

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

RICHARD T. STRIBLING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000153

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Was trial counsel ineffective in failing to properly explain the Alford plea, rendering the plea involuntary?

STATEMENT

In December of 2015, the Spartanburg County Grand Jury indicted Petitioner, Richard T. Stribling for criminal sexual conduct with a minor first degree, indictment #2015-GS-42-5243. On July 10, 2017, Petitioner proceeded to jury trial before the Honorable J. Derham Cole. Matthew W. Shealy represented Petitioner at trial. Lindsey H. Overby, Jennifer A.J. Jordan and Barry Joe Barnette prosecuted the case. On July 13, 2017, after the State rested and after Judge Cole denied Petitioner's motion for a mistrial based on the State's failure to establish a reasonable chain of custody with regard to fetal tissue that was tested for DNA comparison, Petitioner entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Pursuant to a recommendation by the State, Judge Cole sentenced Petitioner to fifteen (15) years in prison and ordered electronic monitoring.

In February of 2018, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return in April of 2018. Petitioner filed an amendment to the PCR application in October of 2018. On November 9, 2018, an evidentiary hearing was held before the Honorable J. Mark Hayes. Rodney W. Richey represented Petitioner at the PCR hearing. Jordan A. Cox represented the State. In a written order filed January 29, 2019, Judge Hayes denied relief and dismissed the application. A timely notice of intent to appeal was served on January 30, 2019. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel was ineffective in failing to properly explain the Alford plea, rendering the plea involuntary.

After the State rested and after Judge Cole denied Petitioner's motion for a mistrial based on the State's failure to establish a reasonable chain of custody with regard to fetal tissue that was tested for DNA comparison, Petitioner entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). (App. pp. 330-358). The State agreed to recommend a sentence of fifteen years. (App. p. 341, lines 3-16). In the motion for a mistrial Petitioner strongly argued that the chain of custody was not adequate, specifically noting several missing links in the chain and unsealed storage of the fungible fetal tissue. (App. pp. 288-321). Judge Cole, however, denied the motion for a mistrial. (App. p. 317, line 25 – p. 318, 319, 320, 311, lines 1-3). The next day Petitioner entered the Alford plea.

Although the sentencing sheet notes Alford, (App. p. 358), counsel testified at the PCR hearing that Petitioner entered an Alford plea, (App. p. 421, line 22 – p. 422, lines 1-11), and the order of dismissal reflects that Petitioner entered an Alford plea, (App. p.439), the record of the plea shows that the judge never referred to the plea as being pursuant to Alford. Consistent with Alford, Petitioner did not admit guilt, as Petitioner testified at the PCR hearing. (App. p. 405, lines 6-11). During the PCR hearing Petitioner agreed that the State had evidence that could possibly lead to conviction. (App. p. 405, lines 6-9). During the plea however, the judge failed to question Petitioner about the strength of the State's evidence and failed to question Petitioner about whether the Alford plea was in his best interest. Petitioner did not enter a knowing and intelligent plea pursuant to Alford.

In the amendment to the PCR application Petitioner alleged, among other things, that, “The Applicant guilty plea was not knowing and intelligently made.” (App. p. 381). During the PCR hearing Petitioner testified:

And I asked him about the Alford plea. And he said we could do the Alford plea and maintain your innocence. Well by doing that, I had in my mind I was protecting my rights on appeal. I thought I’d still be able to appeal. And I didn’t realize my mistake until I was in front of Judge Cole and he was telling me that I couldn’t appeal – I couldn’t appeal.

And he kept asking me all the questions, did I understand it. And I was scared to say anything in front of Judge Cole because I was scared he’d give me 30 years anyway because it was a recommendation and not a negotiated sentence, I mean, plea.

(App. p. 399, lines 13-24). Petitioner additionally testified, “I didn’t know what to do. I didn’t know what to do at that time. I didn’t realize my mistake until I was already going through the guilty plea. And I didn’t – I didn’t know what to do. I didn’t want to plead guilty. If I could have backed up, I would have give it to the jury again.” (App. p. 400, lines 6-11). Petitioner later testified, “I was afraid that Judge Cole would give me the 30 years anyway. I mean, that’s because he’d had so much trouble with this trial back and forth, like the objections, all the sidebars. He’d done hollered at the solicitor about the breaks in the chain of custody. And I didn’t – I was scared he was fed up with the whole trial.” (App. p. 401, line 21 – p. 402, line 1).

When asked at the PCR hearing about advising Petitioner about the ability to appeal the denial of the mistrial motion following the Alford plea, counsel testified:

Well, I don’t recall my exact conversation with Mr. Stribling. I will tell you that my habit is that I tell any body who’s pleading guilty that an Alford plea is treated just like a guilty plea and the you waive any defenses that you were asserting at that guilty plea. And so he waives any defense in an Alford plea.

