STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

D. Craig Brown, Circuit Court Judge

WILLIE GUNTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002205

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge erred in denying Petitioner relief where (1) Petitioner discovered, after his guilty plea, that the state's DNA evidence against him was actually a mixture of which Petitioner was only one contributor and (2) the interest of justice required vacation of Petitioner's guilty plea to criminal sexual conduct and related offenses based upon the weight and quality of this evidence?

STATEMENT

Guilty plea

During its August 2002 term, a Richland County grand jury indicted Petitioner for kidnapping (2002-GS-40-6905), carjacking (2002-GS-40-6906), and criminal sexual conduct in the first degree (2002-GS-40-6907). App. 573-574; App. 576-577; App. 579-580. Initially, Lee Coggiola of the Richland County Public Defender Office represented Petitioner in anticipation of trial. App. 4, ll. 7-13; App. 10, ll. 7-8; App. 78, ll. 9-13; App. 103, ll. 15-17; App. 116, l. 24 – App. 117, l. 3; App. 531, ll. 11-13. When Coggiola left the Public Defender Office in October 2003, Fielding Pringle was assigned to represent Petitioner. App. 4, ll. 7-13; App. 10, ll. 6-10; App. 78, ll. 21-25; App. 103, ll. 18-22; App. 117, ll. 4-9; App. 531, ll. 14-18.

On December 17, 2003, Petitioner filed a motion to relieve counsel. App. 3, l. 12 – App. 7, l. 17. On January 12, 2004, Petitioner appeared before the Honorable G. Thomas Cooper, Jr., when the state called his case for trial, after having continued the case for several terms. App. 1; App. 2, ll. 2-3; App. 5, ll. 1-5; App. 10, ll. 15-20; App. 117, l. 16 – App. 118, l. 14. While considering Petitioner's motion to relieve counsel, Judge Cooper inquired whether Petitioner was prepared to represent himself. App. 7, ll. 7-8; App. 7, ll. 23-25; App. 9, ll. 11-12. Petitioner repeatedly indicated he lacked the necessary experience and training to represent himself. App. 7, ll. 9-10; App. 8, l. 1. Petitioner requested the appointment of counsel. App. 8, ll. 6-8; App. 8, l. 24 – App. 9, l. 3. Judge Cooper refused, stating he would not continue Petitioner's case and new counsel would not be able to "get ready in an hour or two." App. 8, l. 5; App. 8, ll. 9-12; App. 9, l. 4; App. 16, ll. 7-8. Judge Cooper denied Petitioner's motion to relieve counsel. App. 18, l. 3.

After a break, Petitioner entered guilty pleas to the charged offenses. App. 20, ll. 23-25; App. 21, ll. 20-25; App. 22, ll. 21-25; App. 24, ll. 11-14. Pringle and Debra Ahrens represented Petitioner, and Kathryn Luck Campbell and Brian Jeffries represented the state. App. 1. There was no plea agreement reached with the state, and the state made no recommendation as to sentence. App. 27, ll. 10-11.

During the guilty plea hearing, the state informed the plea judge that on July 25, 2002, R.R. was getting out of her car in the Wachovia Bank parking lot when she was approached by Petitioner, who had a handgun. App. 27, l. 22 – App. 28, l. 3. According to the state, Petitioner forced R.R. to get back into the car. App. 28, ll. 3-5. He then drove her to another location. App. 28, ll. 8-10. Petitioner then sexually assaulted her. App. 28, ll. 11-12. Thereafter, Petitioner drove to a home where he stopped, got out of the car, and entered the home to get a condom. App. 28, ll. 13-14. R.R. got out of the car and went to a home where some police officers lived. App. 28, ll. 14-24. Petitioner then drove off. App. 28, l. 25.

