

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County

Honorable J. Mark Hayes, Circuit Court Judge

MAURICE ODOM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000950

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

RECEIVED

Mar 24 2022

S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT OF THE CASE.....2

ARGUMENT

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to investigate Petitioner’s cell phone records, specifically his cell site location information around the timeframe of the burglary, since there is a reasonable probability Petitioner would have proceeded to trial instead of pleading pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), if he had been aware of this potentially exculpatory evidence.6

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL10

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to investigate Petitioner's cell phone records, specifically his cell site location information around the timeframe of the burglary, since there is a reasonable probability Petitioner would have proceeded to trial instead of pleading pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), if he had been aware of this potentially exculpatory evidence?

STATEMENT OF THE CASE

A Newberry County Grand Jury indicted Petitioner on February 3, 2012 for second degree burglary. App. 122-123. The state alleged Petitioner burglarized a convenience store in Newberry during the early morning hours of October 7, 2011. Deputies responded to “Around the Clock BP” on Highway 34 around 4:57 a.m. that morning. App. 7, ll. 8-10. The owner, who was present, “complained that his gas station had been broken into.” App. 7, ll. 10-12. Officers discovered a side window had been propped open and believed it was the “point of entry.” App. 7, ll. 12-14. Numerous cartons of cigarettes were stolen. App. 7, ll. 15-18. The surveillance footage showed two black males enter the store. However, law enforcement was unable to identify the men because their faces were covered. App. 7, ll. 21-23.

About a month later, a BP convenience store in Laurens County off of Interstate 385 was burglarized and cigarettes were stolen. App. 7, ll. 23-25. The surveillance footage from this store likewise showed two black males enter the store with masks on. App. 8, ll. 4-6. Around the time of the burglary, law enforcement had seen a car parked on the side of the interstate near the store. They thought the vehicle, which was registered to Petitioner, was abandoned. App. 7, l. 25 – 8, l. 4. After “bloodhounds tracked a scent” from the convenience store to the car, law enforcement suspected Petitioner may have been involved in the burglary. App. 8, ll. 6-9. They traveled to Barnwell, where Petitioner lived, to speak with him. App. 8, ll. 10-12.

During its investigation, law enforcement was also able to identify the second male involved as Christopher Nix. Nix admitted his involvement in both burglaries and implicated Petitioner. App. 8, ll. 12-16. Petitioner was ultimately arrested and charged with burglary and related offenses in both Newberry and Laurens County.

In June 2014, the state offered to allow Petitioner to plead guilty in Laurens County to burglary, conspiracy, and grand larceny with a sentence recommendation of ten years. As part of this plea deal, the state would have dismissed Petitioner's pending charges in Newberry County. App. 64, ll. 13-16; App. 67, ll. 16-20; App. 99, l. 6 – 100, l. 9. However, Petitioner refused the offer and proceeded to trial in Laurens County. App. 64, ll. 16-22. Petitioner was found guilty of burglary by a Laurens County jury and sentenced to fifteen years imprisonment. This conviction was a “second strike” for purposes of the recidivism statute. App. 63, ll. 23-25; See S.C. Code Ann. § 17-25-45.

After Petitioner was convicted in Laurens County, the state served him with notice of its intent to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45 if he were convicted of burglary in Newberry County. App. 46, l. 12 – 47, l. 10. The state again extended a plea offer. It offered to allow Petitioner to plead guilty to second degree burglary (violent) “straight up” with the recommendation that whatever sentence he receive run concurrent with the fifteen year sentence Petitioner was already serving for his Laurens County conviction. App. 2, ll. 3-6; App. 47, ll. 11-23. Petitioner accepted this offer to avoid the possibility of being sentenced to life without parole. App. 14, ll. 22-24; App. 48, ll. 3-12; App. 84, ll. 3-6.

On January 5, 2015, Petitioner pled pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to second degree burglary before the Honorable Eugene C. Griffith, Jr. App. 1. Deputy Solicitor C. Dale Scott represented the state. App. 1. Russell Brown represented Petitioner. App. 1. Judge Griffith sentenced Petitioner to fifteen years imprisonment. App. 16, ll. 7-9; App. 124. The judge accepted the recommendation and ordered Petitioner's sentence run concurrent with the sentence Petitioner was serving for his Laurens County conviction. App. 16, ll. 7-10.

During his evidentiary hearing, Petitioner explained that Judge Griffith signed an order directing Petitioner's wireless carrier to produce his cell phone records, including the cell site location information. The order, which is dated November 17, 2011, was marked as Applicant's Exhibit No. 1. App. 103. The order explained that law enforcement was investigating a burglary that occurred at "Around the Clock BP" in Newberry and three other burglaries in Laurens County, in which Petitioner was a suspect. App. 103. It ordered the wireless carrier to furnish any and all subscriber information and cell site location information from 10:00 p.m. on October 6, 2011 to 5:00 a.m. on October 7, 2011, which covers the time period in which the burglary at the "Around the Clock BP" took place. App. 103.

