

RECEIVED

Jul 22 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable D. Craig Brown, Circuit Court Judge

RASHAD DEMOND JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001898

JOHNSON PETITION FOR WRIT OF CERTIORARI

Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT OF THE CASE.....2

ARGUMENT

The PCR court erred in finding Petitioner’s guilty plea was knowingly and voluntarily entered into where Petitioner testified at the PCR hearing that he was not aware of the results of the victim’s gunshot residue test until after he had entered the guilty plea and that he would not have entered the guilty plea if he had known that the victim tested positive for gunshot residue.5

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL9

ISSUE PRESENTED

Whether the PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily entered into where Petitioner testified at the PCR hearing that he was not aware of the results of the victim's gunshot residue test until after he had entered the guilty plea and that he would not have entered the guilty plea if he had known that the victim tested positive for gunshot residue?

STATEMENT OF THE CASE

On May 29, 2016, Petitioner and Deangelo Kirk, the deceased, were involved in an altercation at the Palmetto Place apartments in Lancaster, South Carolina. The apartment complex security system captured the incident on video. In the video Petitioner and Kirk are seen confronting one another before Kirk begins to run away from Petitioner. Petitioner chases Kirk out of the view of the camera system. The pair comes back onto the security video, from a different angle, and the video shows when Petitioner fired the fatal shot. A witness to the incident, "Mr. Craig," heard multiple gunshots and saw Petitioner as he ran away from the scene. App. 13.

The SLED enhanced video showed that Kirk was also armed with a handgun during the altercation. Neither the video nor the eyewitness could identify who fired the first shot, although Petitioner contended that Kirk fired the first shot as he ran away from Petitioner. App. 13. Further, both Petitioner and Kirk tested positive for gunshot residue (GSR). App. 9-11. However, as seen *infra*, Petitioner did not know the GSR results when he pled guilty. Petitioner subsequently testified at the PCR hearing that he would have gone to trial if he had known that the decedent tested positive for GSR because the positive test result made Petitioner's self-defense claim viable.

In August of 2016, a Lancaster County grand jury indicted Petitioner for one count of murder and one count of possession of a weapon during the commission of a violent crime. App. 96-97. On November 11, 2017, Petitioner appeared before the Honorable Brian M. Gibbons to enter a guilty plea. App. 1. The state was represented by Lisa Collins. Petitioner was represented by Michael Lifsey. App. 1. Pursuant to the plea agreement, Petitioner pled guilty without recommendation to the lesser included charge of voluntary manslaughter and possession

of a weapon during the commission of a violent crime. App. 3. Petitioner also pled guilty to the charge of assault and battery first degree which arose from a separate incident in which Petitioner had originally been charged with assault and battery by mob, second degree. App. 3-4. Petitioner was sentenced to an aggregate term of imprisonment for twenty-three years: eighteen years on the voluntary manslaughter charge, five years, consecutive, on the weapon charge and ten years, concurrent, on the assault and battery charge. App. 37.

Petitioner filed an application¹ for post-conviction relief on September 20, 2018. App. 40-48. The state filed a return and motion for a more definite statement dated March 12, 2019. App. 49-54. PCR Counsel Donae Minor filed an amended PCR application dated July 15, 2019. App. 15-56. An evidentiary hearing was convened before the Honorable D. Craig Brown on July 29, 2019. Lindsey McCallister represented the state. Petitioner was represented by Donae Minor. App. 57.

At the hearing Petitioner alleged that his guilty plea was involuntary because his plea counsel did not adequately explain the evidence against him or review the discovery with him. App. 61, ll. 6-14. Specifically, Petitioner stated that plea counsel did not tell him the results of the victim's GSR test prior to Petitioner entering the guilty plea. The first time Petitioner heard that the victim tested positive for GSR was when the state presented the facts supporting the plea during the plea colloquy. App. 63, ll. 9-24. Petitioner had told plea counsel that if the victim's GSR test on the victim came back positive he wanted to take the case to trial. App. 64, ll. 8-14. Although Petitioner asked about the results of the victim's GSR test on multiple occasions, including on the day he entered the guilty plea, he was told the results had not come back yet. App. 63; App. 64.

¹ Petitioner's PCR application does not challenge the conviction or resulting sentence of the assault and battery charge or the weapons charge. App. 40-41.