Later, the car was found in the parking lot of an apartment complex where Petitioner's ex-girlfriend lived. App. 29, ll. 3-7. Using this information along with R.R.'s description of her assailant, the police developed Petitioner as a suspect. App. 29, ll. 7-10. After R.R. identified Petitioner from a photo line-up, the police arrested Petitioner. App. 29, ll. 11-14. According to the state, DNA testing on underwear found in the car matched Petitioner's DNA. App. 29, ll. 17-25.[1]

Judge Cooper sentenced Petitioner to twenty years imprisonment for carjacking, twenty-five years imprisonment for kidnapping, and twenty-five imprisonment years for criminal sexual

[1] Coggiola indicated that although she provided Petitioner with a copy of his discovery while she was representing him, she did not provide him with a copy of the DNA report because she did not have it when she gave him a copy of the discovery. App. 120, ll. 13-19. In fact, the SLED report was dated November 4, 2003. App. 124, ll. 8-21.

conduct. App. 48, ll. 7-13; App. 575; App. 578; App. 581. He ordered the sentences to be served concurrently. App. 48, ll. 13-14; App. 575; App. 578; App. 581.

Direct appeal

Following his guilty plea and sentencing, Petitioner served a notice of appeal on January 14, 2004. App. 50-51. Thereafter, Petitioner decided to withdraw his notice of appeal. App. 52-53. As a result, the Court of Appeals dismissed Petitioner's appeal. App. 54. Remittitur was sent on April 19, 2004. App. 54.

Post-conviction relief proceedings

First application

Petitioner filed an application for post-conviction relief (PCR) on June 18, 2004 (2004-CP-40-2947). App. 55-67. The matter proceeded to an evidentiary hearing before the Honorable James R. Barber, III, on February 13, 2006. App. 73. Tara D. Shurling represented Petitioner. App. 73. Robert L. Brown represented the state. App. 73. During the PCR hearing, Petitioner explained that at the time of the offenses, he was selling cocaine. App. 83, ll. 10-13. A woman, R.R., approached him, wanting to buy some cocaine. App. 83, ll. 14-16. The two agreed to "a favor for a favor." App. 83, l. 20. In other words, R.R. would have sex with Petitioner in exchange for drugs. App. 84, ll. 1-11. Based upon these facts, Petitioner told plea counsel he was willing to plead guilty to possession of a stolen vehicle or breach of trust. App. 86, ll. 17-22. According to Petitioner, plea counsel "said that she could get [him] under ten years." App. 87, ll. 2-6; App. 97, ll. 2-4. Later, plea counsel told Petitioner "something like four or five." App. 87, ll. 7-13. Petitioner explained that plea counsel indicated the charges for criminal sexual conduct and kidnapping would be dropped. App. 87, ll. 14-21.

Petitioner explained that when he got his discovery materials from plea counsel after the guilty plea, he discovered that the DNA evidence the state had against him was from a pair of boxer shorts, not from any testing of a sexual assault kit. App. 90, l. 15 – App. 91, l. 13. He indicated that if he had known of the source of the DNA evidence, he would not have pled guilty. App. 91, ll. 14-17.

Plea counsel indicated that Petitioner told her that he obtained R.R.'s car through a "crack rental." App. 105, l. 21 – App. 106, l. 11; App. 121, ll. 9-20. He gave R.R. some crack in exchange for use of her car. App. 105, l. 21 – App. 106, l. 11. As plea counsel explained, Petitioner left R.R. at a crack house, and he was supposed to return her car to her, but he failed to do so. App. 105, l. 21 – App. 106, l. 11. However, the day before the guilty plea, Petitioner "admitted" "what had taken place." App. 108, ll. 19-22. On the day the trial was scheduled to begin, plea counsel met with Petitioner to prepare him for what she believed was a guilty plea. App. 108, l. 16 – App. 109, l. 9. Petitioner indicated he no longer wanted plea counsel to represent him. App. 109, ll. 4-9. Regarding plea negotiations, plea counsel indicated that the state offered a twenty-year sentence in exchange for Petitioner's guilty plea, but that Petitioner rejected the offer in hopes of obtaining a lesser sentence with a "straight up" plea. App. 110, l. 17 – App. 111, l. 3. Further, plea counsel indicated she did not guarantee or promise any particular sentence to Petitioner. App. 111, ll. 4-8. More specifically, she never promised him a sentence of eight years. App. 111, ll. 10-11.

