

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 12 2013

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

S.C. SUPREME COURT

JEREMY MCPHAIL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

2012-212750

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT

Counsel’s performance was constitutionally deficient for failing to sufficiently advise Petitioner prior to pleading guilty that duress could be a complete defense where evidence of the defense of duress was present in Petitioner’s case, and where Petitioner affirmed that had he known duress was a complete defense he would have gone to trial rather than plead guilty.....8

CONCLUSION12

PETITION TO BE RELIEVED AS COUNSEL.....13

ISSUE PRESENTED

Whether Counsel's performance was constitutionally deficient for failing to sufficiently advise Petitioner prior to pleading guilty that duress could be a complete defense where evidence of the defense of duress was present in Petitioner's case, and where Petitioner affirmed that had he known duress was a complete defense he would have gone to trial rather than plead guilty?

STATEMENT

Petitioner Jeremy McPhail was indicted by the Richland County grand jury on September 12, 2007, for armed robbery, kidnapping, assault and battery of a high and aggravated nature (ABHAN), and criminal conspiracy. App. 4, line 23—App. 5, line 3; R. 237—R. 246. The charges arose from Petitioner’s involvement with four codefendants—Kelvin Blakely, Dominique Blakely, Dominique Lyde, and Daryl Friarson—in the robbery of an armored truck on the night of May 10, 2007. App. 6, line 5—App. 7, line 21. His case proceeded to a guilty plea hearing before the Honorable J. Michelle Childs on December 4, 2008. Joseph M. McCulloch (Counsel) represented Petitioner, while Daniel R. Goldberg represented the State. App. 1.

At the plea hearing, Counsel addressed the plea court after the State presented its alleged facts. Specifically, Counsel acknowledged that facts were present that Petitioner was under duress or coercion, but that Counsel “did not believe and do not believe today that they would have been sufficient as an absolute defense.” App. 8, line 21—App. 9, line 4; App. 12, line 2—App. 13, line 14. Petitioner pled guilty with a negotiated sentencing range of 15 to 28 years. App. 16, lines 1-4; App. 23, line 24—App. 24, line 4; App. 159, lines 7-9.

The first sentencing hearing was held on August 10, 2009, again before Judge Childs. App. 26. Appellant affirmed his guilty plea, which the court accepted. App. 34, line 20—App. 35, line 14. At the hearing, Counsel informed the plea court that Petitioner’s prior statements to police indicated coercion, as did a letter from one of Petitioner’s four codefendants:

[W]e have attached in the documents provided to you, Your Honor, a letter from one of the Co-Defendant’s, which indicates what Mister McPhail indicated to the police, that on a level that in my view was never sufficient to constitute a legal defense, that he was cut where’s to buy one of the Co-Defendants. And in fact a weapon was brandished in his direction as a motivating device, shall I say. But I believe it is fair to say that this young man was a reluctant participant, but nonetheless, Your Honor, a participant.

App. 107, lines 12-22. On August 24, 2009, the sentence hearing was reconvened. Judge Childs imposed the following concurrent sentences upon Petitioner: 25 years for armed robbery; 25 years for kidnapping; 10 years for ABHAN; and 5 years for criminal conspiracy. App. 170, lines 11-14; App. 171, lines 20-23; App. 239; App. 242; App. 245—App. 246. No direct appeal was taken.

On September 10, 2010, Petitioner filed an application for post-conviction relief (PCR). App. 175. An evidentiary hearing was held on May 22, 2012, before the Honorable L. Casey Manning. Jeremy Thompson represented Petitioner, while Rob D. Corney represented the State. App. 185.

Petitioner testified at the hearing, and explained to the court the circumstances surrounding his involvement in the robbery. App. 197, line 16—App. 204, line 6. Specifically, Petitioner indicated that he did not know the codefendants with whom he was riding on October 30, 2010, were taking him to help rob the armored car at the gas station. Once he realized what was occurring he attempted to leave, but was threatened at gunpoint by one of the codefendants and coerced into participating:

When I was getting ready to walk off, Lyde comes running up behind me. He's like, Bro what's up, you ready to do this. I was like, I ain't -- what I tell you about last time, I ain't got nothing to do with this. I'm not—I ain't even know this was going on. He proceeded to tell me, he was like, you going to have to do this, Bro, I'm trying to get thi~ money in, so many words. I can't remember. But he was like, you got to do this. If not, I can't risk you telling. You know what I'm saying, if you tell, that's going to get us in trouble. So he say, you either going to help me get in this truck and get this money. You ain't even really got to do nothing. You going to help us or I'm going to have to leave you here. So at that time, I'm like, Man, you do what you have to do, I'm getting ready to go. I leave to walk—when I turn around, that's when he grab me by the arm, not hard or rough, he just grabbed me by the arm and pointed a pistol at me.

Q. And he had a firearm?

A. Yes.

Q. And you saw it?

A. Yeah.

Q. And he pointed it at you?

A. Yes.

Q. And what did he tell you?

A. He told me if I didn't help him, he was going to leave me there.

.....