Plea Counsel Lifsey testified that he met with Petitioner at least eleven times and went over the evidence in the case with Petitioner in detail. App. 72, ll. 12-25. They discussed possible defenses to the murder charge at trial and discussed the differences between murder and voluntary manslaughter. App. 73, ll. 1-12. Counsel Lifsey recalled that they were waiting on the GSR test results for quite a while and they had discussed how those test results would impact a possible self-defense argument at trial. App. 73, ll. 17-25.

Since the shooting of Kirk was on video, the state had been unwilling to offer a plea deal. Counsel Lifsey testified that the victim's GSR test being positive was the factor that made the state offer the lesser included charge of voluntary manslaughter. App. 74, ll. 4-8. According to Counsel Lifsey, he was aware of the GSR test results prior to the plea and told Petitioner that the test results were the reason for the reduction in charge. App. 74, ll. 9-25. Counsel Lifsey believed that the most likely outcome at trial would be a conviction for voluntary manslaughter and discussed with Petitioner why a self-defense not guilty verdict was not likely. App. 79, ll. 8-14.

At the conclusion of the hearing Judge Brown orally denied Petitioner's PCR application. App. 81, ll. 16-25. An order of dismissal was filed on November 8, 2019. App. 84-95. The PCR court found that Petitioner had not met his burden of proof. Based on the testimony at the hearing and the plea transcript, the court found the testimony provided by Counsel Lifsey was credible while Petitioner's testimony was not credible. The court ruled Counsel Lifsey and Petitioner had "engaged in in-depth discussions" of the evidence and that Petitioner chose to enter a guilty plea "to avail himself of a favorable plea offer and to resolve both sets of charges at the same time in order to avoid a potential life sentence at trial or on a subsequent case." App. 93.

ARGUMENT

The PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily entered into where Petitioner testified at the PCR hearing that he was not aware of the results of the victim's gunshot residue test until after he had entered the guilty plea and that he would not have entered the guilty plea if he had known that the victim tested positive for gunshot residue.

Petitioner entered his guilty plea without knowing the results of the victim's GSR test. Petitioner could not make an informed and intelligent choice about whether he should enter a plea or pursue self-defense at trial unless he was aware of the results of this key piece of evidence. Therefore, his guilty plea was not knowingly and voluntarily entered into.

The United States Supreme Court has held that “[g]uilty pleas are no more foolproof than full trials to the court or jury... Accordingly, we take great precautions against unsound results.” Brady v. United States, 397 U.S. 742, 758 (1970). An “unsound result” occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him). Accordingly, “[d]efendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012). “Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.” Padilla v. Kentucky, 130 S.Ct. 147, 1480-81 (2010) (internal quotations omitted).

“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 v. Lockhart, 474 U.S. 52, 56 (1985). An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by

demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must show that counsel’s “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, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

The “prejudice” requirement when examining a guilty plea focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability that he would not

have pleaded guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

While plea counsel testified that the victim's GSR test results were the reason for the plea offer he never testified that he provided those results to Petitioner. Plea counsel stated that *he* knew the results of the test at the time of the plea but not that Petitioner knew the results at the time of the plea. Further, plea counsel's testimony was that he explained to Petitioner that the GSR test results were the reason the state was making an offer to voluntary manslaughter but he did not ever state that he explained the results of the GSR test to Petitioner or that he even told Petitioner what the results were.

Petitioner repeatedly asserted that he wanted to go to trial if the results of the victim's GSR test were positive. He had discussed his theory of the case with plea counsel and wanted to pursue self-defense if it could be shown that the victim did in fact fire a gun as Petitioner alleged. The GSR test results were very important to Petitioner's decision-making process and without them he was not able to make an informed decision to enter a plea. While plea counsel knew the results of the GSR test at the time of the plea, Petitioner did not. Therefore, Petitioner's plea did not represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of July, 2020.

RECEIVED

Jul 22 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable D. Craig Brown, Circuit Court Judge

RASHAD DEMOND JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rashad Demond Johnson 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 July 29, 2019, 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 Rashad Demond Johnson.

Respectfully Submitted,

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of July, 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/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 22nd day of July, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jul 22 2020

S.C. SUPREME COURT

—————
Certiorari to Lancaster County

Honorable D. Craig Brown, Circuit Court Judge

—————
RASHAD DEMOND JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

—————
CERTIFICATE OF SERVICE
—————

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Johnson Petition for Writ of Certiorari and Appendix has been served upon opposing counsel this 22nd day of July, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Rashad Demond Johnson, #314730, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER