RECEIVED

May 09 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Michael S. Holt, Circuit Court Judge

JAYSEN R. HODGE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001288

JOHNSON PETITION FOR WRIT OF CERTIORARI

Jessica M. Saxon
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

INDEX

ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel effective where counsel did not conduct any independent investigation into the facts and circumstances of the case or review the discovery with Petitioner prior to advising Petitioner to plead guilty which caused Petitioner's guilty plea to the charges to be made unknowingly and involuntarily?

STATEMENT OF THE CASE

On December 31, 2012, at approximately 9:30 in the evening, officers responded to a report of a burglary at the home of Gregory Smalls. An unknown individual had used a rock to break a window in the rear of the residence and gain entry to the home. Several televisions, cameras, and laptops, valued at approximately $4,000 in total, had been removed from the home. When Smalls returned to his home later that evening, he discovered the broken window and saw a flashlight on his bed that did not belong to him. App. 9, ll. 2-10; App. 25; App. 29.

The flashlight was collected as evidence and processed for DNA. Two years later, on October 30, 2014, law enforcement received a CODIS hit that matched Petitioner. At the time of the DNA match Petitioner was incarcerated on a shoplifting charge. App. 9, ll. 11-16. The shoplifting charge arose from an incident on September 12, 2014, at a local Target store. Petitioner, aided by a "universal key", took merchandise from locked shelves and placed them in a bookbag. When Petitioner attempted to leave the store, he was confronted by loss prevention and subsequently arrested. App. 10, ll. 4-8.

Investigators spoke with Petitioner about the DNA match from the burglary. After being read and waiving his Miranda[1] rights, Petitioner admitted to committing the burglary. Petitioner stated that once he had seen the homeowner leave the residence he broke in, stole the various items, and then sold those items on the street for crack cocaine. Petitioner provided a written statement admitting he committed the burglary. He also provided a buccal swab which was used for a confirmatory DNA test. App. 9, l. 17-App. 10, l. 3.

Petitioner was indicted for shoplifting, third or subsequent offense, during the December 2014 term of the Richland County grand jury. App. 22-23. During the May 2015 term of the

---

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

Richland County grand jury, Petitioner was indicted for burglary first degree and grand larceny, more than $2,000 but less than $10,000. App. 26-27; App. 30-31. On May 11, 2017, Petitioner appeared before the Honorable Steven H. John to enter a guilty plea. App. 1. The State was represented by Molly Flynn. Petitioner was represented by Ronald Moak. App. 1.

The State informed the plea court that in consideration for the plea it was dismissing another burglary first degree charge, a petit larceny charge, and several "accompanying city-level charges." App. 10, ll. 9-12. The State recommended a fifteen-year sentence on the burglary charge, with the sentences on the other charges to run concurrently. App. 3, l. 8-App. 4, l. 2. After conducting a full and thorough plea colloquy, the court accepted Petitioner's guilty plea. App. 11, l. 19-App. 12, l. 1. Petitioner was sentenced to fifteen years incarceration on the burglary first degree charge, ten years incarceration on the shoplifting charge, and five years incarceration on the larceny charge, all sentences to run concurrently with credit for 861 days. App. 18, l. 15-App. 19, l. 2.

Petitioner did not appeal his convictions or sentences. On May 16, 2018, Petitioner filed an application for post-conviction relief alleging, *inter alia*, inadequate representation because Counsel Moak failed to do an independent investigation into the facts of the case and did not review discovery with Petitioner. App. 33-37. The State filed a return and motion to dismiss dated March 16, 2020. The motion to dismiss was based on the alleged failure of Petitioner to file his PCR application within the one-year statutory period. App. 38-41. Petitioner's PCR counsel, Cassity Brewer, filed a response to the State's motion to dismiss on August 5, 2020. Counsel Brewer argued that Petitioner had placed his PCR application in the mail prior to the statutory filing period running out and therefore he was entitled to equitable tolling under the "prison mailbox rule." App. 42-45.

A hearing[2] was held on the motion to dismiss on August 13, 2020, before the Honorable D. Craig Brown. App 46. The circuit court denied the State's motion to dismiss and issued an order finding Petitioner was entitled to equitable tolling. App. 46-48. Subsequently, the State filed an amended return to Petitioner's PCR allegations dated June 22, 2021. App. 49-54.

An evidentiary hearing was convened on July 12, 2021, before the Honorable Michael S. Holt. App. 55. Petitioner was represented by Counsel Brewer. The State was represented by Michael Davidson. App. 55. Petitioner proceeded forward on the claims set forth in his original application. App. 58, l. 14-App. 59, l. 9. Petitioner, Counsel Moak, and Jahari Crawford,[3] Petitioner's cousin, testified at the hearing. App. 56.

