STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Jul 16 2021

S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable Eugene C. Griffith, Circuit Court Judge

PAUL HARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000166

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel effective where counsel failed to review all of the discovery in the case with Petitioner, specifically the video recordings of the drug buys, rending Petitioner's plea unknowing and involuntary?

STATEMENT OF THE CASE

During the February 2016 term of the Spartanburg County grand jury, Petitioner was indicted for one count of trafficking in cocaine base 28-100 grams, three counts of trafficking in cocaine base 10-28 grams, and one count of possession of a weapon during the commission of a violent crime. App. 3; App. 105-120. The charges arose from a series of controlled buys performed by a confidential informant working with the Spartanburg County Sheriff's Office (SCSO) Narcotics Unit. App. 13, ll. 2-8. The State alleged that the confidential informant purchased crack cocaine from Petitioner on April 6, July 20, and August 21, 2015. Each purchase was for over 10 grams[1] of crack cocaine. App. 13-14. The controlled buys were audio and video recorded. App. 17.

The SCSO Narcotics Unit, along with agents of the D.E.A., obtained a warrant to search the residence where the buys occurred. App. 14, ll. 10-16. During the search, officers discovered a clear jar just outside of the residence containing two bags of crack cocaine weighing 56.57 grams. App. 15, ll. 1-4. Inside the residence, officers located marijuana, two guns, and various items used in the manufacturing of crack cocaine. App. 15, ll. 5-15. Petitioner made statements to the officers about purchasing and selling crack cocaine in certain increments. App. 14, ll. 20-24.

Petitioner was served with notice of the State's intent to seek a life sentence pursuant to S.C. Code Ann. § 17-25-45 (LWOP Notice) on April 20, 2016. App. 121. On March 26, 2018, Petitioner appeared before the Honorable Grace Gilchrist Knie to enter a guilty plea to the four trafficking charges for a negotiated fifteen-year sentence. App. 1; App. 3. Petitioner was represented by William Yarborough and Joshua Schultz. App. 1. The State was represented by

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[1] The weights of the three controlled buys were 11.3 grams, 12.65 grams, and 13.51 grams. App. 13-14

Lindsey Overby. App. 1. The State, as part of the plea negotiations, dismissed the weapons indictment and reduced the trafficking charges from third to second offenses. App. 3.

During the plea colloquy, the court asked if discovery had been shared with defense counsel. The State confirmed that everything had been shared with defense counsel but clarified that the identity of the confidential informant had not been disclosed. App. 16, ll. 16-21. Counsel Yarborough informed the court that he had reviewed the discovery with Petitioner at length and further stated,

> I watched the video tape of the buy or the sell that they were going to go forward with on this particular case. It's one of the worst cases for the defense I've seen in a long time, and I advised Mr. Harris of that, and that's what's brought about this plea today, I think, Your Honor. At that – before that we were – we were posturing towards a trial. But I don't think after looking at the video it – it was very damaging for the defense, and I've shared that with him.

App. 17, ll. 3-12.

Prior to sentencing, Petitioner spoke to the court. He stated he had been on the "straight and narrow path" for the last fifteen years, had obtained his GED, attended NA meetings, and was employed. He stated that "all of these incidents, it occurred from one person...he called me, and I did some for him. It ain't like that I'm out here just selling drugs. It is one guy...one guy." App. 19, ll. 7-21. Petitioner asked for home detention or a suspended sentence. App. 20, ll.1-2. The court then clarified with Petitioner that the plea was for a negotiated fifteen years and that the sentence could not be suspended. App. 21, ll. 6-14.

The State reviewed Petitioner's prior convictions, establishing the necessary offenses for enhancement of the charges and the serving of LWOP Notice. App. 21-22. At the conclusion of the plea hearing, Judge Knie sentenced Petitioner to fifteen years imprisonment and a fine of $50,000 on each charge, sentences to run concurrently. App. 23-24.

On July 27, 2018, Petitioner filed an application for post-conviction relief alleging, *inter alia*, that counsel had failed to review discovery with him. App. 26-32. The State filed a return on May 6, 2019. App. 33-42. A hearing was convened on November 30, 2019, before the Honorable Eugene C. Griffith. Petitioner was represented by Rodney Richey. The State was represented by Jacob Isenberg. App. 43.

At the hearing, both Counsel Yarborough and Schultz testified that they reviewed the discovery with Petitioner. App. 49, l. 25-App. 25, l. 11; App. 72, ll. 13-16. The only evidence they did not share with Petitioner was the video recordings of the drug buys. App. 54, ll. 9-24; App. 74, l. 24-App. 75, l. 2. Counsel Yarborough and Schultz watched the video in Solicitor Overby's office and were provided with still shots from the video to share with Petitioner. App. 54, ll. 12-23; App. 78, ll. 1-8. Counsel Schultz testified that the video was "unfavorable" to Petitioner based upon the description of the individual in the video. App. 78, ll. 5-11. However, Counsel Yarborough testified that there "was a question whether or not that was him [Petitioner]" in the video. He stated,

> I believed that that pictured looked like him, but I couldn't swear to it today. I think they have a very similar nose. The hair was different. It was different than I remembering [sic] it being at that time. But they [the State], they said that that was a picture of Mr. Harris doing the, doing the deal.

