Court Copy

State of South Carolina
In The Supreme Court

Appeal from Spartanburg County
Roger L. Couch, Special Circuit Court Judge

Dana Middleton,

petitioner

v.

State of South Carolina

Respondent

RESPONSE TO APPELLANT DEFENDER JOHNSON Petition

Robert M. Pachall
Appellant Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia S.C. 29211
Attorney for petitioner

Alan Wilson
ATTorney General
John W. McIntosh
Chief Deputy Attorney General
Sally W. Elliott
Assistant Deputy Attorney General
Suzanne H. White
Assistant Attorney General
P.O. Box 11549
Columbia S.C. 29211
Attorneys for Respondent

Issue Presented

Whether petitioner's Appellate Counsel should be relieved as Counsel where there is merits in his case which arose during the Post-Conviction Relief Process.

Statement

ON February 25,26, 2009, petitioner appeared before the honorable J. Derham Cole in Spartanburg County and pled guilty to attempted armed robbery and assault and battery With intent to Kill. A sentence of twelve (12) years imposed on each charge. Tanya Jones, Esquire was plea Counsel. During this plea hearing the petitioner gave testimony which wasn't Sworn before he plead guilty.

Petitioner filed an application for Post-Conviction Relief on December 15, 2009 alleging that he is being held in Custody Unlawfully for the following: Ineffective assistance of Counsel; and involuntary guilty plea. An evidentiary hearing was held on September 16, 2010 before the honorable Roger L. Couch. Petitioner was present and was Represented by CHristopher D. Brough, esquire. Respondent was represented by Suzanne H. White, Assistant Attorney General. Petitioner testified in his own behalf and called alibi witness Shalonda Mitchell and state Witness ED BAllenger to testify. Tanya Jones, Esquire testified in respondent's behalf.

On November 16, 2010 Judge Couch issued an Order denying and dismissing petitioners' application for post-Conviction relief.

This petition follows after Appellant Defense filed a Johnson Petition stating the Case has no merits and petition to be relieved as Counsel.

ARGUMENT

Petitioners Appellate Defender filed a Johnson petition and petition the Court to be relieved as Counsel Stating he briefed the one arguable legal issue which arose during the Post-Conviction Relief Process. This does not meet the Johnson V. STATE, 294, S.C. 310, 364 S.E.2d 201 (1988) Standard. In Johnson, the Supreme Court has approved the withdrawl of Counsel in meritless post-conviction appeals, providing the procedures outlined in Anders V. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). The petitioner's counselor admitted in his petition that he briefed the one arguable legal issue which he saw arose during the post-conviction. The Petitioner's appellant Counselor argued Petitioners guilty plea failed to comply with the MANdates set forth in Boykin V. Alabama. This arguments has merits. 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 jury, and the right to Confront one's accusers. A valid Waiver of these rights cannot be presumed from a Silent record. Boykin V. Alabama, 345 U.S. 238, 89 S.Ct. 1709 (1969). In State V. Armstrong, 263 S.C. 594, 211 S.E. 2d 889 (1975), this 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), this 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 Boykin, Supra, the U.S. Supreme Court held that trial Courts were mandated to use the UTmost Solicitude When Canvassing a guilty plea to insure that the plea was given freely and voluntarily With full Knowledge of the Circumstances Surrounding the plea and the attendant Waiver of rights occuring with the guilty plea. In this Case petitioner was advised of his right to a jury trial (app. p. 24 lines 18-25). He was not told, however, that a jury could not Convict him Unless their verdict was Unanimous. Petitioner was never informed ~~that if theres~~ any evidence of a lesser including

offense, the trial judge could charge the jury with a lesser including offense pursuant to South Carolina Constitution Article V § 20. During the plea phase, the petitioner stated to the trial judge that he didnt understand the significance of the crime being classified as most serious. (App. p. 19 Lines 7-18, p. 20 Lines 4-5). Petitioner was only 17 years old and the record show this was petitioner's first adult charge. Petitioner had no fundamental understanding of the substantive or prscedural Criminal law and did not understand his plea. As petitioner stated early, his involuntary guilty plea has merits.

