

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

RICHARD LEE BOATWRIGHT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001818

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R Seeger
Appellate Defender

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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

Plea counsel provided ineffective assistance of counsel when she subpoenaed records from the wrong trucking company leaving Petitioner unable to corroborate his alibi, and causing him to plead guilty because he feared being convicted without an alibi defense. 4

Relevant Facts 4

Discussion 5

CONCLUSION 9

PETITION TO BE RELIEVED AS COUNSEL 10

ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel when she subpoenaed records from the wrong trucking company leaving Petitioner unable to corroborate his alibi, and causing him to plead guilty because he feared being convicted without an alibi defense?

STATEMENT

During the May 2014 term, the Lexington County Grand Jury indicted Petitioner for criminal sexual conduct with a minor, 3rd degree; criminal sexual conduct with a minor, 2nd degree; and two counts of sexual exploitation of a minor, 3rd degree. App. 270 – 277.

On April 25, 2016, Petitioner’s trial began before the Honorable R. Knox McMahan with several pretrial motions. App. 1; App. 46, l. 22. Elizabeth C. Fullwood and Sarah H. Mauldin represented Petitioner. App. 1. Suzanne Mayes and Rhonda Patterson represented the state. Id.

After all of Petitioner’s pretrial motions were denied and plea counsel failed to subpoena the proper trucking company to corroborate Petitioner’s alibi, Petitioner pled guilty. App. 150, ll. 5 – 6. Petitioner pled guilty as indicted without, “any plea negotiations in this case.” App. 150, ll. 9 – 20; App. 160, ll. 8 – 11.

Judge McMahan accepted Petitioner’s guilty plea as freely, voluntarily, knowingly, and intelligently made. App. 172, ll. 8 – 13. Petitioner was sentenced to twenty years’ imprisonment for criminal sexual conduct with a minor in the second degree; fifteen years’ imprisonment for criminal sexual conduct with a minor in the third degree; ten years’ imprisonment each for both counts of sexual exploitation of a minor in the third degree. App. 181, l. 9 – 182, l. 1. All sentences ran consecutive. App. 182, ll. 2 – 4.

On March 4, 2017, Petitioner filed a PCR application that alleged plea counsel was ineffective for failing to investigate potentially exculpatory evidence. App. 184 – 190. The state filed its Return on June 12, 2017. App. 191 – 216.

Petitioner’s evidentiary hearing was held on February 21, 2018, before the Honorable J. Derham Cole. App. 217. Aimee J. Zmroczek represented Petitioner. Id. Caroline Scramton represented the state. Id.

In an order filed on September 6, 2018, Judge Cole dismissed Petitioner's PCR allegations. App. 256 – 269. Judge Cole found that because no additional exculpatory evidence was presented at the PCR hearing and, “[plea counsel] testified that she subpoenaed [Petitioner's] former trucking employer for logbooks [that would have corroborated Petitioner's alibi].” Id.

This petition follows.

ARGUMENT

Plea counsel provided ineffective assistance of counsel when she subpoenaed records from the wrong trucking company leaving Petitioner unable to corroborate his alibi, and causing him to plead guilty because he feared being convicted without an alibi defense.

Relevant Facts

The state alleged the facts as follows: In July 2012 Petitioner purportedly threatened Minor, a twelve-year-old girl, with a firearm to force her to have sex with him. App. 162, l. 24 – 163, l. 22. Almost a year later, Minor disclosed the incident and alleged multiple other similar instances. App. 163, l. 23 – 164, l. 8.

Sometime after that disclosure, Petitioner's cellmate, who was incarcerated for being a sex offender, provided law enforcement a letter supposedly written by Petitioner outlining these encounters with Minor. App. 164, l. 9 – 165, l. 5. The letter had signatures throughout that were allegedly Petitioner's and the state obtained other documents signed by Petitioner for comparison. App. 164, l. 22 – 165, l. 17. The state claimed they had an expert that would have testified that the handwriting came from the same person. Id.

