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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT

V.

Bobby Ray McClure, Jr,

DEFENDANT

APPELLATE CASE NO. 2022-000347

Appellant's ProSe Brief under Anders

Bobby Ray McClure, Jr.
Kershaw Correc. Inst. HA-25
4848 Goldmine Hwy.
Kershaw, S.C. 29067

Pro-Se Questions On Appeal

1. WHETHER APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED ON APPEAL: OR IN THE ALTERNATIVE;

2. WHETHER APPELLANT'S FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS WERE VIOLATED WHEN APPELLATE COUNSEL FILED A ANDERS BRIEF, AS OPPOSED TO A "MERITS" BRIEF UNDER THE CIRCUMSTANCES OF THIS CASE?

3. WHETHER TRIAL COUNSEL SHOULD HAVE BEEN SUBSTITUTED AT APPELLANT'S WITHDRAWAL HEARING BECAUSE THE ATTORNEY WOULD HAVE BEEN LABORING UNDER DIRECT ACCUSATIONS OF CONFLICTING INTEREST?

STATEMENT OF THE CASE

In June of 2021, Appellant was indicted by the York County Grand Jury, of Trafficking Crack Cocaine, 100 grams or more. On March 7, 2022, Appellant appeared before the Honorable J. Cole, to enter a guilty plea to a "lesser" included offense of trafficking cocaine more than 28 grams, but less than 100 grams. Tr. 1; R.

While at trial court level, Appellant was represented by Twana Burris-Alcide. Tr. 1. However, Appellant entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970); and was sentenced to seven (7) years incarcerated with credit for 340 days previously served. On March 9, 2022, Appellant, through counsel Burris-Alcide, filed "a motion to withdraw Appellant's guilty plea, based on Appellant's insistence".

A hearing was held on the motion on March 10, 2022, before Judge Cole. At the end of the hearing, Judge Cole denied the motion to withdraw the guilty plea, A written order denying the motion to withdraw the plea was filed on May 23, 2022. This "Pro-Se Appellate Brief Follows"

SUMMARY OF THE ARGUMENT

In Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), the Sixth Amendment's requirement that "the accused shall enjoy the right to have Assistence of Counsel for his defense" was made obligatory on the States by the Fourteenth Amendment, the Court holding that 'in our adversarial system of criminal justice, and person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided him'. at 344, 83 S. Ct. at 796.

When Anders was decided, for at least a decade prior to its decision in a continuing line of cases, the United States Supreme Court reached its conclusion concerning discrimination against the indigent defendant on his initial appeal. Beginning with Griffin v. People of State of Ill., 351 U.S. 12, 76 S. Ct. 585 (1956), where it had been ruled equal justice was not afforded an 'indigent defendant' where the nature of the review 'depends on the amount of money he has' at 19, 76 S. Ct. at 591., and continuing through Douglas v. People of State of Cali., 372 U.S. 353, 83 S. Ct. 814 (1963), this Court has consistently held invalid those procedures "where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that this case is without merit, is forced to shift for himself". At 358, 83 S. Ct. at 817.

SUPPORTING ARGUMENT IN FAVOR OF GRANTING RELIEF

Here, Appellant acknowledges he is not so positioned to argue whether or not the lower court abused its discretion when it denied his motion to withdraw his alleged guilty plea. Where for all aparent reasons, Appellant entered "a North Carolina v. Alford's plea. 400 U.S. 25, 91 S. Ct. 160 (1970)

For example, Alford sought post-conviction relief in state court. Among the claims raised was the claim that his guilty plea was invalid because it was the product of 'fear and coercion'. Fear of the sentence he could otherwise receive by not pleading guilty, and coercion by counsel, this was the best course of action.

