

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2009-CP-40-2523

Jaime E. Marrero,.....Petitioner,

v.

State of South Carolina,.....Respondent.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Questions Presented..... ii
Statement of the Case iii
Argument.....1

I. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE
INHERENTLY COERCIVE PLEA PROCEEDINGS.....1

II. COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE AN APPEAL
BASED UPON THE INHERENTLY COERCIVE PLEA PROCEEDINGS.....8

Conclusion10

QUESTIONS PRESENTED

1. Did the circuit court err in holding Petitioner's trial counsel was not ineffective, even though trial counsel failed to object to or intervene in the coercive plea proceedings?
2. Did the circuit court err in holding Petitioner's trial counsel was not ineffective for failing to file a direct appeal from the guilty plea?

STATEMENT OF THE CASE

On September 25, 2008, Petitioner Jaime E. Marrero (Petitioner) pled guilty to murder and armed robbery and was sentenced to 38 years imprisonment for the murder charge and 22 years imprisonment for the armed robbery charge, the sentences to run concurrently. No direct appeal was taken from the guilty plea.

Petitioner then brought this action seeking post-conviction relief (PCR) in April of 2009. He alleged his trial counsel was ineffective for failing to object to leading direct examination; failing to discredit a key state witness; and preventing Petitioner from sharing important information with trial counsel. Petitioner also asserted the trial judge improperly placed a condition upon Petitioner's guilty plea and erroneously denied a motion for continuance. Petitioner filed an Amended Application for Post-Conviction Relief in November of 2012. He alleged trial counsel was ineffective for: (1) failing to request the judge recuse himself based upon a lack of impartiality; (2) failing to have Petitioner undergo a mental evaluation; (3) telling Petitioner to plead guilty so Petitioner may one day see his son again; (4) failing to ensure Petitioner served an unrelated federal sentence¹ before serving his state sentence; and (5) failing to properly advise Petitioner of his right to appeal and to file a notice of appeal.

The circuit court denied the application on March 8, 2013. Petitioner received written notice of the entry of that order on March 14, 2013. Petitioner filed a Motion to Alter or Amend the Judgment on March 21, 2013, which the circuit court denied on July 18, 2013. A Notice of Appeal was filed on August 23, 2013. Petitioner now seeks a writ of certiorari to review this denial.

¹ Petitioner received a five year sentence from the federal court in an unrelated case prior to pleading guilty in the instant case. See App. p. 47, line 23 through p. 48, line 5. He remained in state custody after receiving his federal sentence, and has not served any of his federal sentence.

ARGUMENT

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Boan v. State, 388 S.C. 272, 275, 695 S.E.2d 850, 851 (2010).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland, 466 U.S. at 687, 104 S. Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Boan, 388 S.C. at 275, 695 S.E.2d at 851. “First, the applicant must show counsel’s representation was deficient, which is measured by an objective standard of reasonableness.” Boan, 388 S.C. at 275, 695 S.E.2d at 851, citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2052. “Next, the applicant must show he was prejudiced by counsel’s performance such that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different.” Id. at 275–76, 695 S.E.2d at 851–52. In the context of a guilty plea, the petitioner must demonstrate that but for counsel’s deficient performance the petitioner would not have pled guilty and would have proceeded to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

1. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INHERENTLY COERCIVE PLEA PROCEEDINGS.

The plea proceedings were inherently coercive because they were urged by the trial judge, not by the parties, thus Petitioner’s guilty plea was not freely and voluntarily made. Petitioner’s defense counsel’s performance was deficient in not objecting to or intervening in the guilty plea urged by the trial judge, thus depriving Petitioner of his constitutional right to effective assistance of counsel. See U.S. Const., amend. VI.

“In the guilty plea context, the inquiry with respect to the counsel’s alleged deficiency turns on whether the plea was voluntarily, knowingly, and intelligently entered.” Hyman v. State, 397 S.C. 35, 43, 723 S.E.2d 375, 379 (2012). Courts look to the both the guilty plea transcript and the testimony from the PCR hearing to determine whether the guilty plea was freely and voluntarily made. Id. at 44, 723 S.E.2d at 379. Therefore, the voluntariness of the plea is not determined solely on the plea colloquy with the sentencing judge. Id.