Q. What did you take that to mean?

A. He was going to shoot me or he was going to pistol whip me, one or the other. I don't know what he mean.

Q. You were afraid he was going to shoot you—

A. Yes.

Q. -- if you didn't go along?

A. Right.

Q. And so is that why you went along and helped them?

A. The only reason.

App. 201, line 1—App. 202, line 13. Further, Petitioner testified that he explained all of this to Counsel, and Counsel told Petitioner “that I didn’t have much to go on. I didn’t have a defense, basically. It was—I was under the impression that . . . I could go to trial, but I would lose because I don’t have a defense. I don’t have enough to prove anything.” App. 206. Specifically, Petitioner stated that he “was under the impression that coercion and duress was something that you do in mitigation, but it wasn’t a complete defense. It wasn’t something that [Petitioner] could go to trial and have a defense on.” App. 206, line 23—App. 207, line 1. Petitioner also indicated at the

hearing that he would not have pled guilty, but would have gone to trial if he knew he could have presented a defense of duress:

- Q. If you would have known you could go to trial and present a defense of duress would you have pled guilty?
- A. No, because I believe that somebody would have seen the facts that I was trying to avoid the situation at all costs.

App. 207, lines 11-15.

Counsel also testified at the hearing. Counsel agreed that Petitioner's testimony was "largely consistent" with what happened, and proceeded to relay additional information. Specifically, Counsel acknowledged that he spoke with Petitioner a number of times, that Petitioner felt he was coerced to participate, and that "ultimately our discussions were all about the evidence, the evidence against him, the evidence that would have mitigated against the jury's belief and acceptance of duress and coercion and the evidence that . . . would have been in our possession to produce that would have consisted of [Petitioner's] testimony and an inadmissible letter." App. 211, lines 17-22; App. 218, lines 1-6. As to the letter, Counsel confirmed that one of Petitioner's codefendant's subsequently sent a letter corroborating Petitioner's statement that he was coerced at gunpoint:

There was some evidence by Blakely that the gun shouldn't have been pointed at—and I have the reference here.

App. 218, lines 19-24. However, Counsel did not believe he could have entered the document into evidence without the authoring codefendant's authentication from the witness stand. App. 218, lines 8-16.

Additionally, Counsel indicated that, although duress was a defense, it was an imperfect defense under factual circumstances of Petitioner's case. Namely, Counsel indicated the following factors militated against the defense of duress had Petitioner gone to trial: (1) no witness would

corroborate the act of coercion; (2) Petitioner admitted to police that he had a BB gun; (3) David Jones, the armored truck guard, was beaten by Petitioner in the incident; (4) and Petitioner did not leave the scene or lock himself in the armored truck with the codefendants outside when the opportunity arose. App. 216, line 17—App. 217, line 25. Ultimately, Counsel agreed that “there was a defense of duress,” but he did not think that “it would have been successful because of the practicalities of the evidence.” App. 221, lines 23-25. Finally, Counsel indicated that he advised Petitioner of “that technicality that he could present a defense of duress.” App. 222, lines 1-3.

The Order of Dismissal was filed by the PCR court on June 27, 2012. Regarding the sole issue of ineffective assistance of counsel, the court held that Counsel did not provide deficient performance: “Ultimately, it was [Petitioner’s] own voluntarily decision that precluded [C]ounsel from presenting the duress defense which [Petitioner] not complains of. [Petitioner] has failed to convince this Court that [C]ounsel’s performance was unreasonable under professional norms in this regard.” App. 234. Further, the PCR court also held that Petitioner did not prove any prejudice resulting from Counsel’s performance. Specifically, the PCR court did “not find any reasonable probability that the outcome of the case would have been different had it been presented to the jury.” App. 234. Thus, the court dismissed Petitioner’s application with prejudice. App. 235.

This petition follows.

ARGUMENT

Counsel's performance was constitutionally deficient for failing to sufficiently advise Petitioner prior to pleading guilty that duress could be a complete defense where evidence of the defense of duress was present in Petitioner's case, and where Petitioner affirmed that had he known duress was a complete defense he would have gone to trial rather than plead guilty.

Petitioner asserts that Counsel provided ineffective assistance by indicating to him that duress and coercion were imperfect defenses for mitigation, and not a defense that could be raised as a complete defense at a trial. Had Petitioner known it was a complete defense, he would have gone to trial rather than plead guilty to the charged offenses. As a result, Counsel's performance was constitutionally deficient and resulted in prejudice to Petitioner.

The difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea." Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a 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, 106 S.Ct. 366, 369 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) to claims of the same against plea counsel). First, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. On the other hand, the prejudice requirement focuses on whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Id. 474 U.S. at 59, 106 S.Ct. at 370.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 560 (2004). Moreover, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Ard v. Catoe, 372 S.C. 318, 642

S.E.2d 590 (2007) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)) (internal quotation marks omitted). “[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Lounds v. State, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting Ard, 372 at 331-32, 642 S.E.2d at 597); see also Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982) (“To meet this standard, an attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’”) (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)).

