

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

DARRELL GRIFFIN,

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S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001646

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R. Seeger
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South Carolina Commission on Indigent Defense
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INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT.....2

ARGUMENT

The PCR court erred when it found Petitioner’s attorneys provided effective assistance of counsel where Petitioner was misadvised that if he testified in his defense at trial, his prior 1989 conviction for attempted murder would be used to impeach his testimony, where that prior conviction was over ten years old and could only be admissible if Petitioner opened the door3

Relevant Facts3

Discussion4

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL10

ISSUE PRESENTED

Whether the PCR court erred when it found Petitioner's attorneys provided effective assistance of counsel where Petitioner was misadvised that if he testified in his defense at trial, his prior 1989 conviction for attempted murder would be used to impeach his testimony, where that prior conviction was over ten years old and could only be admissible if Petitioner opened the door?

STATEMENT

During the October 2012 term, the Richland County Grand Jury indicted Petitioner for murder. App. 110 – 111. During the January 2015 term, the Richland County Grand Jury indicted Petitioner for desecration of human remains and arson. App. 112 – 115.

Petitioner proceeded to trial on May 3, 2015, but on May 5, 2015 he pled guilty as indicted in front of the Honorable D. Craig Brown. App. 1. Alicia Dyar Goode, Tracy Pinnock, and Lucas Hawkes represented Petitioner. Id. Joanna McDuffie, Kathryn Luck Campbell, and Nicole M. Simpson represented the State. Id.

Judge Brown accepted Petitioner's guilty plea as freely, voluntarily, knowingly, and intelligently made. App. 19¹. Judge Brown sentenced Petitioner to thirty years' imprisonment for murder, fifteen years' imprisonment for arson, and ten years' imprisonment for desecration of human remains. App. 37.

Petitioner filed an application for post-conviction relief (PCR) on January 14, 2016. App. 37 – 45. The state filed its return on May 2, 2017. App. 46 – 51.

Petitioner's evidentiary hearing was held on August 31, 2017 in front of the Honorable Paul M. Burch. App. 53. Jonathon D. Waller represented Petitioner. Id. Jessica E. Kinard represented the state. Id.

In an order filed on August 23, 2018, Judge Burch denied Petitioner's PCR allegations. App. 104 – 109. In spite of the fact that Petitioner's prior conviction was over ten-years old, Judge Burch found that his attorneys provided effective assistance and that Petitioner knew the strengths and weaknesses of the state's case when he chose to plead guilty. App. 107.

This petition for writ of certiorari follows.

¹ The guilty plea transcript in this case did not have number lines on it. To the best of Petitioner's knowledge, this was the transcript that was in front of the PCR court.

ARGUMENT

The PCR court erred when it found Petitioner's attorneys provided effective assistance of counsel where Petitioner was misadvised that if he testified in his defense at trial, his prior 1989 conviction for attempted murder would be used to impeach his testimony, where that prior conviction was over ten years old and could only be admissible if Petitioner opened the door.

Relevant Facts

The state alleged the facts as follows. On August 7, 2012 Petitioner killed the deceased, Ms. Jonette Pratt. App. 13. Petitioner explained to Investigator McDaniels that he and Pratt were having sex when he began choking her with her consent. App. 13 – 14. As he applied more pressure, her neck broke, and she died. App. 14.

Petitioner panicked and drove to a nearby church with the deceased in the car. Id. Petitioner then lit the car on fire with her remains still inside. Id.

Petitioner's PCR hearing was held on August 31, 2017. App. 53. Petitioner argued that his attorneys provided ineffective assistance of counsel when they misadvised Petitioner regarding the admissibility of his prior conviction for attempted murder from 1989. App. 68, ll. 17 – 20. Petitioner explained that he was under the impression that the solicitors would have been able to question him about the 1989 conviction because, "that's what [Petitioner's] attorneys told [him]." App. 70, ll. 16 – 23.

Petitioner testified at his PCR hearing that after the first few days of his trial, his attorneys came to him and told him to, "save his own life and plead guilty." App. 67, l. 24 – 68, l. 18. Petitioner stated he was prepared to go to trial, as evidenced by the fact that they were already three days into trial before he plead guilty. Id.

