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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Courtney Clyburn Pope, Circuit Court Judge

RANDY SCHULTZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000570

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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

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ISSUE PRESENTED

Did the PCR judge err in finding that the guilty plea was intelligently made when plea counsel failed to interview the confidential informant who was arrested and charged with possession of crack third offense three days before she was scheduled to testify at trial against Petitioner?

STATEMENT

In June of 2016, the Aiken County Grand Jury indicted Petitioner, Randy Schultz, for failure to stop motor vehicle when signaled by law enforcement vehicle and two counts of distribution of cocaine base, indictments #2016-GS-20-1057, 1059, 1060. (App. pp. 40-45). On December 5, 2017, Petitioner appeared before the Honorable Doyet A. Early, III and selected a jury with the trial to start later in the week. On December 7, 2017, Petitioner again appeared before Judge Early and pled guilty to the three charges. Martin C. Puetz represented Petitioner at both the jury selection and the guilty plea. Elizabeth B. Young and Cassie W. Hall prosecuted the case. Judge Early sentenced Petitioner to three (3) years for failure to stop and concurrent fifteen (15) year sentences for the distribution charges. (App. pp. 46-48). Petitioner did not appeal the convictions or sentences.

On October 12, 2018, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 49-70). The State filed a return on February 4, 2019. (App. pp. 71-82). An amended PCR application was filed on May 6, 2019. On January 21, 2020, an evidentiary hearing was held before the Honorable Courtney Clyburn Pope. Arthur K. Aiken represented Petitioner at the PCR hearing. Brianna L. Schill represented the State. In a written motion signed February 21, 2020, Judge Pope denied relief and dismissed the application. (App. pp. 144-161). A timely notice of intent to appeal was served on April 1, 2020. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that the guilty plea was intelligently made when plea counsel failed to interview the confidential informant who was arrested and charged with possession of crack third offense three days before she was scheduled to testify at trial against Petitioner.

In the amended PCR application Petitioner alleged that the guilty plea was not intelligently made and trial counsel never interviewed the confidential informant [CI]. (App. pp. 83-84). During the PCR hearing Petitioner testified, "My plea was involuntary made according to *Hill v. Lockhart*, 474 U.S. 52, 1985. A plea should be intelligent and voluntarily made. Had I been properly informed, I would have continued to trial." (App. p. 96, lines 4-7). Petitioner additionally testified that, "Trial counsel was ineffective for failure to interview the state key witness/C.I. on my behalf. *Strickland v. Washington*, 466 U.S. 668, 104, ineffective assistance of counsel due to my attorney failing to interview the state key witness before advising me to plead guilty. If my case had gone to trial, rather than to a guilty plea, the key witness, the C.I., could have changed the outcome or at least changed my decision to plead to this charge. This prejudiced – prejudiced me and the outcome of my case." (App. p. 96, line 20 – p. 97, lines 1-4).

Plea counsel admitted that he did not interview the CI. (App. p. 127, lines 13-15). Discussing the CI, plea counsel testified, "Ironically, it – it appears as though she had been arrested on December 4th of 2017, three days before she was to be here in court and testify, and was charged with possession of crack cocaine, third." (App. p. 128, lines 1-4).

In the order of dismissal the PCR judge, addressing trial counsel's failure to interview the CI, wrote:

> This Court finds Counsel's testimony as to the issue very credible, while also finding Applicant's testimony not credible. Contrary to Applicant's testimony, Counsel knew who the CI was because Applicant told him the name of the CI. Counsel investigated the CI's criminal background. The CI was a legitimate informant who partook in a controlled buy that was recorded on videotape and

> clearly depicted Applicant as the drug dealer. Additionally, Applicant did not provide any evidence of information that would have been uncovered had Counsel personally interviewed the CI. Accordingly, this allegation is denied and dismissed with prejudice.

(App. p. 159). The PCR judge erred.

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)).

In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> To establish a claim of ineffective assistance of counsel, the defendant has the burden of proving "(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). In order to establish prejudice when challenging a guilty plea, a defendant 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. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). As the United States Supreme Court stated in Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), "[I]n order to satisfy the 'prejudice' requirement, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."

The guilty plea was not made intelligently. Plea counsel was ineffective in failing to interview the CI who was arrested and charged with possession of crack third offense three days before she was scheduled to testify at trial against Petitioner. There is a reasonable probability

that, but for counsel's errors, Petitioner would not have pled guilty and would have insisted on going to trial. The convictions should be reversed.

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 9th day of November, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Randy Schultz 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 Courtney Clyburn Pope, which was held on January 21, 2020, 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 Randy Schultz.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of November, 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."

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This 9th day of November, 2020.