

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

JOSEPH O. MORANT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002042

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel when he failed to have the DNA found at the scene of one of the burglaries independently tested?

STATEMENT

During the March 2015 term, the Lexington County Grand Jury indicted Petitioner for burglary in the first degree. App. 95 – 104. During the May 2015 term, the Lexington County Grand Jury indicted Petitioner for burglary in the second degree, violent, and two more counts of burglary in the first degree. Id. During the June 2015 term, the Lexington County Grand Jury indicted Petitioner for a second burglary in the second degree. Id.

On July 14, 2016, Petitioner pled guilty before the Honorable Eugene Griffith. App. 1. Michael D. McMullen represented Petitioner. Id. Suzanne Mayes represented the state. Id.

Petitioner pled guilty as indicted on the aforementioned charges. App. 4, ll. 3 – 16. The negotiated sentence for Petitioner's guilty plea was a sentence between fifteen years and twenty years' imprisonment for the burglary first charges, and the sentence for the burglary second convictions to be concurrent. App. 21, ll. 15 – 20.

Judge Griffith found that Petitioner's guilty plea was freely, knowingly, and voluntarily made. App. 21, ll. 5 – 13. Judge Griffith sentenced Petitioner to twenty years' imprisonment for the burglary in the first-degree charges; fifteen years' imprisonment for the charge of burglary in the second degree, violent; and, ten years' imprisonment for burglary in the second degree. App. 34, ll. 4 – 13.

Petitioner filed an application for post-conviction relief (PCR) on July 5, 2017. App. 36 – 43. Petitioner alleged that his plea counsel was ineffective for failing to investigate into how the state's DNA testing process. Id. The state filed its Return on September 13, 2017. App. 44 – 52.

On August 1, 2018, Petitioner's PCR hearing was held before the Honorable Perry H. Gravely. App. 53. Ashley A. McMahan represented Petitioner. Id. Kelly Oppenheimer represented the state. Id.

In an order filed on October 12, 2018, Judge Gravely denied Petitioner relief. App. 82 – 94. Judge Gravely found that Petitioner failed to “identify what further investigation he wanted plea counsel McMullen to do with the DNA evidence and footprints.” App. 92.

ARGUMENT

Plea counsel provided ineffective assistance of counsel when he failed to have the DNA found at the scene of one of the burglaries independently tested.

Relevant Facts

The state alleged that Petitioner burglarized multiple homes in Lexington County between November of 2013 and January of 2014. App. 5, l. 3 – 7, l. 2. On one occasion Petitioner purportedly entered the home of a Marie Rawl through a window. App. 10, l. 9 – 11, l. 17. There was blood found on the window. Id. DNA was collected from the blood sample and entered into CODIS. Id. The DNA from the blood sample matched Petitioner’s DNA stored at the CODIS¹ database. Id.

At Petitioner’s PCR hearing he testified that he was told SLED tested his DNA, but he found out after he pled guilty that his DNA was tested at a private company in Florida. App. 57, ll. 13 – 19. Petitioner would not have pled guilty if he knew a private company tested his DNA. App. 57, l. 23 – 58, l. 13. Petitioner stated, “I chose to plead guilty because... they said that SLED [performed the DNA testing].” Id. Petitioner was insistent on fighting the charges against him and only pled guilty after he was told about the DNA testing he thought SLED had performed. App. 63, ll. 11 – 13; App. 71, l. 5 – 72, l. 11.

Plea counsel McMullen testified at the PCR hearing as well. App. 69, l. 7. Plea counsel testified that he was appointed as Petitioner’s attorney only one month prior to the guilty plea

¹ CODIS is an acronym for the Combined DNA Index System. CODIS and NDIS Fact Sheet, FBI (2016), <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Jul 31, 2019).

hearing². App. 69, ll. 22 – 24. Plea counsel explained that he thought there was no reason to “question those [DNA test] results,” nor was there a reason to independently test the DNA collected from the blood sample at the scene. App. 70, ll. 12 – 19. However, plea counsel also admitted Petitioner, “was really fighting” the charges against him, and he did not want to plead guilty. App. 71, l. 5 – 72, l. 11. It was only after Petitioner thought that there was a DNA match found by SLED that Petitioner decided to plead guilty. App. 63, ll. 11 – 13.

The PCR court found that Petitioner failed to show how he was prejudiced by McMullen’s performance because Petitioner did not explain what he wanted plea counsel to investigate. App. 82 – 94. However, Petitioner’s testimony at PCR, taken in its entirety, can only be reasonably interpreted as Petitioner wanting plea counsel to independently verify the results of the DNA testing.

Discussion

When plea counsel McMullen failed to inform Petitioner that a private company conducted the DNA test and when he chose not to pursue an independent investigation into the DNA evidence in Petitioner’s case, plea counsel provided ineffective assistance of counsel. App. 57, ll. 13 – 19; App. 70, ll. 12 – 19. Hill v. Lockhart, 474 U.S. 52 (1985).

