STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Abbeville County

Honorable J. Mark Hayes, Circuit Court Judge

ALLEN BOBO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001083

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

INDEX

ISSUE PRESENTED

Whether the PCR court erred in denying relief, where the only witness in Petitioner's case did not want Petitioner to be prosecuted, where the witness wanted no involvement in the case, where the witness negated the elements of the crimes for which Petitioner was charged, and where plea counsel rendered Petitioner's guilty plea involuntary by telling him that he was guaranteed to lose at trial?

STATEMENT

Petitioner was indicted by an Abbeville County grand jury in January 2016 for pointing or presenting a firearm, unlawful neglect of a child, and domestic violence of a high and aggravated nature. App. 95 – 100. He waived presentment on the charge of possession with intent to distribute marijuana. App. 101 – 102. On March 1, 2016, Petitioner appeared before the Honorable R. Scott Sprouse and pleaded guilty. App. 1; App. 4 ll. 10 – 22. Christopher Lance Sheek and Cecil Brown, Jr. were the assistant solicitors, and Yasha Patel represented Petitioner. A cap of twelve years was agreed to by the parties. App. 2 ll. 8 – 13.

The facts as alleged by the State were as follows: On November 26, 2014 a law enforcement officer found Petitioner with 58.5 grams of marijuana in his pocket after a disturbance at a gas station. App. 6 l. 18 – App. 7 l. 2. On September 17, 2015, the State claimed Petitioner pointed a gun at Nakeila Johnson while she was holding their seven-month-old child. The assistant solicitor alleged Petitioner drove her car down the road and shot it seven times before abandoning it. App. 7 ll. 3 – 18.

Judge Sprouse found a factual basis for the pleas and accepted them. App. 8 ll. 11 – 15. Johnson asked for a lenient sentence for Petitioner and indicated that she forgave him. App. 9 ll. 14 – 19. Five members of Petitioner's family spoke in his defense during mitigation. App. 12 l. 13 – App. 13 l. 16.

Judge Sprouse sentenced Petitioner to five years on the pointing and presenting charge, and ten years on each of the remaining charges, concurrent. App. 20 l. 20 – App. 21 l. 15. Petitioner's probation was also revoked in full and crafted to run concurrently. Id.

On or about June 9, 2016, Petitioner filed an application for post-conviction relief. App. 23 – 29. His application contained allegations that plea counsel was not truthful with him and

that he was forced to plea and falsify statements and a claim of ineffective assistance of counsel. App. 25. The State made its Return on November 7, 2016. App. 30 – 25.

An evidentiary hearing took place before the Honorable J. Mark Hayes on March 1, 2018. Thomas Thompson represented Petitioner, and Justin Hunter appeared on behalf of the State. Petitioner, Nakelia Johnson, and plea counsel testified at the hearing. By way of a written Order of Dismissal, Judge Hayes denied relief. App. 84 – 94.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where the only witness in Petitioner's case did not want Petitioner to be prosecuted, where the witness wanted no involvement in the case, where the witness negated the elements of the crimes for which Petitioner was charged, and where plea counsel rendered Petitioner's guilty plea involuntary by telling him that he was guaranteed to lose at trial.

Background

As briefly described above, the facts giving rise to Petitioner's arrest took place on or about September 17, 2015. Petitioner described this as an altercation but denied pointing a gun at his child's mother, Nakelia Johnson. App. 41 ll. 3 – 11; App. 42 ll. 22 – 25. Johnson, who testified at the evidentiary hearing, also gave a statement to law enforcement. App. 82 – 83. Petitioner and plea counsel never had an opportunity to discuss the statement. App. 44 l. 18 – App. 45 l. 1. Notably, the statement does not contain any reference to Petitioner pointing a gun at Johnson while she was holding the child. App. 45 ll. 14 – 22.

Plea counsel was appointed to Petitioner soon after he was arrested. App. 41 ll. 12 – 16. Petitioner indicated that they spoke for only three or four minutes during each of their three meetings. App. 41 l. 25 – App. 42 l. 8. The two never discussed the discovery in the case; Petitioner did not receive it until he made the request himself. App. 42 ll. 9 – 18. Petitioner testified that although he attempted to speak with plea counsel regarding his charges, they "never really [built] on it." App. 43 ll. 6 – 11. Plea counsel never spoke with Johnson, the lone witness in the case. App. 43 ll. 12 – 16. According to Petitioner, Johnson would have taken the position that "it was all a misunderstanding." App. 43 l. 17 – App. 44 l. 10.

