STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

JAMIE MISHOE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002030

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel when he failed to provide Petitioner with a full copy of his discovery materials which prevented Petitioner's from entering his guilty plea freely and voluntarily?

STATEMENT

During the September 16, 2014 term, the Greenville County Grand Jury indicted Petitioner for attempted murder and possession of a weapon during the commission of a violent crime. App. 84 – 85. During the August 2016 term, the Greenville County Grand Jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime. App. 86 – 87. During the September 2016 term, the Greenville County Grand Jury indicted Petitioner for threatening the life of a public official. App. 88 – 89.

On November 16, 2016, Petitioner had a guilty plea and an Alford[1] plea hearing before the Honorable Letitia H. Verdin. App. 1; App. 65, ll. 17 – 21. Christopher D. Scalzo represented Petitioner. Id. Bryna S. Seay represented the state. Id. Petitioner pled pursuant to Alford on the attempted murder charge and the accompanying possession of a weapon during the commission of a violent crime charge. App. 5, ll. 21 – 25. He pled guilty to his other charges. App. 5, ll. 12 – 20.

Petitioner negotiated a sentence of twenty years' imprisonment for voluntary manslaughter; twenty years' imprisonment for attempted murder, and five years' imprisonment for both possession of a firearm during the commission of a violent crime, all to run concurrent. App. 12, l. 24 – 13, l. 4. The negotiated sentence also had Petitioner receive five years' imprisonment for the threatening the life of a public official charge, suspended upon five years of probation. Id. However, the probation would be tolled until after his prison sentences were completed. Id.

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[1] North Carolina v. Alford, 400 U.S. 25 (1970).

Judge Verdin accepted Petitioner's guilty plea and Alford plea as freely and voluntarily made. App. 14, ll. 17 – 22. Judge Verdin then sentenced Petitioner pursuant to the negotiated sentence. App. 17, l. 8 – 18, l. 2.

Petitioner filed a post-conviction relief (PCR) application on March 27, 2017 where he alleged his guilty plea was involuntary because plea counsel failed to provide Petitioner with all of his discovery materials prior to the guilty plea hearing. App. 20 – 29. The state filed its Return on July 28, 2017. App. 31 – 35.

On October 23, 2018, Petitioner's PCR hearing was held before the Honorable Alex Kinlaw. App. 37. Rodney W. Richey represented Petitioner. Id. Deshawn H. Mitchell represented the state. Id.

In an order filed on November 5, 2018, Judge Kinlaw denied Petitioner relief because, "plea counsel testified credibly that he provided Petitioner's discovery materials to him and discussed the statements with Petitioner." App. 74 – 82. The PCR Court further found that Petitioner failed to show deficient performance or prejudice from plea counsel's representation. Id.

ARGUMENT

Plea counsel provided ineffective assistance of counsel when he failed to provide Petitioner with a full copy of his discovery materials which prevented Petitioner's from entering his guilty plea freely and voluntarily.

Relevant Facts

The state alleged the facts as follows: On December 18, 2012, police officers responded to an attempted murder call at Centre Boulevard in Greenville County. App. 9, l. 21 – 10, l. 14. When they arrived, the officers saw the complaining witness Charles Chambers being treated by emergency medical service (EMS) workers. Id. Chambers told police that an unknown black male came on Chambers' porch, opened the glass storm door, and shot Chambers in the stomach. Id. After Chambers was treated for his wounds he was able to identify Petitioner as the shooter in a photographic line up. Id.

Petitioner pled to unrelated charges of voluntary manslaughter and possession of a weapon during the commission of a violent crime at the same guilty plea hearing. App. 10, l. 15 – 12, l. 11. As to this charge, on February 23, 2013, police responded a call at Petitioner's residence on Centre Boulevard. Id. When they arrived the officers found the decedent, John Zimeri, dead from an apparent gunshot wound. Id.

Petitioner's mother told the police that an unknown white male entered the home, killed the decedent, and then fled. Id. There were several other witnesses at the scene and they all stated they did not know the identity of the shooter. Id. However, they were asked to go to the "Law Enforcement Center" for follow-up interviews where they all recanted their first statements and gave subsequent statements implicating Petitioner in the shooting. Id.

According to one witness, prior to the incident, the decedent was having sexual relations with the Petitioner's sister. Id. He stated that the Petitioner walked into the bedroom and an argument ensued between he and the decedent. Id. Petitioner told the decedent to get out of the house and as the decedent was leaving the argument continued. Id. The decedent made a "smart remark" to Petitioner and laughed at him. Petitioner allegedly said, "so you think this is funny," and shot the decedent. Id.