After a hearing, the state court in 1965, found that the plea was 'willingly, knowingly, and understandingly' made on the advice of competent counsel and in the face of a strong prosecution's case. Subsequently, Alford petitioned for a writ of habeas corpus, first in the United States District Court for the Middle District of North Carolina, and then in the Court of Appeals for the Fourth Circuit. Both courts denied the writ on the basis of the state court's findings that Alford voluntarily and knowingly agreed to plead guilty. In 1967 Alford again petitioned for a writ of habeas corpus in the District Court for the Middle District of North Carolina. That Court, without an evidentiary hearing, again denied relief on the grounds that the guilty plea was voluntary and waived all nonjurisdictional defects in

any prior stage of the proceedings and that the findings in state court in 1965 clerly required rejection of Alford's claim that he was denied effeictive assistance of counsel prior to pleading guilty.

On appeal, a divided panel of the Court of Appeals for the Fourth Circuit reversed on the ground that Alford's guilty plea was made "involuntarily". 405 F.2d 340 (1968). In reaching its conclusion, the Court of Appeals relied heavily on United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209 (1968), which the court read to require invalidation of the North Carolina statutory framework for the imposition of the death penalty because North Carolina statutes encourage defendants to waive constitutional rights by the promise of no more than life imprisonment if a guilty pleas was offered and accepted.

Conceding that Jackson did not require the automatic invalidation of pleas of guilty entered under the North Carolina statutes, the Court of Appeals ruled that Alford's guilty plea was involuntary because "it's principle motivation was fear of the death penalty".

In addition, this Court held in Brady v. United States, 397 U. S. 742, 90 S. Ct. 1463 (1970), that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment, "or a term of years" was not reason compelled within the meaning of the Fifth Amendment. Thus, Jachson established a new test for determining the validity of guilty pleas.

As recounted after Alford's plea of guilty was offered and the State's case was placed before the judge, Alford "denied" that he had

committed the murder but reaffirmed his desire to plead guilty to avoid a possible death sentence and to limit the penalty of the 30-year maximum provided for second-degree murder.

Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the admission by the defendant "that he committed the offense charged against him".

In the instant case at bar however, McClure plead under Alford, negating trial in lieu of what could have been a "much harsher sentence", if tried "with incompetent counsel". Or one for which Appellant did not trust, arguing a "conflict of interest". See Tr. tr. (Motion To Withdraw Plea), pages 36-49.

a. To begin, "Appellant's attorney for the subsequent plea withdrawal hearing should have been substituted". Where none attending this proceeding was not aware one of the central concerns of McClure, "was he no longer trusted his plea attorney". See Tr. tr. p. 36, l., 16-25.

> "It is his position that he would also like to-- the basis for this motion to withdraw is because I am a former prosecutor and because I specifically prosecuted him on a case and so that's why basically, the basic for his motion to withdraw his guilty plea. He would like to enter, he would like to petition the court to withdraw this guilty plea and would like to proceed to trial with another attorney". Thank you.

In United States v. Glover, 8 4th 239 (4th Cir. 2021). This Court was faced with the identical situation "of whether defendant's Sixth Amendment right to effective assistance of counsel, during a

critical stage of the proceeding, including plea hearings and plea withdrawal hearings, were violated".

In accordance with this Court's decision in Glover, "in cases where attorney has an actual conflict of interest, 'prejudice is presumed' under Strickland v. Washington, if the defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected his lawyer's performance. 466 U.S. 668 (1984); (quoting Culer, 466 U.S. at 350; see also Garza v. Idaho, 139 S. Ct. 738 (2019).

Cuyler dealt with an actual conflict created by multiple representation. See 466 U.S. at 350, 100 S. Ct. at 1708. But conflicts also arise when a lawer "must choose between representing a client's interests and implicating herself in her own serious misconduct". A lawyer "cannot reasonably be expected to make arguments advancing a client's claim that, in essence, 'denigrate their own performance'".

Thus, Appellant's motion to withdraw hearing "was no hearing at all safeguarded by the protections under the Constitution". See Christeson v. Roper, 574 U.S. 373, 135 S. Ct. 891 (2015).

Moreover, once reviewing Appellant's original guilty plea. Appellant specifically admonished the plea Judge that; "he was coerced into pleading guilty by his attorney". See Tr. tr. p. 14, lines 1-25; Tr. tr. p. 15, lines 1-15. To compile the exchange for this Court's convenience. Appellant essentially stated on the record; "want the truth"? I was coerced into taking this plea. Along with Alford, to which counsel was aware Appellant maintained his innocence.