By an order filed March 7, 2006, Judge Barber denied Petitioner relief. App. 131-138. Thereafter, Petitioner filed a notice of appeal. On September 14, 2006, Robert M. Pachak filed a petition for writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1998). App. 139-146. Subsequently, Petitioner filed a *pro se* petition for writ of certiorari. App. 147-

153. On July 2, 2007, the Supreme Court denied the motion to be relieved and ordered appellate counsel to file a petition addressing whether the PCR judge erred in dying relief where plea counsel indicated to the judge that Petitioner intended to commit perjury by referencing In re Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983). App. 154. In compliance with the Court's order, appellate counsel filed a petition for writ of certiorari on August 1, 2007. App. 155-162. After the state filed its return, the Court denied the petition for writ of certiorari. App. 174. Remittitur was sent on February 8, 2008. App. 175.

Second application

On December 29, 2008, Petitioner filed a PCR application (2008-CP-40-9097). App. 176-180. On January 26, 2009, Petitioner filed another PCR application (2009-CP-40-512). App. 181-187. The state moved to dismiss on October 15, 2009, arguing it was "successive to the previous application" and filed outside the statute of limitations. App. 188-193. Thereafter, Judge Barber issued a conditional order of dismissal on October 19, 2009. App. 194-198. On December 10, 2009, Petitioner filed objections to the conditional order of dismissal. App. 199-219. However, on that same date, Judge Barber filed the final order of dismissal. App. 220-222. Later, on December 14, 2010, the Honorable J. Ernest Kinard filed an amended final order of dismissal and order of merger. App. 223-227. Judge Kinard explained that his previous final order and Petitioner's objections "passed each other in the mail." App. 223-227. Judge Kinard presided over a hearing on September 10, 2010, concerning Petitioner's objections. App. 223-227. According to his amended final order, he dismissed the application as successive and untimely. App. 223-227. He also merged Petitioner's two PCR applications into one case number. App. 223-227. Petitioner then filed a motion to alter or amend the judgment. App. 228-230. By an order filed October 24, 2011, Judge Kinard denied the motion. App. 231-236.

Petitioner then filed a pro se petition for writ of certiorari. App. 238-241. On January 16, 2012, Petitioner wrote to this Court to explain why the lower court's determination that his PCR application was successive and untimely was improper. App. 242-255. On February 24, 2012, this Court determined Petitioner failed to show an arguable basis for asserting the lower court's determination was improper. App. 257. Thus, this Court dismissed the appeal. App. 257. Remittitur was sent on March 13, 2012. App. 258.

Third application

On April 5, 2013, Petitioner filed a PCR application (2013-CP-40-2062). App. 259-268.. The state moved to dismiss the application. App. 269-278. On September 20, 2013, the Honorable L. Casey Manning issued a conditional order of dismissal. App. 279-287. Thereafter, on April 7, 2014, Judge Manning issued a final order of dismissal. App. 288-289.

Fourth application – newly discovered evidence

Petitioner filed an application for PCR on December 16, 2014 (2014-CP-40-7848). App. 290-356. In his application, Petitioner asserted he had newly discovered evidence. App. 290-356. The state moved to dismiss the application on November 17, 2015. App. 357-367. The state argued the application was successive, outside the statute of limitations, failed to present a valid claim of newly discovered evidence, and was barred by laches. App. 357-367. Petitioner responded to the state's motion on December 16, 2015. App. 378-524. The matter proceeded to a hearing on December 16, 2015, before the Honorable D. Craig Brown. App. 525. Kristy Goldberg represented Petitioner, and Jessica Kinard represented the state. App. 525.

Petitioner explained that he discovered the new evidence on September 22, 2014. App. 532, ll. 16-22. When Petitioner was transferred from McCormick Correctional Institution to Broad River Correctional Institution, the prison system lost his legal property. App. 532, l. 23 –

App. 533, l. 1. As a result, Petitioner wrote to multiple people, including the public defender's office, to obtain a second copy of his legal materials. App. 533, ll. 1-11. The public defender's office provided Petitioner with two packets, which contained information he had "never seen before." App. 533, ll. 8-15. Specifically, Petitioner received "detailed DNA documents, ... a memo from a Dr. Estrowski," and "some extra DNA evidence." App. 533, l. 23 – App. 534, l. 3. Petitioner believed Dr. Estrowski was a DNA expert. App. 534, ll. 4-7. Pringle explained that Dr. Estrowski often helped her "draft cross questions" regarding DNA expert, and that in this case, "he drafted a few pages of cross questions." App. 548, ll. 5-14. Pringle also indicated that she intended to call Dr. Estrowski as an expert if Petitioner had gone to trial. App. 548, ll. 14-20.