Argument II

Appellant Counsel Contends in his Johnson petition that he briefed the one legal issue with merit but failed to acknowledge that petitioner trial counsel representation fell below an objective standard of reasonableness demanded of attorney by the Sixth Amendment of the United States Constitution. This issue has merits.

To establish a claim of ineffective assistance of Counsel, a post conviction relief (PCR) applicant must prove that: (1) Counsel failed to render reasonably effective assistance under prevailing norms; and (2) the deficient performance prejudiced the applicant case. CHerry V. State, 300 S.C. 115, 386 S.E. 2d 624 (1989) Citing Strickland V Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed 2d 674, 692 (1984).

In this case the petitioner was ready to go to trial. A jury was selected and recess until the next day. The following day, petitioner plead guilty to attempted armed robbery and assault battery with intent to kill. During the petitioner's PCR hearing, he testified that his intentions was to go to trial, and one of his defenses was that he was not at the scene of the crime the day or night of the crime, and that he had alibi witnesses. (App. p. 67, lines 2-14). Petitioner Contends that on the day of trial, he notice none of his alibi witnesses were present, and tried to fire his trial Counsel and proceed forward with another Counsel but that motion was denied. Petitioner testified that from that point he knew his chances of winning trial was Slim. (App. p. 71 Lines 11-16). There were issues dealing with the identification

of the petitioner and DNA evidence that was tested, proved not to have been the petitioners. Petitioner trial Counsel failed to file a pretrial Motion to Suppress the identification of him after knowing the identification was tainted. Neil v. Biggers 409 U.S. at 199, 93 S.Ct. at 382. The following factors are to be considered in evaluating the totality of the circumstances as to whether an identification is admissible (1) The opportunity of the witness to view the Criminal at the time of the crime (2) the witness's degree of attention (3) the accuracy of the witness's prior description of the Criminal (4) the level of certainly demonstrated by the witness at the confrontation (5) and the length of time between the crime and the confrontation. The identification of the petitioner was crucial to the state case. The Greer police Department Supplemental Reports stated the confidential informants stating that he had observed a B/M fitting the description running down hampton rd, which was close to the incident location shortly after the incident the same night, the report allege that the informant stated that the subject name was Bean and was familiar with a B/M name DANA Middleton that goes by the name "Bean" and his physical description was very consistent with the description given by the victim. See Police Department Supplemental Report Exhibit (1). No where in this report it states the confidential informant was showed a six person line up. The confidential informant who later was found to be EDward Ballenger testified at petitioners PCR hearing (App. p. 128 Lines 17-21). Edward Ballenger testified that he did not tell them specifically who the guy was because he didn't know. He testified that he saw a guy dressed in a t-shirt (No color) and blue jeans during the daylight. (App. p. 129 Lines 5-14). The Greer police developed a lineup base off Mr. Ballenger testimony and showed the victim. Mr. Ballenger testified he wasn't aware of this information. (App. p. 130 Lines 1-5). Mr. Ballenger testified that he never told police that the person he saw walking around the area was a person he knew name Bean. (App. p. 131 lines 1-25). For these reasons Trial counsel was ineffective not only for failing to suppress the identification of the petitioner, but for failing to properly investigate the case at hand. If Counsel had properly investigate the petitioners case, facts would of been establish that police had use a deliberate scheme to frame the petitioners. ED Ballenger was never investigated by trial Counsel nor was he subpeona as a defense witness. Ed Ballenger testimony would have strengthen the defense tremendously

