

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

JASON LEAPHART

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000981

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in denying relief, where plea counsel failed to perform an investigation in his case, where an investigation would have led to the discovery of a witness listed in the incident report who testified favorably at the evidentiary hearing, where plea counsel was unable to perform an investigation without transferring Petitioner's case to another attorney?

STATEMENT

In July 2017, Petitioner was charged in Lexington County for unlawful neglect of a child and domestic violence in the third degree. App. 108 – 111. He appeared before the Honorable William P. Keesley for a plea on July 25, 2017. App. 1. Hallie Willm represented Petitioner; La’Jessica Stringfellow appeared on behalf of the state. Petitioner waived presentment to the grand jury. App. 11 ll. 4 – 9. The facts as alleged by the assistant solicitor were as follows:

On May 13, 2017, Petitioner’s girlfriend called the police and claimed Petitioner “became angry and punched her in the eye.” App. 7 l. 24 – App. 8 l. 20. After a third individual intervened in an attempt to break up the altercation, Petitioner supposedly pushed his girlfriend, who was holding their six-month-old child. Id. As Petitioner’s girlfriend fell, the child supposedly suffered an injury to his eye and head. Notably, Petitioner’s girlfriend neither returned any of the calls from the solicitor’s office nor responded to any of their letters. Id. After the factual recitation, Petitioner responded in the affirmative when asked by the plea judge if he was guilty of the charges. App. 9 ll. 11 – 13.

The plea judge found a factual basis for the plea and noted that Petitioner’s decision to plead was knowingly, voluntarily, and intelligently made. App. 11 ll. 4 – 9. Judge Keesley accepted Petitioner’s plea. App. 20 ll. 22 – 23. As a result of the plea, Petitioner’s probation on a prior offense was revoked in full. App. 11 l. 10 – App. 17 l. 4; App. 21 ll. 3 – 13.

On the domestic violence charge, Petitioner received a sentence of time served. App. 20 l. 22 – App. 21 l. 2. On the unlawful neglect charge, Petitioner was sentenced to ten years’ incarceration consecutive to the revoked probation time. App. 21 l. 14 – App. 22 l. 11.

Petitioner filed an application for post-conviction relief on September 1, 2017. App. 24 – 35. It contained allegations of ineffective assistance of counsel. The state made its Return on or

about November 8, 2017. App. 36 – 43. An amended application for post-conviction relief was filed on January 14, 2019. App. 44 – 45. The amendment added the claim that plea counsel failed to interview McCurry.

An evidentiary hearing occurred on April 1, 2019 before the Honorable Walton J. McLeod, IV. App. 46. Ashley McMahan represented Petitioner; Megan Jameson appeared on behalf of the state. A witness named Tyler McCurry, Petitioner, plea counsel, and Petitioner's investigator testified at the hearing. Petitioner introduced three exhibits at the hearing: a statement from Tyler McCurry and two law enforcement incident reports. App. 84 – 93. The PCR judge took the matter under advisement. App. 82 ll. 6 – 7.

An Order of Dismissal was filed on June 4, 2019. App. 94 – 105. In denying relief, the PCR judge found McCurry's testimony lacked credibility and thereby prevented a finding of deficiency. App. 104.

This petition follows.

ARGUMENT

The PCR court erred in denying relief, where plea counsel failed to perform an investigation in his case, where an investigation would have led to the discovery of a witness listed in the incident report who testified favorably at the evidentiary hearing, where plea counsel was unable to perform an investigation without transferring Petitioner's case to another attorney.

Relevant facts

The communication between Petitioner and plea counsel leading up to the plea was minimal. There was one letter, one phone call, and one visit. App. 56 ll. 8 – 25. Plea counsel noted that did not represent Petitioner for very long. App. 57 ll. 1 – 16. Had she investigated McCurry and discovered that he was willing to recant and clarify that he never saw Petitioner shove his girlfriend, Petitioner would have gone to trial. App. 61 l. 20 – App. 62 l. 24.

At the evidentiary hearing, Tyler McCurry authenticated a handwritten note that he created on December 12, 2017, approximately five months after Petitioner pleaded guilty. App. 51 l. 6 – App. 52 l. 3. The note, marked as Applicant's Exhibit 1, denounced McCurry's prior claim that Petitioner assaulted his girlfriend. App. 84 – 85. It plainly stated that McCurry never saw Petitioner push her or endanger the child. Id. The written note suggested that the entire situation was manufactured by Petitioner's girlfriend because she wanted Petitioner "out of her life." Id.

Petitioner described the day in question, May 13, 2017. App. 54 l. 12 – App. 56 l. 1. Relying on the two incident reports marked as Applicant's Exhibit 2 and Applicant's Exhibit 3, Petitioner testified that law enforcement was called twice in the same day after Petitioner's girlfriend asserted that she and the child had been assaulted. The first complaint implicated

another of her brothers, Jerry Hall, Jr. App. 88. According to the incident report, Hall “jumped on her.” Id. He later punched her for calling the police. Id.

Plea counsel Willm explained that she began representing Petitioner when he advised his original attorney, Jael Gilreath, that he wanted to plead guilty. App. 66 l. 15 – App. 67 l. 5. As a result, she began representing him. Id. Plea counsel’s position at the time was to try and reduce the number of people in the jail:

At that time, I was working as - - well, we have the jail attorneys, kind of what they call it, in the office. It’s - - basically, it was a position created to try and help reduce the - - we had too many people in the jail. And some folks can’t just make bond and they don’t want a jury trial; they want to waive their rights to a jury trial and kind of move a little bit more expediently through the system.

