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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO GREENVILLE CO.
HONORABLE ALEX KINLOW,JUDGE

LORGIO D. MORALES

PETITIONER,

V.

STATE OF SOUTH CAROLINA

RESPONDENT.

APPELLATE NO. 2019-000072

PETITIONER"S PRO-SE BREIF / WHITE V. STATE ANDERS

LORGIO D. MORALES
PERRY CORR. INST
430 OAKLAWN ROAD
PELZER,SC 29669
petitioner pro se

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Issue Presented

1) Did the Magistrate Judge have probable cause to issue a search warrant where there was no exigent cicumstances?
2) Was trail counsel ineffective for giving petitioner erroneous advic[e]on which he based his decision not to testify?
3) Was trial counsel ineffective for conceding guilt through a stipulation on petitioner,s behalf?
4) Was trial counsel ineffective for failure to convey/ communicate to petitioner the precise terms and expiration dates of a plea/offer before going to trial?
5) Was the petitioner's due process rights violated by trial counsel's failure to challenge the chain of custody of the allege marijuana?
6)Did trial counsel violate petitioner's due process right's by not objecting to the trial court's erroneous jury charge on the hand of one hand of all theory?
7) Was the trial court and Pcr court's decision on the above issues resulted in an unreasonable determination of the facts in light of the evidence submitted?
8) Did the state court (PCR) adjudication result in a decision that was contrary to clearly established Federal Law, as determined by the Supreme Courtof the United State's.
and involved on unresonable application of clearly established Federal Law as determined by the Supreme Court of the United State's.

STATEMENT

Petitioner Lorgio Morales was tried before the Honorable Edward W. Miller on February 5-6 in Greenville County General Sessions Court for the offenses of Trafficking Marijuana, Manufacturing Marijuana, theft of Electrical Current and tampering with a utility meter for the purpose of growing a controlled substance.

Petitioner was represented by Scott D Robinson. Petitioner Morales was convicted and sentenced to serve concurrent terms of imprisonment of twenty-five year's, Twenty year's, time served and ten year's,respectively. Petitioner was also fined in the amount of twenty-five thousand dollar's.

Defense counsel did not file a notice of appeal.

Petitioner filed a PCR application alleging that counsel ineffective assistance when he failed to file and servenotice of appeal. A hearing was held on the matter before Judge Alex Kinlaw Jr. on December, 17 2018. R Mills Arial Jr. represented the petitioner.

On January 9, 2019, The PCR court issued and order of dismissal. The PCR court denied Petitioner a belated Direct Appeal, ruling that he was not entitled to one given counsel's testimony that petitioner never asked counsel to file an appeal.

Petitioner filed a petition for writ of certiorari and the State made it's return on January 29, 2020, The South Carolina Supreme Court transferred the appeal to this court pursuant to rule 243 (1), SCACR. On January 4, 2022,this court granted the petition for writ of certiorari as to the question 1, Whether petitioner knowingly and intelligently waived his right to direct appeal pursuant to White v. State,263 S.C. 110,2085 S.E. 2d 35. This brief of the direct appeal issues follows this court's grant of certiorari.

1) Did the Magistrate Judge have probable cause to issue a search warrant where there was no exigent circumstances?

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seisures. Evidence seized in violation of the Fourth Amendment must be excluded from trial. State v. Khingratsaiphon, 352 S.C. 62,69, 572 S.E. 2d 456,459 (2002). A Search or seizure is resonable under the fourth when it is authorized by a warrant that is suppored by probable cause. State v. Kinloch, 410 S.C. 612,616,767 S.E. 2d 153,155. See pages #36 of the appendix line 4- line 20.

First of all, Judge there wasn't an exigent circumstance in this matter. He observed the building.They shut the power off to the building, There was a rush of air in this case. But what he talks about here, he say's there's still possibly power to the property and the threat of a fire hazard.

The officer in this case, there was no fire hazard in this manner, no fire going on. There were a number of people walking around and looking at what was going on,but there was no fire, there was no fire hazard taking placeat this time.And Judge because of that we don't believe that there was an exigent cicumstance in this case to allow him to get into the building without a warrant in this matter. This was done after they got into the property.

Because the Sheriff officer's and duke power cut the power off of the wires said to be melted,Then the exigent circumstances to justify a warrantless entry were eliminated, and the warrantless entry by the sheriff's deputy's violated the Petitioner's Fourth Amendment right to privacy, since the Petitioner did reside, live, and had control over the warehouse in question.

