STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

MELEIK LAMONT ROACH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001527

PRO-SE PETITION FOR WRIT OF CERTIORARI

Meleik L. Roach
[Pro-Se Litigant]

For Petitioner.

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ISSUES PRESENTED

Did PCR Judge abuse his discretion by denying post-conviction relief when record showed petitioner pled and was convicted and sentenced for ABHAN without his attorney present?

Was petitioner's counsel ineffective for erroneously advising petitioner he faced a life sentence if he refused plea deal and chosen trial?

Was counsel ineffective for allowing petitioner to plead guilty to ABHAN when he was not petitioner's attorney for that charge?

STATEMENT

On September 8, 2009, petitioner appeared before the Honorable Steven H. John in Horry County and pled guilty to two (2) counts of armed robbery and one (1) count of assault and battery of a high and aggravated nature (ABHAN). Petitioner was sentenced to fifteen (15) years for armed robberies charges and ten (10) years for ABHAN charge. Sentences ran concurrent. James C. Galmore, Esquire, was counsel for armed robbery charges. William H. Monckton was counsel for ABHAN charge. Attorney Monckton was never notified of plea agreement nor was he notified of plea court date, therefore, he was not present during plea and sentencing. (App. p. 123 lines 19-23). George DeBusk was the assistant solicitor. (App. p. 1 - p. 18).

Petitioner filed an application for post-conviction relief on August 26, 2010. (App. p. 19 - p. 25). Respondent filed a return on October 25, 2010. (App. p. 26 - p. 28). An evidentiary hearing was held on January 31, 2011, before the Honorable Benjamin H. Culbertson. Petitioner was present and was represented by Marshall Biddle, Esquire. Respondent was represented by Christina J. Catoe, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 29 - p. 75). On Febuary 23, 2011, Judge Culbertson issued

an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 84 - p. 95). Biddle did not file an appeal.

On December 12, 2011, petitioner filed a second application for post-conviction relief requesting a belated appeal of the denial of his first PCR application. (App. p. 106 - p. 114). Also in said application, petitioner sought "a fair PCR hearing." (App. p. 110 No. 18). Respondent filed a return dated January 5, 2012. (App. p. 115 - p. 118). An evidentiary hearing was held on April 24, 2012, before the Honorable Larry B. Hyman, Sr. as to the belated appeal issue only, and would not allow a PCR hearing on petitioner's other claims. Petitioner was present and was represented by Brana J. Williams, Esquire. Respondent was represented by Tyson Andrew Johnson, Sr., Assistant Attorney General. Both petitioner and the former PCR counsel testified. (App. p. 119 - p. 144). On December 2, 2013, Judge Hyman issued an amended order granting a belated appeal. (App. p. 152 - p. 155).

Pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991); King v. State, 308 S.C. 348, 417 S.E. 2d 868 (1992), and Rule 243(i), SCACR, this petition follows. An Austin petition was also filed.

ARGUMENT

PCR Judge abused his discretion by denying post-conviction relief when record showed petitioner pled and was convicted and sentenced for ABHAN without his attorney present.

An appellate court "will reverse the PCR judge's decision when it is controlled by an error of law." Pierce v. State, 338 S.C. 139, 145, 526 S.E. 2d 222, 225 (2000). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E. 2d 360 (1984). At the PCR hearing held on January 31, 2011, the following testimony from petitioner's counsel for armed robbery charges, James C. Galmore, Esquire, takes place:

Q: Okay, and did you explain to - I mean, did Mr. Roach say, "Look, you're not my lawyer on that, I want, you know, I want Mr. Monckton here?"

A: Yes, I recall him wanting Mr. Monckton and I think I said something like, "Well, you know,

if you don't plea to that charge then the plea offer goes away completely and you end up in a trial on the armed robberies."

Q: Okay.

A: So, yeah, Mr. Monckton was his lawyer, but, you know, what choice did he have. (App. p. 55 lines 8-17). It is quite clear from this testimony that petitioner's armed robbery attorney coerced him into pleading guilty to the ABHAN, knowing petitioner requested to consult with his ABHAN attorney first before rendering his plea.

At PCR, Honorable Benjamin H. Culbertson stated:

"In that Mr. Monckton represented him on 2006-GS-26-3680 I am granting his request for post-conviction relief on that charge due to the fact that he didn't have his attorney there at the time he pled guilty and I think he's certainly entitled to the attorney that he retained at that guilty plea. So I'll vacate the guilty plea and the sentence on the ABHAN charge, so that can be brought back...". (App. p. 72 lines 17-23).