In State v. Cross, 270 S.C. 44, 240 S.E.2d 514 (1977), this Court, for the first time, considered the effect of a judge’s involvement in the plea process. In Cross, the defendant went to trial on several gun charges. Once the State rested its case, the judge, solicitor, and defense counsel participated in a conference, during which the judge informed defense counsel that if the defendant pled guilty, he would not receive a prison term, but if defendant went forward and was convicted, he would receive at least one year in prison. Id. at 46–47, 240 S.E.2d at 515–16. After the conference, defense counsel communicated this information to the defendant, and the defendant pled guilty to avoid jail time. Id. On appeal, this Court determined that “the judge should not initiate or influence the [plea] agreement, nor be a party to the negotiations.” Id. at 48, 240 S.E.2d at 516. The Court cited an opinion from the Supreme Court of Pennsylvania, which enumerated three compelling reasons to support the rule that judges should not participate in plea discussions:

First, the defendant can receive the impression from the trial judge’s participation in the plea discussions that he would not receive a fair trial if he went to trial before the same judge. Second, if the judge takes part in the pre-plea discussion, he may not be able to judge objectively the voluntariness of the plea when it is entered. Finally, the defendant may feel that the risk of not going along with the disposition which is apparently desired by the judge is so great that he ought to plead guilty despite an alternative desire.

Id. at 50, 240 S.E.2d at 517.

The Court emphasized that plea discussions “should be between the adversaries” and that the judge “must remain in a position of complete neutrality” Id. at 46–47, 240 S.E.2d at 516–17. Ultimately, this Court held as a matter of law the defendant was “unduly coerced” to plead guilty and forego his constitutional right to a fair trial by jury because the judge induced the plea agreement. Id. at 50, 240 S.E.2d at 517.

In 1981, four years after the Cross decision, this Court issued opinions in two cases dealing with the propriety of a judge’s involvement in plea discussions. In Harden v. State, 276 S.C. 249, 277 S.E.2d 692 (1981), the Supreme Court found the trial judge was merely involved in the plea discussions and did not coerce the defendant into pleading guilty. The Court noted the plea was time pressured, but not by any actions of the judge, and there was no claim the judge indicated the defendant would face a harsher sentence if he did not plead guilty. Id. at 251–52, 277 S.E.2d at 693. The Court rejected the strict approach in Cross that a judge may never be involved in the plea discussion process, distinguishing the case on its facts and noting that the facts in Cross and Beaver “indicated much more direct coercion” than in the Harden case. The Court specifically disavowed “adherence to the apparent position of the Federal Rules quoted in Cross that there are no circumstances in which a trial judge should participate in the plea bargain process prior to the taking of the actual plea.” Id. at 256, 277 S.E.2d at 695. The Court instead adopted the position of the ABA Standards for Criminal Justice, Standard 14-3.3, Pleas of Guilty, Responsibilities of the Trial Judge, which reads, in pertinent part:

(c) When the parties are unable to reach a plea agreement, if the defendant’s counsel and prosecutor agree, they may request to meet with the judge in order to discuss a plea agreement. If the judge agrees to meet with the parties, the judge shall serve as a moderator in listening to their respective presentations concerning appropriate charge or sentence concessions. Following the presentation of the parties, the judge may indicate what charge or sentence concessions would be acceptable or whether the judge wishes to have a preplea report before rendering a decision. The parties may thereupon decide among themselves, outside of the

presence of the court, whether to accept or reject the plea agreement tendered by the court.

(e) Where the parties have neither advised the judge of a plea agreement nor requested to meet for plea discussion purposes, the judge may inquire of the parties whether disposition without trial has been explored and may allow an adjournment to enable plea discussions to occur.

(f) **All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved**, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, **the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.**

Id. at 253–55, 277 S.E.2d at 694–95 (emphasis added). As the Supreme Court stated, the Standards were “designed to prevent both the fact and the appearance of the trial judge’s becoming an advocate against the desires of the defendant or the State of a particular resolution.” Harden, 276 S.C. at 257, 277 S.E.2d at 695. The Standards and the Harden case allow a trial judge to participate in plea discussions as a neutral but state that such plea discussions involving the judge should be on the record in open court. Id. at 253–55, 277 S.E.2d at 694–95. They do not allow a trial judge to demand the plea discussions.

This Court adopted the ABA approach because it “provides access by the State and the defendant to the judge, and yet provides standards to guide all concerned so that the fear of coercion in the plea-bargain process, to which we are sensitive as the Cross and Beaver decisions indicate, should be minimal.” Id. at 256, 277 S.E.2d at 695. In Medlin v. State, 276 S.C. 540, 280 S.E.2d 648 (1981), the Court reaffirmed its adoption of the ABA Standards.

The facts of this case indicate a coercive plea process, both under the concerns discussed in Cross and the Standards adopted in Harden. At the PCR hearing, trial counsel testified the judge, at a pre-trial meeting with counsel, asked the solicitor what the case was about. The

solicitor replied that it is a murder trial on video, to which the judge responded, “Well, then why are we trying this case if he’s on video?” (App. p. 94, lines 2–15.) Trial counsel further testified that during an *in camera* meeting, held in the middle of the State’s case in chief, the judge “called us back and said, asked, and told the State to make this boy an offer. . . . He said with the way the trial is going and with Ms. Fuller’s testimony about Mr. Marrero’s remorse, please make, this boy needs to get an offer.” (App. p. 95, line 33 through p. 96, line 4.) Trial counsel testified the judge directed the solicitor to get a plea agreement. (App. p. 96, lines 9–12.) This discussion was not recorded. Trial counsel testified Petitioner was under time pressure from the court and was given thirty (30) minutes or fewer to decide whether or not to take the plea deal offered by the State at the judge’s direction. (App. p. 98, line 23 through p. 99, line 6; p. 101, line 17 through p. 102, line 3.) Trial counsel testified that while Petitioner was consulting with his family and counsel,

It was either he [the judge], or somebody came out. But it was his directive to say, well we need to, we either, we either need to try this case or he needs to plead but we need to make a decision.

