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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable D. Craig Brown, Circuit Court Judge

ALBERT LEE WITHERSPOON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001896

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R Seeger
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ISSUE PRESENTED

Whether Petitioner pled guilty unknowingly as a result plea counsel's ineffective assistance of counsel for failing to review the discovery materials with Petitioner which left Petitioner unaware of the evidence against him and led Petitioner to believe he had no choice but to plead guilty?

STATEMENT

During its December 2010 term, the Lancaster Grand Jury indicted Petitioner for criminal sexual conduct with a minor in the first degree. App. 88 – 89.

On March 13, 2017, Petitioner pled guilty to the lesser included offense of criminal sexual conduct with a minor in the second degree before the Honorable W. Jeffrey Young. App. 1; App. 3, ll. 1 – 9. Michael Lifsey represented Petitioner. App. 1. David A. Fernandez represented the state. Id.

Judge Young accepted Petitioner's guilty plea as freely and intelligently made. App. 12, l. 17 – 13, l. 3. Petitioner's sentencing was deferred until March 17, 2017 when he was sentenced to twenty years' imprisonment. App. 17; App. 30, l. 1 – 31, l. 5.

On August 1, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 33 – 40. Petitioner alleged, inter alia, that plea counsel provided ineffective assistance of counsel for his failure to go over discovery material. App. 41 – 45.

Petitioner's PCR hearing was held on July 29, 2019 before the Honorable D. Craig Brown. App. 47. Donae A. Minor represented Appellant. Id. Lindsey A. McCallister represented the state. Id.

On November 4, 2019, the PCR court filed an order of dismissal denying Petitioner relief. App. 72 – 87. The PCR court found that plea counsel was not ineffective for failing to review discovery with Petitioner because plea counsel testified credibly that he reviewed discovery with Petitioner such that Petitioner's guilty plea was not involuntary. App. 80 – 83.

This petition for writ of certiorari follows.

ARGUMENT

Petitioner pled guilty unknowingly as a result plea counsel's ineffective assistance of counsel for failing to review the discovery materials with Petitioner which left Petitioner unaware of the evidence against him and led Petitioner to believe he had no choice but to plead guilty.

Relevant Facts

On or about September 18 – 19, 2010, Petitioner allegedly engaged in sexual battery with a minor less than eleven years of age. Tr. 6, l. 10 – 7, l. 6. A forensic interview was conducted with the minor where he disclosed the sexual assault allegation. Id. Petitioner also allegedly confessed to the crime to a “fellow inmate friend.” Id.

During Petitioner's PCR hearing, he testified that plea counsel only visited him once and did not discuss or show Petitioner the video of the forensic interview. App. 52, l. 23 – 53, l. 15. Petitioner explained that plea counsel never called, nor did he show Petitioner his discovery materials. App. 53, ll. 16 – 22. He stated plea counsel provided ineffective assistance of counsel because of his “failure to meet with [Petitioner] sufficiently and also to go over the discovery.” App. 54, ll. 13 – 17.

Plea counsel also testified at Petitioner's PCR hearing. App. 55, l. 10. Plea counsel testified that he discussed the forensic video with Petitioner in a cursory fashion and would have had further conversations with Petitioner “had [Petitioner] been anywhere [plea counsel] could find him in the last several months before this case ultimately was concluded.” App. 59, ll. 1 – 13.

Plea counsel alleged that “there was a period of time where [Petitioner] was not in communication with [plea counsel's] office,” and that he thought Petitioner absconded to

Tennessee. App. 59, ll. 13 – 25. Plea counsel acknowledged he would have liked to have had more time to discuss the case with Petitioner. App. 63, ll. 7 – 12. He also admitted that he only informed Petitioner of the guilty plea terms on the day of the plea hearing and that Petitioner had to make a “rush decision” to plead guilty. App. 60, l. 14 – 62, l. 8; App. 66, ll. 4 – 7.

The PCR court made an oral ruling denying Petitioner relief. App. 69, l. 23 – 70, l. 21. In the order of dismissal, the PCR court found plea counsel testified credibly that he reviewed the discovery evidence with Petitioner and “would have had more numerous and in-depth discussions” with Petitioner, but Petitioner “voluntarily absented himself from South Carolina and did not keep in contact with [plea counsel].” App. 80 – 83. The PCR court also found that plea counsel explained to Petitioner that he did not have to plead guilty and was prepared to proceed to trial. Id.

Discussion

Petitioner’s guilty plea was not freely and voluntarily made where he pled guilty while unaware of the evidence against him because plea counsel failed to provide and discuss Petitioner’s discovery materials with Petitioner prior to entering his guilty plea.

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). “Although the trial court is not required to direct defendant’s attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of his guilty plea.” State

v. Pittman, 337 S.C. 597, 600, 524 S.E.2d 623, 600 (1999) (citing State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976)).

To prove a claim of ineffective assistance of counsel, the Petitioner must show that counsel provided was deficient and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Specifically, "the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Holden v. State, 393 S.C. 565, 572 – 74, 713 S.E.2d 611, 612 – 15 (2011).

In this case, plea counsel's performance was deficient, as it fell below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 668, 687 – 88 (1984). During Petitioner's PCR hearing, Petitioner testified that plea counsel never showed or discussed the discovery evidence with Petitioner. App. 53, ll. 16 – 22. Petitioner also explained that plea counsel only met with him once and did not discuss the video of the forensic interview of the alleged victim. App. 52, l. 23 – 53, l. 15. As a result, Petitioner was left unaware of the evidence against him and felt he had no other option but to plead guilty.

Plea counsel testified that he discussed the discovery evidence with Petitioner, but would

have liked to have more time to discuss the case with him. App. 59, ll. 1 – 13. Plea counsel also stated that he could not locate Petitioner prior to the guilty plea and only conveyed the plea terms to Petitioner on the day of the guilty plea. App. 59, ll. 13 – 25; App. 60, l. 14 – 62, l. 8. Plea counsel admitted that Petitioner had to make a “rush decision” to plead guilty. App. 66, ll. 4 – 7.

In this case, Petitioner suffered prejudice because plea counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon 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. 668, 692). Specifically, plea counsel’s failure to discuss Petitioner’s discovery evidence with him, rendered Petitioner unable to voluntarily plead guilty as he pled guilty while unaware of the evidence against him. App. App. 52, l. 23 – 53, l. 22. Therefore, the PCR court erred in finding plea counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [plea] counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Hill, 474 U.S. 52, 58.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of July, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Albert Lee Witherspoon 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 D. Craig Brown, which was held on July 29, 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 Albert Lee Witherspoon.

Respectfully Submitted,

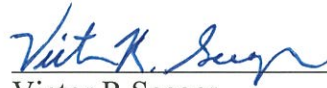


Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of July, 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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