

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Sep 21 2020

S.C. SUPREME COURT

—————
Certiorari to Laurens County

Honorable L. Casey Manning, Circuit Court Judge
—————

TITO O. MARIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-002025
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

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ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel provided effective representation where counsel did not perform any independent investigation of the facts and circumstances surrounding the charges?

STATEMENT OF THE CASE

On March 7, 2017, Minor 1 was ten years old and in the fourth grade. On that day her class was learning about “good touches and bad touches” in school. During the class Minor 1 began to cry and react to the information that she was learning. The teacher took Minor 1 aside to see if she was alright and Minor 1 stated that she had received “bad touches” from her second cousin, Tito Marin, Petitioner. App. 9, l. 25-App. 10, l.14

DSS and law enforcement were notified. Jared Honeycutt of the Lauren’s County Sheriff’s department interviewed Minor 1. During that interview Minor 1 described incidents that occurred when she was eight years old. App. 10, ll. 15-21. Minor 1 attended a forensic interview on March 10, 2017.

At the forensic interview Minor 1 stated that Petitioner would babysit her sometimes while her mother was at work. She alleged that he first assault occurred when Petitioner came into her room, closed the door behind him and began touching her body, breast, and vagina. At some point Petitioner allegedly stated, “it is time,” and he made Minor 1 lay on her bed. He placed a pillow over her face and proceeded to have sexual intercourse with Minor 1. Petitioner made Minor 1 keep the pillow over her face until he finished and left the room. When it was over Minor 1 vomited because she “felt so sick.” App. 10, l. 24-App. 11, l. 18.

Minor 1 alleged that the assaults happened multiple times and that each time Petitioner would place the pillow over her face. After he was finished, Petitioner allegedly warned Minor 1 against telling anyone what had happened. He would tell her it was “her fault too” and that “what they had done was wrong”. Further he told her that she would get in trouble if she told anyone and that her parents would not love her anymore if they found out what had occurred.

App. 11, l. 23-App. 12, l. 8. Petitioner claimed that during the time period Minor 1 alleged the assaults occurred he was living and working in North Carolina. App. 58, l. 25-App. 59, l. 9.

As part of the investigation the sheriff's department interviewed various members of Minor 1's family. During those interviews Minor 1's seventeen-year-old cousin (Minor 2) began to cry and disclosed that she had also been sexually assaulted by Petitioner when she was ten years old. Minor 2, without knowing the details of Minor 1's disclosure, alleged that Petitioner had taken her into his bedroom, locked the door, touched her body, made her undress, placed a pillow over her face, and had sexual intercourse with her. Minor 2 also stated that Petitioner told her that "what they had done was wrong" and that if she told her parents they would hate her forever. App. 12, ll. 13-App. 13, ll. 6.

In May of 2017, Petitioner was indicted by a Laurens County grand jury for two counts of criminal sexual conduct with a minor, first degree. App. 113-114; App. 116-117. Petitioner was originally represented by appointed counsel Joel Broome. App. 51, ll. 11-16. He eventually hired Angelica Hernandez to represent him. App. 91, ll. 1-6. On February 27, 2018, Petitioner appeared before the Honorable Frank Addy to enter a guilty plea to both indictments. The state was represented by C. Dale Scott. Petitioner was represented by Angelica Hernandez. App. 1. Emily Ortiz Alfonso was sworn in as the court approved translator. App. 4, ll. 3-13.

Pursuant to the plea agreement, Petitioner pled guilty to both counts as charged and was sentenced to a negotiated twenty-five years imprisonment on each count, to run concurrently. App. 5, ll. 3-15; App. 23-24. Petitioner filed an application for Post-Conviction Relief on July 5, 2018, alleging that counsel was ineffective for, *inter alia*, failing to investigate the case against him. App. 26-35. The state filed a return dated December 14, 2018. App. 36-44.

An evidentiary hearing was convened before the Honorable L. Casey Manning on October 14, 2019. The state was represented by Brianna Schill. Petitioner was represented by Ashley McMahan. App. 45. Emily Alphonso was sworn in as the court approved translator. App. 48, ll. 16-23. At the hearing Petitioner,¹ original counsel Joel Broome, and plea counsel Angelica Hernandez testified. App. 46.

Petitioner testified that Counsel Broome never brought a translator to their meetings, so Petitioner had a difficult time communicating with him about the case. App. 51, l. 19-App. 52, l. 4. However, Counsel Broome stated he never had any difficulty communicating with Petitioner and that Petitioner spoke with him in English. App. 77, ll. 3-11. During the meetings with Counsel Broome Petitioner repeatedly told him that he had an alibi for the time period surrounding Minor 1's allegations. He told Counsel Broome to contact his cousin, Santiago Caldena, but Counsel Broome never spoke to Caldena. App. 57, l. 17-App. 58, l. 14. Counsel Broome testified that he attempted to contact Petitioner's cousin at the phone number that Petitioner had provided him, but he was never able to speak to anyone who identified themselves as Santiago. App. 79, l. 19-App.80. l. 1.

Counsel Broome testified he investigated Petitioner's alibi² and learned that a "Jose Marrero" had worked in North Carolina from July to September of 2014. "Jose Marrero" was another name that Petitioner allegedly used but Counsel Broome had no way to prove that Petitioner and "Jose" were the same person. App. 77, l. 16-App. 79, l. 7; App. 82, ll. 1-10. He

¹ At various times throughout the hearing Petitioner would not use the translator but would instead answer questions in somewhat broken English. This created some unintelligible responses in the record that make it difficult to fully understand Petitioner's claims. App. 48.