(App. p. 99, lines 3–6.)

Petitioner’s testimony at the PCR hearing is similar to trial counsel’s testimony. Petitioner testified his trial counsel returned from the *in camera* hearing and informed Petitioner “the judge made the Solicitor come back with a plea,” and that the judge said “it’s clear of this young man’s guilt and I want a plea.” (App. p. 146, lines 10–16.) Petitioner further testified he felt pressured to accept the plea offer, (App. p. 150, line 21 through p. 151, line 1), and was given very little time to consult with his counsel and consider the offer, (App. p. 145, lines 8–22). Petitioner testified as follows in regard to the time allowed to consider the plea offer:

It wasn’t very long at all. I mean, I asked, I asked to speak with my family and we were up this side. The benches would have been on this side in the other courtroom. And I was up there talking with my sister-in-law. The next thing I

know, you know, I'm in tears, I'm very emotional at this time. And the next thing I know he beating the gavel. The judge was being the gavel and saying, well, it's time to continue the trial. And I, I really felt that I didn't have long at all. It was either I was going to do this now or it—I was going to have to go to trial.

(App. p. 145, lines 11–22.)

All the testimony in this case states the trial judge brought counsel into his chambers and instructed the solicitor to make a plea offer to the Petitioner. This discussion was not on the record as required by the Standards, and the plea discussion was not instituted at the desire of either the State or the defense—the plea came about solely because the judge wanted it. The Standards plainly state a judge is not to indicate a preference for or against a plea. During the plea colloquy, the judge told Petitioner, “. . . I think the evidence clearly established your guilt in this case.” (App. p. 60, lines 1–2.) The judge held this view—and voiced this view—after only hearing a portion of the State's case; the judge heard nothing of the defense's case. This is the sort of inherently coercive plea atmosphere the Supreme Court intended to avert when it adopted the Standards in the Harden case and that is found coercive as a matter of law in Cross.

The Cross opinion emphasizes the necessity of the judge maintaining his neutrality. While the Harden decision disavows the analysis in Cross, it does not break from that requirement of neutrality. The Standards adopted in the Harden decision also require a judge to remain neutral during plea discussions: “Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.” Id. at 255, 277 S.E.2d at 695. The trial judge in this case, however, did exactly that—he called counsel into chambers specifically to instruct the solicitor to offer a plea deal to Petitioner, overtly indicating he felt a plea was in the best interest of Petitioner. Here, the trial judge did not remain neutral and thus violated the Standard adopted by this Court in Harden.

As recognized by the Standards and this Court, even a judge's best intentions to see a young man receive an advantageous sentence have no place within a criminal trial. A judge is to be a neutral at all times, and any deviation from that strict and honored role may—and did here—deprive a citizen of his constitutional right to a trial by jury. Because the plea was initiated and pressed upon the parties by the trial judge, it was coercive and Petitioner's resulting plea was not freely and voluntarily made. Trial counsel was deficient in not objecting to or intervening in the coercive plea discussion, and the resulting prejudice prevented Petitioner from receiving his constitutionally guaranteed trial by jury. The circuit court erred in not finding trial counsel's performance deficient.

If the trial judge had not initiated the plea discussions and indicated his desire for a plea, or had defense counsel objected in an effort to halt the discussions, Petitioner would have proceeded to trial. Petitioner received a 38-year sentence when he could have faced a sentence of life without parole. The circuit court in its order notes this and mentions that Petitioner accepted a plea deal for an "advantageous sentence." (App. p. 13.) However, the sentence received cannot be a factor in whether Petitioner was prejudiced by his counsel's deficient performance or was coerced into a plea by the judge. The inquiry in this post-conviction relief proceeding is whether, but for defense counsel's deficient performance, Petitioner would not have pled guilty and would have instead proceeded to trial, not whether Petitioner got a better deal than he would have if he had gone to trial and been convicted. See Hyman v. State, 397 S.C. 35, 48, 723 S.E.2d 375, 382 (2012) ("To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.") (internal quotation omitted). The proper analysis discerns whether ineffective assistance of counsel deprived Petitioner of his

constitutionally guaranteed trial by jury. As is clear from the testimony, the trial judge did not adhere to the standards elucidated by this Court in its prior decisions on a judge's role in plea discussions. Petitioner's trial counsel should have objected to or intervened in the judicially orchestrated plea discussion; failure to do so constitutes deficient performance that prejudiced his client by depriving him of a jury trial. The circuit court erred in not finding that trial counsel's deficient performance prejudiced Petitioner. This Court should grant a writ of certiorari to review the circuit court's finding trial counsel's assistance regarding the guilty plea was not constitutionally ineffective.