Petitioner does not challenge PCR judge's power to change his mind up until written order is signed. However, PCR judge abused his discretion once he

was informed by State that plea is a package deal and cannot be separated. (App. p. 73 lines 2-7). At that point, PCR judge admitted he did not know the law regarding these circumstances. (App. p. 73 lines 8-10; App. p. 73 lines 14-17; and App. p. 74 line 5). On line 5 of App. p. 74, PCR judge states:

"... I don't know what the law is..."

The PCR judge wanted to vacate the ABHAN without vacating the armed robbery convictions. It was petitioner's position that since the plea was a package deal, and relief was granted on grounds of involuntary guilty plea, than the entire plea was tainted and should have been vacated. (App. p. 74 lines 18-22). On App. p. 74 lines 20-22, PCR judge states:

"Well, you might be right. I don't know. That's why I want to look it up to see if it can be severed or if it is a package deal."

Once PCR judge knew the entire plea was a package deal, and that it was an "all or nothing" situation, he abused his discretion by denying post-conviction relief to petitioner. PCR judge's denying of relief was extremely contrary to his statements on the record, and the Court will

not uphold the findings when there is no probative evidence to support them. See Holland v. State, 322 S.C. 111, 470 S.E. 2d 378 (1996).

The PCR judge's actions have denied petitioner his due process rights guaranteed by U.S.C.A. Const. Amend. 14 and SC Const. Art. I §§ 3 and 22. Furthermore, the record provides a prima facie showing that petitioner was denied his constitutional right to counsel. U.S.C.A. Const. Amend. 6 and SC Const. Art. I § 14. Therefore, PCR judge should have vacated the entire plea. See State v. Bickham, 381 S.C. 143, 672 S.E. 2d 105 (S.C. 2009) (Pleas are a package deal and must remain a package deal to retain integrity of the package.). Also see Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (S.C. App. 2009) (The State also argues the PCR court erred in granting Pelzer relief as to the arson charge, only, without vacating the entire plea.).

Petitioner's attorney provided ineffective assistance of counsel by erroneously advising petitioner he faced a life sentence had petitioner chosen to go to trial.

In order to establish a claim of ineffective assistance of counsel, a post-conviction relief (PCR) applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case. U.S.C.A. Const. Amend. 6. McKnight v. State, 378 S.C. 33, 661 S.E. 2d 354 S.C., 2008.

At PCR (Jan. 31, 2011), trial counsel James C. Galmore testified. He stated that the prosecution was ready to try the armed robbery charges and that "We did have a jury.". Mr. Galmore also testified that he informed petitioner that he faced life in prison sentence. (App. p. 56 lines 1-19). Furthermore, Galmore states, "I said something like, well, you know, if you don't plea to that charge then the plea offer goes away completely and you end up in a trial on the armed robberies". Galmore's testimony clearly proves there would have been a

single trial, that day, had petition declined plea offer. Charges can be joined in same indictment and tried together where they arise out of single chain of circumstances, are proved by same evidence, or are of same general nature, and no real right of defendant has been prejudiced. State v. Tucker, 478 S.E. 2d 260 (S.C. 1996).

In order for petitioner, through SC Code Ann. § 17-25-45, to receive life in prison sentence, the State has to prove a prior conviction that the State seeks to use under sentence enhancement statute. See State v. Payne, (S.C. App. 1998) 332 S.C. 266, 504 S.E. 2d 335. Petitioner has no prior convictions which the State could have used to trigger recidivist sentencing. Additionally, § 17-25-45 (H) reads:

"Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial."

No such notice was given. In fact, petitioner's counsel did not advise petitioner of solicitor's intent to seek life sentence until the day of trial, which was certainly in violation of § 17-25-45(H)'s time/notice requirement. Although the Honorable

Jean Toal, Chief Justice, has ruled actual notice met legislative intent the same as written notice, the ten-day requirement was not met in this case, therefore, barring petitioner from receiving a life in prison sentence.

Counsel also failed to review § 17-25-50, which reads:

"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."

Armed robbery is listed in § 16-11-330(A), SC Code of Laws, 1976, as amended. The offense is punishable by ten to thirty years in prison. Even if found guilty of two (2) armed robbery charges, petitioner, twenty-six at time of plea, would not have spent the rest of his life in prison.

For these reasons, Counsel's advice to petitioner that petitioner faced life in prison if petitioner didn't sign plea agreement was clearly erroneous and fell below professional norms.

Assuming a defendant is adjudicated guilty, disposing of all charges at the same time will avoid the application of section 17-25-45(F) as it relates to those charges and preclude a life without parole sentence. Bryant v. State, 683 S.E. 2d 280 S.C., 2009. Section 17-25-50 is a safeguard which, if applicable, operates to foreclose a life sentence. Bryant, id.

