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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable J. Derham Cole, Circuit Court Judge

TIRRELL BOYD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001999

JOHNSON PETITION FOR WRIT OF CERTIORARI

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The PCR Court erred in finding that Petitioner’s attorneys were effective where the attorneys only investigation into the murder and attempted murder cases was to talk to potential witnesses and listen to jail phone calls, which was not a reasonable, independent investigation under the circumstances and thus rendered Petitioner’s guilty plea to the murder and attempted murder charges unknowing and involuntary.....7

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ISSUE PRESENTED

Whether the PCR Court erred in finding that Petitioner's attorneys were effective where the attorneys only investigation into the murder and attempted murder cases was to talk to potential witnesses and listen to jail phone calls, which was not a reasonable, independent investigation under the circumstances and thus rendered Petitioner's guilty plea to the murder and attempted murder charges unknowing and involuntary?

STATEMENT OF THE CASE

On March 1, 2014, police responded to a report of shots fired in the parking lot of Club Climax, located in Richland County, South Carolina. A disturbance had occurred inside the club and the owners had decided to shut down for the evening, forcing everyone to leave at the same time. App. 25, ll. 5-11. As everyone was exiting the club, Mark Anthony Wilson (“Dooley”), got into a verbal altercation with Bradley Hart, Maurice Hart, and Cecil Morris. A friend of Wilson’s, described as a light-complexioned male with long hair, a goatee, and very long, distinctive sideburns, allegedly stated “Whatever, Dooley, I’ll kill them for you. Go ahead and fight them if you want to.” Travis Singleton was standing between the two groups of men attempting to get them all to leave for the night. App. 25, ll. 12-23.

Witnesses said that the light-complexioned male reached for a gun and began shooting. Bradley Hart and Cecil Morris were struck by bullets and survived their injuries. Travis Singleton was caught in the crossfire and died from a gunshot wound. App. 26, ll. 1-13. Tips began coming into the police that identified one of the shooters as “Rell.” The police decided that “Rell” was Tirrell Boyd, the petitioner. App. 27, ll. 4-7. The eyewitnesses from the club were shown a photo lineup and they identified Petitioner as the individual that had pulled out a gun and started shooting in the parking lot of Club Climax. App. 25, l. 24- App. 26, l. 5; App. 27, ll. 8-10.

When the police went to arrest Petitioner at his house he fled in a stolen vehicle. The police pursued him for ten minutes before Petitioner crashed his vehicle and was taken into custody. App. 27, ll. 11-17. Inside of the crashed vehicle police found fifty-four grams of cocaine and one hundred and forty grams of marijuana. App. 120; App. 125.

During the December 2014 term of the Richland County grand jury, Petitioner was indicted for murder, trafficking cocaine 28-100 grams, possession with intent to distribute marijuana, and possession of a stolen vehicle. Petitioner was then indicted for two counts of attempted murder during the November 2015 Richland County grand jury term. App. 118-140. Petitioner appeared before the Honorable L. Casey Manning on March 18, 2016, to enter a guilty plea. The state was represented by Meghan Walker. Petitioner was represented by Barney Giese and Justin Kata. App. 1.

Pursuant to the plea agreement¹ Petitioner entered a guilty plea to murder, two counts of attempt murder, trafficking cocaine, possession with intent to distribute marijuana, and possession of a stolen vehicle for a negotiated thirty-year sentence. App. 3, ll. 6-7. Petitioner pled to the murder and attempt murder charges in accordance with North Carolina v. Alford². App. 4, ll. 6-12. Judge Manning accepted Petitioner's guilty plea and sentenced Petitioner to a term of imprisonment for thirty years for murder, thirty years for each attempted murder charge, twenty-five years for trafficking cocaine, five years for possession with intent to distribute marijuana and five years for the possession of a stolen vehicle charge, all to be served concurrently. App. 30.

Petitioner filed a PCR application on July 25, 2016. App. 33-37. The state filed a return dated June 23, 2017. App. 38-45. The state then filed an amended return, motion for a more definite statement, and partial motion to dismiss on August 31, 2018. App. 46-55. An evidentiary hearing was convened on April 5, 2019, before the Honorable J. Derham Cole. The

¹ As part of the plea deal the state dismissed the following charges: possession with intent to distribute cocaine, possession of a stolen pistol, unlawful carry of a pistol, hit and run, and failure to stop for blue lights. App. 58, ll. 19-23.