Petitioner advised plea counsel that he wanted a jury trial, and counsel confirmed that they discussed a possible trial. App. 44 ll. 11 – 16; App. 65 ll. 5 – 8. He was surprised that the plea offer arose, because he believed his court appearance to be a bond hearing: "When I went to court, I walked right into a trial that I knew nothing about." App. 46 ll. 7 – 13. He agreed to plead after counsel told him that he was "guaranteed to lose at trial because of [Johnson's] statement." App. 46 ll. 14 – 20.

At this point, Petitioner inquired whether he could hire a different attorney, but plea counsel advised him that "it would be a waste of money and time [because] [t]he results still would be the same." App. 46 l. 25 – App. 47 l. 5. Petitioner therefore understandably did not feel like plea counsel was ready for trial that day; nor did he feel ready. App. 47 ll. 6 – 13. They had not prepared the case for trial. Id. In fact, plea counsel had not gone to see the car which was allegedly shot seven times by Petitioner. App. 68 ll. 9 – 10.

Plea counsel advised Petitioner that his plea was going to be to non-violent charges. App. 48 ll. 1 – 6. He therefore believed he was going to be eligible for parole. App. 48 ll. 7 – 13. As a result, Petitioner's plea was not freely and voluntarily made. App. 49 l. 12 – App. 50 l. 14. When asked why he did not stop the plea, he responded that plea counsel "made [him] promise" that he would go along with the plea. App. 53 l. 25 – App. 54 l. 10.

Johnson testified at the evidentiary hearing that Petitioner never pointed a gun at her or the child. App. 56 ll. 13 – 15. She testified that during the altercation, she was neither scared nor fearful; she never felt like Petitioner was going to hurt her or the child. App. 58 ll. 2 – 11.

Plea counsel's secretary contacted Johnson. App. 59 ll. 8 – 23. Johnson indicated that she did not want any involvement in the case. Id. She repeatedly stated this at the evidentiary

hearing. App. 60 ll. 2 – 8. When asked to be specific, she clarified that she did not want to prosecute the matter. App. 60 l. 20 – App. 61 l. 1.

Plea counsel confirmed that the purpose of the hearing which resulted in Petitioner's guilty plea was originally understood to be something else: a hearing on his probation violation. App. 64 ll. 17 – 23. However, Petitioner was forced to proceed with the plea even though he wanted to "take a different route." App. 49 l. 12 – App. 50 l. 8.

Discussion

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

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.

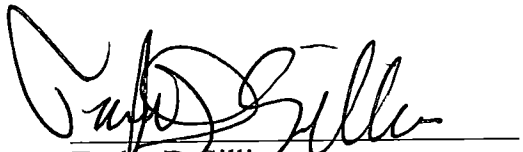
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would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

Petitioner only accepted the plea in this matter because his attorney advised him that he was guaranteed to lose at trial because of Johnson's statement. After his court-appointed advocate indicated the hopeless nature of a trial, Petitioner felt as if he had no choice but to plead guilty. He did not object during the plea colloquy, as counsel had made him promise that he would acquiesce to the plea. He therefore pleaded guilty involuntarily and without the

knowledge that the only witness in his case did not wish to prosecute the matter. Her potential refusal to show up to court likely would have prevented her statement from being admissible. Without her testimony or her statement, Petitioner would have had a fighting chance at trial. However, he did not receive that opportunity, as he wished; instead he was forced to plead guilty.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Allen Bobo 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 J. Mark Hayes, which was held on March 1, 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 Allen Bobo.

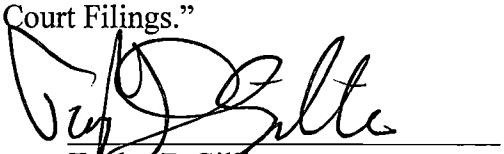
Respectfully Submitted,

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of March, 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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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 Allen Bobo, #367299, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 8th day of March, 2019.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of March, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027