

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

S.C. Supreme Court

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No.: 2011-CP-43-1192

Michael Boulware,

Petitioner,

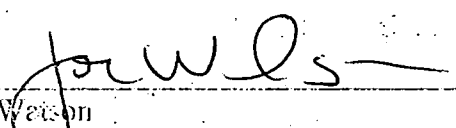
v.

State of South Carolina,

Respondent.

2013-000513

REPLY TO PETITION FOR WRIT OF CERTIORARI


Joe Watson
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Attorney for the Petitioner

Other Counsel of Record:

Megan E. Harrigan
South Carolina Attorney General's Office
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Dated this 11th day of December, 2013
Greenville, South Carolina

ARGUMENT

I. Counsel was ineffective for failing to advise the petitioner that he could have an alcohol charge and a criminal sexual conduct charge tried separately, thereby prejudicing the petitioner.

It is undisputed that counsel failed to advise the petitioner that he could have an alcohol charge and a criminal sexual conduct charge tried separately. (*See* State's Return at pp. 8-9). It is undisputed that the alcohol charge and criminal sexual conduct charge could, in fact, be tried separately. (*See* State's Return at pp. 8-9; Petition for Writ of Certiorari at pp. vi-vii). Yet, the State asserts that there was evidence of probative value for the court to find that counsel was effective when failing to advise the petitioner he could have two separate trials. (*See* State's Return at pp. 8-9). Despite the State's assertion, it is evident that counsel's performance fell below an objective standard of reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

As stated in the Petition for Writ of Certiorari, Minor, the victim on the CSC indictment, was the petitioner's former wife's niece.¹ (Appx. 74-75). Bailey C., the victim on the alcohol indictment, was Minor's cousin. (Appx. 77). There was no allegation that the petitioner provided alcohol to Minor. (Appx. 78). There was no allegation that the petitioner had sexual conduct with Bailey C. (Appx. 152). The State does not dispute this. (*See* State's Return at pp. 4-5, 8-9).

The amount of evidence against the petitioner for the alcohol charge and the CSC charge was vastly different. There was ample evidence that the petitioner committed the alcohol charge. Prior to his arrest, the petitioner approached law enforcement and

¹ The term "former wife" is used herein because the petitioner and his wife's marriage was annulled after six months. (Appx. 75-76).

admitted that he provided alcohol to Bailey C. (Appx. 39). The petitioner said that if questioned about it, he would tell his supervisors at the Sheriff's Department the truth. (Appx. 39). Thereafter, the petitioner waived his Miranda rights and gave a statement admitting that he brought Bailey C. alcohol. (Appx. 40). The Sheriff's Department conducted an interview with Bailey C. (Appx. 40). According to Bailey C., she asked the petitioner to bring her alcohol. (Appx. 40). The petitioner brought Bailey alcohol, knowing that minors Allie B. and Molly D. were present with her. (Appx. 40). The Sheriff's Department also conducted interviews with Allie B. and Molly D., both of whom stated that the petitioner brought Bailey C. alcohol. (Appx. 39-40). In their interviews, all three minors said that the petitioner brought them alcohol while in his police uniform. (Appx. 39-40). The State does not dispute this. (*See State's Return at pp. 4-5, 8-9*).

On the other hand, there was little evidence that the petitioner committed the CDC charge. He never gave a statement to police admitting to this crime, and there was no inculcating forensic evidence. (Appx. 80, 91-92, 161). Further, there were no other alleged witnesses besides Minor. (Appx. 80). The State does not dispute this. (*See State's Return at pp. 4-5, 8-9*).

Moreover, the two charges were separate in time. The alcohol indictment charged that on or about March 1, 2009, the petitioner provided alcohol to Bailey C. (Appx. 167). The alleged CSC did not occur until three months later - - June 2009. (Appx. 170, 173). The State does not dispute this. (*See State's Return at pp. 4-5, 8-9*).

Despite the separate charges, the separate victims, the separate evidence, and the separate time frames, counsel failed to advise the petitioner that he was entitled to two

separate trials. (Appx. 87). Given these circumstances, which are undisputed by the State, counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Moreover, the State does not dispute prejudice to the petitioner. (*See State's Return* at pp. 8-9). As stated in the Petition for Writ of Certiorari, if he knew that the charges could have been tried separately, he would have not pled guilty and would have instead proceeded to trial. (Appx. 87-88). This is precisely the type of prejudice envisioned by the United States Supreme Court in *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). It is clear that the petitioner was prejudiced by counsel's ineffective assistance.

II. Counsel was ineffective for failing to object to statements from the petitioner's former wife regarding the impact on non-victims, thereby prejudicing the petitioner.

The State argues that there is evidence of probative value that counsel's failure to object to statements from the petitioner's former wife regarding the impact on non-victims was effective assistance. It argues that although counsel failed to object, he told the court that there was only one victim of the CDC charge. (*See State's Return* at pp. 9-10).

Despite the State's assertion, by failing to object, counsel improperly permitted non-victim impact considerations to be part of the judge's sentencing decision. This failure was not cured by counsel's later comments that there was only one victim in the CSC charge.

