

Douglas Thompson
Petitioner

v.

State of South Carolina
Respondent

State of South Carolina
In the Supreme Court

County of Richland

J. Earnest Kinard, Jr., Circuit Court Judge

Petitioners
Motion to Amend
RECEIVED
Case# 2012-211296

OCT 24 2013

S.C. SUPREME COURT

Introduction

Petitioner alleges that he is being in custody unlawfully and Unconstitutionally and appeal Post Conviction Relief based on the following:

1. Actual Absence of Counsel
2. Involuntary Guilty Plea
3. Ineffective Assistance of Counsel
4. Subject Matter Jurisdiction
5. Constitutional Violation

Argument

1. Actual Absence of Counsel

On date 11-21-2012 the petitioners attorney filed Johnson brief legally giving one meritorious issue out of the petitioners PCR claim along with petition to be relieved as counsel. By the petitioners attorney asking the court to be relieved as counsel, the granted decision to the relief of petitioners counsel would be in violation of Plaintiff's 6th Constitutional U.S. Amendment.

Attorney David Alexander was appointed to represent petitioner on his appeal of right to South Carolina court of Appeals. On 11-21-2012, Attorney David Alexander filed certiorari to Richland County, J. Earnest Kinard, Jr., Circuit Court Judge, State of South Carolina in the Supreme Court a motion to be relieved as counsel so motion would be granted. Petitioners appeal remained pending until if when the South Carolina court of Appeals affirm his conviction. People v. Morse, NO. 131309 (Mich. Ct. App. Nov. 1, 1991) There is no indication that petitioner knowingly waived his right to counsel, that he concurred in Attorney Alexander's withdrawal. Moreover, the record before the court indicates that substitute counsel was never appointed.

Where a petitioner is denied counsel on appeal in contrast to a claim, that counsel on appeal in contrast to a claim, that counsel was ineffective: "it is.... in appropriate to apply either the prejudice requirement of strict land or the harmless error analysis of

of Chapman [v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967)]. Id. at 88. Where petitioner need not prove that he was prejudiced by counsel's performance. U.S. v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed. 2d. 657 (1984). Petitioner was denied the right to counsel while his appeal was pending before South Carolina Supreme Court of Appeals. Petitioner has an absolute right to be represented by counsel on his first appeal of right from his conviction. Douglas v. California, 372 U.S. 353, 356, 83 S.Ct. 814, 9 L.Ed. 2d. 811 (1963). Penon v. Ohio, 488 U.S. 75, 83-83, 109 S.Ct. 346, 102 L.E. 2d 300 (1988). Petitioner's absence of counsel establishes a Sixth Amendment violation of his right to counsel. Morse v. Trippett 102 F. Supp. 2d 392 (E.D. Mich. 2000). Prejudice is presumed when a defendant suffers the actual or constructive denial of counsel. U.S.C.A. Const. Amend. 6... Counsel's behavior in failing to correctly advise petitioner as to the offense to which he was pleading guilty was so egregious that the petitioner was constructively denied right to counsel, thus giving rise to presumption of prejudice resulting from counsel's ineffectiveness, U.S.C.A. Const. Amend. 6.

There was no indication that petitioner knowingly waived his right to counsel, that he concurred in Attorney David Alexander's withdrawal, or that he was ever advised that counsel had filed a motion to withdraw until received Johnson Brief. Moreover, the record before the court indicates that substitute counsel was never appointed. Petitioner ask the court for new substitute counsel. This Actual Absence of Counsel is also included for the court to amend with included Allegations from PCR.

2. Involuntary Guilty Plea

Petitioner argues that his guilty plea was not voluntary because he he was not informed and did not understand every element of the offence because the factual basis was insufficient to prove every element of the offense because petitioner did not raise this issue in district court. Review is only for plain error. see Pickett v. U.S. 129 S. Ct. 1423, 1429 (2009). The petitioner also never committed any sexual Battery against victim because the act was consensual and the victim was the petitioners girlfriend. The petitioner was placed on element of sex offender registry and as number 18 says on the PCR Application, as petitioner states: "...to have conviction vacated because the act was consensual and under § 23-3-430(B) the petitioner is not an offender," Read § 23-3-430(C)(5).

By not informing petitioner of his crucial element of the offense the district court erred by failing to inform petitioner of, and ensuring that he understood the nature of the charge in violation of federal Rule of Criminal Procedure 11(b)(1)(G). As PCR Application States: "The Applicant asserts that pursuant to the mandates that are set forth in *Boykin v. Alabama*, 89 S.Ct. 1709 (1969), that his guilty plea, was involuntary because no one in their right mind would plead guilty to an offense in which he could not be guilty of. The sex act involved, was consensual and the entire record will reflect the same." Additionally the the district court erred in accepting petitioners guilty plea because there was an insufficient factual basis to support petitioner guilty plea as to this element of the offense. See Fed. Rule crim. Proc. 11(b)(3): *U.S. v. Adams* 961 F.2d 505, 508 (5th Cir. 1992).