Petitioner testified that he was represented by the Richland County Public Defender's office from the time of his arrest in 2014 until Crawford retained Counsel Moak for him in January 2017. App. 63, l. 8-App. 64, l. 22. According to Petitioner, his initial public defender only provided him with discovery for the shoplifting charge. However, the public defender did advise him that the State's plea offer was to plead to one burglary first charge for a fifteen-year sentence. His public defender also explained that if he went to trial on the burglary charge, he could potentially be sentenced to life in prison. App. 65, l. 5-App. 66, l. 10.

Petitioner testified that he met with Counsel Moak twice, but that Counsel Moak never discussed his charges with him nor provided him with discovery. App. 66, l. 11-App. 67, l. 6. Counsel Moak advised him that the plea offer was for a fifteen-year sentence and that it was in his best interest to accept the offer. App. 67, ll. 7-22. Petitioner stated that he would not have

---

2 The hearing was held via Cisco WebEx Meetings due to the on-going Coronavirus Pandemic. App. 46.

3 Crawford was unable to attend the hearing in person but was allowed to testify virtually without objection. App. 60, l. 19-App. 61, l. 10.

pled guilty if Counsel Moak had not represented him but would have instead stayed in the county jail waiting on a better offer. App. 68, ll. 10-17. During cross-examination Petitioner testified that he hired private counsel because he thought that would result in the State making a better plea offer. App. 70, ll. 9-15.

Crawford testified that he retained Counsel Moak because counsel had indicated that his relationship with the Richland County Solicitor's office would help him work out a better deal for Petitioner. App. 74, l. 18-App. 75, l. 3; App. 78, ll. 20-25. Crawford spoke with Counsel Moak more than Petitioner, stating he had half a dozen or more conversations about the case with him. Crawford also spoke with the elected Solicitor at the time, Dan Johnson, about the case. App. 75, ll. 17-23. Crawford testified that Counsel Moak did not review the discovery in the case and did not work out a better plea deal. He further stated that Solicitor Johnson refused to make a better offer because it would not be "politically expedient" for him to make a deal with Petitioner. App. 76, l. 2-App. 77, l. 8.

Counsel Moak testified that Crawford contacted him about representing Petitioner after Crawford had an unsuccessful conversation with then-Solicitor Johnson about the case. According to Counsel Moak, he told Crawford he would represent Petitioner to try and undo the damage caused by calling the elected Solicitor about the case, but he never promised that he would be able to reach a better plea offer for Petitioner. App. 83, l. 6-App. 85, l. 23. Counsel Moak testified that did he reviewed the discovery on the burglary charge with Petitioner. App. 86, ll. 18-22.

According to Counsel Moak, he believed the plea was excessive considering how dramatically Petitioner had turned his life around in the almost three years he had been in jail awaiting a resolution to the charges. App. 87, l. 2-App. 88, l. 2. He attempted to meet with then-

Solicitor Johnson to discuss a different resolution, but the Solicitor never showed up for the meetings. App. 88, ll. 6-9. He also suggested alternative plea options to the assistant solicitor in charge of the case and was told that then-Solicitor Johnson would not budge on the fifteen-year plea offer to burglary first. App. 89, l. 14 – App. 90, l. 8. While the plea was not legally problematic, Counsel Moak thought it was morally problematic because of how much progress Petitioner had made while in custody. App. 90, ll. 12-25. Counsel Moak also testified that he attempted to have Petitioner cooperate with law enforcement on an unrelated case in hopes of getting a better plea offer but was not successful. App. 91, l. 19-App. 92, l. 2.

Counsel Moak admitted that he did not do any further investigation into the case or challenge the evidence because the case was a plea. Petitioner never stated he wanted to take the matter to trial, but had the case been in a trial posture, Counsel Moak testified he would have done more investigation. App. 92, l. 15-App. 93, l. 7; App. 100, ll. 5-6. On cross-examination, Counsel Moak asserted that he believed he had met with Petitioner more than twice but could not be sure, as he did not have access to his file[4] any longer. App. 97, ll. 11-18. He reiterated that he did review the discovery with Petitioner, reviewed the elements of burglary first, and discussed possible lesser-included charges. App. 97, l.19-App. 100, l. 6. Counsel Moak never discussed Petitioner's right to a trial because Petitioner never stated he wanted to go to trial. App. 103, ll. 15-22.