In one of the writings that Petitioner's cellmate purportedly took from Petitioner, it said that for the incident in July 2012 Petitioner and the minor had sex fifteen times. App. 166, ll. 5 – 20. Petitioner told plea counsel Fullwood that he could not have accomplished that because he was tired from his shift as a truck driver from the night before, and asked her to subpoena his trucking company for his employment records. App. 231, l. 4 – 232, l. 9. Plea counsel had a subpoena issued for the wrong trucking company. App. 248, l. 14 – 249, l. 1.

Petitioner testified at his PCR hearing that plea counsel failed to subpoena the proper trucking company to corroborate his alibi. App. 231, l. 4 – 232, l. 9. Petitioner stated, "if [plea

counsel] would have just asked my company, they would have supplied her with my DOT records that showed on my logbook that I had gotten up the morning before at 1:00 a.m. to drive from Tom's Brook, Virginia to Columbia." Id. Petitioner alleged that because of his eleven hours of driving the day prior, he could not possibly have had sex fifteen times with Minor, as the writings given to law enforcement by his cellmate stated. Id. Petitioner also testified that his family had a letter from his trucking company stating that they would help in any way they could. Id.

Petitioner did not know he could object during the plea colloquy. App. 235, ll. 15 – 18. Petitioner plead guilty because he was "ignorant of the law," and apologized during the plea hearing because he thought the judge would go easier on him. App. 235, l. 24 – 236, l. 2; App. 238, l. 23 – 239, l. 7.

Plea counsel Fullwood testified at the PCR hearing as well. App. 240, l. 12. Fullwood explained she asked for the logbooks from a "TLC" trucking company who did not have any documentation corroborating his alibi. App. 248, l. 14 – 249, l. 1. Plea counsel explained that the company she subpoenaed was not required to keep logbooks or electronic logbooks. Id.

Fullwood did not tell Petitioner that the trucking company she subpoenaed could not corroborate Petitioner's alibi. Had plea counsel followed up with Petitioner, he would have pointed her to the correct company to subpoena which would have corroborated his alibi.

Therefore, plea counsel provided ineffective assistance of counsel for failing to subpoena the proper trucking company's records to corroborate Petitioner's alibi.

Discussion

When plea counsel did not follow up with Petitioner after subpoenaing the wrong trucking company so that he could tell her the correct trucking company to subpoena to

corroborate his alibi, she provided ineffective assistance of counsel that rendered Petitioner's guilty plea involuntary. App. 232, l. 4 – 232, l. 9; App. 248, l. 14 – 249, l. 1.

In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) this Court held that trial counsel failed to conduct a reasonable investigation into McKnight's death by child abuse case. Id. at 47, 661 S.E.2d 361. Although McKnight was not a death penalty case, this Court cited Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883, n. 8 (2006), and Wiggins v. Smith, 539 U.S. 510 (2003) because the principle that to provide effective assistance of counsel an attorney must conduct a reasonable investigation into "all reasonably available mitigation evidence and reasonably available evidence tending to rebut any aggravating evidence introduced by the State," applies equally in the non-death penalty context. McKnight, at 46, 661 S.E.2d at 360.

In Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014) the Court of Appeals held that Bagwell's counsel provided ineffective assistance of counsel when she failed to test the blood found on the broken glass of the victim's back door. Bagwell was convicted of burglary at an apartment complex, where a witness saw Bagwell leaving the home from the shattered backdoor. Id. at 262, 763 S.E.2d at 632. The witness said he accosted Bagwell outside of the apartment and saw Bagwell bleeding. Id. There was also a trail of blood on the broken glass of the backdoor. Id.

Bagwell testified that he was asleep in his apartment at the time of the burglary. Id. During closing arguments, the state relied on the witness' testimony that they saw Bagwell bleeding and the trail of blood on the glass. Id. at 263, 763 S.E.2d 632. Bagwell was convicted of first-degree burglary. Id.

At Bagwell's PCR hearing trial counsel admitted to knowing the state possessed blood samples of the blood found on the broken glass, but did not request DNA testing. Id. At the PCR hearing Bagwell introduced DNA test results that showed the blood found on the broken glass did not match him. Id.

