STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable J. Mark Hayes, Circuit Court Judge

MICHAEL F. WIGGLETON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000166

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R Seeger
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel when he failed to inform Petitioner, prior to pleading guilty, that he could have challenged the legality of the pat down search during the traffic stop, where the police officers who conducted the search gave contradictory reasons as to why reasonable suspicion existed to search Petitioner's person, and where the rest of the evidence against Petitioner stemmed from that illegal search?

STATEMENT

During the December 2013 term, the Spartanburg County Grand Jury indicted Petitioner for trafficking cocaine, possession of a weapon during the commission of a violent crime, and possession of cocaine with intent to distribute within one-half mile of a school. App. 118 – 123.

On October 18, 2016, a hearing was held before the Honorable J. Derham Cole. App. 1. John Belton White, Jr., and Ryan Frederick McCardy represented Petitioner. Id. Derrick Bruce Bulsa represented the state. Id. The purpose of the hearing was for the state to explain its plea offer on the record[1]. App. 4, l. 1 – 12, l. 22.

On October 21, 2016, Petitioner pled guilty before the Honorable J. Derham Cole. App. 16. Ryan Frederick McCardy represented Petitioner. Id. Derrick Bruce Bulsa represented the state. Id.

Judge Cole accepted Petitioner's plea. App. 26, ll. 1 – 2. Petitioner was sentenced, pursuant to the negotiated sentence, to twelve years' imprisonment with thirty-months of home detention to run consecutive. App. 27, l. 21 – 28, l. 3.

On April 6, 2017, Petitioner filed a post-conviction relief (PCR) application alleging that plea counsel failed to advise Petitioner of his Fourth Amendment rights and of the potential defenses to the illegal search in his case. App. 30 – 36. On November 1, 2017, the state filed its Return. App. 37 – 44.

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[1] The state's plea offer was, "a twelve-year active Department of Corrections sentence with two and a half years of home detention to follow." Id. The 808 days of time served credit that Petitioner was entitled to would be applied to his prison sentence and not his home detention. Id. The state also said that if Petitioner deiced to go to trial, they would seek a life without parole sentence. Id. The state's offer expired by the end of the week. Id.

On November 7, 2018, Petitioner's PCR hearing was held before the Honorable J. Mark Hayes, III. App. 45. Rodney W. Richey represented Petitioner. Id. Jordan A. Cox represented the state. Id.

In an Amended Order of Dismissal filed on January 25, 2019, Judge Hayes denied Petitioner relief. App. 107 – 116. Judge Hayes found that Petitioner failed to show how his Fourth Amendment rights were violated in this case. App. 113. Moreover, he found that Petitioner did not show that he would have been successful on his Fourth Amendment challenge had he proceeded to trial. App. 113.

ARGUMENT

Plea counsel provided ineffective assistance of counsel when he failed to inform Petitioner, prior to pleading guilty, that he could have challenged the legality of the pat down search during the traffic stop, where the police officers who conducted the search gave contradictory reasons as to why reasonable suspicion existed to search Petitioner's person, and where the rest of the evidence against Petitioner stemmed from that illegal search.

Relevant Facts

On June 28, 2013, police officers pulled over Appellant because he, "turned left without using a turn signal," and he was allegedly speeding. App. 24, l. 15 – 25, l. 20. During the traffic stop, the officers gave two different accounts as to why they had reasonable suspicion to take Petitioner out of his car and pat him down. App. 24, ll. 22 – 25; App. 55, ll. 4 – 13. When the officers patted Petitioner down, "the found a bulge in his pocket" which, after reaching into his pocket, was found to be cocaine. App. 24, l. 25 – 25, l. 3. The traffic stop was within half a mile of a school. App. 25, ll. 9 – 11.

As a result of the drugs found during the traffic stop, a search warrant was obtained for Petitioner's residence. App. 25, ll. 15 – 20. Upon execution of the search warrant, police officers discovered more drugs inside Petitioner's residence. Id.

At Petitioner's PCR hearing he testified that the entirety of the state's case was derived from the search during the traffic stop. App. 52, l. 18 – 53, l. 6. Petitioner told the plea court he was satisfied with his attorney during the colloquy because he did not know of the potential challenges he could have raised regarding legality of the traffic stop search, until after he pled guilty. App. 64, l. 24 – 65, l. 11; App. 70, l. 18 – 71, l. 9.

