

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

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SEP 19 2013

S.C. Supreme Court

MICHAEL ODOM,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000242

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to object to the solicitor's incorrect summary of petitioner's prior record submitted to the plea judge before sentencing because the prejudicial impact of this misinformation deprived petitioner of his right to a fair sentencing proceeding.

STATEMENT

Petitioner Michael Odom pled guilty to breaking and entering into a motor vehicle, petty larceny, and two counts of shoplifting (both of which were third or subsequent offenses) during the April 2011 term of the Spartanburg County General Sessions Court before Judge Mark Hayes. Petitioner was sentenced to imprisonment for an aggregate period of ten years. App. 1-18. Bob Usry and Frank Adams represented petitioner at the plea proceeding.

On October 28, 2011, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 20-26. The respondent filed a return dated July 17, 2012, requesting that a hearing be held in response to petitioner's PCR action. App. 27-30.

A PCR hearing was convened on September 6, 2012, at the Spartanburg County Courthouse before Judge J. Derham Cole. Petitioner was present at the hearing and represented by Richard Allen. App. 21-52. On December 7, 2012, Judge Cole issued an Order of Dismissal in the case therein denying petitioner's allegations of ineffective assistance of counsel. App. 54-59.

Petitioner appealed Judge Cole's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to the solicitor's incorrect summary of petitioner's prior record submitted to the plea judge before sentencing because the prejudicial impact of the misinformation deprived petitioner of his right to a fair sentencing proceeding.

During the plea proceeding, the solicitor apprised the plea judge of the facts in the case. Apparently, petitioner was seen taking a television and disc player from a WalMart store in Spartanburg County without purchasing the items on September 20, 2009, and September 21, 2009, respectively. App. 8, l. 24-p. 9, l. 19. Also, on February 28, 2009, a Spartanburg County Bi-Lo customer found petitioner inside her vehicle taking a camera and some bags when she exited the store. App. 8, l. 24-p. 9, l. 19.

During the PCR hearing, petitioner testified that the solicitor summarized his prior record incorrectly to the plea judge and included prior crimes that he neither committed nor was convicted of during the sentencing phase of his plea proceeding, and that trial counsel erred in failing to object to the submission of this misinformation regarding his criminal record. App. 36, lines 18-24.

The solicitor read petitioner's priors into the guilty plea record as follows:

SOLICITOR: 1982 reckless driving; 1984 simple possession of marijuana; 1985 a violation of the pistol act and two counts of possession of marijuana; 1986 two counts of DUI first; 1987 9 counts of fraudulent check and unlawful possession of a pistol and possession of marijuana; 1988 open container; 1989 for counts of DUI, possession of marijuana and another violation of the pistol act; 1990 shoplifting, armed robbery, two count of simple possession of marijuana, receiving stolen goods and three counts of DUI; 1991 DUI third, habitual traffic offender; 1194 DUI third, common law robbery, habitual traffic offender and a DUI fourth; 1996 two counts of attempted armed robbery and two counts of common law robbery; 2000 driving under suspension, burglary second degree, grand larceny and common law robbery; 2004 possession of marijuana, possession of cocaine; 2005 possession of cocaine and 2008 two counts of third or subsequent property offences.

App. 12, l. 14-p. 13, l. 8.

Petitioner testified that the solicitor listed two attempted armed robbery convictions on his prior record when in fact he stated that he had never been convicted of attempted armed robbery. App. 43, l. 2-25; App. 37, l. 12-p. 38, l. 24; App. 41, l. 3-8. Furthermore, the plea judge was told that he had an armed robbery prior, but petitioner testified that he was never convicted of armed robbery. Additionally, the plea judge was told that he had two prior robbery convictions when he had only one prior robbery conviction. Counsel made no objections to preserve these errors for appellate review. App. 33, l. 24-p. 34, l. 9; App. 34, l. 19-p. 35, l. 24.

Petitioner stated that he “nudged” counsel when his record was read incorrectly and begged in effect for an objection, but that counsel told him it would be unwise to argue with the solicitor about the misinformation. App. 39, l. 5-p. 40, l. 3; App. 40, l. 16-22. Finally, petitioner explained that he was prejudiced by the misreading of his prior record at sentencing because the trial judge started writing immediately when the prior robbery convictions were read to the plea judge. Petitioner interpreted such action to mean that the plea judge was “influenced” and “very upset” by the solicitor’s incorrect summary of his prior record. App. 41, l. 14-25.

Only one of petitioner’s two plea attorneys testified at the PCR hearing. Counsel Rob Usry testified that the solicitor’s summary of petitioner’s prior record read to the plea judge **was incorrect with respect to the robbery priors**, but that he did not object to such errors because he did not want to irritate the solicitor and lose the recommendation of concurrent sentencing agreed upon during plea negotiations in the case. App. 47, l. 2-p. 48, l. 18; App. 50, l. 8-p. 51, l. 17.

With respect to this matter, the PCR judge found that counsel’s testimony was “credible” and that counsel was not ineffective in that petitioner failed to prove that counsel’s failure to object to the errors on petitioner’s record constituted ineffective assistance under prevailing professional norms. App. 56-58.

In State v. Franklin, 267 S.C. 240; 226 S.E. 2d. 896 (1976), the Court cited to Townsend v. Burke, 334 U.S. 736 (1948), in assessing the issue regarding the problem of sentencing misinformation received by the sentencing judge as follows:

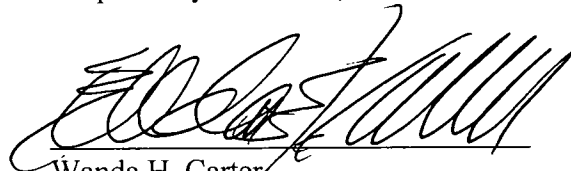
[The defendant] was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with the due process of law, and such conviction cannot stand. 334 U.S. at 741; 68 S.Ct. at 1255; 92 L.Ed at 1693.

In the case at bar, the incorrect reading of the petitioner's prior record reflected negatively upon petitioner in that petitioner was seen as one who habitually committed theft/property offenses, which obviously impacted the plea judge's sentencing on the instant theft/property crimes. Counsel's error in failing to object to the misinformation submitted to the plea judge in this case constituted deficient legal representation. Clearly, but for counsel's failure to correct the reading of his prior record to the plea judge, a reasonable likelihood exists that petitioner would have been sentenced less harshly in the instant case.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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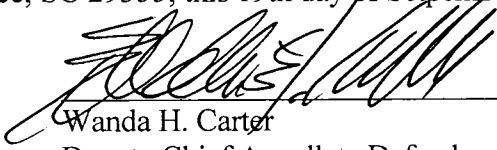
STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000242

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Michael Odom, #280968, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355, this 19th day of September, 2013.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of September, 2013.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.