In light of the plea counsel's ineffective assistance, petitioner has requested to go to trial on all charges. (App. p. 47 lines 22-25). The Supreme Court, Toal, J., held that in light of erroneous advice given by defense counsel, defendant's guilty plea was not intelligently and voluntarily made. Ray v. State, 401 S.E. 2d 151 (S.C. 1991). Also see Alexander v. State, 402 S.E. 2d 484 (S.C. 1991); Hinson v. State, 377 S.E. 2d 338 (S.C. 1989) and Roscoe v. State, 546 S.E. 2d 417 (S.C. 2001). With respect to guilty plea counsel, the applicant 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. Hill v. Lockhart, 474 U.S. 52 (1985).

Plea counsel was ineffective in allowing petitioner to plead guilty to ABHAN when he was not petitioner's counsel of record on that charge.

Petitioner hereby adopts this argument from Counsel's Johnson petition dated Febuary 26, 2014. (Pages 4-6 of Johnson Petition For Writ of Certiorari Pursuant to Austin v. State).

ARGUMENT

Plea counsel was ineffective in allowing petitioner to plead guilty to ABHAN when he was not petitioner's counsel of record on that charge.

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 on September 8, 2009, to two (2) counts of armed robbery and one (1) count of ABHAN. Plea counsel, James Galmore, Esquire, represented petitioner at the plea. (App. p. 2, lines 1 – 8). On August 26, 2010, an application for post-conviction relief was filed alleging an involuntary guilty plea and ineffective assistance of counsel. (App. p. 19 – p. 25). At the evidentiary hearing, petitioner testified that William Monckton, III, Esquire, actually represented him on the ABHAN charge. He was not in the courtroom on the day of the plea. When petitioner's mother contacted him, he told her he did not get notice of the court dates. (App. p. 34, lines 14 – 23). Petitioner had retained Mr. Monckton on that charge. (App. p. 35, lines 1 – 2). Petitioner said Galmore told him that if he did not plead guilty to the three charges that day, the assistant solicitor was going to take everything off the table and that he would get a life sentence. (App. p. 35, line 21 – p. 36, line 24).

Petitioner testified that Galmore did not have a file on the ABHAN charge. Monckton had all the information on that charge. Petitioner did not know of any substitution of counsel and he did not agree to Galmore taking over that case. He did not waive his right to have Monckton present. (App. p. 43, line 5 – p. 45, line 2).

Galmore testified that he was not the attorney of record on the ABHAN charge. He said the assistant solicitor wanted petitioner to plead to all three charges that day. They had discussed the

ABHAN charges a few times and he did have a file on that charge. He remembered petitioner wanting Monckton on the ABHAN charge and he told him if he did not plea to the charge, the plea offer would go away and he would face a trial on the armed robberies. (App. p. 53, line 25 – p. 55, line 14). Galmore testified that he was prepared to go to trial, but he did not want to because he thought they would lose and he did not want petitioner to get a more severe sentence. He explained this to petitioner. (App. p. 59, lines 4 – 10).

On cross-examination, Galmore said as a result of the plea, the following other charges were dismissed:

1 count, use of a vehicle without consent,
2 counts, possession of a weapon during a violent crime,
2 counts, forgery,
2 counts, bank fraud,
1 count, ABHAN

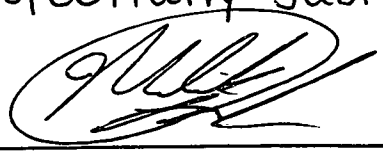
(App. p. 61, line 1 – p. 62, line 16).

Totally absent from petitioner's guilty plea transcript is any mention by Gilmore, as an officer of the court, that he was not counsel of record on the ABHAN charge and that petitioner was represented by another attorney on that charge. Galmore should have informed the plea court of this fact. It would have prevented a collateral proceeding such as this one. This was where he was ineffective. His failure to advise the court that he was not counsel of record deprived petitioner of his right to counsel on the ABHAN charge.

CONCLUSION

Based on the above arguments, petitioner's convictions should be vacated or reversed and remanded for a new trial.

Respectfully submitted,



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This 4 day of
April, 2014.

SWORN to and subscribed before me this
4th day of April 2014.
(L.S.)
Notary Public for South Carolina

My Commission Expires: 4-27-2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Larry B. Hyman, Jr., Circuit Court Judge

MELEIK LAMONT ROACH,

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CERTIFICATE OF SERVICE

I certify that a true copy of Pro-Se Petition for Writ of Certiorari has been mailed to: Daniel E. Shearouse, SC Supreme Court Clerk of Court, P.O. Box 11330, Columbia, South Carolina 29211 by placing one (1) copy in the U.S. mail, postage prepaid.

Meleik Roach
[Petitioner]

This __ day of April, 2014.

SCDC

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