STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Horry County

William H. Seals, Jr., Circuit Court Judge

---

RECEIVED

Nov 09 2020

S.C. SUPREME COURT

GAFASKIE D. RICHARDSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000569

---

JOHNSON PETITION FOR WRIT OF CERTIORARI

---

Joanna K. Delany
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**

## ISSUE PRESENTED

Whether the PCR court erred where it found counsel effectively represented Petitioner in his plea to trafficking methamphetamine, where counsel erroneously advised Petitioner that he had no defense to the charge at trial because Petitioner did have a valid defense to the charge, since counsel's ineffective performance resulted in a plea that was not knowingly, voluntarily, and intelligently tendered?

## STATEMENT

During the July term of 2017, an Horry County Grand Jury indicted Petitioner for possession with intent to distribute cocaine (PWID cocaine). App. 87 – 88. During the September term of 2017, an Horry County Grand Jury indicted Petitioner for trafficking methamphetamine. App. 89 – 90. On March 12, 2018, Petitioner appeared before the Honorable Larry Hyman for a guilty plea hearing. Petitioner was represented by Linward Edwards. The State was represented by Grayson Ervin. App. 1.

The parties had negotiated a sentence of concurrent terms of ten years for PWID cocaine and ten years for trafficking methamphetamine. App. 3, l. 16 – 4, l. 16. As part of the plea negotiations, the State dismissed by *nolle prosequi* other charges that were pending against Petitioner: possession with intent to distribute MDMA;[1] trafficking cocaine; distribution of cocaine; and possession with intent to distribute marijuana. App. 74; App. 9, ll. 19-24.

The court accepted Petitioner's pleas and, in keeping with the negotiations, sentenced him to serve concurrent terms of imprisonment of ten years for PWID cocaine and ten years for trafficking methamphetamine. App. 11, ll. 5-9; App. 12, ll. 19-23; App. 91 – 92.

No direct appeal was taken and on July 16, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 14 – 22. The State made its return. App. 23 – 28. On October 8, 2019, a hearing was held on the matter before the Honorable William H. Seals, Jr. James Falk represented Petitioner. Johnny James, Jr. represented the State. App. 29. At the hearing, Petitioner clarified that he was seeking post-conviction relief as to his conviction for trafficking methamphetamine but not for PWID cocaine. App. 46, l. 20 – 47, l. 15.

---

1 Methylenedioxymethamphetamine hydrochloride is also known as MDMA or "ecstasy." *In re Farlow*, 369 S.C. 48, 48, 631 S.E.2d 75 (2006).

Petitioner testified that he was not guilty of trafficking methamphetamine because he was unaware the pills he possessed contained methamphetamine: Petitioner thought the pills were instead ecstasy pills. App. 39, ll. 8-20.

Petitioner revealed that he only pleaded guilty to trafficking methamphetamine because he "was pressured." "I felt that I had no choice but to plead or go to trial without even, without even being in the position to go to trial that day." App. 41, ll. 1-8. "I didn't want to enter it [the plea], but I felt like I had no choice but to enter it." App. 42, ll. 21-23. "I knew we didn't have a defense ready." App. 43, l. 19.

Plea counsel confirmed that he advised Petitioner to accept the plea offer because there was no "valid" defense to be had at trial. According to plea counsel, Petitioner "did not sell methamphetamine, but that's what the composition of those pills were so said the SLED report. Therefore, not knowing what you possess, even though you possess it, I don't think that would be a valid defense." App. 53, ll. 16-20. "And that's why I went over that with him and told him based on the time he was facing that I believe the plea offer was a good offer." App. 53, ll. 20-22. Nevertheless, counsel claimed he was prepared for trial to begin. App. 59, ll. 23-25.

On March 30, 2020, the PCR court issued an order of dismissal. App. 75. The PCR court found Petitioner's testimony that he wanted a trial on trafficking methamphetamine not to be credible. App. 82. The PCR court found plea counsel's "testimony broadly credible." App. 82. The order of dismissal further stated that the record of the plea hearing showed that Petitioner's plea was not coerced, and that Petitioner "presented no credible evidence at the evidentiary hearing to show any undue pressure or improper coercion on the part of [c]ounsel, or anybody else, to elicit his guilty plea." App. 83.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred where it found counsel effectively represented Petitioner in his plea to trafficking methamphetamine, where counsel erroneously advised Petitioner that he had no defense to the charge at trial because Petitioner did have a valid defense to the charge, since counsel's ineffective performance resulted in a plea that was not knowingly, voluntarily, and intelligently tendered.

Petitioner told plea counsel he did not know the pills he possessed contained methamphetamine, but counsel told Petitioner that was not a "valid" defense. This erroneous advice was ineffective assistance of counsel, since the *mens rea* for trafficking methamphetamine is knowledge.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

Before a guilty plea may be accepted, it is required "that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea." *Rollison v. State*, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001); *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

To establish prejudice when challenging a guilty plea, a PCR applicant must prove "there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial." *Harden v. State*, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). "The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial." *Frierson v. State*, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018).

Counsel provided deficient representation here. Although Petitioner denied knowing the pills contained methamphetamine, counsel did not inform Petitioner that the State was required to prove Petitioner knowingly trafficked the drug in order to secure a conviction at trial.

"Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." *State v. Fennell*, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000) (citing *United States v. Bailey*, 444 U.S. 394, 402 (1980); McAninch & Fairey, *The Criminal Law of South Carolina* 1 (1996)). "A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." *Id.* "[O]rdinarily, in order to establish criminal liability, a criminal intent of some form is required." *State v. Ferguson*, 302 S.C. 269, 271, 395 S.E.2d 182, 183 (1990). Unless the legislature has designated an act or omission a crime regardless of fault (crimes referred to as strict liability offenses), "the

mental state required to be proven by the State for a particular crime might be purpose (intent), knowledge, recklessness, or criminal negligence." *Id*. at 271-72, 395 S.E.2d at 183.

An accused's argument that he "did not have the requisite *mens rea* to commit any crime," is a legitimate reason for a finding of not guilty. *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804-05 (2002).

Petitioner was convicted of trafficking methamphetamine pursuant to S.C. Code Ann. § 44-53-375(C), which criminalizes, *inter alia*, the actions of a person who "**knowingly** sells, manufactures, delivers, purchases, or brings into this State . . . or who is **knowingly** in actual or constructive possession . . . of ten grams or more of methamphetamine . . ." (emphasis added). Counsel's advice that Petitioner had no defense to this charge was incorrect here, since Petitioner did not knowingly possess methamphetamine—Petitioner believed the pills contained ecstasy, not methamphetamine.

Counsel was ineffective in advising Petitioner he had no valid defense since Petitioner denied possessing criminal intent, and the State must prove intent. Petitioner testified he pleaded guilty because he believed he had no defense at trial. Counsel's erroneous advice deprived Petitioner of "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill*, 474 U.S. at 56. Petitioner was prejudiced, because, but for, counsel's deficiency, he would have exercised his right to a trial. *Strickland*, 466 U.S. at 694; *Harden*, 360 S.C. at 408, 602 S.E.2d at 49.

## CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2020.

RECEIVED
Nov 09 2020
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Horry County

William H. Seals, Circuit Court Judge

---

GAFASKIE D. RICHARDSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

# PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Gafaskie D. Richardson 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 William H. Seals, Jr., which was held on October 8, 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 Gafaskie D. Richardson.

Respectfully Submitted,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of November, 2020.

RECEIVED

Nov 09 2020

S.C. SUPREME COURT

**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/ *Joanna K. Delany*
Joanna K. Delany
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 9th day of November, 2020.