Petitioner stated that when he and plea counsel spoke about his case, plea counsel would tell Petitioner that he had no chance at trial and no defenses to the charges against him. App. 53, l. 25 – 56, l. 16; App. 62, l. 17 – 63, l. 23. Had Petitioner known of the possible challenges to the searches he could have made, he would have proceeded to trial. App. 53, l. 1 – 24; App. 60, l. 2 – 61, l. 2.

Petitioner explained that his Fourth Amendment challenge to the traffic stop search would have been successful because the officers lacked reasonable suspicion to take him out of the car and search him. App. 53, l. 25 – 56, l. 16. Moreover, the arresting officers gave two different reasons for searching him. Id. One officer said they thought he had a weapon and the other said they thought Petitioner "placed something in the car." Id.

Plea counsel testified he discussed the Fourth Amendment issues with Petitioner in his case. App. 75, l. 16 – 77, l. 22. Plea counsel said that since there was no video or audio of the traffic stop, it was Petitioner's word versus the arresting officers' word. App. 78, l. 1 – 79, l. 1. Plea counsel stated that it was Petitioner's decision to plead guilty, but admitted that Petitioner wanted to go to trial "up until the last minute." App. 79, l. 15 – 80, l. 10.

The PCR court found that Petitioner failed to show how his Fourth Amendment rights were violated by the search during the traffic stop. App. 103. The court also stated that Petitioner did not show how he would have been successful had he challenged the legality of the search at trial. Id.

Discussion

Petitioner pled guilty without knowing his Fourth Amendment rights or that he could have challenged the legality of the searches in his case. App. 53, ll. 7 – 24. Had plea counsel properly explained the weaknesses of the state's case and the potential Fourth Amendment

challenges that Petitioner could have raised, he would have gone to trial. Id; App. 60, l. 2 – 61, l. 2.

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 v. Lockhart, 474 U.S. 52, 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." Hill, at 56. 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).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must

show that counsel's representation fell below an objective standard of reasonableness." Id. at 687 – 688. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The police pulled Petitioner over because he allegedly failed to use a turn signal and was speeding. App. 24, l. 15 – 25, l. 20. However, the officers gave conflicting accounts as to why they patted Petitioner down during the traffic stop. App. 53, l. 25 – 56, l. 16.

Plea counsel failed to explain to Petitioner that the police needed articulate a "reasonable suspicion that [Petitioner] was armed and dangerous," before patting him down. App. 57, ll. 12 – 15; App. 59, ll. 2 – 4. State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006) ("a police officer must have a reasonable suspicion that a person is armed and dangerous before conducting a pat down or frisk of that person. 'Reasonable suspicion' of weapons requires that a reasonably prudent person under the circumstances be warranted in the belief that his safety or that of others is in danger.") (internal citations omitted)

Moreover, plea counsel failed to explain that the United States Supreme Court extended that standard to "valid automobile stops for traffic violations." App. 59, ll. 2 – 4; Pennsylvania v. Mimms, 434 U.S. 106, 111-112 (1077). Thus, Petitioner would likely have been successful if he challenged the legality of the traffic stop pat down for lacking reasonable suspicion that Petitioner was armed and dangerous. App. 53, l. 25 – 56, l. 16

The search warrant for Petitioner's home was obtained and executed because of the drugs found on Petitioner during the traffic stop search. App. 52, l. 18 – 53, l. 6. Plea counsel never discussed with Petitioner that he could challenge the admissibility of the evidence found from

both of the aforementioned searches as fruit of the poisonous tree. App. 53, ll. 7 – 24; Wong Sun v. United States, 371 U.S. 471, 485 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.")

In the instant case, plea counsel's failure to explain to Petitioner that he could have challenged the admissibility of the drugs discovered if he proceeded to trial constituted deficient performance. App. 53, l. 25 – 56, l. 16. That deficient performance induced Petitioner to plead guilty and prejudiced Petitioner because he would not have pled guilty if plea counsel had explained that he could have challenged the drug evidence discovered after the illegal search of Petitioner during the traffic stop. App. 53, ll. 7 – 24; App. 55, ll. 14 – 24; App. 60, l. 2 – 61, l. 2; Hill, at 57 – 59.

CONCLUSION

Based on 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 27th day of August, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael F. Wiggleton 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. Mark Hayes, which was held on November 7, 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 Michael F. Wiggleton.

Respectfully Submitted,

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of August, 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 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 Michael F. Wiggleton, #167168, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 27th day of August, 2019.

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 27th day of August, 2019.

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