ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

RECEIVED

SEP 19 2014

S.C. Supreme Court

BOBBY MACK MATHIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000405

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Trial counsel erred in allowing petitioner to plead guilty to throwing body fluids on an officer because there was insufficient evidence available to convict him on this offense since there was no proof of the required mental intent for such a charge where petitioner's act of spewing forth saliva was not an intentional act, but rather an involuntary act that occurred automatically (sans any intent) after having been sprayed with pepper mace.

STATEMENT

Petitioner Bobby Mack Mathis entered Alford[1] pleas to the charges of resisting arrest and throwing body fluids on an officer during the January 2012 term of the Spartanburg County General Sessions Court before Judge Roger L. Couch. App. 1 – 23. Petitioner was sentenced to imprisonment for a period of one year for resisting arrest and ten years on the throwing of body fluids conviction. Petitioner did not appeal his convictions and sentences. James Cheek represented petitioner at the plea proceeding, and Assistant Solicitors Jennifer Jordan and Prina Tailor appeared on behalf of the state.

On July 25, 2012, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 25 – 29. The respondent filed a return requesting that a hearing be held in response to petitioner's PCR action. App. 32 – 35. A hearing was convened on October 1, 2013, at the Spartanburg County Courthouse before Judge J. Derham Cole. App. 37-72. Petitioner was present at the hearing and represented by Shane Williams Rogers, and Assistant Attorney General Suzanne H. White appeared on behalf of the state. On February 20, 2013, Judge Cole issued an Order of Dismissal in the case therein denying petitioner's PCR action. App. 74 – 80.

Petitioner appealed Judge Cole's Order of Dismissal in the case. The petition follows.

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[1] North Carolina v. Alford, 400 U.S. 25 (1970).

ARGUMENT

Trial counsel erred in allowing petitioner to plead guilty to throwing body fluids on an officer because there was insufficient evidence available to convict him on this offense since there was no proof of the required mental intent for such a charge where petitioner's act of spewing forth saliva was not an intentional act, but rather an involuntary act that occurred automatically (sans any intent) after having been sprayed with pepper mace.

During the plea proceeding, the solicitor apprised the trial judge of the facts of the case. Apparently, a disturbance of some sort occurred in Spartanburg on November 26, 2011, which resulted in a reported call to local police. When police arrived on the scene, petitioner was seen leaving a store wearing silver paint on his face while running around and screaming simultaneously. The officer dispatched to the scene sprayed petitioner with pepper mace in order to subdue him. In the process of doing so, petitioner allegedly kicked and spit on the officer until the arrest was accomplished. Tr. 14, l. 20 – p. 15, l. 10. It was believed that petitioner had been sniffing paint or glue. App. 17, l. 15 – p. 18, l.11.

During the PCR hearing, petitioner testified that he pled guilty to the charge of throwing body fluids, but that this was an accident because he was only "spitting up mace." App. 45, l. 15 – 24. Petitioner stated that the charge was a "mistake" because anyone who is "maced would spit" and that he had to spit because he "had mace all in [his] mouth." App. 54, lines 15 – 24. Petitioner stated that he was not "intentionally spitting at anybody." App. 54, l. 25 – p. 55, l. 5.

Trial counsel testified at the PCR hearing and explained that petitioner did inform him of the fact that he (petitioner) was only trying to clear "his mouth of the mace." Counsel added that he was aware of petitioner's position that he did not intentionally spit at the arresting officer. App. 65, l. 8 – 10; App. 65, l. 23. Also, there was an investigation report in existence from the initial intake

interview at the police station that included a statement that the "defendant states the he had trouble breathing and began to spit trying to relieve himself from the mace." App. 67, l. 20 – p. 68, l. 2.

The PCR judge ruled that trial counsel was thoroughly competent in his legal representation which did not fall below the standard of reasonableness required of criminal attorneys. App. 79-80.

The offense of throwing body fluids on an officer is codified under S.C. Code Ann § 24-13-470 and reads as follows:

> (A) An inmate, a detainee, a person taken into custody, or a person under arrest, who attempts to throw or throws body fluids including, but not limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state correctional facility or local detention facility, a state or local law enforcement officer, a visitor of a state correctional facility or local detention facility, or any other person authorized to be present in a state correctional facility or local detention facility in an official capacity is guilty of a felony.

