

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Feb 11 2022

S.C. SUPREME COURT

Certiorari to Sumter County

Honorable R. Kirk Griffin, Circuit Court Judge

MICHAEL ROSE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000484

JOHNSON PETITION FOR WRIT OF CERTIORARI

Jessica M. Saxon
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

Whether the PCR court erred in finding that Petitioner was not unfairly and improperly pressured and coerced by counsel to enter a guilty plea?

STATEMENT OF THE CASE

On February 4, 2016, Barbara Evans returned home from visiting her mother and discovered someone had been in her home. As she was walking into her bedroom, she heard a man behind her say “Oh, Barbara, it’s me.” Evans identified the man as Michael Rose, Petitioner. Evans had known Petitioner growing up and recognized him immediately. The police were called to investigate and discovered that copper wire in the attic had been cut. Evans told police she had seen Petitioner with copper wires in his hand when he spoke to her. App. 7, 1. 10-App. 8, 1.6. Petitioner was arrested for burglary, first degree. App. 112. The Sumter County grand jury originally indicted Petitioner for burglary, second degree. App. 113-114. However, the State amended the indictment to burglary, first degree, on October 31, 2019. App. 115-116.

On June 22, 2018, while the 2016 case was still pending, police received a call from Isaac Bracey reporting a burglary in progress at the Burgess Brodgon Do-It-Yourself Center. Police responded to the scene to find broken plexiglass and various tools missing. App. 8, 1. 9-App. 9, 1. 3. Bracey, who knew Petitioner from the neighborhood, identified Petitioner as the person that had burglarized the business. App. 70, 11. 3-10. Petitioner was arrested for burglary first degree but subsequently indicted for burglary second degree, violent. App. 118-120.

Petitioner, represented by Debbie Butcher¹ and Jack Barnes, appeared before the Honorable R. Ferrell Cothran, Jr. on December 9, 2019, to enter a guilty plea to two counts of burglary second degree, violent. The State was represented by Margaret Held. App. 1. Based on the recommendation of the State, Judge Cothran sentenced Petitioner to eight years imprisonment on each burglary charge, sentences to run concurrently. App. 10-11.

¹ Counsel Butcher represented Petitioner on the 2016 charge but was not available for the plea hearing. Petitioner, after consultation with Counsel Barnes and Counsel Butcher, decided to allow Counsel Barnes to act as stand-in counsel for the purposes of the plea. App. 6, 11. 19-23.

Petitioner did not appeal his convictions or sentences. On March 3, 2020, Petitioner filed an application for post-conviction relief alleging, *inter alia*, that counsel had pressured and coerced him to enter a guilty plea. App. 13-19. The State filed a return, partial motion to dismiss, and motion for a more definitive statement dated September 18, 2020. App. 20-30. Appointed PCR counsel Timothy Griffith filed an amended PCR application on behalf of Petitioner. App. 31-33.

An evidentiary hearing² was convened before the Honorable R. Kirk Griffin on March 8, 2021. Petitioner was represented by Timothy Griffith. The State was represented by Michael Neubauer. App. 34. At the hearing Petitioner testified that he had not wanted to plead guilty, but Counsel Barnes pressured him into entering³ the guilty plea. Petitioner testified he felt “pressured and coerced to sign up my rights” because Counsels Barnes and Butcher had told him he would lose at trial based on evidence that placed Petitioner at the crime scenes. However, he claimed that Counsels Butcher and Barnes had not shown him the discovery in his cases and did not giving him an opportunity to discuss the plea. App. 43, ll. 2-21. Petitioner admitted he remembered most of the plea colloquy. Nevertheless, he stated that he only answered the questions the plea judge asked with “yes” because that is what Counsel Barnes had told him to do. App. 54- 56; App. 59, ll. 2-5.

Counsel Butcher testified that she had reviewed the discovery with Petitioner and told him she believed the State would be able to prove him guilty beyond a reasonable doubt. App.

² Due to the on-going pandemic, the hearing was conducted via WebEx. At the start of the hearing Petitioner agreed to proceed via video conferencing and waived the right to an in-person hearing. App. 37.

³ At the evidentiary hearing, Petitioner asserted that he “never did plead guilty.” At the request of the State, the PCR judge took judicial notice that Petitioner had, in fact, pled guilty to two counts of burglary second degree, violent. App. 56, l. 13-App. 57, l. 9.