I told him that – or at least I recall telling him he couldn’t appeal it. Because if he had said – if he had said, no, I want to appeal it, I would have said, well, I got a jury, let me go and close because that was literally where we were was we were right at closing. I had prepared a limiting charge. I mean, we were ready to go.

(App. p. 421, line 25 – p. 422, lines 1-11). Additionally, during the plea, counsel advised the judge that he explained to Petitioner that by entering the plea he waived the ability to appeal the denial of the mistrial motion involving the inadequate chain of custody. (App. p. 349, line 21 – p. 350, lines 1-10). Petitioner does not contest that he was advised that by entering the Alford plea he waived the appellate issue with regard to the inadequate chain of custody. Counsel, however, did not advise that an Alford plea required Petitioner to intelligently conclude that the plea was in his best interest and that the State's evidence strongly supported guilt. The Alford plea was involuntary because neither the Judge nor counsel properly explained the Alford plea.

In the order of dismissal the PCR judge wrote:

The plea transcript clearly reflects Applicant was advised of all of his rights, including the guilty plea's limited right of appeal. Counsel testified credibly at the evidentiary hearing. Counsel testified he advised Applicant that the jury was likely to convict him, but he may have a viable appellate issue for the chain-of-custody evidence, specifically the denial of his motion for a mistrial. Counsel cautioned Applicant that although he could win on this appellate issue, it would result in a new trial where he would likely be convicted based upon the corrected chain-of-custody evidence. Applicant testified that he made the decision to enter his guilty plea, in part, based upon the offer of fifteen years. Applicant testified that he was scared of facing a thirty year sentence if convicted at trial. The plea transcript reflects a thorough colloquy with Applicant and his understandings of the plea proceedings. The record establishes Applicant had a full understanding of the consequences of his plea and the charges against him. Applicant has failed to meet his standard of proof. This allegation is denied and dismissed with prejudice.

(App. p. 448). The PCR judge erred. The plea colloquy fails to reference or explain the Alford plea. The record does not support a basis for the Alford plea. The fifteen year offer was only a recommendation and Petitioner testified that he did not say anything during the plea because he feared the judge would sentence him to thirty years. Counsel was ineffective in failing to properly explain the Alford plea. Petitioner was prejudiced by counsel's deficient performance.

In Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999), the South Carolina Supreme Court noted that, “The United States Supreme Court held in Alford that an accused may consent voluntarily, knowingly, and understandingly to the imposition of a prison sentence although unwilling to admit culpability, or even if the guilty plea contains a protestation of innocence, when the accused intelligently concludes that his interests require a guilty plea and the evidence strongly supports his guilt of the offense charged.” Gaines at fn. 1. Counsel was ineffective in failing to explain that the Alford plea required Petitioner’s intelligent conclusion that the plea was in his best interest and that the State’s evidence was strong. The judge failed to question Petitioner about the strength of the State’s evidence or whether the Alford plea was in his best interest.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001), the South Carolina Supreme Court wrote:

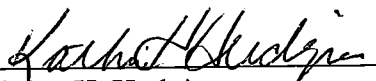
A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial.⁵ Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994). Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding. Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999).

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty 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, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

Counsel was ineffective in failing to properly explain the Alford plea. There is a reasonable probability that if counsel had explained that the Alford plea required Petitioner to intelligently conclude that the plea was in his best interest and that the State's evidence strongly supported guilt, Petitioner would have withdrawn the plea and completed the jury trial. Given Petitioner's testimony at the PCR hearing, the fact that the trial was nearly complete at the time of the plea and the fact that the fifteen year sentence was only a recommendation by the State that the Judge was not required to follow, Petitioner reasonably could have found that the plea was not in his best interest. The Alford plea was rendered involuntary by counsel's failure to properly explain the Alford plea. The plea colloquy fails to establish that Petitioner knowingly and intelligently entered the Alford plea when the judge failed to explain or even reference Alford, failed to ask Petitioner about the strength of the State's evidence and failed to ask Petitioner whether he believed the Alford plea was in his best interest.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of August, 2019.

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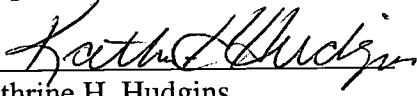
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richard T. Stribling states:

1. She is 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 J. Mark Hayes, which was held on November 9, 2018, 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 Richard T. Stribling.

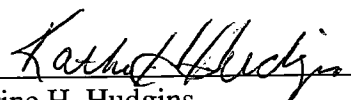
Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of August, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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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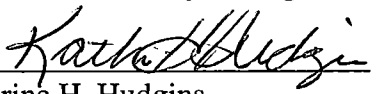
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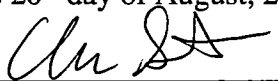
CERTIFICATE OF SERVICE

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 Johnny Ellis James, Jr., 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 T. Stribling, #263959, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 20th day of August, 2019.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of August, 2019.



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