² Petitioner only offered an alibi defense to the allegations made by Minor 1. Petitioner never provided an alibi or specific defense for the allegations made by Minor 2.

also testified that Petitioner's alleged alibi only covered a small portion of the dates listed in the indictment relating to Minor 1. App. 82, l. 24-App. 83, l. 1.

According to Petitioner, he and Counsel Broome never discussed a plea offer. App. 57, ll. 2-10. Counsel Broome testified that the state did not make an actual plea offer but would recommend twenty-five years imprisonment on a "straight up plea." App. 73, ll. 6-24. Furthermore, Counsel Broome maintained that Petitioner never wanted a plea offer, that he always maintained his innocence to the allegations of abuse, and that they were preparing for trial during his representation of Petitioner. App. 76, ll. 11-21.

Petitioner hired Counsel Hernandez in January of 2018, a few weeks before he was scheduled to start trial. App. 72, ll. 14-16; App. 74-75. Petitioner testified he hired Counsel Hernandez because Counsel Broome was always asking him the same questions and was not talking to his witnesses. App. 57, l. 16-App.58, l. 23. Counsel Hernandez testified she was hired³ solely to work out a plea deal because Petitioner's "first attorney was pushing going to trial" and Petitioner did not want to "risk spending the rest of his life in prison." App. 87, ll. 8-18. According to Counsel Hernandez, Petitioner asked her if she could negotiate a plea deal to a reduced charge. App. 86, ll. 19-22.

Petitioner provided Counsel Hernandez with some information regarding his work in North Carolina during 2014 but she stated he never gave her the names of any possible witnesses to speak with. Counsel Hernandez also testified that while Petitioner had told Counsel Hernandez that he had worked in North Carolina during a period of time in 2014, he had also

³ Counsel Hernandez stated that her fees were \$3,000 because Petitioner hired her solely for the purpose of negotiating a plea deal. She testified that if Petitioner had hired to her to take the case to trial her fee would have been higher. App. 92, ll. 16-23.

told her he came back to South Carolina every two weeks during that time and stayed in Minor 1's home for the weekend. App. 86, ll. 12-18.

Further, Counsel Hernandez did not speak with Petitioner regarding any possible defenses to the charges because he was specific about not wanting a trial. Petitioner told her "don't even waste your time on that." Counsel Hernandez also testified that she reviewed the case and went over the allegations with Petitioner prior to his entering a guilty plea. App. 91, l. 7-App. 92, l. 5.

The PCR court order dismissing Petitioner's application was filed on November 25, 2019. The PCR court found that Petitioner's testimony was not credible, while testimony from Counsel Hernandez was credible.⁴ The court ruled that Counsel Hernandez was not deficient in any manner and that Petitioner had failed to establish any prejudice. App. 96-111.

⁴ The PCR court did not make any findings regarding the representation of Counsel Broome, despite the fact that Petitioner argued that both Counsel Broome and Counsel Hernandez were ineffective in their respective representation. App. 96-111.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective representation where counsel did not perform any independent investigation of the facts and circumstances surrounding the charges.

Counsel Hernandez represented Petitioner for just over a month. During that time period the only “investigation” she performed was to review the case file. Petitioner spoke to Counsel Hernandez about his employment in North Carolina and his possible alibi to the allegations made by Minor 1, but she did not follow up on this information. The failure to conduct any investigation into the case was deficient performance.

“A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); see also Strickland v. Washington, 466 U.S. 668, 691 (1984). When evaluating the reasonableness of counsel's conduct, “the 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.” Strickland v. Washington, 466 U.S. at 690. Therefore, “at a minimum, counsel has the duty to interview potential witnesses and 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.

Counsel Hernandez had a duty to conduct an independent investigation into the facts and circumstances of Petitioner’s case, regardless of the scope of her representation. This duty included following up on Petitioner’s potential alibi and speaking with any potential witnesses in the case, including the alleged victims. Whether she was hired solely to negotiate a plea or not did not negate the duty to ensure the state had an actual case against Petitioner.

Based on the record Counsel Hernandez did not conduct any investigation, much less a meaningful one, despite her representation to the plea court that she had conducted an investigation into the facts and circumstances of the allegations. Counsel Hernandez testified

that she reviewed the file and without doing more advised Petitioner to enter a guilty plea to the mandatory minimum. This was deficient performance.

Petitioner and Counsel Broome both testified that Petitioner wanted to proceed to trial. However, Petitioner stated he did not believe he had any other choice but to enter a plea after he hired Counsel Hernandez because no one had investigated his case or talked to his witnesses. The testimony that Petitioner hired Counsel Hernandez solely to “work out a plea deal” was incongruous with all of Petitioner’s prior actions. The record shows that Petitioner wanted a trial and but for Counsel Hernandez’s failure to investigate the facts and circumstances of the allegations, he would not have pled guilty. See Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

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 21st day of September, 2020.

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Counsel for Tito O. Marin 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 L. Casey Manning, which was held on October 14, 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 Tito O. Marin.

Respectfully Submitted,

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

This 21st day of September, 2020.

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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
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Appellate Defender

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