As a rule, criminal offenses contain a mental element of intent to commit the crime charged. However, in the case at bar, petitioner's reaction to having been sprayed with pepper mace did not result in any intent to expel saliva upon the police officer. Hence, the element of mental intent was missing in connection with the offense of throwing body fluids charged against petitioner.

In State v. Jeffries, 316 S.C. 13, 446 S.E.2d 427 (1994), the Court held that the required mens rea for a particular crime can be classified into a hierarchy of culpability, i.e., purpose, knowledge, recklessness, and negligence, but went on to acknowledge that at common law, crimes were classified as general intent or specific intent. In Jeffries, the Court held that knowledge was the mens rea required for kidnapping. Compare the case of State v. Mimms, 2014 WL 3734360 (July 30, 2014), where the Court held that DUI was not a crime of intent, but rather a strict liability offense, which meant that the driver's impaired driving made her guilty without the presence or absence of intent being a factor in the case, because the DUI statute is a safely statute devoid of any language referencing knowledge or intent, i.e., no mens rea requirement needed. The Mimms Court

went on to hold that the kind of criminal intent is required to prove one guilty of a crime would be a question of legislative intent based on the construction and language of the statute. The Mimms Court expounded further by sorting out inherently immoral crimes that require a corrupt purpose or evil intent and crimes not necessarily immoral that require no evil intent; but noted that nonetheless, purpose is the only criminal intent requisite usually required for most basic statutory offenses. More importantly, however, the issue of how an **involuntary action** would bear on mental intent was addressed in Mimms when the Court indicated that criminal intent would be an element of a crime of DUI where the driver **"involuntarily or unknowingly"** ingested alcohol. Here, the instant offense of "throwing" body fluids involves a mental state of purpose at most, or voluntary, at the very least; however, none of the mental states applied to petitioner because he had no mental state (purpose or voluntariness) to spew out saliva on the officer as the spitting was not a mindful action, but an **involuntary** bodily response to the assault of pepper mace sprayed upon him. Voluntariness, at a bare minimum, is required even in DUI cases of strict liability because the act of driving is at the very least a voluntary act. See McAninch's The Criminal Law of South Carolina, 6th Ed. (2013).

Note that the trial judge was aware of petitioner's resistance to pleading guilty to this offense in question. Note the following colloquy in support of petitioner hesitancy to plead on this offense:

> Defendant: I plead guilty on the resisting.
>
> The Court: yes, sir.
>
> Defendant: But on the spitting, I was maced before I spit. I didn't know I was spitting on him. I was spitting the mace out my mouth.
>
> The Court: Sit him down, Mr. Cheek. He's presented a defense.
>
> Defendant: I'm pleading no contest, Your Honor.
>
> Mr. Cheek: He signed the plead no contest to that, Your Honor. App. 12 lines 8-16.

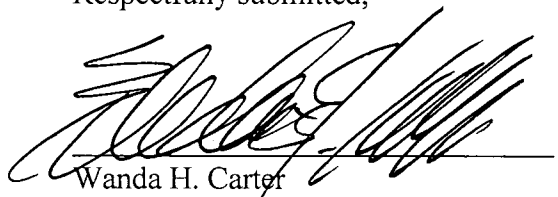
A plea received despite a defendant's protests of innocence cannot be considered voluntarily given. Rolen v. State, 384 S.C. 409, 683 S.E. 2d 471 (2009). In Rolen, trial counsel was found ineffective in failing to move for the withdrawal of the defendant's guilty plea where the defendant repeatedly asserted his innocence prior to sentencing at this plea proceeding. In South Carolina, a trial judge can reject a guilty plea if the defendant protests his innocence. State v. Paris, 354 S.C. 578 S.E. 2d 751 (2003).

In the case at bar, petitioner's protests of innocence preceded his guilty pleas. Counsel erred in allowing petitioner to plead guilty where the evidence was not sufficient to convict him on the offense at issue. Counsel's error in allowing petitioner to plead no contest despite his protests of innocence constituted deficient legal representation. But for the error, petitioner would have opted to exercise his right to a trial by jury in the case. Counsel's error violated petitioner's Sixth Amendment right to effective legal assistance during a plea proceeding. Hill v. Lockhart, 484 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

BOBBY MACK MATHIS,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bobby Mack Mathis 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 October 1, 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 Bobby Mack Mathis.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of September, 2014

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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 Suzanne H. White, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Bobby Mack Mathis #248562, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 19th day of September, 2014.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of September, 2014.

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