App. 55, ll. 2-8.

Counsel Yarborough also told Petitioner that after reviewing the video footage and still photograph he did not believe they could win at trial and encouraged Petitioner to plead guilty. App. 56, ll. 19-22. Both Counsel Yarborough and Schultz testified that the State would not provide a copy of the video to Petitioner unless he rejected the offer and was going to stand trial under the LWOP Notice. This was allegedly due to the State wanting to protect the identity of the confidential informant. App. 54, ll. 14-19; App. 77, ll. 19-25.

Petitioner testified that he repeatedly asked to see the video of the buys, but that Counsel Yarborough and Schultz would only show him a photograph from the video. App. 58, ll. 16-20. Petitioner did not understand why he could not see the video and was only told that if he watched the video, he would receive a life sentence. App. 58, ll. 20-24; App. 62, ll. 24-25; App. 65, ll. 8-24; App. 66, ll. 21-23. Petitioner did not know that he could have seen the video if he had decided to proceed to trial. App. 66, ll. 19-21. Petitioner stated that seeing the video was not about learning the identity of the confidential informant. App. 59, l. 19-App. 60, l. 4. Petitioner merely wanted to see the evidence the State said they had against him so that he could defend himself. App. 65, ll. 8-25. Petitioner did admit to seeing a picture that was purportedly a still shot taken from the video testifying, "[a]ll I seen was one picture, a picture that they claim that's supposed to have been me." App. 66, ll. 4-8. Petitioner stated he filed his PCR application because he wanted to go to trial. App. 65, ll. 12-13.

At the conclusion of the hearing, the court took the matter under advisement. App. 81, ll. 2-3. An order of dismissal was filed on January 29, 2021. App. 83-104. In the order, the court found the testimony of Counsel Yarbrough and Schultz more credible than Petitioner's testimony. The court ruled that Counsel Yarborough and Schultz had reviewed the discovery, with the exception of the video, with Petitioner. Additionally, the court ruled that Petitioner was not permitted to attack his plea on the basis of not having seen the video "because Applicant seemingly knew the video existed, what is [sic] consisted of with the exception of the confidential informant's identity, and the impact it would have on this case, this Court finds that Applicant waived his right to view the video by entering the plea." App. 100.

ARGUMENT

The PCR court erred in finding plea counsel effective where counsel failed to review all of the discovery in the case with Petitioner, specifically the video recordings of the drug buys, rending Petitioner's plea unknowing and involuntary.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury... Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969) (finding a guilty plea is voluntarily and knowingly entered into when the accused has a full understanding of the consequences of his plea and the charges against him); See also Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999) (finding a defendant must understand the sentencing consequences of his plea for it to be considered voluntarily given).

"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 v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Six Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effect assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 147, 1480-81 (2010) (internal quotations omitted).

An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice,"

requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

In Hyman v. State, 379 S.C. 35, 39, 723 S.E.2d 375, 377 (2012)[2], Hyman alleged that his guilty plea was not knowingly, intelligently, and voluntarily entered into because he was not allowed to watch the videotape of the alleged drug buy prior to entering his plea. The State, wanting to protect the identity of the confidential informant used in the buy, was unwilling to disclose the video of the buy to Hyman, but did disclose the video to defense counsel. Id. at 36-40, 723 S.E.2d at 377. The State also provided still photographs of the video to Hyman. Id. at 41, 723 S.E.2d at 377-78.

At the PCR hearing, defense counsel testified that she reviewed the video and it "clearly" depicted Hyman engaged in a drug transaction. Id. Hyman testified that he recognized himself in the still photographs that were provided to him, but that the photographs did not show him engaged in a drug transaction. He therefore argued he still needed to personally review the video. Id. The PCR judge stated that "he was concerned over the seemingly widespread policy of withholding evidence from criminal defendants to allegedly protect the identity of confidential informants, which he described as effectively 'impairing a defendant's ability to make an intelligent choice regarding his jury trial rights." Id. However, the PCR court ruled that because counsel had reviewed the videotape, Hyman had been provided with still photographs, the

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2 Abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

evidence was not exculpatory, that counsel was not deficient, and Hyman could not show prejudice. Id. at 41-42, 723 S.E.2d at 378.