The trial Court's decision was on unreasonable determination of the fact's in light of the evidence submitted to get a search warrant.
The PCR court's decision was also an unreasonable determination of the facts' in the light of the evidence submitted.

See Smith, 301 S.C. at 373,392 S.E. 2d at 183 mere conclusory statements which give the magistrate no basis to make a judgement regarding probable cause are insufficient. Weston, 329 S.C. at 291,494 S.E.2d at 803 (providing a search affidavit could not be provided a substantial basis for finding probable cause to search because the affidavit failed to set fourth any fact's as to why Law Enforcement believed the defendant committed the crime.

The four corner's of the affidavit and search warrant were not sufficient or filled out properly to establish the right procedure in getting a search warrant. The procedure used were flawed. See affidavit & Search Warrant.

Great deference must be given to the magistrates finding of probable cause.
See Weston 329 S.C. at 290,494 S.E. 2d at 802.
Given the totality of the circumstances this court should find the magistrate lacked a substantial basis for concluding probable cause existed for a search of the building.
Under the narrow facts of this case the search warrant was therefore invalid

See State v. Dill, 423 S.C. 534, 816 S.E. 2d 557
See attached affidavit in support of the search warrant. The affidavit is not complete. It's not valid on the face.

The petitioner have established by a preponderance of the evidence that the false statement used was included in the affidavit by the affiant knowingly and intentionaly, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruit's of the search excluded from the trial to the some extent as if probable cause was lacking on the face of the affidavit.
Franks v. Delaware,438 U.S. 154, 57 L.Ed 2d 667, 98 S. ct 2674.

Based upon the above arguement,this Honorable Court should reverse and remand for a new trial.

2) Was trial counsel ineffective for giving petitioner erroneous advice on which he based his decision not to testify

Petitioner maintain's his decision not to testify in his was based on trial counsel's advice that he would by subject to cross-examination on his prior criminal convictions. Petitioner contends that trial counsel's advice was in error since neither prior conviction was admissible under the rule for the purpose of impeachment.

In order to meet the two-prong test establishing ineffective assitance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of resonableness and (2) That, but for counsel's error, there is a reasonable probabilty the result would have been different; Martinez v. State, 403 S.E. 2d 113, Butler v. State, 334 S.E. 2d 813.

There is no showing in the record that the trial court admonished the petitioner about taking the stand in his case. There is no showing in the record that the trial counsel sought a ruling on the possible admissibility from the judge. The petitioner was not given a chance to take the stand in his own defense. A flagrant due process violation occured. See appendix pages # 178 L. 8-20 & pages # 183 L.19-23.

It's obvious that trial counsel's advice in this instance was premised upon an unsustantiated legal assumption and he was under a duty to move the court for a ruling either confirming or invalidating his assumption. Horton v.State, 411 S.E. 2d 223.

Petitioner's case should be vacated and remanded for a new ttrial because of the due process rights of the petitioner being violated.

3) Was trial counsel ineffective for conceding guilt through a stipulation on petitioner's behalf?

Petitioner's trial counsel violated his sixth and fourteenth amendment right to effective assistance of counsel when he conceded guilt through a stipulation without petitioner's knowledge or approval and despite petitioner taking a jury trial and clothing himself with the robe of innocense.

See page's # 75 L.17-18 & pages # 202 L.19-22

Not even a prosecutor can express such a personal opinion as the defendant's guilt. Francis v. Spraggins, 720 f.2d 1190, 1194. citing U.S. v. Morris, 568 f. 2d 396,401. What was presented to the jurors and the court as an admission through a stipulation was in fact flagrant. See Canon 7 (EC 7-24) of the code of Professional Responsibilty of the American Bar Association which provides, the expression by a Lawyer of his personal opinion as to justness of a cause, as to the guilt or innocense of an accused is not a proper subject for admission to the jury.

Trial counsel breached the duty of loyalty when he conceded to the jury that the petitioner knew the content's of what was in the building. Page # 202 L. 19-22.

When the Lawyer concedes a client's guilt during the guilt innocense phase of the trial in spite of their client's plea of not guilty (Jury Trial) and without the defendant's consent as in the case at bar, Counsel provides ineffective assitance of counsel regardless of the weight of evidence against the defendant or the wisdom of counsel's credibility approach strategy; Spraggins, supra; Wiley v. Sanders,647 F. 2d 642; N.C. v. Horbinson,315 N.C. 175.

