

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable D. Craig Brown, Circuit Court Judge

JOHNNY RAY WALKER, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000176

JOHNSON PETITION FOR WRIT OF CERTIORARI

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SEP 26 2019

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation where it was undisputed that counsel advised petitioner to plead guilty or else petitioner would get the maximum sentence at trial, since counsel's advice resulted in a plea that was not knowingly and voluntarily entered?

STATEMENT

On May 5, 2016, a Marion County Grand Jury indicted petitioner for the offenses of felony DUI involving death and felony DUI involving great bodily injury. App. 92 – 93. Petitioner had been driving to the beach with friends, one of whom died when petitioner's car collided with another car. App. 6, l. 15 – 7, l. 4. In addition to the death of petitioner's passenger, the driver of the other car was seriously injured, and petitioner was seriously injured. App. 6, ll. 8-17. A blood test showed that petitioner's blood alcohol content was "20/100ths of one percent" or ".20." App. 7, ll. 17-23.

On May 12, 2017, petitioner appeared before the Honorable Michael G. Nettles. App. 1. Henry Anderson, Jr., had been appointed to represent petitioner and Kevin Hope represented the state. App. 1; App. 53, ll. 1-5. Petitioner pleaded guilty as indicted, with a negotiated plea agreement that the sentences were to be run concurrently. App. 4, ll. 12-22; App. 12, ll. 1-7.

The court sentenced petitioner to concurrent terms of eight years imprisonment for the felony DUI involving death, and twelve years imprisonment for the felony DUI involving great bodily injury. App. 23, ll. 11-25. Petitioner was also fined ten thousand and one hundred dollars, and five thousand and one hundred dollars, respectively. App. 23, ll. 11-25. No direct appeal was taken.

On April 9, 2018, petitioner filed an application for post-conviction relief (PCR) and alleged ineffective assistance of counsel. App. 28 – 34. On June 22, 2018, the state made its return. App. 35 – 40. A hearing was held on the matter before the Honorable D. Craig Brown on November 7, 2018. App. 41. Petitioner was represented by Jonathan Waller and the state was represented by Samuel Key. App. 41. At the PCR hearing, the court heard from petitioner and from his plea counsel. App. 42.

Petitioner testified that when he met with counsel, counsel advised him to plead guilty or else he would be sentenced to the maximum term of imprisonment at trial. Petitioner said counsel “told me if I took it to trial . . . that we would go to trial the following week and it would be in front of a judge that had their kid killed by a drunk driver so I wouldn’t have much of a chance so I would get twenty-five (25) years.” App. 57, ll. 3-8. PCR counsel asked petitioner to “tell the judge why you went from wanting a trial to what changed for you ultimately to plead guilty,” and petitioner responded, “The fact that I would get twenty-five (25) years if I tried to fight for not guilty.” App. 57, ll. 9-13. Plea counsel did not dispute this testimony.

The PCR court denied relief, and an order of dismissal was filed on January 7, 2019.¹ App. 79, ll. 21-24; App. 82 – 90. In its order of dismissal, the court noted that petitioner “testified that he spoke with his plea counsel the week before the case was scheduled for trial. [Petitioner] stated that during this discussion plea counsel told him, if he was convicted at trial, he would get the maximum sentence of twenty-five years. [Petitioner] stated that after this discussion, he asked plea counsel to enter into plea negotiations.”² App. 85.

This petition for writ of certiorari follows.

¹ The PCR court found petitioner’s testimony credible that he “did not want his convictions overturned, did not want a new plea deal, and did not want a trial.” App. 87. The order stated that petitioner failed to establish prejudice because he “never testified he would not have pled guilty.” App. 87.

² Despite acknowledging this testimony, the order of dismissal did not address what effect this advice had on the knowing and voluntary nature of petitioner’s pleas.

ARGUMENT

The PCR court erred when it found counsel provided effective representation where it was undisputed that counsel advised petitioner to plead guilty or else petitioner would get the maximum sentence at trial, since counsel's advice resulted in a plea that was not knowingly and voluntarily entered.

Counsel provided deficient representation when he advised petitioner that he must plead guilty because he would be punished for exercising his right to trial. Because petitioner believed counsel's advice—that he must plead guilty to avoid being punished for going to trial—his plea was not knowingly, voluntarily, and intelligently tendered.