due to the fact, the victim identification was base on Mr. Ballenger description of the person he saw during day light Saving time. See State V. Lounds 670 S.E. 2d 646 (S.C. 2008). Petitioner in state Vs. Lounds, argues that trial Counsel was ineffective for failing to adequately prepare for petitioner trial especially given the fact that Counsel had ample notice charges was LWOP. A Criminal defense attorney has a duty to perform a reasonable investigation. See Ard V. Catoe 372 S.C. 318, 331, 642 S.E 2d 590, 596 (2007), quoting Strickland V. Washington, 466 U.S. at 695. In Lounds, this Court stated: Due process should require access to atleast one investigator and to experts who can evaluate the State's evidence, in cases where the state has employed expert. In most Cases where the defendant Cannot afford to retain an Attorney, investigator and expert, the responsibility is on the State to provide the funding to ensure that due process is provided to indigent defendants, a responsibility that is being ignored nationwide by legislators who do not appreciate the fact that a Criminal justice System Cannot function within the bounds of the Constitution Unless effective indigent defense is fully funded. Theres no record that Petitioner trial Counsel used an private investigator to investigate possible potential Witnesses who Could of help strengthen the petitioner case. The record do shows that trial counsel was assign to the petitioner's case in June of 2008 and trial was scheduled (7) Seven months later. During the (7) Seven months period, Trial Counsel only saw the petitioner only (5) five times. During the Course of the (7) Seven months period trial counsel was on maternity leave. (App. p. 92 Lines 20-25, p. 93 Line 1-7). The record reveal ample proof that trial Counsel was ineffective. If she had prepared the best defense by investigating Witnesses, the results Could of been different. Trial Counsel failed to acknowledge that Shalonda Mitchell was a favorable Witness due to the fact the time frame in which the Crime was stated to happen was faulty. Ms. Mitchell had personal knowledge that her son was at a card game around the time frame the victim was attack. Shalonda Mitchell was available to testify at trial, but trial Counsel fail to acknowledge her and Ed Ballenger as favorable Witness. (App. p. 89-90). Trial Counsel testified at Petitioner's PCR hearing that Ed Ballenger was present the first day of trial and that she spoke to him. (App. p. 75 Line 6-10). If trial Counsel spoke to ED Ballenger, this mean she learned that ED Ballenger never stated that he saw the petitioner around the area, and that the time he saw someone dressed in a t-shirt and

blue jeans was during day light saving time. Trial Counsel failed to suppress the identificat ion of the petitioner. This prejudice the petitioner alot because the State case was based on identification. Trial Counsel failed to call ED Ballenger at trial and to speak during the petitioner plea hearing. Further more, prejudice from trial counsel's failure to interview or Call Witnesses Cannot be shown Where the Witnesses do not testify at Post Conviction Relief. Underwood V. State, 309 S.C 560, 425 S.E.2d (1992); Bassette V. Thompson, 915 f.2d 932 (4th Cir. 1990) Cert. denied, 499 U.S. 982 (1991). The applicants mere speculation as to what a witnesses testimony would have been cannot, by itself, satisfy his burden of Showing prejudice. Clark V. State, 315 S.C. 385, 434 S.E. 2d 266 (1993). The petitioner in this case has prove prejudice from the trial Counsel failure to call favor- able Witnesses at trial. The favorable Witnesses testified at his PCR Hearing. See ED Ballenger and Shalonda Mitchell testimony. Glover v. State 318 S.C. 496, 458 S.E. 2d 538 (1995). An applicant must produce the testimony of a favorable witness or other wise offer the testimony in accordance With the rules of evidence at the PCR Hearing in order to es- tablish prejudice from the witness failure to testify at trial. The testimony of Sharon Miller was proffered into the record by petitioner PCR attorney Mr. Brough accordingly by the SCRCrim P. Rule 103 Without an Contemporaneous objection from the State. ED Ballenger and Shalonda Mitchell testified at petitioner PCR hearing in accordance With the Rules of Evidence. If the petitioner had known that Ed Ballenger was in fact more a defense Witness then a state Witness, he would of proceeded forward to trial. The Record Show that the petitioner relied on trial Counsel advice to plea to the twelve years be- Cause she was Concerned about his age and the Charges against him was violate (App. p.112 Line 6-24). Never in the record does it state that trial Counsel explain to petitioner that he had good chances of winning trial because the state evidence was weak. The DNA test results on the the lighter and Cigarette butt didnt match the Petitioner. Petitioner Trial Counsel never explain to pet itioner that the burden of proof remains on the State to prove his guilty beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.E.d 2d 368 (1970). Petitioner wanted a trial but relied on Counsel advice of taking twelve years because Counsel felt he would lose trial and Sentence to 40 years, Counsel Coerce petitioner into accepting 12 years. See (App. p. 138

