

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Saluda County

R. Lawton McIntosh, Circuit Court Judge

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DEC 18 2013

S.C. Supreme Court

SHAUN WAYNE WILES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000729

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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ISSUES PRESENTED

1.) Trial counsel erred by not objecting to the amount of restitution ordered and in failing to request a restitution hearing because there was no evidentiary or factual basis presented in support of a true and accurate assessment of the damages in this case.

2.) Trial counsel erred in failing to object to the trial judge's illegal sentences handed down in the case because the sentences were not statutorily authorized.

STATEMENT

Petitioner Shaun Wayne Wiles was convicted of assault and battery of a high and aggravated nature and failure to stop for a blue light per jury trial held during the March 2006 term of the Saluda County General Sessions Court before Judge William P. Keesley. Petitioner was sentenced to imprisonment for an aggregate period of thirteen years. App. 1-330. Adrian Falgione represented petitioner at trial, and Assistant Solicitor H. Franklin Young appeared on behalf of the state in the case.

Petitioner appealed his convictions and sentences, and M. Celia Robinson represented him on direct appeal. The case was affirmed on appeal by the South Carolina Court of Appeals. See State v. Wiles, Op. No. 2007-UP-318 (Ct. App. June 14, 2007). After a petition for writ of certiorari was filed in the case, the South Carolina Supreme Court affirmed the case as modified in State v. Wiles, 383 S.C. 151, 679 S.E. 2d 172 (2009).

On November 2, 2009, petitioner filed a PCR application with the Saluda County Office of the Clerk of Court. App. 322-327. The respondent filed a return dated March 2, 2010, requesting that a hearing be held in response to petitioner's PCR action. App. 338-343.

A PCR hearing was convened on February 4, 2010, at the Saluda County Courthouse before Judge R. Lawton McIntosh. Petitioner was present at the hearing and represented by Nick Riley. The respondent was represented by A. West Lee of the South Carolina Attorney General's Office. App. 344-362.

On December 22, 2011, Judge McIntosh issued an Order of Dismissal denying petitioner's allegations of ineffective assistance of counsel in the case. App. 364-373.

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

QUESTION I

Trial counsel erred by not objecting to the amount of restitution ordered and in failing to request a restitution hearing because there was no evidentiary or factual basis presented in support of a true and accurate assessment of damages in the case.

This case involved a car chase that resulted in two collisions. Officer Heath Davis testified that he was patrolling on U.S. Highway 25 when he encountered two vehicles (one Crown Victoria and one truck) being driven at a very high rate of speed (obviously racing). Apparently, after seeing the officer, the driver of the truck pulled off to the side of the road. Officer Davis stated that he then flashed his blue lights while in pursuit of the driver of the Crown Victoria; and that the driver of the Crown Victoria pulled his vehicle over, but then drove off minutes later. Officer Davis stated that he gave chase immediately thereafter. Soon, the driver of the Crown Victoria collided his vehicle into a sheriff's patrol car that was sitting at an intersection on Highway 378 in Saluda County and then crashed into a building nearby also. App. 99, l. 2; App. l. 37-p. 138, l. 25; App. 168, l. 9-p. 172, l. 16. According to the testimony of two SLED agents, who appeared at trial as state's witnesses, petitioner obtained the Crown Victoria (apparently illegally) after his illegal escape from prison. App. 228, l. 9-p. 245, l. 11.

At the close of the trial, the issue of restitution for damages to the patrol car and building was addressed ever so briefly as follows:

The Court: Thank you. Do y'all have any restitution requests?

Mr. Young: Mr. Daniels informed me that he ended up paying about \$400 after everything else was taken care of. The state would seek that amount in restitution to be paid if there is probation or be paid during the time of parole.

The Court: All right. If there's nothing further, the Court has taken into consideration everything that's been presented. Sentence of the Court on failure to stop for a blue light is that you be

committed to the South Carolina Department of Corrections for a period of three years plus cost and assessments. The sentence on assault and battery of a high and aggravated nature is that you be committed to the for 10 years plus South Carolina Department of Corrections cost and assessments. On the ABHAN charge of \$400 plus a 20 percent handling fee to be paid within 6 months from your release from actual confinement. App. 329, l. 19 – p. 330, l. 25.

The above cursory and abbreviated colloquy did not constitute a proper restitution hearing mandated by S.C, Code §17-25-322, which reads as follows:

(A) When a defendant is convicted of a crime which has resulted in pecuniary damages or loss to a victim, the court must hold a hearing to determine the amount of restitution due the victim or victim's of the defendant's criminal acts. The restitution hearings must be held unless the defendant in open court agrees to the amount due, and in addition to any other sentence which it may impose, the court shall order the defendant make restitution or compensate the victim for any pecuniary damages. The defendant, the victim or victims, or their representatives or the victim's legal representative as well as the Attorney General and the solicitor have the right to be present and be heard upon the issue of restitution at any of these hearings.

Before a court may order any reparation to a victim, it must hold a hearing and determine the actual amount of damages. State v. Fussell, 299 S.C. 162, 383 S.E. 2d (1998). In the case at bar, no factual showing was presented in the form of a hearing as statutorily required to assess, verify, or challenge via testimony and documentation on the actual amount of loss or damages suffered due to petitioner's car collisions at issue. A restitution amount was presented and trial counsel neither objected to this undocumented arbitrary amount of restitution ordered as part of his sentence nor requested that a hearing be held to entertain the matter of restitution in the case.

