

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenwood County

Honorable J. Mark Hayes, Circuit Court Judge

WAYNE MICHAEL SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001169

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR judge err in refusing to find counsel ineffective for not arranging for Petitioner to enter a guilty plea and be sentenced for strong armed robbery prior to the trial for murder?

STATEMENT

In November of 2013, the Greenwood County Grand Jury indicted Petitioner, Wayne Michael Smith, for murder, indictment #2013-GS-24-1710. In October of 2015, Petitioner was additionally indicted by the Greenwood County Grand Jury for robbery, indictment #2015-Gs-24-1485. On October 19, 2015, Petitioner appeared before the Honorable Frank R. Addy, Jr. and pled guilty to strong armed robbery. Judge Addy deferred sentencing and Petitioner proceeded to jury trial for murder. Janna A. Nelson represented Petitioner at both the plea and the trial. Patricia Bolen also represented Petitioner at trial. Elizabeth White and Wade Dowtin prosecuted the case. The jury returned a verdict of guilty to the lesser included offense of involuntary manslaughter. Judge Addy sentenced Petitioner to fifteen (15) years for strong armed robbery and five (5) years consecutive for involuntary manslaughter. Petitioner did not file a notice of intent to appeal.

On June 3, 2016, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on February 16, 2017. An evidentiary hearing was held on February 27, 2018, before the Honorable J. Mark Hayes. Ashley McMahon represented Petitioner at the PCR hearing. Justin J. Hunter represented the State. In a written order signed April 20, 2018, Judge Hayes denied relief and dismissed the application. A timely notice of intent to appeal was served on June 22, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find counsel ineffective for not arranging for Petitioner to enter a guilty plea and be sentenced for strong armed robbery prior to the trial for murder.

Petitioner pled guilty to strong armed robbery right before the start of his trial for murder. The judge deferred sentencing for the strong armed robbery charge until the conclusion of the murder trial. The jury found Petitioner guilty of the lesser included offense of involuntary manslaughter. Although Petitioner pled guilty to strong armed robbery, the judge sentenced him to the maximum fifteen (15) years. The judge additionally sentenced Petitioner to the maximum five (5) years for involuntary manslaughter, to be served consecutively to the fifteen-year sentence for strong armed robbery. Petitioner's only prior record consisted of a city ordinance violation and out of state misdemeanor. (App. p. 518, line 18 – p. 519, lines 1-7).

In sentencing Petitioner the judge stated, “. . . I have to ask myself whether after you did this spur of the moment thing it would have been possible for Phillip to have survived this if, instead of grabbing the laptop and stealing the car, you had taken a few moments to dial 911 and at least let them know there's someone who is having a heart attack at address X,Y,Z. An ambulance needs to get here. And then grab the laptop and run away. So I have – I have a problem with that, Mr. Smith. I understand and I believe you did not go over there that evening with the intention to kill him.” (App. p. 529, lines 5-15). The judge additionally stated, “So I have taken all of that into account. I'm more shocked, Mr. Smith, at your reaction after the assault happened in the first place. I know you may not have intended the result. But quite honestly, sometimes it's just better to hear a case, and it gives the Court a better feeling for what an appropriate punishment is.” (App. p. 530, lines 11-17). The judge finally stated, “Mr. Smith,

you took a life. Twenty years is the price you're going to have to pay. Good luck to you, sir." (App. p. 531, lines 8-10). The jury, however, convicted Petitioner of involuntary manslaughter which carries a maximum sentence of five (5) years, not twenty (20) years.

During the PCR hearing Petitioner testified, "I thought that if I pled to strong armed robbery early on and it – earlier on, then I wouldn't get 15 years because I've never been in trouble a day in my life. I've never been in trouble ever. So I thought I was getting a reasonable sentencing. But instead, since I waited to the murder trial and I beat murder – be honest with you, I beat murder charge. So it was – they had to find a way to get me for something, so they maxed me out on everything." (App. p. 567, lines 1-8). Petitioner agreed that he believed the judge was punishing him through the strong armed robbery sentence because of what happened at trial. (App. p. 567, lines 9-14).

Counsel testified at the PCR hearing:

I don't disagree with – with Wayne's statement up here that if we had done – if we had been able to do just a plea to strong armed robbery earlier, that his sentence might not have been 15 years. However, I also don't remember us ever talking about just pleading to that charge earlier as an option. What I remember is that we were always talking about some kind of resolution of one or more charges that would get him out of 85 percent time. But I absolutely think if we had gone that route, if I had thought of that or if Wayne had suggested that to me earlier, that that could have been a lower sentence on that charge, yes.

(App. p. 587, lines 13-24).

In the order of dismissal the PCR judge wrote, "This Court finds Applicant has failed to meet his burden of proving Counsel was ineffective for failing to allow Applicant to plead guilty. This Court finds there is no evidence that Counsel prevented Applicant from pleading guilty or that her performance affected his ability to plead guilty." (App. p. 597). The PCR judge erred. Counsel was ineffective in failing to arrange for Petitioner to enter a guilty plea to strong armed robbery well in advance of the murder trial. In regard to prejudice, the PCR judge wrote,

“Furthermore, Applicant has failed to meet his burden of proving he was prejudiced by Counsel’s actions. This Court finds there is no evidence the length of Applicant’s sentence was a direct result of Counsel’s conduct or that the timing of Applicant’s plea affected his sentence.” (App. p. 597). Again, the PCR judge erred. The sentencing judge’s comments at sentencing and counsel’s testimony at the PCR hearing support the finding that if counsel had arranged for Petitioner to enter a guilty plea and be sentenced for strong armed robbery prior to the murder trial, the sentence for strong armed robbery would have been less than the maximum fifteen (15) years.

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.

Counsel was ineffective in failing to arrange for Petitioner to enter a guilty plea to strong armed robbery and be sentenced prior to the murder trial. There is a reasonable probability that, but for counsel’s deficient performance, Petitioner would have received less than the maximum sentence for strong armed robbery. As Petitioner only challenged the timing of the guilty plea to strong armed robbery in post-conviction relief, this Court should remand the case for re-sentencing on the strong armed robbery charge. See Rolen v. State, 384 S.C. 409, 414-15, 683 S.E.2d 471, 474 (2009) (post-conviction relief may be tailored to remedy the precise prejudice

resulting from trial counsel's deficient performance, citing United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) recognizing that the remedy for a violation of the Sixth Amendment right to counsel “should be tailored to the injury suffered from the constitutional violation”).

CONCLUSION

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



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of February, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Wayne Michael Smith states:

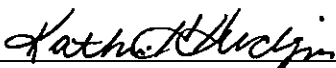
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge J. Mark Hayes, which was held on February 27, 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 Wayne Michael Smith.


Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of February, 2019.

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."



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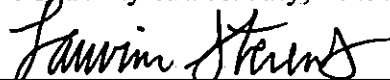
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Wayne Michael Smith, #365770, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 19th day of February, 2019.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of February, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.