² 400 U.S. 25 (1970)

state was represented by Lindsay McCallister. Petitioner was represented by Leah Moody. App. 56.

At the start of the hearing, PCR Counsel Moody informed the court that Petitioner wanted to relieve her as counsel and that he was requesting a continuance. App. 59, ll. 14-17. Petitioner did not “feel” that they were prepared to move forward with the hearing because the witnesses that he wanted to call to testify he was not the shooter the night of the murder were not present. App. 59, ll. 21-24. Counsel Moody informed the court that she had talked with the individuals Petitioner wanted to call as witnesses and they were not willing to come to court. The individuals would only give a written statement and would not come to court to testify. App. 60, ll. 1-23. The state opposed the continuance, arguing the case had been called three or four times previously. The court denied Petitioner’s motion to relieve Counsel Moody and continuance motion. App. 61, ll. 15-25.

Petitioner testified that he entered the plea because he did not “feel like” he had a defense to the murder and attempted murder charges. Petitioner had given his lawyers the names of people to contact as witnesses but the “people wouldn’t come forward” for him. App. 64, ll. 12-18. He did not think his lawyers did an independent investigation of the murder and attempted murder cases because the investigator they hired was unable to get any statements from possible witnesses. App. 65, ll. 1-14.

Petitioner also testified that the witnesses who allegedly identified him as the shooter told police that they had seen Petitioner shooting a gun but in their written statements they clarified that they had only heard that Petitioner was the shooter. Petitioner thought that his lawyers should have investigated those inconsistent statements. App. 66, ll. 13-20. Further, Petitioner stated that there were different caliber shell casings recovered from the scene which indicated

that there were three different shooters the night of the murder, and no one could tell him what caliber bullet killed the decedent. App. 72, ll. 17-25.

Importantly, Petitioner had maintained his innocence on the murder and attempted murder charges from the beginning of the case. App. 84, ll. 19-22. Petitioner wanted a trial, but without a defense or witnesses to testify on his behalf he was scared to go forward with a trial. App. 75, ll. 1-16. Petitioner entered the plea on Friday and his trial was set to start the following Monday. Petitioner testified he entered the plea so that he could avoid a possible life sentence. App. 64, ll. 19-21; App. 74, ll. 20-23.

Counsel Kata described the scene the night of the murder as “really chaotic” and involving multiple shooters. App. 83, ll. 8-9. According to Counsel Kata, the core of the state’s case was the testimony of the club owner and two bouncers who identified³ Petitioner as having a gun and having been an active shooter during the incident. App. 91, ll. 13-19. There were some discrepancies between the description of the shooter and Petitioner’s appearance that Counsel Kata pointed out to the state in plea negotiations. Among them was the fact that Petitioner did not have long hair or “Wolverine-type” sideburns. App. 92, ll. 1-25. Further, Counsel Kata believed that there were grounds to challenge the photo lineup identification as unduly suggestive at trial. App. 88, ll. 1-8. However, Petitioner having a “get out” date was a “big deal” and Counsel Kata thought that having a release date was a main factor in Petitioner’s decision to enter a guilty plea. App. 88, ll. 13-20.

Petitioner gave him names of potential witnesses to speak with regarding the shooting incident. Further, Counsel Kata listened to “hundreds of hours” of jail phone calls made by

³ Petitioner was identified through a “six-pack” photo lineup. The witnesses that identified Petitioner allegedly did not know him and were not familiar with him prior to the incident. App. 87, ll. 12-17.

Petitioner trying to track down favorable witnesses that would testify Petitioner was not the shooter. Counsel Kata also sent a private investigator out to talk with potential witnesses, but no one would speak with the investigator. Counsel Kata testified that he was unable to find a cooperative witness that would have been able to offer favorable testimony for Petitioner at trial. App. 85-86.

Counsel Giese testified that when the assistant solicitors on the case made a plea offer of thirty years, he appealed to then Circuit Solicitor Dan Johnson to try to get a more favorable plea offer. Solicitor Johnson was not willing to go below the thirty year offer on the murder charge, so Counsel Giese began preparing for trial. App. 95, ll. 18-25. Petitioner gave the attorneys the names of witnesses who he believed would testify on his behalf at trial. Additionally, the attorneys listened to “hundreds of hours” of jail phone calls made by Petitioner in an attempt to find favorable witnesses to testify on behalf of Petitioner at trial. App. 96, ll. 38-11.