line 15-25). See Thompson V. State (S.C. 2000) 340 S.C. 112, 531 S.E.2d 294. Defendant who plead guilty on advice of Counsel may only attack the voluntary and intelligent Character of a plea by showing that Counsel's representation fell below an objective standard of reasonableness demanded of attorneys in Criminal Cases and that there is a reasonable probability that, but for Counsel's errors, defendant would not have plead guilty and would have insisted on going to trial, and "reasonable probability" is a probability Sufficient to Undermine Confidence in the outcome of the trial. See Moorehead V. State (S.C. 1998 329 S.C. 329, 496 S.E.2d 415). Same

Conclusion

The findings of the PCR Judge are not supported by any evidence of record. Holland V. State 470 S.E.2d 378. Where there is no probative evidence to support the P.C.R Judges finding, the finding should not be UPheld. Accordingly, the order of the P.C.R. Judge is reversed. Because Petitioner hearing reveals evidence that trial Counsel's representation fell below objective Standard of reasonableness demanded of attorneys and that he wasnt fully advised of the jury trial right he Was Waiving has merits and does not fall Within the Scope of Johnson V. State, 294 S.C. 310, 364 S.E. 2d 201 (1988). Therefore petitioner's Writ of Certiorari Should be granted, and Appellate Counsel Should remain as petitioner's appellate defender as a matter of right to brief the issues necessary to perfect Petitioners Writ of Certiorari.

Respectfully Submitted,

18th day of July 2011

x Dora Middleton
PROSE PETITIONER

GREER POLICE DEPARTMENT
SUPPLEMENTAL REPORT

Agency Id
0230300

Case Number
032007017349

Dana Middleton 333427 D-X-14/ 4 Copies

☐ Original Report ☐ Status Change ☐ Additional Victims ☐ Additional Stolen Property Incident Type: ROBBERY: ARMED

☒ Supplemental Report ☐ Other Report ☐ Additional Offenders ☐ Additional Recovered Property Patrol District 2 Page of Pages

INCIDENT NARRATIVE

IN REFERENCE TO THE ABOVE LISTED CASE OF ROBBERY/ABWIK I/O WAS CALLED OUT TO MR. BINGO ON 08/24/2007. I/O WAS ADVISED THAT A 71 YEAR OLD WHITE MALE WAS SITTING IN HIS TRUCK PARKED IN FRONT OF MR. BINGO WINDOW, AND A UNKNOWN BLACK MALE APPROACHED HIM IN THE WHILE HE WAS SEATED IN THE TRUCK AND ASKED TO BORROW A CIGARETTE. THE VICTIM HANDED THE B/M A CIGARETTE, AND THE BLACK MALE BEGAN ASKING HIM QUESTIONS ABOUT THE BINGO HALL, AND THEN STATED" I HATE TO DO THIS BUT GIVE ME YOUR WALLET" THE VICTIM STATED YOURE NOT GETTING MY WALLET, AND THE B/M SUBJECT PRESENTED A KNIFE OR BOX CUTTER AND BEGAN STABBING AND CUTTING THE VICTIM THROUGH THE WINDOW, ABOUT HIS LEGS AND ARMS, AND HANDS. THE VICTIM STATED THAT THE SUBJECT THEN RAN OFF. I/O WENT TO SPARTANBURG REGIONAL TO FOLLOW UP ON THE CASE, AND PHOTOGRAPH THE INJURIES SUSTAINED I/O SECURED THE VICTIMS CLOTHING AND VICT. STATED THAT SUBJ. ASKED TO BORROW HIS LIGHTER WHEN HE BORROWED A CIGARETTE, I/O SEIZED THE LIGHTER, AND WILL HAVE IT SENT OFF FOR LATENT PROCESSING. SPARTANBURG FORENSICS WERE CALLED OUT TO THE SCENE AT MR. BINGO TO PHOTOGRAPH AND PROCESS THE SCENE. A SEARCH OF THE AREA WAS CONDUCTED IN HOPES OF LOCATING A WEAPON OR SUSPECT, NEITHER FOUND. I/O RETURNED TO THE CRIME SCENE AND CANVASSED THE AREA FOR A CIGARETTE BUTT, THAT MAY HAVE BEEN SMOKED BY SUBJ. ONE CIGARETTE BUTT WAS LOCATED AND SEIZED. I/O RECEIVED A CALL FROM AN INFORMANT THE FOLLOWING DAY STATING THAT HE HAD OBSERVED A B/M FITTING THE DESCRIPTION RUNNING DOWN HAMPTON RD., WHICH WAS CLOSE TO THE INCIDENT LOCATION SHORTLY AFTER THE INCIDENT, THE SAME NIGHT. THE INFORMANT ADVISED THAT THE SUBJ.'S NAME WAS "BEAN". I/O WAS FAMILIAR WITH A B/M NAMED DANA MIDDLETON THAT GOES BY THE NAME "BEAN" AND HIS PHYSICAL DESCRIPTION WAS VERY CONSISTENT WITH THE DESCRIPTION GIVEN BY THE VICTIM. I/O PLACED THE SUBJ. DANA MIDDLETON INTO A 6 PERSON PHOTO LINE UP AND PRESENTED IT TO THE VICT. ON 08/27/2007. THE VICTIM PICKED #2 WITHOUT HESITATION AND STATED THAT IS HIM 100% POSITIVE. I/O HAD VICT. INITIAL AND DATE THE PICTURE #2 WHICH IS DANA MIDDLETON, AND SIGNED AN AFFIDAVIT OF LINE-UP FORM.