Moreover, the State does not dispute that the court applied the wrong standard in concluding that the petitioner was not prejudiced by counsel's error. (*See State's Return*

at pp. 9-10). It instead argues that under the correct standard, the petitioner was not prejudiced. (*See* State's Return at pp. 9-10).

Yet, the fact remains that the court applied the wrong standard. Citing Hill, the post conviction relief court held that "[w]ith respect to guilty plea counsel, the [petitioner] must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial." (Appx. 11-12, 13). The United States Supreme Court has recently held that Hill does not provide the sole means for demonstrating prejudice. Missouri v. Frye, -- U.S. --, --, 132 S.Ct. 1399, 1409-10, 182 L.Ed.2d 397 (2012). To establish prejudice, the petitioner may "show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Frye, -- U.S. at --, 132 S.Ct. at 1409 (citing Glover v. U.S., 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001)); *see also* U.S. v. Moya, 676 F.3d 1211, 1214 (10th Cir. 2012) ("The more general test set forth in Frye is whether the defendant can show a reasonable probability that the end result of the criminal process would have been more favorable to the defendant in the absence of counsel's deficiencies") (internal quotations omitted).

The South Carolina Supreme Court "will reverse the PCR judge's decision when it is controlled by an error of law." Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). Here, it is undisputed that the PCR judge's decision was controlled by an error of law. Therefore, its decision should be reversed.

In fact, there is a reasonable probability that the petitioner would have received less prison time. A "'reasonable probability' is, of course, less than a certainty, or even a

likelihood.” U.S. v. Tapia, 665 F.3d 1059, 1061 (9th Cir. 2011) (citing U.S. v. Dominguez Benitez, 542 U.S. 74, 86, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004) (Scalia J., concurring in the judgment) (observing that the “reasonably probability” standard is more “defendant-friendly” than the “more likely than not” standard). This standard can be met even without direct evidence of what sentence would have been imposed if not for counsel’s error. *See Tapia*, 665 F.3d at 1061.

As stated in the Petition for Writ of Certiorari, counsel researched a similar case in which the sentencing judge took a guilty plea. (Appx. 142-43). The judge sentenced that defendant to five or seven years. (Appx. 143). Here, however, the judge heard how the petitioner’s crimes affected a 2-year-old and 5-year-old and how they had to be checked to make sure they were “in tact.” (Appx. 51-52). The judge sentenced the petitioner 12 years imprisonment on the CSC charge, rather than five or seven years. (Appx. 64-65). There is a reasonable probability that the petitioner would have received less prison time if counsel had objected to these statements.

III. Counsel was ineffective for advising the petitioner that he would receive a sentence of no more than three years imprisonment, thereby prejudicing the petitioner.

The State argues that there is evidence of probative value to support the court’s determination that the petitioner failed to meet his burden of establishing deficiency of counsel. (*See State’s Return* at p. 11). The overwhelming evidence - - testimony from the petitioner, the petitioner’s wife, the petitioner’s brother, the petitioner’s mother, and the petitioner’s father - - establishes that counsel advised the petitioner that he would receive a sentence of no more than three years imprisonment. (Appx. 99-100, 106-07, 113, 127-28).

Moreover, the court found counsel's testimony credible that counsel told the petitioner that the court would reward the petitioner for pleading guilty rather than going to trial. (Appx. 12). When determining a sentence, it is improper for a judge to consider the fact that a defendant exercised his right to a jury trial rather than pleading guilty. Davis v. State, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999). Counsel would have been ineffective if he would have advised the petitioner that the judge could take this into consideration at sentencing. *See Id.* This is undisputed by the State. (*See State's Return at 10-11*).

CONCLUSION

For the reasons demonstrated above and in the Petition for Writ of Certiorari, the petitioner respectfully requests that this Honorable Court grant his Petition and permit full briefing on the issues presented.

Respectfully submitted,



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Attorney for the Petitioner

Dated this 1th day of December, 2013
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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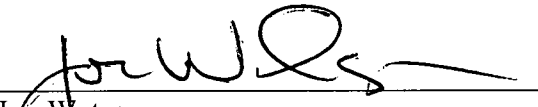
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served the Petitioner's Reply to Petition for Writ of Certiorari on the following:

The Honorable Daniel E. Shearouse
Clerk of Court
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Dated this 4th day of December, 2013
Greenville, South Carolina

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December 4, 2013

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S.C. Supreme Court

The Honorable Daniel E. Shearouse
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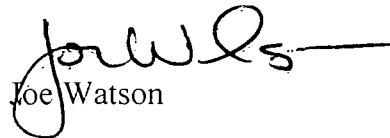
Re: Michael Boulware, Petitioner v. State of South Carolina, Respondent
2011-CP-43-1192

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Petitioner's Reply to Writ of Certiorari along with a certificate of service for the same.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Very truly yours,


Joe Watson

JJW/da
Enclosures

Cc: James C. Campbell, Clerk of Court, Sumter, South Carolina
Megan E. Harrigan, S.C. Attorney General's Office