Petitioner's prior conviction for attempted murder was in 1989. He served a ten-year sentence and was released in 1999. App. 66, ll. 4 – 13. Petitioner pled guilty to the current charges in 2012, making the prior conviction for attempted murder thirteen years old at the guilty plea.

At Petitioner's trial and subsequent guilty plea in 2012, he only pled guilty because he thought that the solicitors would cross examine him with that prior conviction and that, "surely [he] would be found guilty." App. 69, ll. 1 – 9. Petitioner rejected the same plea deal for thirty years' imprisonment prior to trial, which further evinces Petitioner's willingness to go to trial and his contention that he only pled guilty under the wrongful impression his testimony would be impeached by the 1989 remote prior conviction. App. 79, ll. 18 – 20.

Alicia Goode, one of Petitioner's attorneys, testified at the PCR hearing as well. App. 82, l. 3. Goode's testimony was that Petitioner was, "a very well spoken, very smart, articulate man." App. 87, ll. 2 – 5. However, Goode was also extremely concerned that Petitioner might open the door to the admission of the 1989 conviction during his testimony at trial. App. 87, ll. 6 – 9. The reasons why Goode was so concerned about Petitioner opening the door during his testimony, even though he was admittedly a "very well spoken, very smart, articulate man," remained unexplained. App. 87, ll. 2 – 5

During cross-examination at the PCR hearing, Goode testified that the state had agreed "to not introduce [the prior conviction] evidence unless the door was opened if [Petitioner] decided to testify." App. 93, ll. 8 – 11. Goode admitted there was no reason to think that the door would have been opened during Petitioner's testimony. App. 94, ll. 8 – 12.

Discussion

"When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction

may carry indirect consequences of which he or she is not aware. *That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation...*" Padilla v. Kentucky, 559 U.S. 356, 385 (2010) (emphasis added). Plea counsel misrepresented to Petitioner that his testimony would be impeached the solicitors with his remote prior conviction for attempted murder from 1989, if Petitioner chose to testify in his own defense. Petitioner pled guilty based on that erroneous advice. App. 69, ll. 1 – 9.

The right of a criminally accused to testify or not to testify is fundamental. State v. Rivera, 402 S.C. 225, 242, 741 S.E.2d 694, 703 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52 (1987)). “[F]undamental to a personal defense ... is an accused's right to present his own version of the events *in his own words*.” Id. at 53. (emphasis added)

In Robinson v. State, 422 S.C. 78, 810 S.E.2d 32 (2018), this Court held that trial counsel’s erroneous advice constituted ineffective counsel such that Robinson’s guilty plea to criminal sexual conduct with a minor in the first degree was involuntary. Id. at 88 – 89, 810 S.E.2d at 38. In Robinson, plea counsel wrongfully advised Robinson regarding the potential sentencing exposure he would face if he went to trial, Robinson maintained his innocence throughout the process, and testified at his PCR hearing that he pled guilty because of that erroneous advice. Id. at 87, 810 S.E.2d at 37 The Robinson Court held, “[W]hen a [petitioner] claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, [he] can show prejudice by demonstrating a ‘*reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*’” Id. (quoting Lee v. United States, — U.S. —, 137 S.Ct. 1958, 1965 (2017)). (emphasis added)

In State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008), this Court held that the defendant did not open the door to prior convictions when he testified in his own defense that,

“he hated to see a female cry.” Id. at 106, 661 S.E.2d at 389. Young was found guilty of kidnapping and assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of criminal sexual conduct (CSC). Id. at 102, 661 S.E.2d at 387-388.

During trial, Young testified in his own defense that he “hate[d] to see a female cry.” Id. at 105, 661 S.E.2d at 389. The state argued that Young, “opened the door,” to admission of his prior convictions by introducing evidence of his good character towards women and the trial judge agreed. Id.