And so that was my job at that time was to try to, after the attorneys identified those folks, to go and meet with them and try to get their case resolved quicker for them.

App. 66 l. 15 – App. 67 l. 2.

After Petitioner told Gilreath that he wanted to plead “as soon as possible,” plea counsel took over representation, beginning on June 6, 2017. App. 67 ll. 20 – 23. She confirmed Petitioner’s contention that the two only met once. App. 68 ll. 24 – App. 68 l. 9. When she discussed the evidence in the case, Petitioner disputed the allegations leveled by his girlfriend. App. 70 ll. 1 – 18.

Regarding the contention at the PCR hearing, plea counsel could not recall if Petitioner requested that she investigate McCurry. App. 71 ll. 6 – 10. Remarkably, plea counsel would have been unable to perform an investigation if Petitioner had asked for one; his case would have had to be transferred back to his original attorney:

Part of my speech that I give - - that I would give when I [had] this particular position in my office was that if they wanted further investigation or things to be followed up on, that I wouldn’t be able to do that; it would be transferred back to their original attorney.

I was kind of, you know, take where we are - - take-the-case-where-[we]-are type of situation and go from there. But if there were - - he wasn't committed to that route. He could, obviously, always return - - I could always return it to the original attorney and they could do a full workup, because he has the constitutional right to those investigations.

App. 71 l. 11 – App. 72 l. 1. Petitioner wrote a letter to plea counsel's supervisor regarding discovery. App. 73 ll. 9 – 18. He complained that he had not yet received discovery. Id. Plea counsel testified that she received discovery “a few days before” Petitioner's letter was sent and that she provided it to him soon thereafter. Id.

Discussion

Petitioner correctly asserted that plea counsel was ineffective, because she did not investigate McCurry. 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, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, plea counsel failed to investigate Petitioner's case. McCurry's testimony, as outlined above, outright contradicts the assertion that Petitioner harmed his girlfriend or his child. This is not a claim that

plea counsel failed to *fully* investigate Petitioner's case; counsel, by her own admission, was unable to undertake *any* sort of investigation.

"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). As evident from Petitioner's testimony, the prejudice in his case manifests itself in his plea which was made without full knowledge of the evidence that was going to be presented at trial. Had Petitioner been aware of the full nature of witness statements, he indicated that he would have decided to go to trial rather than plead guilty. Further, as admitted by the assistant solicitor, Petitioner's girlfriend was not cooperating with their prosecution. If she was unwilling to attend Petitioner's trial, he likely would not have been convicted.

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). This Court has held that, "in addition to the requirements of Boykin, 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." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602

(1980)). A plea made in ignorance of its direct consequences is entered in ignorance and is invalid. Hazel, 275 S.C. 392, 271 S.E.2d 602.

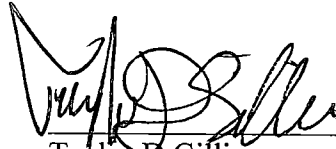
When a defendant is represented by counsel during the plea process and enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Shirley v. State, 306 S.C. 241, 411 S.E.2d 215 (1991). 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) there is a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill at 56-57, 106 S.Ct. at 369, 88 L.Ed.2d at 208-09.

“That the plea be voluntary is not only a requirement of due process, but a premise of the defendant's meaningful participation in the plea process.” United States v. Savinon-Acosta, 232 F.3d 265, 268 (1st Cir. 2000) (citing McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)).

Petitioner was unaware of McCurry's recantation and therefore pleaded guilty without a full understanding of the facts in his case. It was not until after he pleaded guilty that he realized McCurry was able to exonerate him. Had plea counsel investigated all of the witnesses listed in the incident report, she would have encountered McCurry's name and thereby been aware of what his testimony would have been at trial. However, because plea counsel never performed an investigation for Petitioner, he pleaded guilty without knowing the full extent of evidence that would have been elicited at a potential trial in his case.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against his, 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 9th day of March, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Honorable Walton J. McLeod, IV, Circuit Court Judge

JASON LEAPHART

PETITIONER

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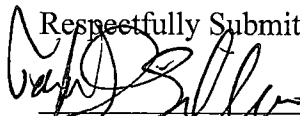
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Carey Leaphart 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 Walton J. McLeod, IV, which was held on April 1, 2019, 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 Jason Carey Leaphart.

Respectfully Submitted,



Taylor D Gilliam

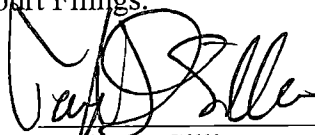
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of March, 2020.

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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ATTORNEY FOR PETITIONER

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JASON LEAPHART

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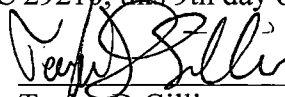
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CERTIFICATE OF SERVICE

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 Megan Harrigan Jameson, 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 Jason Carey Leaphart, #345183, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of March, 2020.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of March, 2020.

Marcy Allgire (L.S)
Notary Public for South Carolina

My Commission Expires: May 12, 2021.

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