 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

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DEC 19 2013

S.C. Supreme Court

JOEY SHAWN WEIR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001695

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether plea counsel was ineffective in failing to ask that 3 counts of injury to real property be considered as 1 offense because they were so closely connected in time?

STATEMENT

On January 6, 2012, petitioner appeared before the Honorable R. Lawson McIntosh in Spartanburg County and pled guilty to petit larceny, receiving stolen goods, six (6) counts of injury to real property to obtain nonferrous metals, damage of \$2,000 - \$10,000, and one (1) count of injury to real property to obtain nonferrous metals, damages of \$10,000 or more. The court gave respective sentences of time served, five (5) years suspended to five (5) years probation, five (5) years on the multiple injury to real property charges, and ten (10) years, consecutive, on the injury to real property charge with damages of \$10,000 or more. James Cheek, Esquire, was plea counsel. Robert Mebane, Esquire and Wes Boyd, Esquire, were the assistant solicitors. (App. p. 1 – p. 38).

Petitioner filed an application for post-conviction relief on March 20, 2012. (App. p. 39 – p. 63). Respondent filed a return dated January 30, 2013. (App. p. 64 – p. 70). An evidentiary hearing was held on April 2, 2013, before the Honorable J. Mark Hayes, II. Petitioner was present and was represented by Thomas A. Belenchia, Esquire. Respondent was represented by Suzanne H. White, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 71 – p. 104). On July 24, 2013, Judge Hayes issued an order denying and dismissing the application for post-conviction relief. (App. p. 107 – p. 114).

This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to request that 3 counts of injury to real property be considered as 1 offense because they were so closely connected in time.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, *supra*. This means 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. In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's

accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the “essence” of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

In this case, petitioner pled guilty to seven (7) separate charges of malicious injury to real property to obtain metals. (App. p. 4 – p. 5). Three of the indictments for malicious injury to real property (2011-GS-42-6941, 6943, and 6942) covered crimes that occurred on the same day of July 12, 2011. They also all occurred on East Main Street in Spartanburg with respective addresses of 812, 791, and 800 East Main Street. The assistant solicitor even noted that these crimes all occurred on the same street and that the police think petitioner went down the street doing one crime after another. (App. p. 25, line 17 – p. 26, line 15). The plea court gave petitioner a five (5) year sentence on indictment 6941, a five (5) year concurrent sentence on indictment 6942, and a ten (10) year consecutive sentence on indictment 6943. (App. p. 34, line 10 – p. 35, line 3).

Plea counsel never requested that the 3 crimes be considered as 1 offense since they were so closely related in time. Neither did he object to the sentence being ordered to be served consecutively on indictment 6943. Petitioner raised this issue in his supplemental brief to his application for post-conviction relief. (App. p. 50 – p. 58). Petitioner raised this issue at the evidentiary hearing. (App. p. 78, lines 11 – 17; app. p. 79, line 20 – p. 80, line 1; app. p. 81, line 4 – p. 82, line 8; app. p. 83, lines 6 – 9).

Plea counsel testified and admitted that he did not ask for the 3 charges to be sentenced concurrently. (App. p. 94, lines 21 – 24). He said he was familiar with S.C. Code § 17-25-50,

which deals with considering closely connected offenses as one. But, he did not think the statute was appropriate in this case because there were 3 different crimes! Contrary to plea counsel's assertion, S.C. Code § 17-25-50 provides as follows:

In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

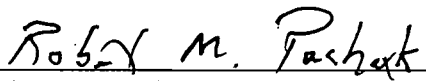
Petitioner's 3 malicious injury to real property offenses were "committed at times so closely connected in point of time to be considered as one offense, not withstanding under the law they constitute separate and distinct offenses." The statute is mandatory as it states "the court shall treat..." Plea counsel failed to articulate a valid reason to avoid a finding of ineffectiveness.

Roseboro v. State, supra.

CONCLUSION

Petitioner's writ should be granted and he should be sentenced as 1 offense on the 3 offenses occurring the same date as malicious injury.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

JOEY SHAWN WEIR,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

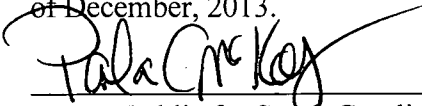
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of December, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.