

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

J. Derham Cole, Circuit Court Judge

RECEIVED

Jan 07 2021

S.C. SUPREME COURT

LESTER MURRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000897

JOHNSON PETITION FOR WRIT OF CERTIORARI

Susan B. Hackett
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

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

Petitioner’s right to the effective assistance of counsel as
guaranteed by the Sixth and Fourteenth Amendments was violated
by plea counsel’s failure to investigate the charges against
Petitioner and advocate on his behalf. 3

Relevant Facts 3

Discussion 4

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL 8

ISSUE PRESENTED

Was Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments violated by plea counsel's failure to investigate the charges against Petitioner and advocate on his behalf?

STATEMENT

Petitioner was charged with criminal sexual conduct with a minor (CSCM) in the second degree and sexual exploitation of a minor in the first degree. App. 87-88; App. 90-91. On April 12, 2016, Petitioner entered guilty pleas pursuant to North Carolina v. Alford, 400 U.S. 25, (1970), to the charges. App. 1. Bethany Miles represented the state, and Jason Chehoski represented Petitioner. App. 1. The Honorable William Seals accepted Petitioner's guilty plea. App. 9, ll. 5-7. Judge Seals sentenced Petitioner to ten years imprisonment on each charge, and ordered the sentences to be served consecutively. App. 12, ll. 5-7; App. 89; App. 92. Petitioner did not appeal from his guilty plea and sentence.

On March 1, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 15-26. The Honorable J. Derham Cole presided over a hearing on the application on February 21, 2018. App. 35. Aimee Zmroczek represented Petitioner. App. 35. Susannah Cole represented the state. App. 35. By an order filed May 20, 2020, Judge Cole denied Petitioner relief from his conviction and sentence. App. 73-86.

On June 19, 2020, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments was violated by plea counsel's failure to investigate the charges against Petitioner and advocate on his behalf.

Relevant facts

Petitioner was arrested in April 2014. App. 39, ll. 2-8. Petitioner denied having sexual relations with the complaining witness. App. 52, ll. 10-15. Petitioner explained to plea counsel that he was at his workplace when the complaining witness alleged she was assaulted. App. 44, ll. 7-9. Not only would his boss have confirmed his whereabouts, but his roommates would have done so too. App. 44, ll. 9-10; App. 53, ll. 4-8.

The state offered to dismiss all charges except two against him. App. 45, ll. 15-18. Initially, plea counsel advised Petitioner he would "get five years." App. 45, ll. 18-20. When this plea offer was not completed, Petitioner was told he would receive ten years imprisonment. App. 45, ll. 20-23. Based upon the advice of counsel concerning the evidence against him and his sentencing exposure, Petitioner decided to enter an Alford plea. Although Petitioner accepted this offer, he was not advised that the terms would be served consecutively due to a statutory mandate for consecutive sentencing. App. 45, l. 25 – App. 46, l. 3; App. 54, ll. 17-18.

In the order of dismissal, the PCR judge noted that Petitioner claimed his roommates would have confirmed his story. App. 82. Further, the PCR judge noted that "in order to prevail on a claim of ineffectiveness based on counsel's failure to call a favorable witness ... a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." App. 82. The PCR court also noted that Applicant did not

present evidence showing how DNA testing would have benefited his case. App. 82. Finally, the PCR court faulted Petitioner for not presenting testimony “from another female affirming she was the subject of the explicit images on [his] phone.” App. 82.

The PCR judge found Petitioner failed to prove counsel was deficient by failing to investigate his claims. App. 82. The PCR judge found Petitioner failed to show how further investigation by counsel would have benefitted him at trial. App. 82. According to the PCR judge, Petitioner failed to present what counsel would have found if he had hired an investigator done further investigation. App. 82. According to the PCR judge, Petitioner “presented no evidence at the evidentiary hearing of any viable defense he could have presented at trial had counsel investigated his case more thoroughly or advocated for vehemently for [Petitioner]’s Constitutional rights.” App. 83. In summary, the PCR judge found Petitioner “failed to prove counsel was either deficient in his investigation and advocacy or that he was prejudiced by counsel’s representation such that there was a reasonable probability [Petitioner] would have insisted on going to trial rather than plead guilty.” App. 84.

Discussion

The Sixth and Fourteenth Amendments to the United States Constitution guarantees the right to the effective assistance of counsel to all criminal defendants. Strickland v. Washington, 466 U.S. 668, 685 (1984). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686. “First, the defendant must show that counsel’s performance was deficient.” Id. at 687. “This requires showing that counsel made errors so serious that counsel was not functioning as ‘counsel’ guaranteed by the Sixth Amendment.” Id. “Second, the defendant must show that the deficient performance

prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

Put another way, "[i]n order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

"Representation of a criminal defendant entails certain basic duties." Strickland, 466 U.S. at 688. "Counsel's function is to assist the defendant." Id. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the courts of the prosecution." Id.

"Without a doubt, a criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Ard, 372 S.C. at 331, 642 S.E.2d at 697 (internal quotation omitted). "[W]hile the scope of a reasonable investigation depends upon a number of issues, 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." Id. at 331-332, 642 S.E.2d at 597 (internal quotation omitted). "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Id. at 332, 642 S.E.2d at 597.

Plea counsel failed to investigate the charges against Petitioner, and he failed to advocate on Petitioner's behalf. Despite Petitioner's insistence on his innocence and his ability to provide alibi witnesses, plea counsel failed to investigate. According to Petitioner, an investigation

would have revealed work records and witnesses who would have insisted Petitioner was at work when the abuse allegedly occurred. Further, according to Petitioner, an investigation would have turned up Petitioner's roommates who would have insisted Petitioner did not assault the complaining witness. Instead, plea counsel encouraged Petitioner to enter guilty pleas to two offenses. Further, plea counsel failed to advise Petitioner that his sentences would be served consecutively in light of the statutory requirement of such. Due to plea counsel's failures, Petitioner entered guilty pleas to offenses for which he was not guilty and forced to serve double the sentence which he expected.

CONCLUSION

Petitioner respectfully requests this Court reverse the PCR court, reverse Petitioner's convictions, and remand for a new trial.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2021.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jan 07 2021

S.C. SUPREME COURT

Certiorari to Lexington County

J. Derham Cole, Circuit Court Judge

LESTER MURRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lester Murray states:

1. She is an 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 the Honorable J. Derham Cole, which was held on February 21, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Lester Murray.

Respectfully Submitted,

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of January, 2021.

RECEIVED

Jan 07 2021

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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/Susan B. Hackett

Susan B. Hackett
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 7th day of January, 2021.