In the present case, Counsel’s performance was deficient for failing to adequately convey to Petitioner that duress and coercion were themselves complete defenses to the offenses charged rather than merely imperfect defenses that could only be raised in mitigation. The defense of duress or coercion is defined as follows:

To excuse the criminal act, coercion must be present, and of such a nature as to induce a reasonable apprehension of death or serious bodily harm if the act is not done. There must be no reasonable way, other than committing the crime, to escape the threat of harm.

Frasier v. State, 306 S.C. 158, 162, 410 S.E.2d 572, 574 (1991) (emphasis added) (citing State v. Robinson, 294 S.C. 120, 363 S.E.2d 104 (1987)). “Coercion is not defense if there is any reasonable way, other than committing the crime, to escape the threat of harm.” Robinson, 294 S.C. at 122, 363 S.E.2d at 104. Further, the fear of injury must also be reasonable. Id. Therefore, when these elements are met, the defense of duress or coercion is complete as an excuse to the offense.

Here, Petitioner was held by a codefendant and had a gun pointed at him. The codefendant then threatened to “leave” Petitioner, meaning was going to either shoot or pistol whip Petitioner.

App. 201, line 1—App. 202, line 13. Under these circumstances, petitioner’s fear of getting shot or pistol whipped was reasonable. Further, the same codefendant was in the same area as Petitioner through the vast majority of the incident. Had Petitioner tried to run away, it is reasonable to believe that he would have been shot. Thus, had Petitioner testified at a trial, the defense of duress/coercion would have been met, and the matter would have been one for the jury.

Moreover, Counsel’s concerns regarding authentication of the letter from Blakely corroborating Petitioner’s statement that a gun was pointed at him by another codefendant was misplaced. Rule 901(a) of the South Carolina Rules of Evidence provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” As for admissibility of writings, Rule 901(b)(2) of the South Carolina Rules of Evidence governs nonexpert opinion on handwriting: “Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.” Thus, it was not necessary for the authoring codefendant to authenticate the letter corroborating Petitioner’s defense of duress; rather, anyone familiar with that codefendant’s handwriting—which ostensibly could have included petitioner himself—could have authenticated the letter. Thus, evidence of duress was present, which, if believed, would have provided a true and complete defense to the charged offenses. Accordingly, Counsel’s performance was constitutionally deficient for advising Petitioner that the defense of duress in his case was imperfect and “was never sufficient to constitute a legal defense.” App. 107, lines 12-22.

Moreover, Petitioner was prejudiced by Counsel’s constitutionally deficient performance. Petitioner affirmatively indicated at the PCR hearing that, had he known duress/coercion was a

complete defense that could be raised at trial, then he would have gone to trial rather than plead guilty:

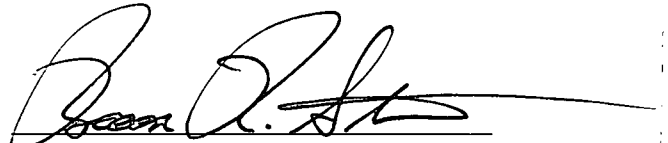
- Q. If you would have known you could go to trial and present a defense of duress would you have pled guilty?
- A. No, because I believe that somebody would have seen the facts that I was trying to avoid the situation at all costs.

App. 207, lines 11-15. See Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422 (2009) (“[I]t is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant’s self-serving statement may be sufficient to establish actual prejudice.”) (citing Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000)). Additionally, as indicated above, sufficient evidence of the defense of duress would have been introduced at a trial through Petitioner’s testimony and by the corroborating letter. Thus, the jury would have most likely been instructed on the defense of duress. Accordingly, Petitioner was prejudiced by Counsel’s constitutionally deficient performance. Hill, 474 U.S. at 59, 106 S.Ct. at 370.

CONCLUSION

For the foregoing reasons, Petitioner Jeremy McPhail respectfully requests that the Court grant his Petition for Writ of Certiorari, reverse the PCR court's Order of Dismissal, and grant him a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of February, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
L. CASEY MANNING, CIRCUIT COURT JUDGE

JEREMY MCPHAIL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

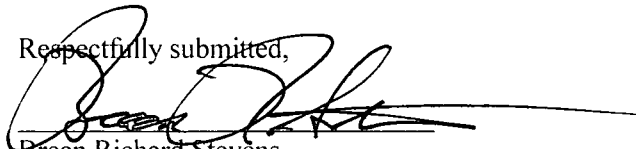
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeremy McPhail states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 22, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Jeremy McPhail.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of February, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

JEREMY MCPHAIL,

PETITIONER,

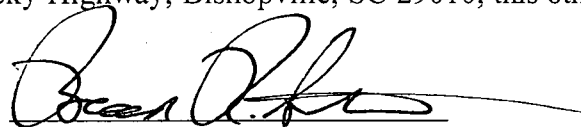
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

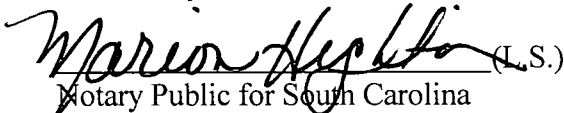
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Robert D. Corney, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Mr. Jeremy McPhail, #336465, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 8th day of February, 2013.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of February, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.