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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

NICHOLAS ANTWAN STEVENSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-0011289

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Deputy Chief Appellate Defender

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ATTORNEY FOR PETITIONER

ISSUE PRESENTED

Trial counsel erred in failing to explain to petitioner the nature and elements of the offense of threatening a public official via S.C. Code Ann. §16-3-1040 (A) charged against him and the five-year maximum sentencing consequence attached therein because petitioner believed he was pleading guilty under S.C. Code Ann. §16-3-1040 (B) of the statute, which carried a maximum sentencing penalty of thirty days.

STATEMENT

Petitioner Nicholas Stevenson pled guilty to threatening the life of a public official and possession of crack cocaine during the October 2011 term of the York County General Sessions Court before Judge William H. Seals. Petitioner was sentenced to imprisonment for a period of four years for his threatening the life of a public official conviction, and one year, consecutive, for his drug conviction. App. 1-13. Phil Smith represented petitioner at the plea proceeding and Assistant Solicitor Erin Joyner appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal in the case.

On October 11, 2012, petitioner filed a PCR application with the York County Office of the Clerk of Court. App. 15-20. The respondent filed a return dated January 10, 2013, requesting that a PCR hearing be held in response to petitioner's application. App. 21-25. A PCR hearing was convened on May 16, 2013, at the York County Courthouse before Judge John C. Hayes, III. App. 27 – 47. Petitioner was present at the hearing and appeared pro se. Assistant Attorney General J. Rutledge Johnson appeared on behalf of the state at the PCR hearing.

On May 21, 2013, Judge Hayes issued an Order denying petitioner's PCR allegations of ineffective assistance of trial counsel in the case. App. 49 - 53. Petitioner appealed Judge Hayes' Order. This petition follows.

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STATEMENT

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ARGUMENT

Trial counsel erred in failing to explain to petitioner the nature and elements of the offense of threatening a public official via S.C. Code Ann. §16-3-1040 (A) charged against him and the five-year maximum sentencing consequence attached therein because petitioner believed he was pleading guilty under S.C. Code Ann. § 16-3-1040 (B) of the statute, which carried a maximum sentencing penalty of thirty days.

According to the solicitor's summary, petitioner threatened a public official after police officers advised him to put down his beer and stop yelling at the door of the residence where he stood (in York County) on August 5, 2011, but that he (petitioner) responded by resisting the officers' attempt to escort him away and voicing "a slew of threats of bodily harm to [the officers]." Later, after petitioner was arrested and released on bond, police found crack cocaine in his possession per a dispatch call from a hotel room where he (petitioner) and his ex-wife were housed. App. p. 4, l. 11 – p. 7, l. 2.

During the PCR hearing, petitioner testified that he was "charged with a thirty-day charge," but that based on his attorney's advice, he pled guilty and ended up getting a "four year sentence for cussing" and that "it (his sentence) was not right." App p. 6, lines 8 – 25. The arrest warrant charged petitioner with threatening a public official under §16-3-1040 (B) (App. 59), but he was indicted under 16-3-1040 (A) of the statute. Petitioner, who appeared at the PCR hearing pro se, explained his confusion as follows:

> Petitioner: The charge that I was really charged with (13-3-1040(B) which I already had seen the sign the this was going to go bad, I was charged with a thirty day charge. [Trial Counsel] didn't know...he came to me, he say, this charge that you have is - has five years. I say, no because I had to get the paper from the officer. I said no, this charge is a thirty day charge...[but trial counsel]...thought it was a five

> year charge [per 16-3-1040 (A)] when it was a thirty-day charge [per 16-3-1040(B)]. App. 35, l.24 – p. 36, l.20
> Petitioner: I said but I don't want to plead to a five-year charge when it was a thirty day charge. App. 37, ll. 3-5.
>
> Petitioner: I told [trial counsel] that is I was to not plead...that the officer was going to come here and tell the people that it was a thirty-day charge [per 16-3-1040(B). App. 38, l. 5-7.
>
> Petitioner: The law that I broke was a thirty-day charge [per 16-3-1040(B)]...[and]... I didn't (sic) suppose to get five years [per 16-3-1040(A). I told him I didn't want to plead to the charge. He told me to plead to it and trust him. I did it anyway and I got five years for something I did not do. App. 38, l. 25 – p.39, l. 5.

Trial counsel testified at the PCR hearing and stated that he explained the offense of threatening a public official to petitioner, but that he (petitioner) did not understand how the offense could carry that much time. App. 42, l. 7-11.

The PCR judge ruled that no PCR relief was necessary since petitioner in effect conceded by pleading guilty to the indicted charge of threatening a public official under S.C. Code Ann. §16-3-1040 (A), which carried a sentence of up to five years, during the plea proceeding even after the trial judge was apprised of the fact that the arrest warrant charged him with 16-3-1040(B), which carried the lesser thirty-day sentence. App. 51-52. Also, see arrest warrant at App. 59.

