

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Larry B. Hyman, Jr., Circuit Court Judge

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JAN 08 2014

SC Court of Appeals

BENJAMIN L. COOPER,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2010-181646

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

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STATEMENT OF THE CASE

Respondent Benjamin L. Cooper pled guilty to threatening a public official and resisting arrest during the November, 2007 term of the Georgetown County General Sessions Court before Judge Edward B. Cottingham. J. Eric Fox represented petitioner at the plea proceeding and Matthew J. Modica appeared on behalf of the state in the case. The respondent was sentenced to imprisonment for a period of three years for threatening the life of a public official and one-year for resisting arrest. The respondent did not appeal his sentences or convictions.

On October 13, 2008, the respondent filed an application for post-conviction relief with the Georgetown County Office of the Clerk of Court. An evidentiary hearing was held on July 28, 2009, at the Georgetown County Courthouse before Judge Larry B. Hyman. The respondent was present at the PCR hearing and represented by Tommy A. Thomas. Assistant Attorney General Christina Catoe appeared on behalf of the state. An Order granting post-conviction relief was filed on August 17, 2009, and an Order denying the state's motion to alter or amend the judgment was filed on November 30, 2010.

The State then appealed and filed a petition for writ of certiorari on March 23, 2011. The respondent filed a return dated July 29, 2011. On August 8, 2013, this Court granted the petition and a Brief of Petitioner was filed on November 8, 2013. This Brief of Respondent follows.

ARGUMENT

The PCR judge correctly found that the respondent's purported pleas of guilty to resisting arrest and threatening an official were given unknowingly and involuntarily when the plea judge at first refused to accept the plea because the respondent claimed he was only doing so "to get it over with" and when the judge then failed to address him again prior to the imposition of his sentence.

The respondent pleaded guilty to offenses that arose out of an altercation he and his brother, Joseph Lewis Allen, had with two law enforcement officers. The respondent and his brother were intoxicated in Allen's truck, and law enforcement officers investigated them. Allen then engaged in assaultive behavior with the officers. The respondent was quickly handcuffed after he was extracted from the truck, but made a number of offensive remarks including telling one of the officers they were going to kill him. App. 13, ll. 4-6.

Before this plea, the trial judge imposed a bench warrant on respondent for failing to attend court the preceding Friday when he was attending his aunt's funeral. A mere two days later he was brought to before the judge to render a guilty plea to these charges. It was clear from the tenor of the plea colloquy that law enforcement officers involved in this case were still very upset with petitioner. App. 9-22.

The court addressed the respondent during the plea:

The Court: Why you standing before me pleading guilty?

Respondent: Well, I—I—to get it over with.

The Court: No, that don't (sic) get it done.

Respondent: Well, I mean that's—I—I—

The Court: I can't help all that. App. 1. 18, lines 18-21.

The trial judge did not address the respondent after this brief exchange. He then imposed a three-year sentence for threatening the life of a public official, and an additional concurrent one-year sentence for resisting arrest.

At the post-conviction relief hearing, the PCR judge was concerned that the trial judge had not conducted a proper plea colloquy per the following comments:

“I specifically find that the plea was neither freely, voluntarily nor intelligently made, the reason being that it's obvious to me from what colloquy we have between the Court and the defendant that either the defendant was not pleading guilty or the defendant did not understand the elements of the offense

I moved by the fact that on page 18, the judge states very clearly to [respondent] that what he's telling him will not get it done . . .

I agree with you, counsel. It would appear that the judge had a problem with the plea, and then they got off on something else, and it never came back.

I'm also somewhat concerned with the fact that [respondent], apparently, never had the opportunity to review the discovery material. I don't think he ever saw this tape. The Court saw it. Counsel saw it. I don't think he saw it.”

App. 121- 122.

The Order reflects the judge's reasoning, and concluded that “[i]t appears to the Court that what transpired is more like a bench trial than a guilty plea.” App. 134. The Order also states that “[n]otwithstanding that counsel discussed with the Applicant the charges and his constitutional rights, he should have ensured that the plea record reflected these things.” App. 135.

The record supports the PCR judge's grant of relief to the respondent because there is evidence in the record to show that he received ineffective assistance of counsel and that he was prejudiced by his attorney's substandard performance. It is clear that the respondent

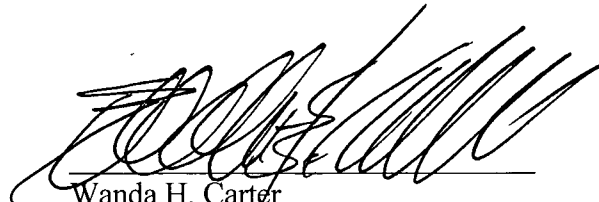
did not intelligently and knowingly enter his guilty plea in this case. The appellate court must sustain findings if there is any probative evidence in the record to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). *See also* Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997); Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997), Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). The Court will “uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court 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).

The trial judge never satisfied himself that the respondent intended to plead guilty to these offenses. By the judge’s own admission, the respondent’s claim that he was before him to simply “get it over with” was not sufficient to enter a guilty plea. Before he accepted the plea, he should have made sure that the respondent indeed was admitting his guilt to these crimes. The plea was infirm because it was not knowingly and intelligently entered. Boykin v. Alabama, 395 U.S. 238 (1969). Additionally, this case is distinguishable from James v. State, 377 S.C. 81, 659 S.E.2d 148 (2008), because in this case, the respondent did not execute a “plea sheet” which evidenced his knowledge of the rights he was forfeiting by entering the plea. Respectfully, the respondent asks this Court to uphold the PCR judge’s order granting relief to him.

CONCLUSION

For the preceding reason, the respondent respectfully asks that this Court uphold the PCR judge's order granting relief to him

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 8th day of January, 2014.

STATE OF SOUTH CAROLINA
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Larry B. Hyman, Jr., Judge

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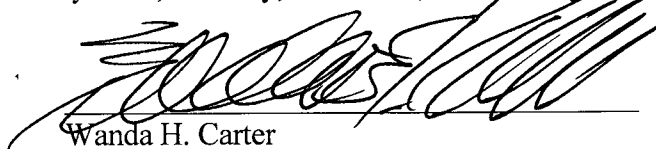
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Christina J. Catoe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Benjamin L. Cooper, 748 Embassy Lane, Conway, SC 29526, this 8th day of January, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 8th day of January, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.