

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

SASHA D. THOMAS,

PETITIONER

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S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000998

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT 4

CONCLUSION 8

PETITION TO BE RELIEVED AS COUNSEL 9

ISSUE PRESENTED

Did the PCR court err in denying Petitioner relief, where plea counsel failed to challenge the sufficiency of the indictment, where Petitioner was indicted for felony DUI resulting in great bodily injury, where the injury was a broken collarbone, and where plea counsel failed to consult with a doctor to decipher the medical records?

STATEMENT

Petitioner was indicted for felony DUI resulting in great bodily injury and for driving under suspension by a Spartanburg County grand jury on or about March 25, 2018. App. 108 – 109. She pleaded guilty as indicted before the Honorable J. Derham Cole on December 15, 2016. App. 1; App. 4 ll. 17 – 23; App. 6 ll. 13 – 15. Barry Barnett prosecuted this matter, and Andrea Price represented Petitioner.

The facts presented at the guilty plea by the solicitor were as follows: On or about December 30, 2015 Petitioner was driving a 2007 Chrysler and allegedly collided with a 2013 Chevy Impala being driven by William Miller. App. 14 l. 3 – App. 15 l. 6. Petitioner’s blood-alcohol reading was .142. Id. Miller’s collarbone was broken in four places. App. 13 ll. 2 – 20. According to the State, Petitioner told law enforcement that “she drank every day all day and also used marijuana once a week.” App. 15 ll. 2 – 11.

Judge Cole sentenced Petitioner to a period of fifteen years’ incarceration and ordered that she pay a fine of \$10,000, suspended upon the service of ninety months and payment of \$5,100 followed by five years’ probation. App. 32 l. 24 – App. 33 l. 17. She received thirty days’ incarceration concurrent for the driving under suspension charge. Id.

On or about June 27, 2017, Petitioner filed an application for post-conviction relief. App. 41 – 50. It contained allegations of ineffective assistance of counsel and averred that her plea was involuntary, including claims that counsel failed to call witnesses, prepare a trial strategy, or challenge the sufficiency of a broken collarbone to satisfy the great bodily injury requirement. Id. The State filed a Return and Motion for a More Definite Statement on or about December 12, 2017. App. 51 – 58.

An evidentiary hearing took place before the Honorable Grace Knie on February 2, 2018. App. 59. Susannah Ross represented Petitioner, and Valerie Giovanoli appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.

At the conclusion of the hearing, Judge Knie took the matter under advisement. App. 92 l. 20 – App. 93 l. 12. By way of a written Order of Dismissal, Judge Knie denied relief on or about May 19, 2018. App. 97 – 106. She found that Petitioner failed to carry her burden of proof and did not establish any ineffectiveness of counsel.

This petition follows.

ARGUMENT

The PCR court erred in denying Petitioner relief, where plea counsel failed to challenge the sufficiency of the indictment, where Petitioner was indicted for felony DUI resulting in great bodily injury, where the injury was a broken collarbone, and where plea counsel failed to consult with a doctor to decipher the medical records.

As noted at the outset of the evidentiary hearing, one of Petitioner's primary challenges was "whether a broken collarbone rises to the level of great bodily injury," which is defined as "substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of [any bodily member] or organ." App. 63 ll. 13 – 22; S.C. Code Ann. § 56-5-2945(B).

PCR counsel for Petitioner cited S.C. Code Ann. § 16-3-600 which defines great bodily injury and moderate bodily injury and argued that Miller's injuries fell into the latter category. App. 69 ll. 14 – 22. Under that statute, moderate bodily injury is defined as:

[P]hysical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive care.

S.C. Code Ann. § 16-3-600(A)(2).

Counsel did not consult with a doctor to review the discovery in this matter which included the medical reports. App. 91 l. 25 – App. 92 l. 3. Additionally, she did not object to the admissibility of Petitioner's statements that she smoked marijuana or drank alcohol frequently. App. 90 ll. 5 – 6. According to Petitioner, counsel never discussed with the contents of her

blood-alcohol sample. App. 687 l. 23 – App. 68 l. 24. Furthermore, although Petitioner met with counsel twice, Petitioner never received a copy of her discovery materials. Id.

Petitioner correctly asserted that plea counsel was ineffective, because counsel could have challenged the sufficiency of the evidence against Petitioner requested a lighter sentence based on the injury. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Id. at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing Strickland v. Washington, supra). In this regard, plea counsel attempted to “work out a deal” with the solicitor but “Mr. Barnette was not amenable.” App. 74 l. 23 – App. 75 l. 1. Counsel did not consult with an expert in order to gain an understanding of the severity of Miller’s injuries.

A felony driving under the influence charge requires proof of three elements: (1) the actor drives a vehicle while under the influence of alcohol or drugs; (2) the actor does an act forbidden by law or neglects a duty imposed by law; and (3) the act or neglect proximately causes great bodily harm or death to another person. State v. Dantonio, 376 S.C. 594, 658 S.E.2d 337 (Ct. App. 2008).

The South Carolina Court of Appeals recently held that trial counsel's failure to object to the State's forensic toxicologist's testimony exceeding his presented qualifications amounted to deficient performance. Kranchick v. State, 418 S.C. 435, 793 S.E.2d 314 (Ct. App. 2016). In that case, the court found evidence in the record to support the PCR court's determination that "the State presented insufficient qualifications for the toxicologist to testify concerning the mental or physical effects of drugs on a person." Id. at 439, 793 S.E.2d 316-7.

Similarly, plea counsel in this matter failed to hold accountable the State's assertion that Petitioner caused great bodily injury. There was no investigation by a doctor who could decipher the medical records. Prior to the plea, counsel did not contest the validity of the charge or negotiate with the solicitor based upon the discrepancy between the actual injuries and the definition of great bodily injury. Likewise, counsel failed to suppress any admission by Petitioner that she consumed alcohol frequently and/or smoked marijuana occasionally. Such performance is deficient; Petitioner could have received a better plea with a lesser maximum sentence.

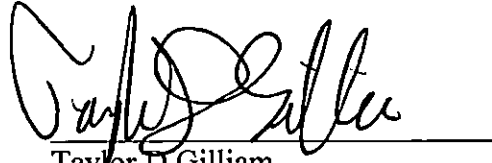
"The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

Prejudice in Petitioner's case manifested itself in the lengthy sentence she received based upon the statutory sentencing scheme. Had counsel challenged the notion that Petitioner caused great bodily injury, Petitioner may have been sentenced to a less time or she may have been

charged under S.C. Code Ann. § 56-5-2930 for operating a motor vehicle while under the influence of alcohol. Her potential maximum sentence would have been significantly less.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant her petition for writ of certiorari to allow full briefing on this issue, reverse the charges against her, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sasha D. Thomas 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 Grace Gilchrist Knie, which was held on February 2, 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 Sasha D. Thomas.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of November, 2018.

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."



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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 Jordan Cox, 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 Sasha D. Thomas, #329945, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 20th day of November, 2018.



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of November, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: 05/12/2027