The South Carolina Supreme Court affirmed the PCR court's ruling, holding that disclosure to defense counsel satisfied the State's discovery requirements. Id. at 46, 723 S.E.2d at 381. Additionally, the Court held that Hyman was fully aware of the inculpatory nature of the videotape throughout the pendency of his case and could not show how the outcome of the case would have been different if he had viewed the videotape himself. Id. at 49, 723 S.E.2d at 382.

In so ruling, the Court noted that "in cases involving a confidential informant, a criminal defendant's interest in access to certain evidence must be weighed against the State's interest in protection the identity and safety of the informant." Id. at 47, 723 S.E.2d at 381 (2012) (citing State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 614–15 (2003) ("Although the State is generally privileged from revealing the name of a confidential informant, disclosure may be required when the informant's identity is relevant and helpful to the defense or is essential for a fair determination of the State's case against the accused. For instance, if the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances." (internal citations omitted)).

Petitioner finds himself similarly situated to the defendant in Hyman, *supra*. Petitioner was not allowed to view the videotape of the alleged drug buys prior to his guilty plea. Only defense counsel was allowed to view the videotape. Additionally, the State provided at least one still photograph that was disclosed to Petitioner. Under the Court's holding in Hyman, Petitioner has no claim of ineffective assistance of counsel. However, Petitioner's case can be distinguished from Hyman.

First, Counsel Yarborough and Schultz never testified that Petitioner was clearly depicted in the videotape or in the still photograph. Even Petitioner characterized the photograph as one that the State said was supposedly him. He did not testify that he was the individual in the photograph, and neither of his attorneys testified that the video "clearly depicted" Petitioner engaging in a drug transaction. Unlike Hyman, Petitioner was not clearly identified by counsel or himself. Accordingly, there was a possibility that the evidence on the videotape was exculpatory or, at the very least, ambiguous.

Second, Petitioner was facing a potential sentence of life without parole if he proceeded to trial. The State made it clear that the only way for Petitioner to avoid LWOP was if Petitioner did not review the videotape of the drug buys. Petitioner was forced to decided between a trial that could have resulted in LWOP and a plea offer without knowing whether the State could in fact prove his guilty.

Third, the decision to charge the drug buys in Petitioner's case was unnecessary. If the State sought to protect the identity of the informant, all it had to do was charge the search warrant case. Adding the drug buy charges was merely gilding the lily – the State did not need the drug buy cases to proceed forward on a trafficking indictment against Petitioner that would have resulted in the same or greater sentence exposure. The unnecessary nature of the charges weakens the contention that the State was trying to protect the identity of the informant by not disclosing the video. If the State truly sought to protect the identity of the informant, it merely had to refrain from bring the charges.

These facts are sufficiently distinct from the facts in Hyman and warrant a different outcome. As the PCR judge deftly stated in Hyman, withholding evidence impairs a defendant's ability to make an intelligent choice regarding his jury trial rights. While the State may have an

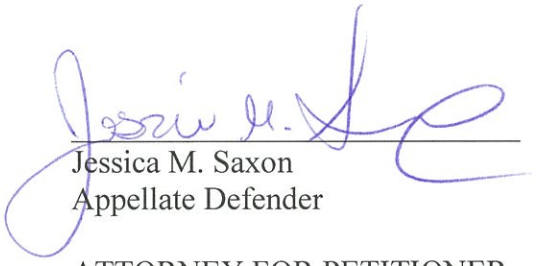
interest in protecting the identity of an informant, a defendant has a greater interest in viewing the evidence the State purports to have against him.

In Petitioner's drug buy cases, the informant was an active participant in the criminal transaction and entirely material to the guilt or innocence of Petitioner. The State would not have been able to proceed to trial on those charges without bringing the informant in to testify. It is therefore illogical to allow the State to withhold that evidence from Petitioner during the plea process. When the State makes a decision to indict a charge that is based solely on a buy, it should not be able to withhold evidence under the guise of protecting the identity of an informant, particularly when a defendant is facing the possibility of life without parole.

Counsel Yarborough and Schultz advised Petitioner to enter a guilty plea even though they did not definitively testify that the videotape showed Petitioner selling drugs. Considering that Petitioner was facing LWOP, it was incumbent upon his counsel to at least attempt to gain the video for his review prior to a plea. Failure to do so was deficient performance. Petitioner was unable to make a voluntary and intelligent decision to plead because he was prevented from reviewing a key piece of evidence. As Petitioner testified that he had wanted to proceed to trial, a statement corroborated by Counsel Yarborough during the plea colloquy, he has shown the requisite prejudice. Accordingly, his guilty plea should be vacated.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



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Appellate Defender

ATTORNEY FOR PETITIONER

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Paul Lavar Harris 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 Eugene C. Griffith, which was held on November 13, 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 Paul Lavar Harris.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of July, 2021.

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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."

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