

AUG 26 2022

S.C. SUPREME COURT

The PCR court erred in ruling that counsel was not ineffective for not cross examining Gary Lewis.

Gary Lewis gave a total of seven different statements. The last of Lewis's statements were sworn statements that were given to Lewis' attorney stating that he had not been truthful in prior statements. Gary Lewis admitted he lied because he feared prison time.

Applicant presented proof of the notarized statements in his PCR application and during PCR hearing. (see Appx. pg. 213)

In *Simpson v. Moore*, the Supreme Court affirmed PCR courts decision to consider certain depositions and affidavits in lieu of live testimony.

In *Rutland v. State*, the Supreme Court found that counsel was ineffective for not cross examining sole witness who gave prior inconsistent statements.

The Supreme court has held that a conviction based on perjured testimony that was knowingly used by the state violates defendants due process rights to a fair trial

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under the 14<sup>th</sup> amendment.

Gary Lewis wrote a statement saying that he had only been to the storage unit a total of three times. The day of his arrest being the first time he had come by himself, the other two times he was only a passenger in applicants vehicle.

In a later statement Gary Lewis recanted his statement by stating that he had been to the unit twice by himself and once with applicant. Contradicting his prior statement. (see Appx. pg. 66, last paragraph) (See Appx pg. 67 second paragraph).

During PCR hearing, counsel stated that he had records of specific activity of the storage facility. Counsel admitted that Gary Lewis lied about going to the storage unit in the months of July and August. Counsel admitted the records showed that no one had been to the storage unit in the months of July and August.

(See Appx. pg. 180, lines 7-17)

Gary Lewis consented to a search of his vehicle which yielded drugs that applicant was charged with. Applicant had no connection

to the drugs that were seized from Lewis' vehicle. Applicant was no where near the storage unit or Gary Lewis' vehicle at the time of Lewis' arrest. While Lewis was detained, he told investigators that applicant told him to retrieve drugs from the storage unit. Gary Lewis' statement is the only evidence connecting applicant to the drugs. Being that Lewis is the sole witness against applicant, counsel was ineffective for not cross examining Lewis. During PCR hearing, attorney General asked counsel what advice did he give applicant as to evidence against applicant. Counsel admitted to advising applicant to plea to allegations. (see Appx. pg. 165, lines 13-18). Counsel's advice renders him deficient. Based on the knowledge of key witness recanting and admitting he had not been truthful in prior statements.

PCR court also erred in finding that applicant provided no credible evidence or testimony to prove a material recantation occurred. (See Appx. pg. 228, bottom of page)

## Argument #2

Counsel was ineffective for not cross examining investigators in state court. Applicant had a Federal revocation probation hearing on August 31, 2016 resulting from state allegations against him. Applicant chose not to accept the drug allegations and advised counsel to cross examine investigators. Codefendant Gary Lewis was not a witness during this hearing due to prior sworn statement admitting he had been lying on applicant. (see Appx. pg. 213)

During the hearing, Lt. Cooper testified that he witnessed applicant and codefendant Andrew Smith in tandem exiting storage facility together. (see Appx. pg. 61, lines 8-19). Lt. Coopers police report shows the exact time of applicant and codefendant Smith's entering and exiting storage facility. The Public Storage video footage show applicant leaves storage unit at 5:18 pm. Andrew Smith exits storage unit at 5:27 pm, nine minutes after applicant. (see Appx. pg. 62, bottom of second paragraph). Counsel asked Lt. Cooper if he was sure about the time frame and he answered "yes".

Counsel then asked if there was a gap in between the time applicant and codefendant exits the facility, Lt. Cooper then testified that he did not know. (see Appx. pg. 61, lines 8-19).

Lt. Cooper also alleged that Gary Lewis had entered storage unit and retrieved a bag. (see Appx. pg. 64, first paragraph)

Whereas, Investigator Kyle testified he actually saw Gary Lewis enter and exit storage unit empty handed. (see Appx. pg. 65, lines 7-17)

Investigators Kyle and Swad were the only officers on the scene during Gary Lewis' arrest which makes it impossible for Lt. Cooper to witness anything. (see Appx. <sup>pg.</sup> 56, lines 11-25).

Counsel admitted he was successful in attacking the credibility of investigators. Quoting "not bragging but we cleaned them out." (see Appx. pg. 190, lines 1-10).

Counsel was aware that Investigators were trying to create evidence against applicant because they didn't have any.

At PCR hearing, counsel mentioned that Josh McKinney had made a controlled

buy from applicant. (see Appx. pg. 152, lines 2-3). There is no evidence to support the allegations of a controlled buy between Josh McKinney and applicant. There is no audio or video to show that a buy ever occurred. Counsel admitted he never saw any statements from McKinney. Counsel stated he doesn't think McKinney gave a statement at all. (see Appx. pg. 181, lines 3-6)

Joshua McKinney has been referred to as a codefendant in this case, which is false. The only codefendants are, Andrew Smith, Gary Lewis, and NaTisha Jackson. (see exhibits 1 and 2).

