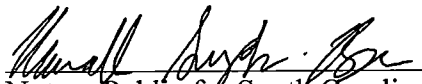
CERTIFICATE OF SERVICE

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 Sherra L. Werkmeister, #369885, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 15th day of February, 2019.



Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of February, 2019.

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