In addition, while being held in the Greenville County Detention Center, Petitioner allegedly threated the life of an officer. App. 12, ll. 12 – 20. That was the act which gave rise to the present threatening the life of a public official charge. Id.

Petitioner testified at his PCR hearing that he never received his full discovery materials. App. 42, ll. 23 – 24. Out of the multiple witness statements given, there was only one statement in the discovery materials he was provided. App. 43, ll. 3 – 12. Petitioner argued that the other statements not contained in his discovery materials were exculpatory. Id.

Most importantly, Petitioner stated that he only pled guilty because he felt he could not contest the charges against him without his full discovery materials. App. 47, ll. 9 – 19. Petitioner testified that plea counsel told him of the existence of the other witness statements, but never gave them to Petitioner. App. 48, l. 12 – 49, l. 10. Petitioner told plea counsel that the witness statements were missing from his discovery materials, but plea counsel still never brought them to Petitioner. App. 49, ll. 12 – 21.

Petitioner explained that he did not know the contents of the witness statements because plea counsel only told Petitioner that the statements existed, not what they said. App. 52, l. 10 – 53, l. 4. After the guilty plea, Petitioner learned from two of the witnesses that their statements did not implicate him as the shooter. App. 51, ll. 13 – 25. Petitioner then explained that he only

answered as he did at the plea colloquy because by the time of the guilty plea hearing, he thought it was already too late to do anything about stopping the guilty plea. App. 54, ll. 19 – 25.

Plea counsel testified that he, "did not have a way of knowing what [Petitioner] does or doesn't have," but that as a common practice he sends his clients a copy of all of their discovery materials when he receives them. App. 57, l. 22 – 58, l. 7. Plea counsel explained that he had notes that showed a subordinate lawyer at the public defender's office labeled all of the statements given by the witnesses. App. 58, ll. 8 – 15. Plea counsel reasoned, "I don't know why I would have pulled [the witness statements] out and not given them to [Petitioner]. I have no reason not to give it to him." Id.

Plea counsel stated that for his clients held in county jail, he or a subordinate would deliver the discovery materials by hand, which is why plea counsel does not have a mailed letter memorializing the date he delivered the discovery materials to Petitioner. App. 59, l. 20 – 60, l. 6. However, plea counsel admitted that there may have been a problem with Petitioner's discovery being incomplete, just that he was unaware of it, if it happened. App. 62, ll. 1 – 5. Plea counsel also claimed that he discussed the witness statements with Petitioner because, "without [the statements] the state didn't have a case." App. 65, ll. 22 – 25.

Discussion

Petitioner's guilty plea was not freely and voluntarily made because he pled guilty while unaware of the evidence against him because plea counsel failed to provide Petitioner his full discovery materials prior to the guilty plea hearing. App. 47, ll. 9 – 19.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury... Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant

does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him). "Although the trial court is not required to direct defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of his guilty plea." State v. Pittman, 337 S.C. 597, 600, 524 S.E.2d 623, 600 (1999) (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976)).

To prove a claim of ineffective assistance of counsel, the Petitioner must show that counsel provided was deficient and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 612-15 (2011).

In this case, trial counsel's performance was deficient, as it fell below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

At his PCR hearing, Petitioner testified that there were exculpatory statements given by

multiple witnesses that he was never provided in his discovery materials. App. 42, l. 23 – 44, l. 12. Petitioner also testified that his guilty plea was not entered into freely or voluntarily because he was not provided with his discovery prior to the guilty plea hearing. App. 47, ll. 9 – 19.

Plea counsel testified that he could not say for sure what documents Petitioner had or did not have. App. 57, l. 22 – 58, l. 7. Plea counsel could only attest to how he "normally" handles discovery. App. 59, l. 20 – 60, l. 6. Plea counsel could not explain why Petitioner would not have received all of his discovery materials but admitted that it was possible there was a problem with the materials Petitioner received. App. 62, ll. 1 – 5.

Accordingly, the PCR court erred in finding that trial counsel performance was reasonable "under prevailing professional norms." Cherry, 300 S.C. 115, 386 S.E.2d 624; See Strickland, 466 U.S. at 687-88.

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was unable to voluntarily plead guilty because of plea counsel's deficient performance.

Therefore, the PCR court erred in finding plea counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [plea] counsel's unprofessional errors, the result of the proceeding would have been different." App. 47, ll. 9 – 19; Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Hill, 474 U.S. 52.

CONCLUSION

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

Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of July, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamie Cornelious Mishoe 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 Alex Kinlaw, which was held on October 23, 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 Jamie Cornelious Mishoe.

Respectfully Submitted,

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of July, 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."

Victor R Seeger
Appellate Defender

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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 Jamie Cornelious Mishoe, #370558, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 10th day of July, 2019.

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of July, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019