

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

Honorable George M. McFaddin, Circuit Court Judge

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S.C. SUPREME COURT

CHRISTOPHER COOPER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000112

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
Appellate Defender

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

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The PCR court erred where it found counsel provided effective representation, where there was evidence counsel discussed neither the element of intent nor the defense of mere presence, since petitioner explained that while he was present outside the home he did not know a crime was afoot, and where counsel’s deficient performance resulted in a plea that was not knowingly, voluntarily, and intelligently tendered.....5

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation, where there was evidence counsel discussed neither the element of intent nor the defense of mere presence, since petitioner explained that while he was present outside the home he did not know a crime was afoot, and where counsel's deficient performance resulted in a plea that was not knowingly, voluntarily, and intelligently tendered?

STATEMENT

On June 9, 2016, a Florence County Grand Jury indicted petitioner for first degree burglary, two counts of receiving stolen goods, and three counts of financial transaction card fraud. App. 106 – 115. On June 12, 2017, petitioner appeared before the Honorable D. Craig Brown for a plea hearing where he entered a negotiated plea of guilty pursuant to *North Carolina v. Alford*¹ to the lesser-included offense of second degree burglary, violent; and a negotiated plea of guilty to shoplifting, third or subsequent property offense.² App. 1; App. 5, l. 22 – 6, l. 14.

The state alleged that petitioner and another man burglarized a home and were stealing guns when they were confronted by the homeowner's father, who pointed a shotgun at the men and told them to leave; whereupon they left. App. 12, l. 21 – 14, l. 15. A baseball cap found outside the house contained petitioner's DNA, and the father picked petitioner out of a photographic lineup as one of the men he confronted in the house. App. 14, l. 16 – 15, l. 15. Stolen property was found in the home of petitioner's girlfriend. App. 15, l. 17 – 16, l. 7.

During the plea, petitioner disagreed with the facts recited by the solicitor and he explained that he never entered the home. App. 17, ll. 16-20. After a short break, the plea continued as an *Alford* plea. App. 18, l. 15 – 20, l. 12. The following exchange occurred:

THE COURT: Mr. Cooper, do you understand that even if you deny having gone in the house, you admit you were there?

THE DEFENDANT: Yes, sir.

THE COURT: You admit you knew what was going on? Either you do or you don't.

THE DEFENDANT: Yes, sir.

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

² The remaining charges were dismissed by nolle prosequi. App. 6, ll. 1-14; App. 46, l. 25 – 47, l. 3.

App. 20, ll. 20-25.

The court accepted the plea. When petitioner addressed the court prior to sentencing, he said, inter alia, “I never knew **just by being there** you could, you know, get the same thing as your co-defendant.” App. 25, ll. 18-20 (emphasis added). The court imposed negotiated sentences of: thirteen years for second degree burglary, violent; and time served for shoplifting, third or subsequent property offense. App. 27, ll. 15-22.

On August 11, 2017, petitioner filed an application for post-conviction relief (PCR). App. 30 – 36. The state made its return on December 17, 2017. App. 37 – 42. A hearing was held on the matter on April 8, 2018, before the Honorable George M. McFaddin. App. 43. Jonathan Waller represented petitioner and Lindsey McAllister represented the state. App. 43.

Petitioner testified that he went to the house for what he believed was a lawful purpose, but he said he never went inside. App. 57, ll. 6-12; App. 58, ll. 9-10. Petitioner explained, “I never knew anything about no intentions of—you know, I didn’t break in no house or nothing.” App. 59, ll. 6-8. He offered that his hat was knocked off of his head by his co-defendant. App. 59, ll. 3-6.

Petitioner said he explained his side of the story to his counsel, but that counsel did not explain the element of entry with intent to commit a crime. App. 60, l. 7 – 61, l. 4. Petitioner revealed that counsel never discussed the defense of mere presence with him. App. 61, ll. 12-21. Thus, petitioner believed he must plead guilty to the charges because he had no defense. App. 61, ll. 22-24.

When he was cross-examined by the state, petitioner also clarified his statements to the plea judge. He said that when asked by the plea judge whether or not he knew a crime was afoot, when he said, “Yes, sir,” he meant that he did not know.

Q. He asked you [if] you admit you knew what was going on, either you do or you don't, and you answered, yes, sir?

A. Yes, sir. I didn't know.

App. 67, l. 18 – 68, l. 15.

