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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

BRUCE M. RICHARDSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000922

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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INDEX

ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel provided effective representation where counsel failed to challenge the validity of the indictment when both the State and counsel knew that Petitioner was improperly indicted for first-degree burglary and where the State was prepared to try Petitioner on the improper indictment?

STATEMENT OF THE CASE

At approximately 5:30 A.M. on August 20, 2018, a burglary occurred at Hayner Auto Sales. The break-in was captured on video. Police took still shots from the video footage and used those pictures to identify Bruce Richardson, Petitioner, as one of the individuals involved in the burglary. Petitioner[1] was promptly taken into custody. Following the advisement of his Miranda[2] rights, Petitioner gave a statement admitting his involvement in the burglary and telling police that he had exchanged the property stolen from the car dealership for drugs. App. 8, l. 20-App. 9, l. 6; App. 81.

Petitioner was subsequently indicted[3] for first-degree burglary during the November 2018 term of the Horry County grand jury. App. 83-84. On May 6, 2019, Petitioner, along with his attorney Clay Pinkerton, appeared before the Honorable William A. McKinnon to enter a guilty plea. The State, represented by Scott Graustein, informed the court that Petitioner was pleading guilty to the lesser included offense of second-degree burglary (violent), with a recommendation of a fifteen-year sentence. App. 1; App. 3, ll. 5-10.

During the plea colloquy the court, noticing that Petitioner had waived presentment to the grand jury, inquired as to whether the indictment was true billed. The State confirmed the indictment for first-degree burglary was true billed. Counsel Pinkerton explained that he had Petitioner sign the grand jury indictment waiver because there had been "issues" with the indictment and he "couldn't remember if it had been true billed or not." App. 5, l. 20-App.6, l. 1.

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1 During the factual recitation the State informed the court that Petitioner was arrested with a co-defendant. That individual is not named or referenced anywhere else in the Appendix. R. 9, ll. 2-3.

2 Miranda v. Arizona, 384 U.S. 436 (1966)

3 Petitioner was arrested on a warrant for second degree burglary (non-violent). App. 81-82.

The State clarified that while the case had been indicted as first-degree burglary, the proper charge based upon the facts was second-degree burglary (violent). The State further informed the court that it was dismissing two separate burglaries, one of which was a properly indicted first-degree burglary, as part of the plea deal. App. 9, ll. 7-17.

Petitioner admitted his guilt, accepted responsibility for his actions, and requested the court show him mercy. App. 11, ll. 20-25. While announcing the sentence the court commended Petitioner for his cooperation with law enforcement. The court declined to give Petitioner further consideration for his cooperation however, as the State was already dismissing a separate first-degree burglary charge as part of the plea deal. Petitioner was sentenced to fifteen years imprisonment, with a recommendation that he be screened for the addiction treatment unit while incarcerated. App. 12, ll. 4-22.

Petitioner did not appeal his conviction or sentence. On November 7, 2019, Petitioner filed an application for post-conviction relief alleging that 1) he received ineffective assistance of counsel, 2) his due process rights under the Sixth and Fourteenth Amendments had been violated, and 3) the court lacked subject matter jurisdiction to accept the plea. App. 15-25. The State filed a return and partial motion to dismiss on September 14, 2020. App. 27-38. Appointed PCR counsel, Carla F. Grabert-Lowenstein, amended Petitioner's PCR application with a more definitive statement of his claims. The amendments alleged, *inter alia*, that Counsel Pinkerton was ineffective for failing to challenge the first-degree burglary indictment. App. 39-41.

An evidentiary hearing was convened before the Honorable William H. Seals, Jr., on June 24, 2021. Petitioner was represented by Counsel Grabert-Lowenstein. The State was represented by William H. Ray. App. 42. At the hearing Counsel Pinkerton testified that he had

been assigned to Petitioner's case for about a year. During that time, Counsel Pinkerton had weekly telephone calls with Petitioner and visited him at the jail between twenty to twenty-five times. App. 44, ll. 15-21. Counsel Pinkerton testified that he discussed the indictment for first-degree burglary with Petitioner. According to Counsel Pinkerton, he was going to challenge the indictment only if Petitioner went to trial. Otherwise, he did not see a benefit to challenging the indictment and testified that challenging it would "have been nothing but a delay tactic, essentially." App. 50, l. 9-App. 51, l. 5.