63, l. 12-App. 64, l.1. She also testified that she spoke with Petitioner about the elements of the offense, the indictment, possible sentences, collateral consequences of a conviction, his right to appeal, and his constitutional rights. App. 61, l.12-App. 62, l. 11. Counsel Butcher further stated that Petitioner was not confused and that he understood everything about his case. App. 65, ll. 18-22. Regarding the guilty plea, Counsel Butcher clarified that, while she was not present for the plea, she had reviewed the plea offer with Petitioner. App. 64, ll. 5-9. When asked about Petitioner's stance on the plea offer, she testified that the plea offer was "something that he was willing to plead to." App. 65, ll. 2-5.

Counsel Barnes likewise testified that he discussed "the nuances" of the case with Petitioner on many occasions. App. 69, ll. 22-25. He had told Petitioner that the biggest hurdle in the cases was the fact that Petitioner was identified committing the burglaries by persons who knew him. App. 70, ll. 12-16. Counsels Barnes and Butcher met with Petitioner during November to discuss what Counsel Barnes called a "pretty good offer" and went over the cases once again. App. 72, ll. 2-23. Counsel Barnes testified that the "pressure" on Petitioner to accept the plea was the fact Petitioner was on the December trial docket for the 2016 burglary first degree case. Therefore, Petitioner had to decide if he was going to plead or go to trial. App. 80, l. 7-App. 81, l. 21. Counsel Barnes testified that although Petitioner did not want to go to jail, it was ultimately Petitioner's decision to plead guilty. App. 80, ll. 17-20; App. 82, ll. 6-18.

The order of dismissal was filed on April 27, 2021. App. 97-111. The PCR court found Petitioner's allegations were without merit. Specific to the guilty plea, the court found that Petitioner had not offered any evidence, outside of self-serving testimony, that showed Counsels Barnes and Butcher had pressured him to plead in any way. App. 104.

ARGUMENT

The PCR court erred in finding that Petitioner was not unfairly and improperly pressured and coerced by counsel to enter a guilty plea.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “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,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

To succeed on a PCR application, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. Additionally, an applicant must show that the “deficient performance prejudiced the defendant 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, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

As announced in Hill v. Lockhart, 474 U.S. 52, 56 (1985), “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.” As plea bargaining has become more central to the criminal justice system, the United States Supreme Court has held that the Sixth Amendment right to counsel extends to the plea-bargaining process. Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012). The US Supreme Court has further held that prior to

“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).

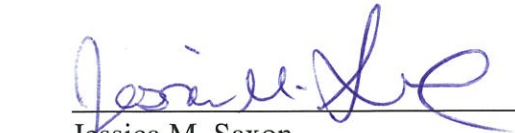
On PCR, an applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe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

Petitioner’s testimony was clear that he had not wanted to enter a guilty plea. Undoubtedly, as the court stated in the order of dismissal, Petitioner’s testimony was self-serving. However, an applicant’s undisputed testimony that he would not have pled guilty but for trial counsel’s advice is sufficient to prove the prejudice prong. See Alexander v. State, 305 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991).

Petitioner’s testimony is not only undisputed but is supported by testimony from Counsel Barnes. Counsel Barnes also testified that Petitioner did not want to plead guilty. He stated Petitioner only pled because trial was looming, and Petitioner faced a possible life sentence if he lost. Counsel had told Petitioner multiple times he would lose at trial and possibly get a life sentence. Such advice unfairly and improperly pressured Petitioner into entering a guilty plea. Petitioner’s plea was not freely and voluntarily entered and should be vacated.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully request this Court grant the writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of February, 2022.

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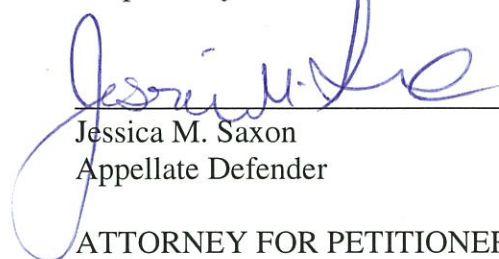
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Charles Rose 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 R. Kirk Griffin, which was held on March 8, 2021, 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 Michael Charles Rose.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of February, 2022.

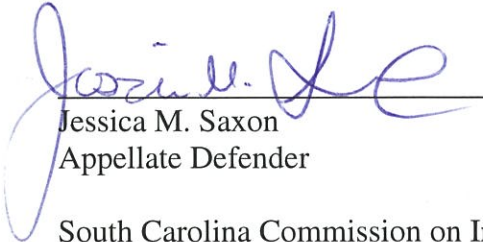
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CERTIFICATE OF COUNSEL

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."



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