The gravity of the consequences of a decision to plead or to admit one's guilt demands that the decision remain in the defendant's hand's. An attorney cannot deprive his or her client of the right to have the issue of guilt or innocense presented to the jury as an adversarial issue on which the State bears the burden of proof without committing ineffective assitance of counsel. See Cronic,466 U.S.648. See appendix page# 154 L. 1-25 to page# 155 L. 1-18.

The due process clause does not permit the attorney to enter a guilty plea or admit fact's that amount to a guilty plea without the client;s consent.See Brookhort v. Janis,384 U.S. 1,86 S.ct.1245.Only a defendant can plead himself guilty, not his Lawyer. The inference from the stipulation's amounted to a plea of guilty.

Petitioner contends that his trial attorney acted Less like an adversary and more like an advocate for the State when he made unsolicited declaration of the petitioner's guilt. Trial counsel caused a break-down in the adversarial process that rendered the outcome of the trial unreliable and therby violated applicant's 6th Amendment right to the effictive assitance of counsel. When a defendant enters a plea of not guilty he preserves two fundamental right's.
(1) He preserves the right to a fair Trial as provided by the 6th Amendment.
(2) He preserves the right to hold the Government to proof beyond a reasonable doubt. Wiley,Supra.

An Attorney may not stipulate to the facts which amount to the functional equivalent of a guilty plea. Trial counsel denied the petitioner in this case, a fair trial.

(4) Was trial counsel ineffective for failure to convey/ communicate to petitioner the precise terms and expiration dates of a plea offer before going to trial?

As a general rule, defense counsel has the duty to convey and communicate for the prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. The advantages and the disadvantages of accepting or rejecting a plea was never explained fully to the petitioner.

The petitioner found out that tha Solicitor offed a 10 year plea to his attorney. Trial counsel did not convey any terms of the plea to the petitioner so that he could make an informed decision whether to accept or reject it.

Petitioner would have accepted the plea had he been afforded effective assitance of counsel. The petitioner can demonstrate that reasonable probability the plea would have been entered without the solicitor conceling it. Ther is a reasonable probability that the end result of the criminal process would have been more favorable by reason of plea to a lessor charge or a sentence of less prison time. Glover v. United States 531 U.S. 198,203, 121 S.ct. 696. Re-Sentence.

Any amount of additional jail time has Sixth Amendment significance. Strickland v. Washington,466 U.S. 668, quoting Davie v. State,381 S.C. at 607,675 S.E.2d at 419.

(5) Was the petitioner's due process rights violated by trial counsel's failure to challenge the chain of custody of allege marijuana?

During the trial, Trial counsel stipulated that 687 plant's were removed from the warehouse, along with 125 pound'sof packaged and processed marijuana was removed from the warehouse. App page# 154 L.1-25 to page # 155 L. 1-18 with no objections.

Trial counsel stipulated to the marijuana instead of objecting and challenging the introduction of the alleged drug's that he was charged with. He failed to put the State's case through advesarial testing. Therwas no chain of custody pursuant to rule 6(b) SCRCrim P. There is no way youcan submit drugs without a chain of custody.

There was no chain of custody tracing possession from evidence's initial control to it's final analysis, must be established as far as practible.
State v. Carter,344 S.C.419,544 S.E.2d 835.

A trial without a chain of custody of allege drug's creates an issue of admissibility.

The State did not submit testimony by affidavit of each individual who handled the evidence, nor did the state comply with rule 6(b). Trial court allowed the introduction of the evidence exhibit's # 11-# 30 App. page # 155 L.17-23 despite no evidence or document's on the chain of custody of the marijuana. See Chisim,584 S.E.2d 401. Chisolm applies the longstanding rule that where there are unexplained gaps in the chain of possession, Leaving to conjecture the identities of the people who handled the evidence and the manner of handling, the evidence is inadmissible.

The allege marijuana was inadmissible because no evidence existed to estabish either the whereabouts of the evidence between the date of seizure and how the last technician came into possession of the marijuana.

The identity of the persons handling the evidence was Left to conjecture.

The custodian did not provide any testimony under oath or produce sworn statement's pursuant to Rule6(b) SCRCrim P id at 801,584 S.E.2d at 404.

Had trial counsel objected and challenged the chain of custody there is a reasonalbe probablity that the outcome would have been different. State v. Pulley,423 S.C. 371, 815 S.E. 2d 461.

The trial court erred in admitting the marijuana and all other evidence. All of the evidence should not have been submitted.

This case should be vacated and remanded for a new trial or whatever this court deems necessary.

6) Did trial counsel violate Petitioner's due process right's by not objecting to the trial court's erroneous jury charge on the hand of one hand of all theory?