Petitioner testified that, even though he had never seen any records responsive to the order, he believed the cell site location information presumably provided to law enforcement contained exculpatory evidence which would have shown he was not in the area of the "Around the Clock BP" at the time it was burglarized. App. 75, ll. 19-24. He maintained his plea counsel was ineffective for failing to obtain and investigate the phone records and that he was prejudiced because if he had gone to trial, he would have been found not guilty based on the exculpatory records. App. 76, l. 5 – 77, l. 1.

Russell Brown, Petitioner's plea counsel, admitted that he did not investigate Petitioner's phone records. He testified that he was not aware of the order requiring Petitioner's wireless carrier to produce Petitioner's phone records, including the cell site location information. Brown did not learn about this order until the day before the evidentiary hearing held during Petitioner's PCR action. App. 52, ll. 1-15. However, Brown conceded it was possible these records contained exculpatory evidence. App. 52, ll. 16-22.

Dale Scott, the solicitor who prosecuted Petitioner, testified that he did not recall the order nor did he recall receiving any cell phone records for Petitioner. He explained, “I don’t recall telephone records in his [Petitioner’s] Newberry case . . . I don’t recall . . . anything that would have been incriminating or exculpatory regarding phone records.” App. 93, l. 23 – 94, l. 14.

The PCR judge denied Petitioner relief. App. 106-121. He found plea counsel’s testimony credible that counsel was not aware of the order “authorizing access to telephone records and phone locations” or any records that may have been produced pursuant to the order. App. 117. The judge further found credible the deputy solicitor’s testimony that the prosecution did not obtain any phone records pursuant to the order. App. 117. Consequently, the judge concluded the evidence established no records were ever obtained and that counsel was not deficient for failing to investigate such records. App. 118. Lastly, the judge determined Petitioner failed to prove he was prejudiced by counsel alleged deficient performance because Petitioner did not prove (1) any phone records were actually obtained pursuant to the order or (2) that such records would have helped his case to the extent that he would have proceeded to trial instead of pleading if counsel had properly investigated the records. App. 118.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate Petitioner’s cell phone records, including the cell site location information during the time period in which the burglary occurred, and because Petitioner was prejudiced since there is a reasonable probability Petitioner would have proceeded to trial and been found not guilty, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when plea counsel failed to investigate Petitioner's cell phone records, specifically his cell site location information around the timeframe of the burglary, since there is a reasonable probability Petitioner would have proceeded to trial instead of pleading pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), if he had been aware of this potentially exculpatory evidence.

Petitioner's plea counsel was ineffective for failing to investigate Petitioner's cell phone records, specifically the cell site location information for the time period in which the burglary at the "Around the Clock BP" occurred in Newberry. Any reasonably competent criminal defense attorney would have investigated the records produced pursuant to the November 2011 order to determine whether the records were exculpatory before advising Petitioner to plead guilty. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the records would have established Petitioner was not near the area where the burglary occurred during the time period in which it occurred. As such, Petitioner would have proceeded to trial instead of pleading pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." *Id.* at 686; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided

representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that counsel's performance was deficient, and "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000); Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000); Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997); Rayford v. State, 314 S.C. 46, 48, 443 S.E.2d 805, 806 (1994). This Court has held that a "defendant's undisputed testimony that he would not have pled guilty but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 631 S.E.2d 260 (2006) (citing Jackson v. State, 342 S.C. 95, 97-98, 535 S.E.2d 926, 927 (2000)); Alexander v. State, 303 S.C. 539, 543, 402 S.E.2d 484, 485-86 (1991)).

"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) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing." Dalton v. State, 376 S.C. 130, 138, 654 S.E.2d 870, 874 (Ct. App. 2007) (quoting Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)) (alteration in original).

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland, 466 U.S. at 691) (alterations in original); See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). “When evaluating the reasonableness of counsel’s conduct, ‘the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.’” Ard, 372 S.C. at 331, 642 S.E.2d at 597 (quoting Strickland v. Washington, 466 U.S. at 690).

Plea counsel was ineffective for failing to investigate Petitioner’s cell phone records, including the cell site location information for the time period in which the burglary at the “Around the Clock BP” occurred in Newberry. Judge Griffith signed an order in November 2011, over three years before Petitioner’s plea, directing Petitioner’s wireless provider to furnish the records. Any reasonably competent criminal defense attorney would have followed up on the order and investigated the records produced to determine whether they were exculpatory before advising Petitioner to plead guilty.

Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the records would have established Petitioner was not near the area where the burglary occurred during the time period in which it occurred. Petitioner testified that if counsel had obtained the records and presented them as evidence during a trial, he would have been found not guilty. App. 76, ll. 5-7.

Respectfully, this Court should hold the PCR judge erred by denying Petitioner relief, reverse Petitioner’s conviction, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing. Petitioner ultimately requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of March, 2022.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County

Honorable J. Mark Hayes, Circuit Court Judge

MAURICE ODOM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Maurice Anthony Odom states:

1. She is an 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, which was held on January 26, 2021, before the Honorable J. Mark Hayes 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 the Court relieve her as counsel for Maurice Anthony Odom.

Respectfully Submitted,

s/ Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of March, 2022.

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.”

s/ Lara M. Caudy _____

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 24th day of March, 2022.