

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

James R. Barber, III, Circuit Court Judge

RECEIVED

OCT 30 2013

S.C. Supreme Court

JOE LARKE WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 6

ISSUE PRESENTED

Trial counsel erred in failing to request that the incorrect prior conviction listed on petitioner's rap sheet that was presented to the trial judge be stricken from the record because such a motion would have ensured that this misinformation would not have been considered as a factor by the trial judge at sentencing.

STATEMENT

Petitioner Joe Larke Williams was convicted of distribution of crack cocaine and distribution of crack cocaine within proximity of a school during the January 2010 term of the Aiken County General Sessions Court before Judge Doyet A. Early III. Petitioner received an aggregate twenty-year sentence in the case. App. 1 – 20. N. Staples Wood represented petitioner at the plea proceeding. Petitioner did not enjoy the benefit of a direct appeal in the case.

On June 23, 2010, petitioner filed a PCR application within the Aiken County Office of the Clerk of Court. App. 22 – 34. On December 16, 2010, the respondent filed a return requesting that a hearing be held in response to petitioner's PCR action. App. 35 – 39.

A PCR hearing was held on July 15, 2011, at the Aiken County Courthouse before Judge James R. Barber III. App 41 – 88. Petitioner was present at the hearing and represented by Jeffrey R. Moorehead. On August 2, 2011, Judge Barber issued an order of dismissal denying petitioner's allegations of ineffective assistance of counsel in the case. App. 90 – 96.

On September 12, 2011, a Rule 59(e) Motion was filed in the case. App. 98 – 99. The respondent filed a return on September 15, 2011. App. 101 – 103. On January 16, 2013, Judge Barber issued an order denying petitioner's Rule 59(e) Motion. App 105.

Petitioner appealed Judge Barbers Orders. This petition follows.

ARGUMENT

Trial counsel erred in failing to request that the incorrect prior conviction listed on petitioner's rap sheet that was presented to the trial judge be stricken from the record because such a motion would have ensured that this misinformation would not have been considered as a factor by the trial judge at sentencing.

During the plea proceeding, the facts of the case were submitted to the trial judge. On May 26, 2009, a confidential informant bought crack cocaine from petitioner during an undercover drug purchase. App. 14, l. 21 – p. 16, l. 5.

During the PCR hearing, petitioner testified that trial counsel erred in failing to object to the solicitor's improper reading of his prior record to the trial judge at the sentencing phase of his plea proceeding. Apparently, the solicitor stated that petitioner had a 2005 possession with intent to distribute drug conviction at the plea proceeding. Petitioner stated that he had been not convicted of any drug distribution offense in 2005. App. 52, l. 4- p. 53, l. 12; App. 61, l. 3 – 19.

The solicitor read petitioner's prior record to the plea judge at the plea proceeding as follows:

His prior record is as follows. He has a CDV in 1997, simple assault in '97, avoiding payment for telecommunications '98, malicious injury to personal property in 1998, shoplifting and resisting arrest in 2000. He also has in 2000 a conviction for distribution of crack cocaine within proximity. In 2005 he has a possession with intent to distribute. In 2007 and in 2008 he has giving [a] giving false information to police. App 16, l. 13 – 20.

Trial counsel testified during the PCR hearing and explained that petitioner alerted him to the misinformation in question regarding his prior record and notified the plea judge of these errors. App. 16, l.22 - p. 17, l.5; App. 76, l. 18 – 25; App. 82, l. 19 – p. 85, l. 7. Trial counsel's PCR comments regarding the incorrect misinformation regarding petitioner's prior record follows:

The Court: And what did his criminal history show as far as priors that affected him?

Defense Counsel: It was actually ...from me going over it with him in such detail, I became aware that one of the charges that's on his record, according to him, [was] not something that he could have been convicted of...so that is why I objected to it during the plea colloquy.

App. 82, l.1 9- p. 83, l. 11.

The PCR judge ruled in effect that since the misstatement of petitioner's prior record that was read to the plea judge was later corrected by counsel, then the misinformation did not affect petitioner's sentencing proceeding in the case. App. 92 – 93.

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 of the problem of sentencing misinformation received by a sentencing judge as follows:

[If a defendant] was sentenced on the basis of assumptions concerning his criminal record which were materially untrue...[then this]...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.

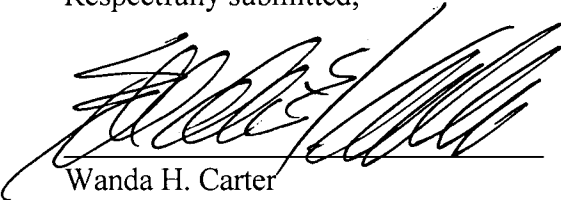
Although petitioner had no drug distribution conviction in 2005; nonetheless, petitioner was being sentenced on drug distribution conviction in the instant case, and hearing this misinformation certainly reflected negatively upon his case because he was probably viewed as one who habitually dealt in drug distributions. This misinformation probably had a less than favorable impact on the trial judge's distribution sentence handed down in the case at bar. Therefore, counsel's error in failing to move that the misinformation be stricken from the record so that it would not be considered at sentencing constituted deficient legal representation. As a rule, any information deemed stricken from the record is deemed to be disregarded and not considered at all. State v. Howard, 384 S.C. 212, 682 S.E.2d 42(2009); State v. Frazier, 375 S.C. 575, 654S.E.2d 280 (2008);

State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (2005). Here, counsel erred in failing to request that the misinformation in question read from petitioner's prior record be stricken from the record in order to ensure that the trial judge did not consider any nonexistent conviction as a factor upon sentencing petitioner in the instant case. Counsel's error in this regard constituted deficient legal representation in violation of the Sixth Amendment. See Hill v. Lockhart, 484 U.S. 52 (1985). But for counsel's error here, a reasonable likelihood exists the petitioner would probably have received more lenient sentences on his present drug distribution conviction.

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 30th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County
James R. Barber, III, Circuit Court Judge

JOE LARKE WILLIAMS,

PETITIONER,

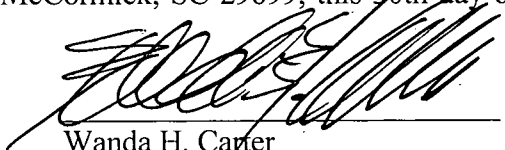
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

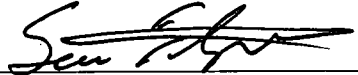
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Joe Larke Williams, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 30th day of October, 2013.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of October, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.