STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Nov 13 2020

S.C. SUPREME COURT

Certiorari to Georgetown County

Honorable George M. McFaddin, Circuit Court Judge

DAQUARIUS HOLMES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000428

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find plea counsel ineffective for failing to obtain Petitioner's mental health records?

STATEMENT

In October of 2013, the Georgetown County Grand Jury indicted Petitioner, Daquarius Holmes, for assault and battery first degree, possession of a weapon during the commission of a violent crime, armed robbery, kidnapping, criminal conspiracy, grand larceny and burglary first degree, indictments #2013-GS-22-976-982[1]. On June 11, 2015, Petitioner appeared before the Honorable Benjamin H. Culbertson and pled guilty to the lesser included offense of burglary second degree, armed robbery and kidnapping. The other charges were dismissed as paart of the plea. (App. p. 2, lines 10-14). Margaret Ann Kneece represented Petitioner at the plea. Alecia A. Richardson prosecuted the case. Pursuant to a recommendation by the State, Judge Culbertson sentenced Petitioner to three concurrent fifteen (15) year sentences. (App. pp. 18-26). Petitioner did not appeal the conviction or sentence.

On May 27, 2016, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on July 27, 2017. On November 12, 2019, an evidentiary hearing was held before the Honorable George M. McFadden, Jr. Steven W. Fowler represented Petitioner at the PCR hearing. Johnny E. James, Jr. represented the State. In a written order signed February 21, 2020, Judge McFadden denied relief and dismissed the application. A timely notice of intent to appeal was served on March 3, 2020. This petition for writ of certiorari follows.

[1] It is unclear who appeared before the grand jury as the witness listed is the Georgetown County Sheriff's Office.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for failing to obtain Petitioner's mental health records.

Petitioner pled guilty to burglary second degree, armed robbery and kidnapping. During the plea counsel advised the judge that Petitioner was seventeen years old at the time of the incident and was the least culpable of the three co-defendants. (App. pp. 10-13). Plea counsel told the judge that the other two co-defendants had other significant charges pending and Petitioner did not. (App. p. 12, lines 13-15). Plea counsel told the judge that one of the co-defendants admitted that he had the gun and drove the victim's car. (App. p. 12, lines 10-13). Plea counsel, however, did not make the plea judge aware of Petitioner's mental health issues. The plea judge followed the recommendation of the State and sentenced Petitioner to fifteen years in prison.

In the PCR application Petitioner alleged plea counsel was ineffective in failing to investigate. (App. p. 29). During the PCR hearing PCR counsel moved for a continuance to obtain Petitioner's medical records from Shoreline at Conway and Waccamaw at Georgetown. (App. p. 48, lines -8-25). PCR counsel admitted that Petitioner asked him to obtain these medical records previously. (App. p. 51, lines 17-25). Petitioner complained that PCR counsel had not obtained the medical records and moved to have PCR counsel relieved. (App. p. 52, line 9 – p. 53, lines 1-25). Petitioner did not want to proceed *pro se.* (App. p. 53, line 21). The PCR judge denied both the motion for a continuance and the motion to relieve counsel and the PCR hearing went forward.

During the PCR hearing Petitioner testified that plea counsel was ineffective for not obtaining his medical records that reflected that he took medications to help him stay focused.

(App. p. 62, line 16 – p. 63, lines 1-4; p . 63, line 23 – p. 64 - 65 lines 1-21; p . 76, lines 3-23). Plea counsel testified at the PCR hearing that Petitioner never asked her to obtain his medical records. (App. p. 138, lines 12-16).

In the order of dismissal the PCR judge wrote:

> The merits of the claim as they are presented to this Court reinforce the Court's finding of a procedural default. The plea transcript reflects Applicant's complete understanding of events as they were occurring and his answers to the plea court's questions reflect that he was paying attention and knew what was taking place. Applicant never testified at the evidentiary hearing that he did not understand what occurred at the plea proceeding, but rather merely offered the possibility that records might support his claimed diagnosis of ADHD. Applicant presented no records. Counsel testified that she never perceived any mental issues to explore with Applicant, and that he was fully engaged in their conversations exploring possible defenses based on his ever-changing and diverse recollections of precisely what happened on the day in question. Applicant has failed to present any evidence to meet his burden under Hill, and failed to demonstrate any reason why he should be relieved of his procedural default; accordingly, his request for relief by way of this allegation is **DENIED.**

(App. pp. 176-177). The PCR judge erred. First, the issue is not procedurally barred. Plea counsel's failure to obtain Petitioner's mental health records was raised as a general failure to investigate. The issue was raised at the PCR hearing, without objection. PCR counsel moved for a continuance when he failed to obtain the mental health records. The issue is not procedurally barred. Second, the PCR judge erred in refusing to find plea counsel ineffective for failing to obtain Petitioner's mental health records.

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)).

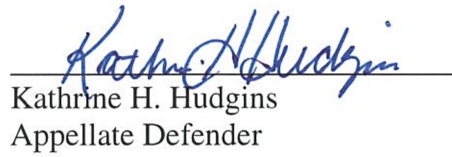
In Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court wrote:

> 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."

Plea counsel was ineffective in failing to obtain Petitioner's mental health records. While Petitioner may have been competent to proceed, the mental health records could have been important mitigation evidence. Given the fact that Petitioner was only seventeen years of age at the time of the incident, plea counsel should have ordered his mental health records. In this case Petitioner should not be penalized for his PCR counsel's failure to obtain the mental health records. There is a reasonable probability that the mental health records would have made the difference between the fifteen-year sentence imposed and the ten-year sentence requested. (App. p. 13, lines 1-2).

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
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Daquarius Holmes states:

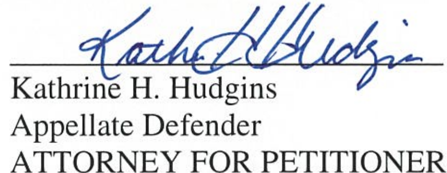
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge George M. McFaddin, which was held on November 12, 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 Daquarius Holmes.

Respectfully Submitted,

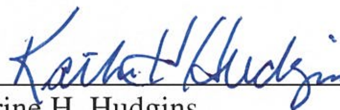


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of November, 2020.

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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