The Court of Appeals held that, "counsel's failure to conduct DNA testing on the glass prior to trial constituted ineffective assistance of counsel... [because] trial counsel's decision not to seek DNA testing prior to trial was unreasonable because the State used the glass as circumstantial evidence of Bagwell's guilt. Id. 266, 763 S.E.2d at 634. (See Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014)) Moreover, the state's case relied heavily on the fact there was blood at the scene and Bagwell was seen bleeding such that, "[A]lthough the DNA test results indicating Bagwell's blood was not found on the pieces of glass do not exonerate Bagwell or preclude the possibility of his guilt, we believe the jury more likely than not would have reached a different verdict had this evidence been presented at trial." Id. at 268, 763 S.E.2d at 635. (See Harrington v. Richter, 562 U.S. 86 (2011)).

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Then Petitioner must show trial counsel's ineffective assistance prejudiced Petitioner case because, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 118, 386 S.E.2d at 625. Therefore, where ineffective assistance of counsel is alleged, the applicant 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, 466 U.S. at 692.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) this Court held that Lounds' attorney provided ineffective assistance when he failed to adequately prepare for trial. Lounds, at 463, 670 S.E.2d at 463. Lounds was convicted of kidnapping and sentenced to life without parole. Id. at 457, 670 S.E.2d at 647. During his trial, Lounds' testified in his own defense that he did not kidnap the victim and force the victim to give him money. Instead, Lounds met with the victim because of an outstanding debt and the victim volunteered to go to a relative's home to ask for the money to pay Lounds back. Id. at 458, 670 S.E.2d at 648.

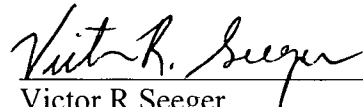
At Lounds' PCR hearing he claimed he was provided ineffective assistance of counsel because Lounds' trial attorney failed to call witnesses that would have corroborated Lounds' testimony. Id. This Court agreed with Lounds and held that his trial counsel had a duty to, "at a minimum... interview potential witnesses." Id.; quoting Ard v. Catoe, 372 S.C. 318, 321, 642 S.E.2d 590, 597 (2007).

In the present case, plea counsel failed to conduct an adequate investigation. App. 225, l. 12 – 226, l. 22; App. 231, l. 4 – 232, l. 9. Plea counsel subpoenaed a trucking company called "TLC," but when they could not corroborate Petitioner's alibi, she never followed up with Petitioner. App. 248, l. 14 – 249, l. 4. Had plea counsel discussed the trucking company she subpoenaed with Petitioner, he would have pointed her to the correct trucking company which would have corroborated his alibi. App. 231, l. 4 – 232, l. 9.

Plea counsel's failure to follow up with Petitioner after subpoenaing the wrong trucking company constituted deficient performance that induced Petitioner to plead guilty because his alibi could not be corroborated. Therefore, Petitioner's guilty plea was involuntarily made and should be vacated.

CONCLUSION

By reason of the forgoing arguments, Petitioner respectfully requests that this Court grant Certiorari to allow for full briefing on this issue.

A handwritten signature in cursive script, reading "Victor R. Seeger", is written over a horizontal line.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

RICHARD LEE BOATWRIGHT,

PETITIONER

V.

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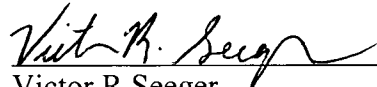
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richard Lee Boatwright 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. Derham Cole, which was held on February 21, 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 Richard Lee Boatwright.

Respectfully Submitted,

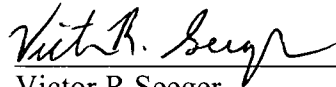


Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of June, 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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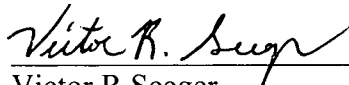
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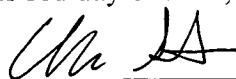
CERTIFICATE OF SERVICE

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 Taylor Z. Smith, 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 Richard Lee Boatwright, #367956, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 3rd day of June, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of June, 2019.



(L.S)

Notary Public for South Carolina
My Commission Expires: October 26, 2019