Petitioner would not have pled guilty he known that the DNA was tested at a private company rather than at SLED. App. 57, l. 23 – 58, l. 13. Plea counsel should have informed Petitioner who tested the DNA sample, and he should have had the DNA test results independently analyzed before Petitioner’s guilty plea hearing.

² Elizabeth Fullwood originally represented Petitioner, but Petitioner moved to have her relieved, she was relieved, and plea counsel McMullen was appointed. App. 57, ll. 5 – 12; App. 60, l. 20 – 61, l. 10.

The difference, “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill, 474 U.S. at 56 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) to claims of the same against plea counsel).

First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. “[T]he 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, 615-12 (2011).

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) for 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 State v. Bagwell, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014) the trial counsel was ineffective for failing to request for DNA testing of blood found at the crime scene. Id. at 268, 763 S.E.2d at 635. In Bagwell, there was an alleged burglary committed where the glass patio door was shattered and there was blood on the broken glass. Id. at 261-262, 763 S.E.2d at 631-632. The homeowner testified he saw Bagwell shortly after the alleged burglary and Bagwell was bleeding from his face. Id. Bagwell was convicted of first-degree burglary and sentenced to twenty years' imprisonment. Id. at 263, 763 S.E.2d at 632.

At Bagwell's PCR hearing, he argued that his attorney was ineffective for not testing the DNA from the blood at the scene to compare to Bagwell's DNA. Id. Bagwell testified that his attorney never informed him that the state had blood samples to compare to at the time of his trial. Id. Additionally, Bagwell presented blood samples at his PCR hearing that showed his blood did not match the blood found at the scene. Id. Trial counsel testified at Bagwell's PCR hearing that he did not pursue further investigation into the DNA evidence because the state "decided not to follow through with testing." Id.

The Court of Appeals held Bagwell's attorney provided ineffective assistance of counsel because, "the State used the [bloody] glass as circumstantial evidence of Bagwell's guilt." Id. at 266, 763 S.E.2d at 634. Additionally, the Court of Appeals held that Bagwell was prejudiced by trial counsel's ineffective assistance because, "the only direct evidence linking Bagwell to the burglary was Armstrong's testimony that he saw Bagwell exiting the apartment through the glass door... [and] the State referenced the broken glass door several times at trial to corroborate Armstrong's testimony and infer Bagwell was inside the victims' apartment." Id. at 267, 763 S.E.2d at 634.


Petitioner testified that he pled guilty when he thought SLED conducted the DNA test, but he would have proceeded to trial if he knew it was a private company who tested the DNA. App. 57, ll. 13 – 19; App. 63, ll. 11 – 13. Therefore, Petitioner did not trust the accuracy of the DNA test conducted by the private company, and he wanted plea counsel to independently test the DNA in his case. Accordingly, the PCR court erred when it found that Petitioner did not “explain what he wanted plea counsel to investigate,” because Petitioner’s testimony at PCR explained what he wanted plea counsel to investigate. App. 82 – 94.

In the present case, plea counsel failed to conduct an adequate investigation, and he did not inform Petitioner that SLED had a third-party company conduct the DNA test. App. 57, ll. 13 – 19. Had Petitioner known that the DNA was tested by a private company he would have proceeded to trial. App. 63, ll. 5 – 13. Plea counsel also provided ineffective assistance of counsel when he failed to have the DNA independently analyzed because he saw “no reason” to have the DNA test results challenged. App. 57, l. 23 – 58, l. 13; App. 70, ll. 12 – 19.

Plea counsel’s failure to investigate constituted deficient performance that induced Petitioner to plead guilty while he had the wrong impression about the testing of the critical DNA evidence. App. 57, l. 13 – 58, l. 13; App. 63, ll. 11 – 13. Therefore, Petitioner’s guilty plea was not intelligently and voluntarily made, and it should be vacated. Hill, 474 U.S. at 56.

CONCLUSION

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



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of July, 2019.

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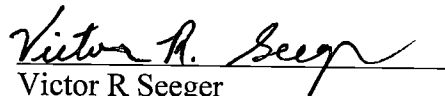
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph O. Morant 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 Perry H. Gravely, which was held on August 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 Joseph O. Morant.

Respectfully Submitted,



Victor R Seeger

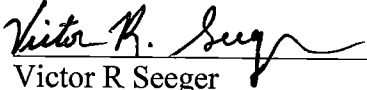
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st 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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Defense
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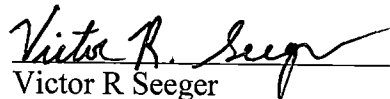
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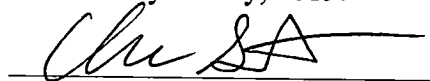
CERTIFICATE OF SERVICE

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 Joseph O. Morant, #184215, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 31st day of July, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of July, 2019.

 (L.S)

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