

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

GERRY BRENT JAMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001498

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Was the guilty plea rendered involuntary by the State's failure to disclose evidence in a timely manner?

STATEMENT

In July of 2015, the Richland County Grand Jury indicted Petitioner, Gerry Brent James, for malicious injury to real property¹ and safecracking, indictments #2015-GS-40-3578, 3579. (App. pp. 35-38). On July 20, 2016, Petitioner appeared before the Honorable L. Casey Manning and pled guilty to the malicious injury charge and the safecracking charge. Additionally, Petitioner waived grand jury presentment and pled guilty to shoplifting third offense, indictment #2016-GS-40-3962. (App. pp. 39-40). Tivis C. Sutherland, IV, represented Petitioner at the guilty plea. Joseph L. Leventis represented the State. Judge Manning sentenced Petitioner to five (5) years for the malicious injury charge, nine (9) years concurrent for safecracking and nine (9) years concurrent for the shoplifting charge. (App. pp. 41-43). Petitioner did not appeal the sentence or conviction.

On June 21, 2017, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 44-48). The State filed a return on June 18, 2018. (App. pp. 49-53). Petitioner filed an amended application on November 30, 2018. (App. pp. 54-55). On December 5, 2018, an evidentiary hearing was held before the Honorable Jocelyn Newman. Jonathan D. Waller represented Petitioner at the PCR hearing. Lindsey A. McCallister represented the State. In a written order filed September 5, 2019, Judge Newman denied relief and dismissed the

¹ One side of the indictment lists the charge as malicious injury to tree, house; trespass upon real property. (App. p. 35). The body of the indictment, however, lists malicious injury to real property and specifically describes the property as an ATM. (App. p. 36). The prosecutor at the guilty plea, however, described the offense as malicious injury to personal property. (App. p. 3, lines 16-17). The indictment lists the offense as a violation of S.C. Code §16-11-520, the real property statute. (App. pp. 35-36). The sentencing sheet lists S.C. Code §16-11-520 in the top right-hand corner but then lists the charge to which Petitioner pled guilty as malicious injury to personal property, S.C. Code §16-11-510. (App. p. 41). There was no objection to the indictment.

application. A timely notice of intent to appeal was served on September 6, 2019. This petition for writ of certiorari follows.

ARGUMENT

The guilty plea was rendered involuntary by the State's failure to disclose evidence in a timely manner.

In the amended application for relief Petitioner alleged that counsel was ineffective “for failing to properly investigate the facts and circumstances surrounding the allegations against Applicant, thus rendering Applicant’s plea unknowingly and involuntarily entered into.” (App. p. 54). Additionally, Petitioner alleged that counsel was ineffective “for failing to conduct adequate amount of meeting with Applicant to review discovery that Applicant would know of the allegations against him, thus rendering Applicant’s plea unknowingly and involuntarily entered into.” (App. p. 54).

During the PCR hearing Petitioner testified that the day before his case was scheduled to go to trial the State provided his lawyer with new photographs. (App. p. 66, lines 15-22; p. 70, line 4 – p. 71, lines 1-19). Plea counsel confirmed at the PCR hearing that he received more photographs from the State very close to the time of trial. (App. p. 87, line 23 – p. 88, lines 1-4). Counsel testified that the new photos destroyed the theory of defense counsel planned to use at Petitioner’s trial. (App. p. 83, lines 3-19). Counsel testified that it was not unusual to receive late discovery from the prosecution. (App. p. 85, lines 12-25). Petitioner testified that he never saw the new photographs. (App. p. 66, lines 16-20). Petitioner testified that, based on the recently provided new photographs, counsel could not have been ready to go to trial. (App. p. 70, line 25 – p. 71, lines 1-8). Petitioner testified that he would have gone to trial if counsel had been ready. (App. p. 71, lines 10-19).

At the end of the PCR hearing counsel for Petitioner argued:

Judge, Mr. James testified that, that the late discovery was on the eve of trial. He testified that it completely destroyed the defense that they had previously discussed. He testified he was ready to go to trial, and not for that new discovery

being provided to them, which he felt Mr. Sutherland just didn't have time to prepare for, I, I don't, I don't think he's blaming Mr. Sutherland. I think he's, he's blaming the, the lack of time that Mr. Sutherland had, and he testified that he would of gone to trial if Mr. Sutherland had had time to prepare based on that new discovery.