The State chose to indict and try the petitioner for the offenses of trafficking marijuana, manufacturing marijuana, theft of electrical current and tampering with a utility meter for the purpose of growing a controlled substance.

The indictment's give no indication ofthe State's theory or any specific's involved in the case other than that alleged in the indictment as a principle.

Each indictment specifically stated that the petitioner allegedly committed the criminal offenses and or about April 23,24,2012 as a principle. Neither indictment listed any other person as co-defendant. Nor did the State charge the petitioner with criminal conspiracy. On or about scenario does not place the petitioner together with an unamed individual.

The prosecution failed to properly allege or prove a conspiracy of accessory theory under which the petitioner and a unamed individual could be found guilty of the offenses there were tried upon.Had the State charged the petitioner and unamed individual with conspiracy, it could have pursued convictions against both alleged defendant's under the hand of one hand of all theory.Under this theory , one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.
State v. Woomer,276 S.C. 258,277 S.E. 2d 696.
To admit evidence under this theory, the exsistence of the common design and the participation of the accused against whom the evidence is offered should first be shown. The State did not charge the allege defendant's with conspiracy so this appoach was unavailable. However,The state placed itself in the position where it could not meet it's burden of proof against each allege individual unless it

Showed participation in the criminal offenses by both or all defendants at least to the point of overcoming "Mere Presence".

While a conviction may be sustained under an indictment which is defective because it omit's essential element's of the offense, such is not true when the indictment facially charges a complete offense, and the State present's evidence which convicts under a different theory than that alleged. Thompson v. State,892 S.W.8,11, 392S.C.434.

In South Carolina it is a rule of universal observance in adminstering the criminal law that a defendant must be convicted if convicted at all of the particular offense charged in the bill of indictment. State v. Corly,186S.E.2d 167.

The court may not substantially amend the indictment through it's instuctionto the jury.
Stirone v. United States,361 U.S. 212, 80 S.ct 270,
United states v. Miller,471 U.S.130,105 S.ct.1811.

The fourth Circuit has held that regardless of whether a defendant objects,Stirone demands reversal

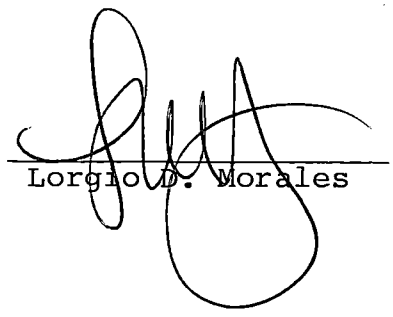
When a constructive Amendment has occurred. See U.S, Floresca,38 F. 3d 706,713 (4th cir 1994)(en banc) stating it would be unfair to deprive a defendant of the Grand Jury's protection. United States v. Randall,171 F.3d 195 210 (4th cir.1999) appliying Floresca.

The instant that the court amends the indictment the court loses jurisdiction.
At that point in time , there is nothing that can cure that defect. It is a jurisdictional defect. Upon an indictment so charged the court can proceed no further.
A trial on such an indictment is void. There is nothing for which the petitioner can be held to answer.If it lies within the province of the court to honor a change in the charging the purpose. See Exparte Bain v. U.S., 30 L. Ed 2d 849.

Trial counsel was ineffective for failure to object to the erroneous jury charge.A material variance between charge and proof entitles the petitioner to a directed verdict.

CONCLUSION

Based on the foregoing, arguement, this court should reverse Petitioner's convictions and sentence and grant him a new trial.



Lorgio D. Morales

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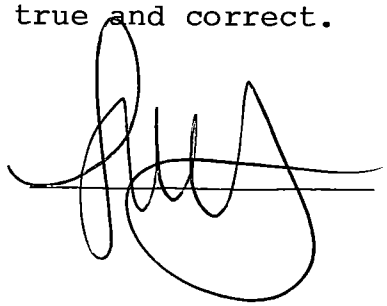
Respondent

2019-000072

Certificate of Service

I Lorgio D. Morales #375312 certify that I have submitted a copy of my Anders brief Pursuant to White v. State, and supplemental Appendix in the above referenced case to South Carolina Court of Appeals by placing a copy in the Perry mailroom hands for mailing.

I Lorgio D. Morales # 375312 certify and verify under the penalty of perjury that the foregoing is true and correct.



Lorgio D Morales, 375312
Perry Corr. Inst.
430 Oaklawn Road
Pelzer, SC. 29669

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Post office box 11629
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Columbia, SC 29201