I/O ADVISED THE NIGHT SHIFT AND ON COMING DAY SHIFT PATROL OFFICERS TO LOCATE DANA MIDDLETON AND BRING HIM INTO GREER PD, AND NOTIFY I/O UPON HIS DETAINMENT. ON 08/28/2007 I/O WAS ADVISED THAT THEY HAD LOCATED DANA MIDDLETON AND HE WAS TRANSPORTED TO GREER PD. I/O MET WITH SUBJ. AT GREER PD , AND TRANSPORTED THE SUBJ. TO CID OFFICE FOR AN INTERVIEW. SUBJ'S MOTHER WAS NOTIFIED AND SIGNED A PARENTAL CONSENT FORM, SUBJ. WAS ADVISED OF HIS MIRANDA RIGHTS AND SIGNED A WAIVER AGREEING TO SPEAK TO I/O. SUBJ. WAS QUESTIONED ABOUT HIS WHEREABOUTS ON FRIDAY NIGHT AND HE STATED "THAT HE WAS JUST WALKING AROUND, HE WALKED ALL OVER, AND EVEN WALKED TO MR. BINGO. SUBJ. WAS QUESTIONED ABOUT THE INCIDENT AND DENIED DOING IT. I/O ADVISED SUBJ. THAT HE WAS IDENTIFIED BY THE VICTIM BY LINEUP AND HE STILL DENIED THE ALLEGATION, AND SHOWED NO REMORSE.
I/O WILL HAVE SUBJ. CHARGED WITH ARMED ROBBERY AND ABWIK., ON A JUVENILE REFERRAL. AND ATTEMPT

THE Supreme Court of South Carolina
Post office Box 11330
Columbia, SC 29211

RE: Middleton, Dana V. State

Dear Mr. Daniel E Shearouse, Enclosed is the above petitioner pro Se response to Appellate Defender Robert M. Pachak Johnson Petition to be filed in your Court. I have also enclosed a second copy to be filed and return to me for my record. The originals have been legibly hand printed with one inch margin on all sides. Also enclosed is a proof of Service evidencing Service Upon you.

Sincerely

July 18, 2011

x Dana Middleton
Signature

Proof OF SERVICE

THE Undersigned, Dana Middleton, hereby declares that he is the petitioner and that on July 18 2011 a true and accurate copy of the petitioners Response to Appellate Defender Johnson Petition was placed in an envelope with a postage thereon prepaid through the United states Postal Service and mailed to the South Carolina Supreme Court as follows.

The Supreme Court of South Carolina
Post office Box 11330
Columbia, SC. 29211

x Dana Middleton
Signature