Petitioner acknowledged that he received a copy of his discovery from Coggiola when she was representing him. App. 534, l. 24 – App. 535, l. 4. Further, Petitioner acknowledged that at the time of his guilty plea, he was aware "there was DNA evidence that had something to do with [his case]." App. 536, ll. 4-7. He elaborated that Coggiola had obtained the rape kit from the hospital and informed him "that it didn't really seem like nothing happened." App. 536, ll. 8-15. Additionally, Pringle told him the state had his DNA from some boxer shorts. App. 536, l. 16 – App. 537, l. 1; App. 537, ll. 4-10.

However, Petitioner never saw a report discussing the DNA evidence. App. 537, ll. 2-3; App. 537, ll. 15-16. The DNA report showed there was DNA from multiple people; not just Petitioner's DNA. App. 543, ll. 21-23; App. 545, ll. 3-15. According to Petitioner, Pringle never told Petitioner that the state's evidence was a mixture of DNA. App. 538, ll. 18-20. Pringle indicated she had no "independent recollection" of a conversation with Petitioner about a DNA mixture. App. 547, ll. 16-23. Petitioner explained that Pringle never advised Petitioner that the state's alleged DNA evidence could be challenged at trial. App. 540, ll. 15-20. Pringle

indicated that she did not remember giving Petitioner a copy of the DNA report from the state, but that it would have been her "practice" to have told Petitioner about the report. App. 547, l. 24 – App. 548, l. 4. Nevertheless, Pringle claimed she had notes from a meeting with Petitioner stating the underwear were "central to the case" and noting the sample was a mixture. App. 550, ll. 13-24.

In fact, during his guilty plea, the state informed the plea judge that his DNA was found on the boxer shorts, but the state failed to inform the plea judge that a DNA mixture was found. App. 538, ll. 4-10; App. 546, ll. 17-23. During the guilty plea, Pringle never informed the plea judge that what was found on the boxer shorts was actually a mixture of DNA. App. 538, ll. 15-17; App. 546, l. 24 – App. 547, l. 2.

Petitioner explained that if he had known about the DNA evidence – that the boxer shorts contained a mixed sample – he would not have entered a guilty plea. App. 539, ll. 7-17. Petitioner understood the expert's memo to indicate there was "no evidence of sexual assault." App. 539, ll. 20-25.

By an order filed October 17, 2018, Judge Brown denied the state's motion to dismiss. App. 557. However, he also denied Petitioner relief from his convictions and sentences. App. 557-568. After citing Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014), Judge Brown first found Petitioner failed to show the DNA evidence was newly discovered. App. 564-565. The PCR court noted that plea counsel was aware the DNA evidence was a mixture of DNA from multiple sources. App. 565. Finding "all evidence about the particular nature and strength of the DNA evidence was known at the time of the guilty plea," the PCR judge relied upon plea counsel's testimony that her notes from meeting with Petitioner "contained a specific reference

to the DNA mixture" and that it was her" standard practice to discuss the DNA results." App. 565.

Second, the PCR judge found "the fact that the DNA evidence contained a mixture of individuals was not of such a weight and quality that the 'interest of justice' requires [Petitioner]'s guilty plea to be vacated." App. 565. The PCR judge noted the alleged victim identified Petitioner as her assailant and that Petitioner "was unable to offer any plausible explanation as to why boxer shorts bearing his DNA were present in the victim's car." App. 565. Thus, the judge found "[t]he fact the DNA sample was a mixture would not have substantially affected the probative value of this very significant evidence against [Petitioner]." App. 565. The PCR judge determined Petitioner "seemed to misconstrue the DNA evidence as exonerative." App. 566. Finally, the Court did "not believe [Petitioner]'s claim that a better explanation of the DNA evidence would have resulted in his choosing not to plead guilty and going to trial." App. 566.