(1) Appellant contends "the State intentionally withheld a crutial video tape that would have shown "he never possessed the drugs charaged in this case". Where both he and codefendant both were searched before being placed in the police crusier.

(2) A jailhouse letter messaging Appellant from the "codefendant, essentially expressing he had told law enforcement the drugs charged in the case belonged to him". Yet defense counsel never attempted to place that evidence before the court.

(3) Coupled with the "search and seizure" for the initial encounter was commited in violation of the Fourth Amendment right, when officers searched the premises initially, and without a search warrant. To establish subsequent probable cause to search the complete premises. Of course there exist discrepencies with the amount of drugs found on the co-defendant, to which Appellant was charged with along with 2.52 grams allegedly found in Appellant's groin area, after arrival at the jail.

Thus, not only does North Carolina v. Alford, stand for circumstances where the defendant fail to admit guilty. But coupled with the additional circumstances of wanting to withdraw the plea, and a clear explanation why it was so important to do so. At bare minimum counsel on appeal "should have filed a merits brief, rather than a Anders, based on the above caselaw and circumstances of this particular case.

Wherefore, based on the foregone reason stated and argued herein. Appellant respectfully request that the Anders brief be denied in favor of instruction to file a merits brief of the lower court's refusal to allow Appellant to withdraw his Alfords plea. Where there is ample evidence which was reasily available, as well as supporting caselaw. To have effectively constructed such.

For these reasons, Appellant prays for the above relief and any additional relief deemed just and proper by thie Honorable Court.

Respectfully Submitted,

/s/ Bobby J McClure Jr.

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cc: S.C. Attor. Gen
2/27/2023

Exhibit A

Big cuzz, whats good, hope everything
ok. I have not talked to anyone,
and I hoping they dissmiss the charge
I'm in lock-up been here since
I came in. Special Needs in Room
43. Anyway So they didn't charge
me with anything at resident so
they don't have probable Cause to
Arrest me.... IDK, I Lost my
Wife She left me and took my
kids She living in NC Now IDK
I'm sick AsF but hell as far
as that "104.8" If you get
it dissmissed thats good and
as for the other shit IDK but
I said On Cam it was mines
so you should be free. If I
said anything it was for Collateral
Damage. They fucked up Our Paper
Work and I'm not taking No
Plea, keep the head up. Miss me
Adriel Rodriguez 1144328

And that's the tricky thing about life, really, that the things we want most will kill us. Tony the Beat Poet read me this ancient scripture recently that talked about loving either darkness or loving light, and how hard it is to love light and how easy it is to love darkness. I think that is true. Ultimately, we do what we love to do. I like to think that I do things for the right reasons, but I don't, I do things because I do or don't love doing them. Because of sin, because I am self-addicted, living in the wreckage of the fall, my body, my heart, and my affections are prone to love things that kill me. Tony says Jesus gives us the ability to love the things we should love, the things of Heaven. Tony says that when people who follow Jesus love the right things, they help create God's kingdom on earth, and that is something beautiful.

I found myself trying to love the right things without God's help, and it was impossible. I tried to go one week without thinking a negative thought about another human being, and I couldn't do it. Before I tried that experiment, I thought I was a nice person, but after trying it, I realized I thought bad things about people all day long, and that, like Tony says, my natural desire was to love darkness.

My answer to this dilemma was self-discipline. I figured I could just make myself do good things, think good thoughts about other people, but that was no easier than walking up to a complete stranger and falling in love with them. I could go through the motions for a while, but sooner or later my heart would testify to its true love: darkness. Then I would get up and try again. The cycle was dehumanizing.

CERTIFICATE OF SERVICE

I, Bobby Ray McClure, do hereby certify that I have provided the State with a true and correct copy of my Pro-Se Appellate brief by placing the same in the U.S. Mail Serive on this 2 day of March ,2023, with adequate postage attached thereto.

S.C. Attorney General
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Respectfully,

/s/ Bobby Ray McClure

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