Analyzing the facts from applicants Appendix, counsel could have impeached all potential witnesses against applicant. Attacking Gary Lewis' credibility would have resulted in exonerating applicant of the drug offense. Counsel failure to interview Gary Lewis was crucial to applicant. Had counsel supported applicants decision to go to trial, applicant would not have pled guilty. Applicant would have went to trial and the outcome would have been different.

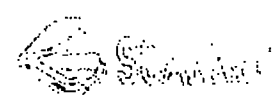
Exhibit # 1

2016-GS-1687

SUBPOENA IN A CRIMINAL CASE

SOUTH CAROLINA GENERAL SESSIONS		COUNTY SPARTANBURG
THE STATE OF SOUTH CAROLINA V. Jerry Simpson, Andrew Smith, Gary Lewis, Nathisha Jackson		CASE NO. 16-1687
		SUBPOENA FOR <input checked="" type="checkbox"/> PERSON <input checked="" type="checkbox"/> DOCUMENT(S) OR OBJECT(S)
TO: JESSICA PISA 182 SEAGLE ROAD COWPENS SC 864-327-5394 CASE# 16011038                      463.0430		
<input checked="" type="checkbox"/> YOU ARE HEREBY COMMANDED to appear in the above-named court at the place, date, and time specified below to testify in the above-entitled case.		
PLACE SPARTANBURG COUNTY COURTHOUSE 180 MAGNOLIA STREET SPARTANBURG SOUTH CAROLINA 29306		COURTROOM SOLICITOR'S OFFICE DATE AND TIME WK OF 10-17-16 BEGIN MON. 10-17-16 AT 9 AM UNTIL EXCUSED
<input type="checkbox"/> YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s).		
LIST DOCUMENT(S) OR OBJECT(S) PLEASE BE ADVISED YOUR CASE IS SUBJECT TO BEING CALLED FOR THE ABOVE WEEK. PLEASE REVIEW YOUR CASE FILE AND CHECK THE STATUS OF ANY EVIDENCE TO CONFIRM ITS EXISTENCE AND AVAILABILITY FOR TRIAL. PLEASE CONTACT JAMES Z. FARR OR REGINA RAY AT 596-2575 UPON RECEIPT OF THIS SUBPOENA AND PROVIDE A NUMBER WHERE YOU CAN BE REACHED.		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.		
CLERK OF COURT  <i>M. Hope Blackley</i>		DATE 09-23-16
(BY) DEPUTY CLERK		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE:  <input checked="" type="checkbox"/> SOLICITOR <input type="checkbox"/> DEFENDANT		NAME AND ADDRESS OF ATTORNEY or DEFENDANT (IF PRO SE/SELF REPRESENTED) J. ZACHERY FARR Assistant Solicitor Seventh Judicial Circuit Spartanburg County Courthouse 180 Magnolia Street, Third Floor Spartanburg, SC 29306 (864) 596-2575

2016 OCT - 23 10:00 AM  
M. HOPE BLACKLEY



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF )  
 )  
 Full name and prison number (if any) of Applicant. )  
 Jerry M. Simpson, 15352-171 )  
 v. )  
 )  
 State of South Carolina )  
 )  
 )

IN THE COURT OF COMMON PLEAS

Case(s) 2016-GS-42-1687  
2016-GS-42-4459

APPLICATION FOR  
POST-CONVICTION RELIEF

2017 SEP 11 PM 4:25  
CLERK OF COURT  
SOUTH CAROLINA

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention FCI Butner II, PO Box 1500, Butner, NC 27509
2. Name and location of Court which imposed sentence Spartanburg South Carolina
3. Name(s) of co-defendant(s) (if any) Andrew Smith & Natisha Jackson, Gary L. Lewis, jr
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2016-GS-42-1687
  - (b) 2016-GS-42-4459
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) Oct. 14, 2016
  - (b) \_\_\_\_\_

- Exhibit #1 - A Subpoena showing all codefendants in applicants case.

- The state of South Carolina

v.

Jerry Simpson, Andrew Smith,  
Gary Lewis, Na Tisha Jackson

- Exhibit #2 - Form 5 of PCR application, question 3, shows name of all codefendants.