Subsequently, Petitioner filed a motion to alter or amend the judgment. App. 569-570. By an order filed December 3, 2018, Judge Brown denied the motion. App. 571-572.

After receiving the order on December 7, 2018, Petitioner served his notice of appeal on December 14, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in denying Petitioner relief where (1) Petitioner discovered, after his guilty plea, that the state's DNA evidence against him was actually a mixture of which Petitioner was only one contributor and (2) the interest of justice required vacation of Petitioner's guilty plea to criminal sexual conduct and related offenses based upon the weight and quality of this evidence.

Relevant facts

When Petitioner obtained his complete file from his attorney, he learned that plea counsel consulted with an expert in DNA analysis. His file contained a memorandum from the expert to plea counsel regarding potential cross-examination questions to pose to the state's DNA expert. The questions revealed that plea counsel had formulated a way to challenge the state's DNA evidence. Prior to his guilty plea, Petitioner was aware that the DNA testing conducted on the sexual assault kit revealed the presence of DNA from R.R. only. In other words, there was no DNA evidence in R.R.'s vaginal vault to support the charge of criminal sexual conduct. However, what Petitioner did not know prior to his guilty plea was that the DNA evidence from the boxer shorts was from more than one person. The cross-examination memo made this point clear.

According to the memo, the state's DNA expert's testing showed the boxer shorts contained DNA from at least three people. App. 396-397. The memo showed how to "box in" the state's DNA expert to admit that "any number of people could have worn the[] shorts." App. 397. The state's DNA evidence was not as cut and dried as it seemed. Further, the memo proposed to cross examine the state's DNA expert with an article from a scientific publication to

show expert had not used the accepted method of formulation for calculating the population genetics numbers the expert had opined in the report. App. 397.

Discussion

In South Carolina, a person may receive a new trial based on newly discovered evidence, but only in limited circumstances. Those circumstances are further limited if the person initially entered a guilty plea. Specifically,

> when a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea be vacated.

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

As an initial matter, the PCR judge erred in concluding that the DNA evidence was not newly discovered. The judge erroneously based his decision on the fact that plea counsel knew the DNA evidence was a mixture. While plea counsel may have known about the nature of the DNA evidence, Petitioner was unaware the state's DNA evidence was a mixture of DNA from multiple people, of which Petitioner was only one. The undisputed evidence showed Petitioner's original counsel, Coggiola, gave him a copy of the discovery materials prior to the state testing the boxer shorts for DNA evidence. Petitioner's second counsel, Pringle, indicated she had no independent recollection of even discussing the nature of the DNA evidence with Petitioner prior to his guilty plea. Thus, the evidence was unequivocal that Petitioner was unaware that the state's DNA evidence was actually a mixture of DNA from multiple individuals.

Further, the PCR judge erred in concluding the the interest of justice did not require Petitioner's guilty plea be vacated. In arriving at this conclusion, the judge noted the alleged

victim identified Petitioner as her assailant and Petitioner could not provide an explanation for why boxer shorts containing his DNA were in the alleged victim's car. The judge failed to consider Petitioner's and plea counsel's testimony at a previous PCR hearing that Petitioner could explain why his DNA was on the boxer shorts in the alleged victim's car – he traded sex for crack cocaine with the alleged victim. Thus, Petitioner provided a very plausible explanation for why his DNA was on the boxer shorts. What could not be explained was why the DNA of other individuals was on boxer shorts. The presence of DNA on the boxer shorts was substantial evidence that someone other than Petitioner stole the car and sexually assaulted the alleged victim. As Petitioner explained during the PCR hearing, had he known there was substantial evidence that a third party was guilty of the offenses for which he was charged, he would not have pled guilty, and he would have insisted upon a trial. The weight and quality of the evidence – a DNA mixture on the boxer shorts – in a case involving an allegation of sexual assault militated in favor of vacation of Petitioner's guilty plea in the interest of justice.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. If this Court grants the petition but dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court and grant him a new trial based on the newly discovered evidence presented.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of June, 2019.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Willie Gunter states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing before Judge D. Craig Brown, which was held on July 12, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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 her as counsel for Willie Gunter.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of June, 2019.

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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 Willie Gunter, #299126, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 24th day of June, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of June, 2019.

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