3. Ineffective Assistance of Counsel

Petitioners counsel was ineffective, as also stated in PCR Application: "The Applicant submits that his attorney was ineffective for advising him to plead guilty to an offense that is in conflict with the South Carolina constitution. The Applicants attorney was also ineffective for not motioning to quash the applicants indictments pursuant to *Gentry v. State*, 610 S.E. 2d 494 (S.C. 2005) because the applicants indictment initially stated § 16-3-655(c) and was amended to reflect § 16-3-655 (b)(2) without ever being to the grand jury for resubmission. The applicants attorney did not operate in the range of competence that is required of an attorney that is representing a defendant in any criminal proceeding pursuant the mandates that are set forth in *Strickland v. Washington*, 104 S. Ct. 2052 (1984)." The results with the respect to the guilty plea of counsel would of been different. With the respect to guilty plea counsel, the applicant must show that there is reasonable probability, that but for counsels, alleged errors, he would not have plead guilty and would have insisted going to trial. *Hill v. Lockhart* 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Petitioner contends that he was denied effective assistance of counsel when counsel abandoned meritorious objections to the guidelines calculations in favor of an alternative calculation of the guideline range. Petitioner also contends that the sentence appeal waiver in his plea agreement should not be enforced and that his sentence is unreasonable because the district court applied a presumption of reasonableness to a within-guidelines sentence and failed to properly consider relevant mitigating factors. See *U.S. v. Robert Louis Hawkins* U.S.D.L. No. 3:07-CR-304-All, No. 07-10057.

4. Subject Matter Jurisdiction

As stated in Petitioner's P.C.R. Application: "The Applicant submits that the Court was without subject matter jurisdiction to convict and sentence the applicant for the offenses that he was sentenced for because his indictment was fatally defective. Also, issues related to jurisdiction can be raised at any time. See *Brown v. State*, 540 S.E.2d 846 (S.C. 2001) Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the circuit does not have the authority to preside. The applicant knows his case was tried in general sessions court. The Applicant is stating that the court did not have jurisdiction because his indictment was fatally defective and he was sentenced in violation of the South Carolina Constitution, and the South Carolina code of laws, because the South Carolina constitution states that a fourteen year old can consent to sexual intercourse. Then, on the other hand, the South Carolina code of law states that a fourteen year old cannot consent to sexual intercourse." These two are in conflict and by the state constitution of South Carolina overrides the South Carolina code of law, the consensual act was legal because the South Carolina code of law was derived from the South Carolina state constitution. Therefore Petitioner's charges need to be dropped.

5. Constitutional Violation

As stated in P.C.R. application: "The applicant submits that his rights under the constitution have been violated because under Art. 3 § 33, age of consent of the South Carolina Constitution. The Constitution states that: No unmarried woman shall legally consent to sexual intercourse who shall not attained the age of fourteen years. (1999 Act No. 3). The Applicant submits that the statute in which he was sentenced under § 16-3-655 (B)(2) states: The actor engages in sexual battery with victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial or official authority to coerce the victim to submit or is older than the victim. The actor submits that the S.C. code of law and the South Carolina Constitution are in conflict. On one hand the South Carolina Constitution

says that a fourteen year old can consent to sexual intercourse, then; on the other hand, the South Carolina code of law says a fourteen, but less than sixteen year old cannot consent to sexual intercourse. The applicant submits that the South Carolina constitution overrides the South Carolina code of law because one is derived from the other.

conclusion

Where petitioner was denied counsel substitute counsel attorney need to be replaced because of the U.S. Constitutional Sixth Amendment violation and the petitioner ask the court to replace attorney correcting Actual absence of counsel. See *Morse v. Trippett* cite 102 F. Supp. 2d, 292 (E.D. Mich. 2000). Petitioner argues that his guilty plea was not voluntary and did not understand every element of the offense. The petitioner alleges that he did not commit sexual battery against the victim because the act was consensual and they were in a relationship because no one in their right mind would plead guilty to an offense in which he could not be guilty of what the petitioners attorney led him to plead guilty. See *Pockett v. U.S.* 129 S. Ct. 1423, 1429 (2009), See Fed. R. Crim. Proc. 11(b)(3); *U.S. v. Adams* 961 F.2d. 505, 508, (5th Cir. 1992). The petitioners attorney was also ineffective for not motioning to quash the petitioners indictments pursuant *Gentry v. State*, 610 S.E. 2d 494 (S.C. 2005) because the petitioners indictment initially stated § 16-3-655 (C) and was amended to reflect § 16-3-655(B)(2) without ever being to the grand jury for resubmission; that's why charges need to be dropped. The court was without subject matter jurisdiction to convict and sentence the petitioner for the offenses that he was sentenced for because his indictment was fatally defective. This is why petitioners charges need to be dropped. See *Brown v. State*, 540 S.E. 2d 846 (S.C. 2001) Art V, § 7. The petitioner submits that his rights under the constitution have been violated because of the S.C. constitution override the

S.C. Code of law and the petitioner was sentenced under the statute of the S.C. Code of law violating the state constitution led by his attorney. The S.C. Constitution and the S.C. Code of law are in conflict within related statutes and by these proof, the charges need to be dropped. By the age of consent is in conflict concerning the statutes of the S.C. Code of laws, that also establish a constitutional violation. By the constitutional violation, the charges need to be dropped. The petitioner in conclusion has explained all allegations and therefore ask the court to ~~vacate~~ all charges thereof.

Respectfully Submitted
I Remain,

Douglas Thompson
Douglas Thompson

SWORN to and subscribed before me this
22nd day of Oct, 2013.
Emily [Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-27-2016

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J. Earnest Kinard, Jr., Circuit Court Judge

Case # 2012-21296

Certificate of
Service by Mail

1. I am the above named Douglas Thompson in the above captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Petitioner's Motion to Amend.
4. In the above-captioned matter on the following person(s) By depositing in the United States Mail Postage Prepaid:

The Supreme Court of South Carolina
Clerk of Court David E. Shearouse
1231 Gervais Street
Columbia, SC 29201

Dated this 22 Day of October 2013.

ATTN:
Note Clerk of Court: The Turbeville Correctional Institution Post Master refused to notarize legal certificate of service document for service upon my request but stamped it along with the other.

Douglas Thompson #313477

1578 Clarence Coker Hwy. (SB-254-A)
Turbeville, S.C. 29162

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