

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge
—————

AQUAVIOUS RAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000150
—————

JOHNSON PETITION FOR WRIT OF CERTIORARI
—————

Sarah E. Shipe
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Jun 23 2021

S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in finding defense counsel was not ineffective where counsel admitted at petitioner's evidentiary hearing that he did not conduct an independent investigation in petitioner's case and relied solely on the state's discovery in advising petitioner to plead guilty?

STATEMENT

On August 21, 2015, a Spartanburg County grand jury indicted petitioner for three counts of armed robbery, first degree burglary, attempted murder, and possession of a weapon during the commission of a violent crime. App. 120-29. Petitioner pled guilty as indicted on November 9, 2016, before the Honorable Daniel Hall. App. 1. Robin File represented petitioner, and Barry Barnette, solicitor, represented the state. App. 1.

Judge Hall sentenced petitioner to concurrent terms of twenty-five years' imprisonment for each count of armed robbery, twenty-five years' imprisonment for first degree burglary, twenty-five years' imprisonment for attempted murder, and five years' imprisonment for possession of a weapon during the commission of a violent crime. App. 32.

Petitioner filed a motion to reconsider his sentence, arguing the sentence was excessive considering petitioner's age and the fact that none of petitioner's prior convictions were classified as violent crimes. App. 34-35. On December 22, 2016, Judge Hall denied petitioner's motion to reconsider. App. 41.

Thereafter, petitioner filed an application for PCR on February 12, 2018. App. 42-47. An evidentiary hearing was held before the Honorable Grace Knie on November 13, 2020. App. 69. Rodney Richey represented petitioner, and Chelsey Marto, assistant attorney general, represented the state. App. 69.

On November 24, 2020, Judge Knie signed an order denying PCR. App. 108-19. Judge Knie found petitioner was not entitled to relief based on the allegation that trial counsel was ineffective for failure to investigate, in part because counsel testified he believed the state's discovery and evidence in petitioner's case were complete and he could not think of anything that needed to be investigated further. Judge Knie also found petitioner was not entitled to relief

this allegation because at his guilty plea hearing petitioner told the court he was satisfied with counsel's representation. Judge Knie also found petitioner did not specify at PCR what evidence or witnesses he thought defense counsel did not properly investigate or how counsel's failure to investigate impacted his decision to plead guilty. App. 117-18.

This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred in finding defense counsel was not ineffective where counsel admitted at petitioner's evidentiary hearing that he did not conduct an independent investigation in petitioner's case and relied solely on the state's discovery in advising petitioner to plead guilty.

Relevant facts

At petitioner's guilty plea hearing, the state alleged that on July 14, 2015, petitioner and two other men, Tyrus Woodruff and Tavaris Newberry, entered the home of Marlon S. Davis (Davis senior), Akia Ross, and Marlon L. Davis. Davis senior was shot multiple times during the incident. The men left the home, taking cell phones and wallets belonging to the residents, in a car driven by Xavier Martin. Later the same day, police tracked the stolen cell phones and arrested petitioner, Woodruff, Newberry, and Martin. App. 16-25.

Petitioner pled guilty as indicted on November 9, 2016, without negotiation or recommendation. App. 4, ll. 16-17.

At the evidentiary hearing, petitioner testified that Robin File represented him in this case. App. 77. Petitioner said he and File only met briefly before he pled guilty and that he was induced to plead guilty when File told him he would likely receive a twelve-year sentence. App. 77-78. Petitioner conceded he told the court he was satisfied with File's representation of him during his plea in order to "go along with the court" because he believed he would receive a more favorable sentence. App. 79, ll. 4-22. Petitioner contended File did not investigate his case properly and due to that failure petitioner received a harsh sentence based solely on his juvenile record and not on the facts of the case. App. 81, ll. 1-10. Petitioner believed if File had investigated the circumstances of his case, the fact that petitioner was not identified as the

shooter could have been brought forward and have been helpful. Additionally, petitioner testified that File should have investigated inconsistent statements given to police by the complainants. App. 82, ll. 5-9; 87, ll. 10-18.

Regarding investigation, Defense Counsel File testified that he “didn’t do a lot.” File did not believe he needed to investigate petitioner’s case and thought the discovery he received reflected a “very thorough investigation” by the state. File testified that petitioner had been identified out of a lineup, his fingerprints were found on the car used in the robbery, and his hands tested positive for gun shot residue. App. 98, ll. 8-25.

Discussion


A two-prong test for determining effective assistance of counsel has been set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, an individual must show that counsel’s performance was deficient. Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* at 688. The second prong of *Strickland* requires a showing that the deficient performance prejudiced the individual to the extent that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The individual is required to overcome the presumption that counsel was effective in order to receive relief. *Id.*

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

The PCR court erred in finding defense counsel was not ineffective where counsel's failure to do any investigation in petitioner's case was unreasonable. Petitioner faced multiple charges classified as violent and most serious, which carried the potential of a life sentence. While this was not petitioner's first exposure to the criminal justice system, he was a young man, twenty-two years old, at the time of his guilty plea. Petitioner was likely unsure of how to assist counsel in his very serious case and trusted that his experienced attorney would do some investigation in his case. The PCR court incorrectly found petitioner did not specify at his PCR hearing what counsel should have investigated. Petitioner testified at PCR that the complainants gave inconsistent statements about the incident to police. He also testified that he had not been identified as the shooter. However, counsel failed to do any investigation in petitioner's case, resulting in petitioner pleading guilty and receiving a twenty-five-year sentence. Counsel's admitted failure to investigate the circumstances of petitioner's case further than what was provided by the state was unreasonable. *See Strickland*, 466 U.S. 688, 691.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of June, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Aquavious JuJuan Ray 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 Grace Gilchrist Knie, which was held on November 13, 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 Aquavious JuJuan Ray.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of June, 2021.

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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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