During the PCR hearing held in the case, petitioner testified that he was denied a restitution hearing at the close of the trial and that he did not agree to the amount of restitution assigned to him. In addition, petitioner testified that he desired a restitution hearing in the case, and in effect implied

that trial counsel violated his rights in regard to the restitution matter. App. 350, l. 4-25; App. 349, l. 4-8; App. 349, l. 24-25.

Trial counsel testified at the PCR hearing and explained simply that he did not recall the particulars of the issue of restitution in the case. App. 357, l. 18-p. 358, l.8.

Also, during the PCR hearing, the PCR judge queried trial counsel regarding the question of restitution as follows:

The Court: Let me ask you something, Mr. Falgione. What was the restitution for?

Defense Counsel: There was damage to a police car. In this particular case, Your Honor, it was a -- there was a -- it involved a collision with a police car, a local police car...The deputy was injured in that particular collision, and that was the -- I think that's where the basis for the initial charge of assault and battery with intent to kill came from. So it's in my memory, Your Honor, and I think restitution was for those kind of damages...Also, there was a building that was injured. When the collision with the police car occurred, the car Mr. Wiles was driving flew into a building and there was property damage to that building.

The Court: Were valuations on repairs to both those items and the car brought up in the trial as far as the amount? I was just curious how Judge Keesley came up with the amount of restitution.

Defense Counsel: I honestly don't recall...Your Honor...I don't recall. I think there was testimony by the injured police officer as to his treatment. The amount of damage to the police car, I don't recall. App. 359, l. 11 – p. 360, l. 7.

The PCR judge ruled that the trial judge held a brief restitution hearing as part of the sentencing proceeding and that there was no objection needed regarding the matter because petitioner “was happy with the outcome of the trial” according to trial counsel’s testimony at the PCR hearing; and therefore, there was no proof that a hearing would have yielded a different restitution amount ordered to be paid by petitioner, and hence no proof that counsel’s representation was ineffective in this regard. App.364-370; App. 359, l. 3-7.

Clearly a restitution hearing was required regarding the amount of damages assigned to the patrol car and the building due to the collisions; and petitioner at no point in the record agreed to the amount of restitution handed down by the trial judge. In other words, the fleeting manner in which the issue of restitution was addressed in this case sans any testimony or documentation was not the equivalent of the statutory requirement to hold a full restitution hearing in the case.

Undoubtedly, trial counsel's failure to object to the trial judge's restitution order and request a statutorily mandated restitution hearing in the case was tantamount to deficient representation because there was no basis in fact upon which to support the assignment of the amount of \$400.00 restitution imposed against petitioner in the case. Counsel's ineffective assistance in this regard violated petitioner's right to competent counsel as guaranteed under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984). Petitioner was prejudiced counsel's deficient representation in this regard because but for the errors, a reasonable probability exists that the amount of restitution owed in the case might have been different.

QUESTION II

Tral counsel erred in failing to object to the trial judge's illegal sentences handed down in the case because the sentences were not statutorily authorized.

During the PCR hearing, petitioner testified that his sentences were illegal because he should have received the benefit of suspended sentences since restitution was made part of the sentence. In other words, petitioner should not have received both maximum sentences and restitution. App. 353, l. 10-p. 354; App. 355, l. 7-17. Trial counsel testified at the PCR hearing and stated that full prison sentences and restitution are legal penalties. App. 357, l. 6-13.

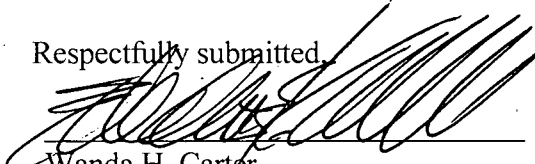
The PCR judge ruled that counsel did not perform deficiently in failing to object to petitioner's sentences as being illegal because restitution can be ordered when maximum sentences are imposed via Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). App. 370-371.

Undoubtedly, Higgins was misinterpreted in the case at bar. In Higgins, the Court held that regardless of whether the judge imposed a minimum sentence or a maximum sentence; nonetheless, restitution can be ordered in either instance because a maximum sentence can be suspended in the same fashion that a minimum sentence can be suspended. The inference from Higgins is that restitution and suspended sentences, regardless of whether they emanate from minimum sentences or maximum sentences, are paired together. Here, petitioner received maximum sentences and restitution, but he did not receive the benefit of the rule that the maximum sentences should have been suspended sentences in order to correspond correctly with the restitution requirement placed upon him. Hence, petitioner's sentences as a whole were illegal, and counsel's failure to object to the illegality of his sentences constituted deficient representation below the standard of competence demanded of attorneys in criminal cases, which in turn violated the Sixth Amendment to the United States Constitution. See also Strickland v. Washington, *supra*. Petitioner was prejudiced because had he received suspended sentences, then his prison term would have been shortened via the use of his probation time to pay restitution.

CONCLUSION

Based on the foregoing sentencing errors outlined above, petitioner would request that this Court grant the petition and allow full briefing on the issues raised in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Saluda County
R. Lawton McIntosh, Circuit Court Judge

SHAUN WAYNE WILES,

PETITIONER,

V.

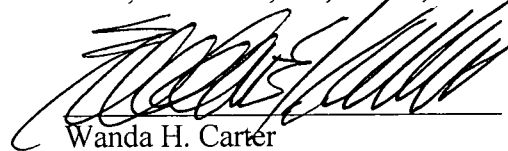
STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000729

CERTIFICATE OF SERVICE

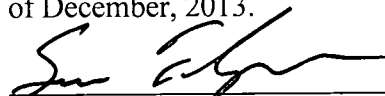
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Shaun Wayne Wiles #284696, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC, 29210, this 18th day of December, 2013.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of December, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.