Counsel Giese first heard that Petitioner wanted to accept the thirty-year plea deal the Tuesday before the trial was set to start. App. 96, ll. 13-17. The morning of the guilty plea Counsel Giese told Petitioner that they were prepared for trial and ready to start the case Monday, but Petitioner was “adamant” about not wanting to go to trial. App. 96, ll. 21-25. Counsel Giese testified that Petitioner knew if he entered a guilty plea, he was getting thirty years. App. 100, ll. 19-21.

An order of dismissal was filed on October 8, 2019. App. 103-116. The PCR Court found that Petitioner had failed to prove that the performance of his attorneys was deficient. App. 111. The court ruled that the attorneys had attempted, but were unable, to find favorable witnesses and that they had adequately investigated the case. App. 114-115. The court further found that Petitioner enter his guilty plea knowingly and voluntarily. App. 115-116.

ARGUMENT

The PCR Court erred in finding that Petitioner’s attorneys were effective where the attorneys only investigation into the murder and attempted murder cases was to talk to potential witnesses and listen to jail phone calls, which was not a reasonable, independent investigation under the circumstances and thus rendered Petitioner’s guilty plea to the murder and attempted murder charges unknowing and involuntary.

Petitioner’s attorneys interviewed possible witnesses and listened to “hundreds of hours” of jail phone calls. That was the extent of their investigation into the murder and attempted murder cases. Considering that the evidence indicated multiple shooters, that there were differences in the physical characteristics ascribed to the main shooter and Petitioner, and that there were inconsistencies in the main witnesses’ statements, that was not a reasonable, independent investigation. As such, Petitioner’s guilty plea to the murder and attempted murder charges was unknowing and involuntary.

It is well established that counsel has a duty to undertake reasonable investigations. Strickland v. Washington, 466 U.S. 668, 691 (1984). Therefore, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); “[A]t a minimum, counsel has the duty to...make an **independent** investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (emphasis in original).

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

The failure to investigate can support the contention that a defendant’s plea was involuntary. In Hill, *supra*, the United States Supreme Court addressed the analysis to be used in addressing such ineffective assistance claims. The Court explained,

“Where the alleged error is failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than to go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.”

Hill at 59.

It is undisputed that Petitioner’s attorneys conducted some investigation into the murder and attempted murder charges. However, the minimal investigation they performed was not reasonable given the serious nature of the charges and the conflicting evidence. Most notably, Petitioner’s attorneys failed to investigate and challenge the identification of Petitioner which was the key to the state’s case. The shooter was described as having long hair and long,

distinctive, “Wolverine type” sideburns – physical characteristics that Petitioner lacked. Petitioner’s attorneys never attempted to find a person who accurately fit the description of the shooter.

Further, there were at least three possible shooters the night of the incident, although Petitioner was the only person ever identified by law enforcement. Petitioner’s attorneys never attempted to identify who the other possible shooters were or who fired the fatal shot. The sole focus of their investigation was to find someone who would say that Petitioner did not have a gun the night of the incident. While that would have been extremely helpful testimony, there was other evidence that could have mitigated any potential involvement by Petitioner that they did not investigate.

Petitioner wanted to go to trial on the murder and attempted murder charges from the very beginning. Petitioner only entered the guilty plea because he did not “feel like” his attorneys had developed a defense to the charges, and consequently he did not want to risk a life sentence. Had his attorneys conducted a reasonable investigation to develop a defense it is likely that Petitioner would not have entered a guilty plea but would have proceeded to trial.

There were weaknesses in the state’s case against Petitioner. If Petitioner’s attorneys had fully investigated those weaknesses, they could have discovered evidence that would have been beneficial to Petitioner. Unfortunately, Petitioner’s attorneys only attempted to find witnesses who would say Petitioner was not the shooter and they ignored all other investigative avenues. That was ineffective assistance of counsel. As such, the investigation into the murder and attempted murder charges was not reasonable and Petitioner’s guilty plea to those charges was unknowing and involuntary. See Hill v. Lockhart, 474 U.S. 52 (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 24th day of July, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tirrell Boyd 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 J. Derham Cole, which was held on April 5, 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 Tirrell Boyd.

Respectfully Submitted,

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

This 24th 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

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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 Petition for Writ of Certiorari and Appendix has been served upon opposing counsel this 24th 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 Tirrell Boyd, #367470, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472.

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