Conversely, counsel testified that when he met with petitioner, he reviewed the element of criminal intent. App. 76, ll. 11-14. Counsel also claimed he discussed the defense of mere presence with petitioner, but could not recall the conversation, although he claimed the matter “would have come up” during a discussion about the hand of one, hand of all doctrine.³ App. 84, ll. 7-19.

In summation, PCR counsel argued that petitioner was “deprived of” a meaningful choice of whether to stand trial or plead guilty due to counsel’s failure to explain the defense of mere presence and the element of intent. App. 89, ll. 2-25.

Nevertheless, on January 11, 2019, the PCR court issued an order of dismissal. App. 95 – 105. The order stated that the PCR court found that counsel’s “notes reflect he and [petitioner] discussed [petitioner’s] version of the facts, the elements of the charges and the State’s burden of proof, possible defenses, and [petitioner’s] option to proceed with a trial or enter a guilty plea.” App. 103. The order also stated the court found the plea colloquy was determinative and petitioner’s “decision to plead guilty was freely and voluntarily made.” App. 103.

This petition for writ of certiorari follows.

³ Counsel also claimed that petitioner admitted to him that he did know his co-defendant intended to commit a crime. App. 81, ll. 7-12.

ARGUMENT

The PCR court erred where it found counsel provided effective representation, where there was evidence counsel discussed neither the element of intent nor the defense of mere presence, since petitioner explained that while he was present outside the home he did not know a crime was afoot, and where counsel's deficient performance resulted in a plea that was not knowingly, voluntarily, and intelligently tendered.

Here, petitioner's testimony provided the PCR court with evidence that he was unaware the state would be required to prove criminal intent and he was unaware he had a defense at trial—mere presence. Counsel's failure to ensure petitioner understood these matters was deficient performance. Therefore, the PCR court erred when it found petitioner's plea was knowing and voluntary.

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.

Before a guilty plea may be accepted, it is required “that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.” *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001). “[A] defendant entering a guilty plea must be aware of the nature and **crucial elements** of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.” *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) (emphasis in original). Here, counsel’s performance was deficient because he failed to ensure petitioner understood a crucial element of burglary—criminal intent.

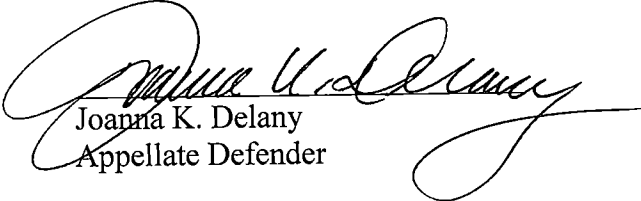
Moreover, “[m]ere presence at the scene is not sufficient to establish guilt as an aider or abettor.” *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987). “Mere presence at the scene of a crime is insufficient to convict one as a principal on the theory of aiding and abetting.” *State v. Zeigler*, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005). Counsel’s performance was also deficient here, since he failed to ensure petitioner knew he had a defense at trial—the defense of mere presence.

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, as PCR counsel correctly noted, because petitioner was “deprived of [the] choice” of whether to plead guilty or stand trial due to counsel’s ineffective assistance, he was prejudiced.

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 14th day of November, 2019.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Cooper 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 George M. McFaddin, which was held on April 3, 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 Christopher Cooper.

Respectfully Submitted,

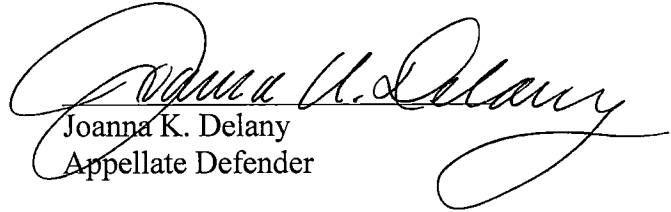


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of November, 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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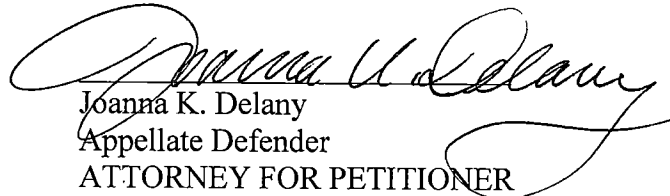
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CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Christopher Cooper, at 206 Downs Dr., Timmonsville, SC 29161, this 14th day of November, 2019.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2019.

Mary Allgire (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.