And, Judge, unfortunately, this is something that, that it does happen very often, and I don't know what the fix for it is. But the discovery is provided on the eve of trial in cases all the time. I don't know why this picture would have been not turned over with the original pictures, but, for whatever reason, it was.

I believe that Mr. James was put in the impossible decision of having to go to trial unprepared, and his criminal record, and, and it's – there's nothing he can do about it in the moment. But it certainly factors in on his decision making when put in a difficult situation of having to face going to trial unprepared versus taking a plea that will most likely reduce, or produce a lesser sentence than be convicted at trial especially if that conviction is, is due to his counsel being unprepared.

So, Your Honor, I think, for those reasons, that the, the plea was not entered into voluntarily, and I would ask that you grant this application for Post-Conviction Relief.

(App. p. 97, line 7 – p. 98, lines 1-12).

In the order of dismissal the PCR judge wrote:

In this case, the Court finds Plea Counsel's testimony to credible – specifically his statements that he reviewed the State's evidence, potential defenses, and the plea agreement² with Applicant prior to the plea. The Court also finds credibility in Plea Counsel's assertion that he had researched, and prepared a defense, but the defense was essentially neutralized once the State produced the pictures showing Applicant had attempted to open the vault. Further, this Court finds the plea colloquy dispositive to these issues, as the record clearly establishes that Applicant pled guilty freely and voluntarily.

In addition, the Court finds that Applicant's testimony is strictly contradicted by the record and is, therefore, not credible. The record reflects that Applicant informed the plea court that he had discussed the charges with Plea Counsel and had understood those discussions, that he did not need any more time to speak to Plea Counsel, and that he was satisfied with Plea Counsel's advice. Most tellingly, the plea court asked Applicant directly whether Plea Counsel had done everything Applicant asked him to do, and Applicant stated that Plea Counsel had. Additionally, Plea Counsel explained to the plea court the potential defense and the late discovery of the new pictures, confirming that, at the time of the guilty

² At the time of the guilty plea there was no plea agreement. (App. p. 3, lines 18-19; pp. 41-43).

plea, Applicant at least knew of the existence of the pictures and was aware of Plea Counsel analysis of how the pictures impacted their defense.

Based on the foregoing, the Court finds that Plea Counsel was not deficient in his representation of Applicant, his investigation of the case, or his preparation for trial. Applicant has also failed to prove prejudice. Plea counsel met with Applicant on multiple occasions to review discovery, discuss the facts of the case, and explain Applicant's constitutional rights and options for resolving the case. He prepared a creative defense based on the discovery he had received and was prepared to try the case. Plea counsel properly informed Applicant that he was unlikely to succeed at trial, and Applicant knowingly and voluntarily agreed to enter a guilty plea to avoid receiving a possible maximum sentence of forty-five years.

The plea court clearly explained the terms of the plea agreement to Applicant, including the possible sentences, and Applicant indicated his understanding of the agreement. The plea court also explained to Applicant his rights to a jury trial, to call witnesses, and to put on a defense – all of which were waived by Applicant. Finally, the plea court clearly explained its sentencing decision had less to do with the circumstances of this case than Applicant's extensive criminal record. Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Therefore, this PCR Application must be denied and dismissed with prejudice.

(App. pp. 109-110). The PCR judge erred. The State's failure to timely disclose evidence rendered the guilty plea involuntary.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland,

466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). “To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea ‘may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.’ ” Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

“The second, or ‘prejudice,’ requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Hill, 474 U.S. at 59, 106 S.Ct. 366. “A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below

an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

The State’s failure to timely disclose evidence rendered the guilty plea involuntary. The guilty plea in the present case does not represent a voluntary and intelligent choice among the alternative courses of action open to the defendant because of the State’s failure to timely disclose evidence. There is a reasonable probability that but for the late disclosure, the outcome of the proceeding would have been different. The judge erred in refusing to grant relief.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gerry Brent James 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 Jocelyn J. Newman, which was held on December 6, 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 Gerry Brent James.

Respectfully Submitted,

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of June, 2020.

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.”

s/ Kathrine H. Hudgins

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