Counsel Pinkerton testified that he discussed the indictment with the solicitor who also agreed that Petitioner had not been indicted for the correct charge. That conversation resulted in the plea offer to second-degree burglary (violent) being extended to Petitioner. App. 49, ll. 2-6. The solicitor believed that Petitioner was mistakenly indicted for first-degree burglary due to his prior burglary convictions. App. 58, ll. 11-17. Further, the solicitor confirmed that if Petitioner had successfully challenged the indictment, the State would have direct indicted him for the proper charge of second-degree burglary (violent). App. 59, ll. 12-17.

Petitioner testified that the evidence in the case did not support an indictment for first-degree burglary and that he had never waived presentment of the indictment to the grand jury. Petitioner admitted to initialing the waiver provision on the sentencing sheet but stated that the waiver was not reviewed during his plea hearing. He further stated the indictment was true billed, so he did not understand how he could have waived presentment of it to the grand jury. App. 61, l. 1-App. 62, l. 3. On cross-examination Petitioner conceded that he was in fact guilty of the burglary and never had any intention to go to trial. App. 63, ll. 10-16.

At the end of the hearing, Judge Seals took the matter under advisement. App. 65, ll. 3-5. An order of dismissal was filed on August 16, 2021. App. 66-77. In the order, the PCR court

ruled that Counsel Pinkerton was not ineffective for failing to challenge the indictment because he offered a reasonable, strategic explanation for not challenging the indictment, and he did not allow Petitioner to plead to a greater offense than the law allowed. Further, the PCR court ruled that even if Counsel Pinkerton had challenged the indictment, such a challenge would have failed because the indictment was facially valid. App. 74.

ARGUMENT

Whether the PCR court erred in finding plea counsel provided effective representation where counsel failed to challenge the validity of the indictment when both the State and counsel knew that Petitioner was improperly indicted for first-degree burglary and where the State was prepared to try Petitioner on the improper indictment.

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). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S. Ct. 147, 1480-81 (2010) (internal quotations omitted).

"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). 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).

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) (internal citations omitted). Pursuant to Strickland v. Washington, 466 U.S. 668 (1984), a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must show that counsel's "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).

When reviewing a guilty plea, 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 that 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).

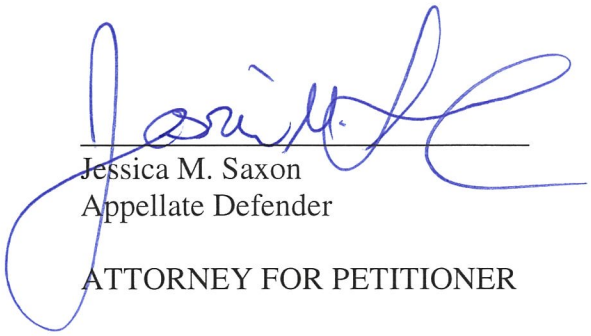
The record reflects that both the State and defense counsel were aware that Petitioner was improperly indicted for first-degree burglary. The testimony elicited at the PCR hearing was that Counsel Pinkerton discussed the indictment with the solicitor and both agreed that it was not proper. However, the solicitor did not move to amend the indictment or re-indict Petitioner. Instead, the solicitor testified he told Counsel Pinkerton he would have directly indicted Petitioner for second-

degree burglary *only if Petitioner succeeded in challenging the indictment for first-degree burglary.* It appears from the record that the State was prepared to proceed on the improper first-degree burglary indictment, meaning Petitioner could have been tried for a greater offense than the law allowed if he went to trial.

Counsel Pinkerton testified he did not challenge the indictment because it would have been nothing more than a delay tactic. The PCR court found that this was a valid "strategic reason" for not challenging the indictment. However, the State was prepared to try Petitioner for first-degree burglary and Counsel Pinkerton knew the State was prepared to move forward on the first-degree burglary indictment. Therefore, to ensure that Petitioner had a voluntary and intelligent choice between a fair trial or a plea it was incumbent upon Counsel Pinkerton to challenge the indictment. The failure to challenge the indictment under these circumstances was neither strategic nor reasonable under prevailing professional norms.

CONCLUSION

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



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This 16th day of March, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bruce M. Richardson 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 William H. Seals, which was held on June 24, 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 Bruce M. Richardson.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of March, 2022.

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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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