### Argument #3

Counsel was ineffective for allowing applicant to plea to an illegal sentence. Applicant pled to Possession with intent to distribute cocaine. 2nd offense, which carries a mandatory 5 to 30 years that can not be suspended nor probation granted. Applicant received a 30 year suspended to 5 years probation sentence, consecutive to the 12 years he received for the Conspiracy offense. (see Appx. pg. 72)

During sentencing, Judge Cole advised counsel that guidelines for sentencing had recently changed. Judge Cole asked counsel if PWID 2nd offense could be suspended. Counsel replied that it could be done. (see Appx. pg. 4, lines 18-25; Appx. pg. 5, lines 1-2)

Counsel admitted during PCR hearing that if he had challenged the PWID offense, that the indictment would have been dismissed. (see Appx. pg. 165, lines 4-7)

Counsel admitted the prosecutor had already dismissed the indictment due to a lack of evidence. (see appx. pg. 147, lines 17-25).

Counsel admitted applicant was

re-indicted for PWID as punishment for not accepting a 12 year plea.

(See Appx. pg. 150, lines 12-19)

Counsel's failure to advise applicant of the mandatory 5 years he could have received prejudiced applicant. Applicant could have challenged the 5 year sentence, proceeded to trial and been acquitted for that offense. Challenging the PWID offense would have resulted in challenging the Conspiracy offense also, which is what applicant wanted to do anyway.

Based on the sole witness in applicant's Conspiracy admitting that he lied about applicant's involvement, (see Appx. pg. 213) combined with facts that Joshua McKinney was not a codefendant, (see exhibits 1 and 2) counsel admitting he never saw any statements from Joshua McKinney, (See Appx. pg. 181, lines 3-6) counsel also admitted he did a great job with attacking the credibility of the investigators. (See Appx. pg. 190, lines 1-10)

Counsel's failure to challenge illegal sentence prejudiced applicant tremendously,

as it could have resulted in proving applicants innocence.

For foregoing reasons, applicants sentence should be reversed and remanded for a new trial.

## Argument #4

Counsel was ineffective for advising applicant to plea to offenses that he did not properly investigate.

During sentencing, counsel stated a part of applicants plea agreement was to charge Na Tisha Jackson, the mother of applicants 3 children, with a misdemeanor and grant her probation for possession of cocaine. (see Appx. pg. 6, lines 16-25) (Appx. pg. 7, lines 1-11). Applicant was not present when counsel and the prosecutor negotiated those specific conditions of the plea agreement.

Counsel forced that statement on record to make it difficult for applicant to prevail on appeal and PCR issues.

Counsel admitted that the negotiation were not in the indictment. (see Appx. pg. 6, lines 16-24). Also, counsel could not have negotiated a valid plea concerning Na Tisha Jackson while her attorney, nor herself was present. (see Appx. pg. 7, lines 8-9)

The prosecutor also stated that the offer had been made but it had not yet been accepted. Prosecutor also stated that the negotiation was separate. (see Appx. pg. 6, line

25, and pg. 7, lines 1-2).

Na Tisha Jackson was indicted because she was the lease holder of a storage unit that investigators assumed was a place applicant stored drugs. Applicant could not argue the 4<sup>th</sup> Amendment nor challenge the drugs found in Gary Lewis' vehicle because no drugs were found in the storage unit. (See Appx. pg. 194, lines 15-22). Therefore, it was error to indict Na Tisha Jackson at all. Due to a lack of evidence, Na Tisha's charges were dismissed all together, not because applicant decided to plea.

Attorney General argued that applicants motivation to plea was due to a 10 year negotiated sentence. (see Appx. pg. 149, lines 10-12).

Counsel stated there was never a 10 year negotiation agreement. (See Appx. pg. 149, line 13).

Counsel also admitted he did not know what motivated applicant to plea. (See Appx. pg. 149, lines 18-25, pg. 150, lines 1-19).

That particular section of the Appendix clearly proves there was no valid agreement for applicant to plea just so Na Tisha

could receive a probationary sentence. It also proves that applicant actually received a harsher punishment due to him refusing to plea to the 12 years on Thursday, October 13, 2016.

During sentencing, Judge Cole asked applicant was he coerced to plea, he answered "no". Applicant did not object to any of the questions the Judge asked. Counsel had previously advised applicant to "just plea", do not challenge anything. Applicant actually told the Judge that he had the possession of 28 grams of cocaine, which proves applicant was only false confessing to the allegations against him because its factual that applicant never possessed any drugs in this case. (See Appx. pg. 8, lines 1-9)

Counsel admitted that his advice to applicant was to take a plea, leaving applicant with no defense. (see Appx. pg. 165, lines 13-18). It's solely the defendant's decision rather to plea to an offense or go to trial. Counsel's advice makes him ineffective. Applicant's sentence should be reversed and remanded for a new trial.

Jerry Simpson - 255266

MacDougall Correctional Institution

1516 Old Gilliard rd.  
Ridgeville SC, 29472

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