The court is constitutionally prohibited from imposing a so-called “trial tax” in sentencing a defendant. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .” U.S. CONST. amend. VI. “When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion.” *Castro v. State*, 417 S.C. 77, 83, 789 S.E.2d 44, 47 (2016).

In *Castro*, this Court rejected the idea that the trial court could sentence one defendant more harshly than another simply because he did not “cooperate” or “acknowledge [his] responsibility” by pleading guilty. *Id.* at 81, 789 S.E.2d at 36. This Court found the trial judge's consideration of the defendant's decision to exercise his right to a jury trial in sentencing was improper. *Id.* at 83, 789 S.E.2d at 47. “[D]espite the fact that the trial judge stated he was not ‘punishing’ [the defendant] for choosing to exercise his right to a jury trial, the trial judge unequivocally *considered* [the defendant's] decision to reject a plea offer and proceed to trial as a factor in sentencing [him]. This was improper.” *Id.* at 84, 789 S.E.2d at 47 (emphasis in

original). *Accord Davis v. State*, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999) (court's sentencing consideration of defendant's decision to proceed with trial was improper and his counsel's failure to object was reversible error); *State v. Hazel*, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995) (consideration of defendant's exercise of jury trial right when declining to sentence under YOA was an abuse of discretion).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

“In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case.” *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). “[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill*, 474 U.S. at 58.

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) that counsel's representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty but would have insisted on going to trial.

Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997).

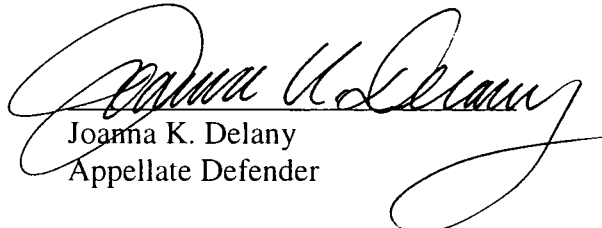
To establish prejudice when challenging a guilty plea, a PCR applicant must prove “there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled

guilty, but would have gone to trial.” *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). “The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.” *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). Here, petitioner said he pleaded guilty because counsel told him he would receive the maximum sentence if he “tried to fight for not guilty.” App. 57, ll. 9-13. Plea counsel did not dispute this testimony.

Counsel’s representation fell below an objective standard of reasonableness since the law was clear that a defendant may not be punished for exercising his right to trial. Petitioner established prejudice when he testified that he pleaded guilty based on this erroneous advice.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable D. Craig Brown, Circuit Court Judge

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PETITIONER

V.

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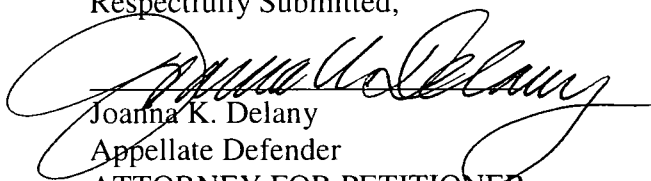
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny Ray Walker 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 D. Craig Brown, which was held on November 7, 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 Johnny Ray Walker.

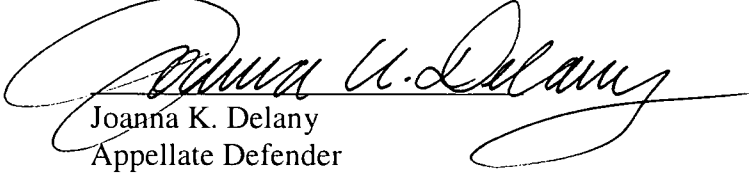
Respectfully Submitted,


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of September, 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."


Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

This 26th day of September, 2019.

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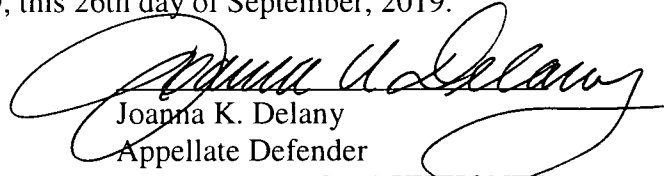
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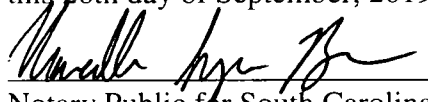
RESPONDENT

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 Samuel Key, 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 Johnny Ray Walker, #372580, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 26th day of September, 2019.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of September, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028