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE AN APPEAL BASED UPON THE INHERENTLY COERCIVE PLEA DISCUSSIONS

Because the plea was not freely and voluntarily made, defense counsel should have raised an objection and pursued a direct appeal. Failure to do so constitutes deficient performance and Petitioner is prejudiced because he was unable to have the trial judge's error reviewed.

Defense counsel testified at the PCR hearing that he did not recall whether he discussed with Petitioner a direct appeal from the guilty plea. (App. p. 113, lines 16–24.) In response to questions regarding whether Petitioner could have filed a direct appeal from the guilty plea, defense counsel conceded an appeal from a guilty plea is allowed, but that “[t]here was no objection raised in the plea colloquy itself.” (App. p. 112, line 25 through p. 50, line 10.) On cross-examination, defense counsel stated that generally he advises every defendant of his right to appeal, but continued, “However, we’d always tell them, however, if we don’t raise an objection there’s really nothing to appeal.” (App. p. 129, line 25 through p. 67, line 3.) Because defense counsel did not object during the plea colloquy, we can assume defense counsel found nothing during the colloquy objectionable. However, in light of the case law of this state clearly holding that judges should not initiate and drive plea proceedings, defense counsel’s failure to

object during the plea process constituted deficient performance. As the circuit court's order states, defense counsel only need advise the defendant of his right to appeal from a guilty plea when "extraordinary circumstances" are present. (App. p. 22.) See also Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) ("Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea.").

In Jones v. State, 382 S.C. 589, 677 S.E.2d 20 (2009), this Court applied the two tests from Roe v. Flores-Ortega to determine whether defense counsel had an obligation to consult with the defendant about a direct appeal from a guilty plea. Defense counsel has a constitutionally imposed obligation to consult with the defendant regarding a direct appeal when "there is reason to think **either** (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), **or** (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Jones, 382 S.C. at 596, 677 S.E.2d at 23, citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (emphasis added). This Court continued to say that a bare assertion that a defendant was not advised of his right to appeal is insufficient to grant relief; instead, there must be some extraordinary circumstance. Jones, 382 S.C. at 595, 677 S.E.2d at 23–24. "One extraordinary circumstances which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal." Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

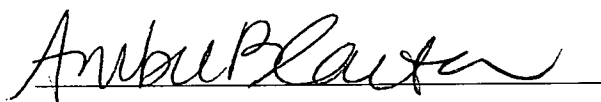
Here, Petitioner testified he asked his defense counsel about filing a direct appeal, but trial counsel told the Petitioner there was no appealable error. (App. p. 149, lines 10–16.) Petitioner’s request for information about a direct appeal satisfies the second of the Flores-Ortega tests. Further, the testimony in this case demonstrates there is a nonfrivolous ground for a direct appeal, thus satisfying the first Flores-Ortega test. Certainly, the fact the trial judge improperly orchestrated a guilty plea is an extraordinary circumstance warranting a direct appeal. Counsel for the State conceded at the PCR hearing that the issue of the judge’s involvement in the guilty plea is an issue proper for direct appeal. (App. p. 174, line 22 through p. 175, line 2.) Defense counsel’s failure to object to the plea proceedings and protect Petitioner’s rights constitutes deficient performance.

Petitioner was prejudiced by defense counsel’s deficient performance regarding filing a notice of appeal because he was deprived of his right to a direct appeal and to have the trial judge’s errors reviewed by an appellate court. This Court should grant a writ of certiorari to review the circuit court’s finding trial counsel’s assistance regarding filing a direct appeal was not constitutionally ineffective.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari.

September 20, 2013



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PROOF OF SERVICE

I certify that I have served the attached Petition for a Writ of Certiorari and Appendix on the below-named parties, at the addresses given, by depositing a copy in the United States Mail, postage prepaid, on this 20th day of September, 2013.

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September 20, 2013

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Re: Jaime E. Marrero v. State of South Carolina
Appeal from Richland County Court of Common Pleas
Case No. 2009-CP-40-2523

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Petition for a Writ of Certiorari, with Proof of Service and the original and two copies of an Appendix in the above referenced matter. Please file the originals and return a clocked in copy of each to our courier. By copy of this letter to counsel of record, we are hereby serving all parties with copies of same.

If you have any questions, please do not hesitate to contact me.

Sincerely,

McNAIR LAW FIRM, P.A.



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