

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County
Thomas A. Russo, Circuit Court Judge

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APR 26 2013

S.C. Supreme Court

MICHAEL E. MINOR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213306

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether petitioner's guilty plea was knowingly and voluntarily entered when plea counsel failed to review discovery with petitioner?

STATEMENT

Petitioner adopts the statement set forth in the petition for writ of certiorari dealing with the granting of this Austin petition.

ARGUMENT

Petitioner's guilty plea was not knowingly and voluntarily entered because plea counsel failed to review discovery with petitioner.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudice by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, supra. This means that there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's

accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

In this case the plea court did advise petitioner of the right to a jury trial (App. p. 8, lines 7-12), but failed to explain that petitioner could not be found guilty of the charges unless the jury presented a unanimous verdict.

In this case, petitioner gave the following testimony concerning discovery:

Q. All right. What do you think your rights as a criminal defendants are if you're charged with a crime? Do you have any tools at your disposal to find out what you're charged with or what the State may have to prove against you?

A. No, sir, I don't. I have only got a seventh grade education, so that is where I'm at, you know, I'm just dumb on other than what I know.

Q. Have you ever heard the word Brady motion, have you ever heard that, what that is?

A. Only since I have been in prison, I have read some documents and stuff and found out.

Q. You heard about a Brady motion after you went to jail?

A. Yes, sir, I did.

- Q. What about a Rule 5 motion?
- A. I heard about that after I went to jail.
- Q. What do you think those things are?
- A. I have read but as far as keeping it in my head, I can't keep it in my head, I'm sorry.
- Q. If I told you that that, those are tools where you can dig into the State's file and find out what evidence they have would sound like what you remember?
- A. I think so, yes, sir.
- Q. Did anyone ever talk to you about that, before you pled guilty?
- A. I would, I was in a state of shock, really, from not knowing nothing up until the Monday before I was sentenced on Wednesday, which Monday was the 25th of February.

(App. p. 32, line 20 – p. 33, line 25).

As can be seen from petitioner's testimony, his plea was not knowingly and intelligently entered because plea counsel failed to review discovery with him prior to his entering his plea.

CONCLUSION

Petitioner's guilty plea should be vacated.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County
Thomas A. Russo, Circuit Court Judge

MICHAEL E. MINOR,

PETITIONER,

V.

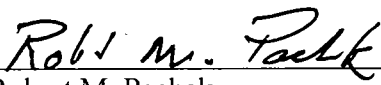
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213306

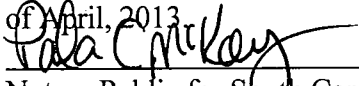
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of April, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day

of April, 2013
 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.