This Court held that Young’s testimony did *not*, “open the door,” because, “Young was not offering evidence of a specific character trait towards women in general. Rather, the isolated statement... was simply part of Young’s narrative recounting his version of events.” Id. at 106, 661 S.E.2d at 389. Moreover, the state’s attempt to admit his prior conviction was only a, “thinly veiled attempt to show propensity, rather than a sincere attempt at impeachment of Young’s credibility.” Id. at 106, 661 S.E.2d at 390.

“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, 466 U.S. at 685 (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 . . . misrepresentation.*” 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)). Accordingly, counsel provides ineffective assistance in the adversarial system when he makes a misrepresentation that induces the defendant to plead guilty.

Here, Griffin's guilty plea was involuntarily made because plea counsel erroneously advised him that if he testified in his own defense, the state would impeach his testimony with a remote prior conviction for attempted murder from 1989 where Petitioner served his ten-year sentence and was released in 1999, and where Petitioner pled guilty to the current charges in 2012. App. 66, ll. 4 – 13; App. 69, ll. 1 – 9

Rule 609 of the South Carolina Rules of states, in part, "evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." SCRE 609(a)(1). However, 609(b) states:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

SCRE 609(b). (emphasis added) Therefore, the only avenue where Petitioner's prior conviction would be admissible to impeach his testimony is on the rare occurrence that his testimony, "opened the door," to the remote prior conviction's admission. State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018).

Petitioner was under the misguided impression that the solicitors in his case would impeach his testimony with a remote prior conviction from 1989 because, "that's what [Petitioner's] attorneys told [him]." App. 70, ll. 16 – 23. Petitioner did not want to plead guilty and wanted to go to trial, as evidenced by the fact that they were already days into his trial. App. 68, ll. 16 – 18. Most importantly, Petitioner only pled guilty because he thought that the

solicitors would cross examine him with his prior conviction and because of that, “surely [he] would be found guilty.” App. 69, ll. 1 – 9. (emphasis added)

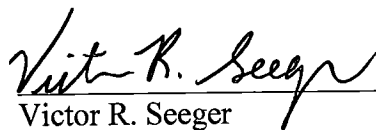
Avoiding, “opening the door,” is not overly difficult. Young, supra. As long as Petitioner did not testify falsely to a general character trait such that his prior conviction would have corrected that falsehood, the prior conviction would not have been admitted. Id.

Goode testified at the PCR hearing she had no reason to think that Petitioner would, “open the door.” App. 94, ll. 8 - 12. Thus, it would seem her, “extreme concern” was unwarranted and her advice to Petitioner, that the state would impeach his testimony with his remote prior conviction, was erroneous. Moreover, if she was that concerned that Petitioner might, “open the door,” to admission of his remote prior conviction, she should have done her duty as his defense counsel and explained to him what, “opening the door,” meant and how to avoid it. There is no indication on the record she ever explained to Petitioner what, “opening the door,” meant.

Therefore, plea counsel’s erroneous advice induced Petitioner to plead guilty and created a reasonable probability that, but for her errors, Petitioner would not have pleaded guilty and would have insisted on going to trial. App. 69, ll. 1 – 9; Robinson, supra.

CONCLUSION

By reason for the foregoing arguments, Petitioner respectfully requests this Court to vacate his guilty plea and remand his case for a new trial, or in the alternative, grant Certiorari to allow for full briefing on this issue.



Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of March, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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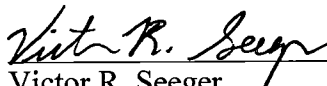
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Darrell Griffin 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 Paul M. Burch, which was held on August 31, 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 Darrell Griffin.

Respectfully Submitted,



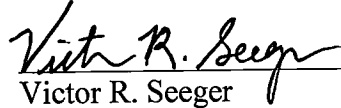
Victor R. Seeger

Appellate Defender
ATTORNEY FOR PETITIONER

This 18th 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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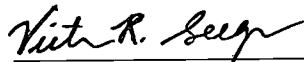
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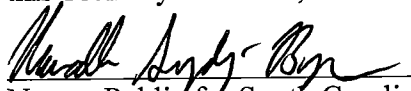
CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Darrell Griffin, #363902, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 18th day of March, 2019.



Victor R. Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

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

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