The PCR court took the matter under advisement. App. 108, ll. 9-12. An order of dismissal was filed on October 8, 2021. In the order, the court ruled that Petitioner had failed to

---

[4] Counsel Moak was unable to review his files prior to the PCR hearing due to being suspended from the practice of law. He testified he believed the aggravating factor in Petitioner's case was that he was armed at some point but could not be sure. App. 98, ll. 8-22. The actual aggravating factor in Petitioner's case was that the unlawful entry occurred during the nighttime. App. 9, ll. 2-4.

offer any probative evidence to support any of his allegations. As to the inadequate representation, the court found that Petitioner did not offer any evidence of what counsel could have or would have found had additional investigation been conducted nor had he shown that but for counsel's failure to investigate, that he would not have pled guilty and would have gone to trial. App. 113-123.

ARGUMENT

The PCR court erred in finding plea counsel effective where counsel did not conduct any independent investigation into the facts and circumstances of the case or review the discovery with Petitioner prior to advising Petitioner to plead guilty which caused Petitioner's guilty plea to the charges to be made unknowingly and involuntarily.

It is well established that counsel has a duty to undertake reasonable investigations. Strickland v. Washington, 466 U.S. 668, 691 (1984). Therefore, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); "[A]t a minimum, counsel has the duty to...make an **independent** investigation of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (emphasis in original).

"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). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. at 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 pled 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 failure to investigate can support the contention that a defendant's plea was involuntary. In Hill, *supra*, the United States Supreme Court addressed the analysis to be used in addressing such ineffective assistance claims. The Court explained,

> "Where the alleged error is failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than to go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."

Hill at 59.

Counsel Moak admitted that he did not perform any investigation into Petitioner's cases. He averred that Petitioner never wanted a trial, so he did not investigate the case, but would have done more had Petitioner wanted to pursue a trial. However, Counsel Moak also testified that he never spoke with Petitioner about his right to trial, thus he could not have known if Petitioner wished to take the case to trial. There is nothing in the jurisprudence of this state that relieves counsel of the duty to investigate simply because the case will be resolved by a plea. In fact, counsel must investigate to effectively advise a client whether to enter a plea or challenge the state's evidence at trial. Counsel Moak shirked this duty, and his representation of Petitioner was deficient.

Admittedly, Petitioner did not testify as to what evidence could have been discovered had Counsel Moak investigated the cases. Nor did Petitioner state he would have proceeded to trial had Counsel Moak performed a reasonable investigation into the cases and reviewed discovery with him. However, Petitioner could not make such statements precisely because he never had

the benefit of effective counsel who investigated the cases, reviewed discovery with him, or explained any weaknesses or challenges to the evidence that could be brought. Petitioner was merely told he could plead for fifteen years or go to trial and possibly receive a life sentence. His choice to enter a plea was not a "voluntary and intelligent choice among the alternative courses of action open"[5] to him because those alternative courses of action were never investigated nor discussed with him.

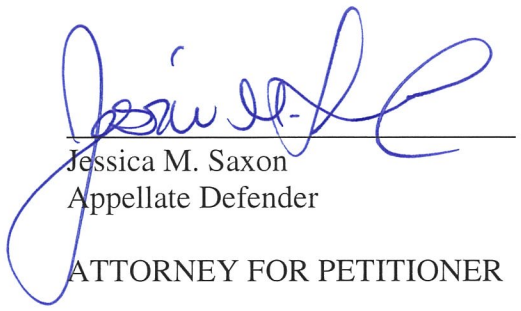
Counsel Moak merely reviewing the discovery of serious felony charges cannot be characterized as a reasonable or strategic decision. The failure to conduct any independent investigation prior to advising Petitioner to enter a plea, simply because Counsel Moak believed the case was never going to be a trial, was not reasonable under prevailing professional norms. While Petitioner cannot point to specific evidence or challenges that could have been brought, he can show that his decision to plead was not a voluntary and intelligent choice among alternative courses of action as no alternative course of action was ever explored or explained by counsel. This was deficient performance and as such renders Petitioner's guilty plea unknowing and involuntary.

---

5 Hill v. Lockhart, 474 U.S. 52, 56 (1985)

CONCLUSION

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



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of May, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

May 09 2022

S.C. SUPREME COURT

Certiorari to Richland County

Honorable Michael S. Holt, Circuit Court Judge

JAYSEN R. HODGE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jaysen Randall Hodge 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 Michael S. Holt, which was held on July 12, 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 Jaysen Randall Hodge.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of May, 2022.

RECEIVED

May 09 2022

S.C. SUPREME COURT

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."

Jessica M. Saxon
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 9th day of May, 2022.