Note that at no time during the plea proceeding did petitioner or trial counsel object to the indicted offense of threatening a public official under subsection (A) of the statute, which carried the greater penalty, on the ground that the arrest warrant listed the same offense charged against him under subsection (B) of the statute, which carried the lesser penalty. Nonetheless, petitioner was clearly confused at the plea proceeding as he believed that he was pleading to the crime alleged in the arrest warrant with the accompanying lesser penalty rather that the crime that appeared printed on his indictment with the greater penalty. This meant that petitioner was unknowingly pleading to

a crime that carried a higher sentence than the crime that he actually pled guilty to in the case. During the plea proceeding the following comments by counsel verified petitioner's confusion in the case:

> Trial counsel: The solicitor talked about this [crime charged] being under subsection A. His warrant was subsection B, which Your Honor knows deals with public employees and is only a 30-day charge, but because they are officers it does count rightfully under subsection A. It has been difficult for [petitioner] to realize that he can jump from a 30 day offense to potential five-year offense for same conduct. App. lines 13-23.

The offense of threatening the life of a public official is outlined under S.C. Code Ann § 16-3-1040 as follows:

> (A) It is unlawful for a person knowingly and willfully to deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict bodily harm upon the public official, teacher, principal, or members of his immediate family...
>
> (B) It is unlawful for a person knowingly and willfully to deliver or convey to a public employee a letter or paper, writing, print, missive, document, or electronic communication or verbal or electronic communication which contains a threat to take the life of or to inflict harm upon the public employee or members of his immediate family...
>
> (C) A person who violates the provisions of subsection (A), upon conviction, must be fined not more than five thousand dollars or imprisoned no more than five years, or both.
>
> (D) A person who violates the provisions of subsection (B), upon conviction, must be fined not more than five hundred dollars or imprisoned not more than thirty days, or both.

As evidenced by petitioner's insistence that he should have received a thirty-day sentence, it is clear that petitioner was unaware of the nature and elements of the crime to which he pled guilty and was ignorant of the sentencing consequences as well. A plea cannot stand as valid unless it is

clear on the record that the defendant understood the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights waived by pleading guilty. Anderson v. State, 342 S.C.54, 585 S.E. 2d 649 (2000). In order for a plea to be considered voluntarily given, it must appear that the defendant had a full understanding of the consequences of the plea and the charges against him. See Terry v. State, 383 S.C. 361, 680 S.E.2d 277 (2009), citing to Boykin v. Alabama, 395 U.S. 238 (1969).

In Terry, the Court found error where counsel failed to advise the defendant of the definition of sexual battery and simply advised the defendant that the lewd act and criminal sexual conduct with a minor charges were the "same" charges because both offenses involved "messing with children." Ultimately, the Terry Court ruled that the trial judge's explanation regarding the elements and nature of the offenses charged during the "plea colloquy" cured the error. Similarly, in the case at bar, petitioner believed that his "threats" to the police officers categorized his crime under the second subsection (B) of the statute, but S.C. Code Ann. §16-3-1040 (B) refers to threats against public employees whereas S.C. Code Ann. §16-3-1040(A) refers to threats against public officials. Furthermore, in State v. Carter, 324 S.C. 282, 478 S.E.2d 86 (Ct App. 1996), the Court held that a police officer is a "public official" and that 16-3-1040(A) is applicable in such an instance.

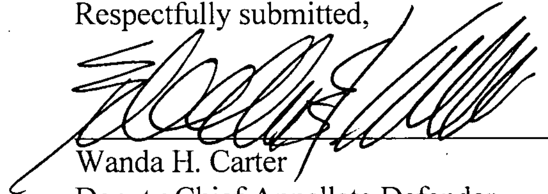
Therefore, counsel's error in failing to explain to petitioner the differences between the subsections of the statute in question and that his actions against the police officers placed him withing subsection (A) of the statute, which held the greater penalty, constituted ineffective assistance of counsel in the case. Thus, petitioner's misunderstanding of the nature, elements, and sentencing consequences of the crime charged against him and the crime to which he pled guilty rendered his guilty pleas involuntarily given and also given in violation of the Sixth Amendment

right to effective assistance of counsel during a plea proceeding. See Hill v. Lockhart, 484 U.S. 52 (1985). Petitioner was prejudiced because had he known that he was pleading to an offense that carried a greater sentence, then he might have foregone a plea and opted for a trial by jury in the case.

CONCLUSION

Based on the foregoing argument, petitioner requests that his petition be granted and full briefing allowed on the issue raised.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
JOHN C. HAYES, III, CIRCUIT COURT JUDGE

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-0011289

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nicholas Antwan Stevenson states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 16, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Nicholas Antwan Stevenson.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of January, 2014

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NICHOLAS ANTWAN STEVENSON

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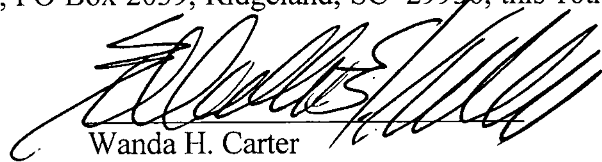
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Nicholas Antwan Stevenson, #264792, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 16th day of January, 2014.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of January, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.