

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

DONTE L. CAPERS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2014-000097

RECEIVED

PRO-SE JOHNSON PETITION FOR WRIT OF CERTIORARI

OCT 29 2014

S.C. SUPREME COURT

DONTE LAQUAWN CAPERS #296357
Pro-se Petitioner

McCormick Corr. Inst.
386 Redemption Way
McCormick, South Carolina 29899

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ISSUE PRESENTED

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY SOUTH CAROLINA LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT PLEA COUNSEL FAILED TO ADEQUATELY INVESTIGATE APPLICANT'S CRIMINAL HISTORY, FAILED TO PROPERLY ADVISE APPLICANT OF THE LAW APPLICABLE TO APPLICANT'S CASE AND ERRONEOUSLY ALLOWED APPLICANT TO PLEAD GUILTY TO THREE (3) COUNTS OF BURGLARY FOR WHICH HE COULD NOT BE CONVICTED OF.

Note: For the purpose of this argument the Petitioner is referred to as Applicant.

STATEMENT

Petitioner agrees with appellate counsel's procedural history of this case. See pages 3-4 of appellate counsel's Johnson Petition for Writ of Certiorari. Appellate counsel omitted a significant issue in his petition.

After the Petitioner filed his April 11, 2012 application for post-conviction relief alleging ineffective assistance of counsel. App. pp. 37-44, and the State filed its June 13, 2012 return, App. pp. 52-55, Petitioner filed an amended application on September 16, 2013. App. pp. 45-51. On October 8, 2013, Petitioner appeared at an evidentiary hearing before the Honorable William H. Seals, Jr. Joshua A. Bailey represented Petitioner and Joshua Thomas represented the State. App. p. 56. Petitioner testified that his plea hearing counsel never explained to him that there was a statute that addresses prior convictions that are committed closely in time. App. p. 72 lines 19-25. Petitioner further testified that he first learned of the statute when he arrived at SCDC and that if he had known that his prior two burglary convictions counted as one, he would not have pleaded guilty and would have insisted on going to trial. App. p. 72, lines 16-25 - p. 73, lines 1-25 - p. 74, line 1. Plea counsel testified that he didn't discuss 17-25-50 with the Petitioner and in counsel's view 17-25-50 did not apply to the Petitioner's case. App. p. 83, lines 18-25 - p. 84, lines 1-4.

On November 25, 2013, the PCR court issued its order of dismissal. App. pp. 98-107. The order stated that Petitioner failed to establish ineffective assistance of counsel based on counsel's failure to challenge Petitioner indictment for first degree burglary. The PCR court agreed with plea hearing counsel that 17-25-50 does not apply to this case. App. pp. 105-106. Appellate counsel omitted this issue in his Johnson Petition for Writ of Certiorari. This pro-se petition follows:

ARGUMENT

APPLICANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY SOUTH CAROLINA LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT PLEA COUNSEL FAILED TO ADEQUATELY INVESTIGATE APPLICANT'S CRIMINAL HISTORY, FAILED TO PROPERLY ADVISE APPLICANT OF THE LAW APPLICABLE TO APPLICANT'S CASE AND ERRONEOUSLY ALLOWED APPLICANT TO PLEAD GUILTY TO THREE (3) COUNTS OF BURGLARY FIRST DEGREE FOR WHICH HE COULD NOT BE CONVICTED OF.

The above issue was raised in the Applicant's amended application for post-conviction relief by PCR counsel, see 10(c), App., pages 47-48. PCR counsel argued in section 11(c) of the amended application, see App., pages 48-49, that on June 16, 2011 Applicant pled guilty to the following indictments and counts:

2011-GS-21-0012 (Count One)-That Donte Laquawn Capers did in Florence County on or about January 20, 2010, willfully and unlawfully entered the dwelling of Scotty Lee located at ----- in Scranton, without consent and with the intent to commit a crime therein, and the defendant has two or more prior convictions of burglary and/or housebreaking, in violation of the Common Law and Section 16-11-311, S.C. Code of Laws, 1976, as amended.

2011-GS-21-0014 (Count One)-That Donte Laquawn Capers did in Florence County on or about January 7, 2010, willfully and unlawfully entered the dwelling of Brenda Altman located at --- ----- in Johnsonville, without consent and with the intent to commit a crime therein, and the defendant has two or more prior convictions of burglary and/or housebreaking, in violation of the Common Law and Section 16-11-311, S.C. Code of Laws, 1976, as amended.

2011-GS-21-0015 (Count Two)-That Donte Laquawn Capers did in Florence County on or about January 16, 2009, willfully and unlawfully entered the dwelling of Andrea Cartwright located at ----- in Timmonsville, without consent and with the intent to commit a crime therein, and the defendant has two or more prior convictions of burglary and/or housebreaking, in violation of the Common Law and Section 16-11-311, S.C. Code of Laws, 1976, as amended.

Counsel also argued that, App. pp. 48-49, "according to the Applicant's criminal history, Applicant was arrested by the Florence County Sheriff's Office on or about May 20, 2003 for one (1) count of Burglary First Degree and one (1) count of Burglary Second Degree Non-Violent. On September 16, 2003, Applicant pled guilty to a reduced charge of Burglary Second Degree Non-Violent (from Burglary First Degree) and received a Youthful Offender Sentence not to exceed six years. Additionally, Applicant pled guilty on September 16, 2003 to Burglary Second Degree and received a sentence of five years and five years probation. According to Applicant's criminal history, Applicant has no other convictions for burglary.

Applicant asserts that section 17-25-50 of the South Carolina Code of Laws applies to his case. Section 17-25-50 states that '[i]n 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.' Appellant contends that both of his prior burglary offenses occurred on the same date (May 20, 2003) and his convictions resulting from the same occurred on the same date (September 16, 2003). In light of section 17-25-50, Applicant's two prior convictions occurred at times so closely connected in point of time that they may be considered one offense.

Counsel also stated that, lastly, Applicant contends that his plea counsel failed to properly review Applicant's indictments and criminal history and advise him of the Applicable law. Applicant asserts that had he been properly advised that he only had one (1) prior conviction for burglary, Applicant would have proceeded to trial as indicted. As a result of plea counsel's ineffective assistance of counsel, Applicant is entitled to have his convictions pursuant to indictments 2011-GS-21-0012, 0014 and 0015 vacated and remanded for trial."

On cross-examination plea counsel testified at the PCR hearing that he did not take any steps to get a ruling from the plea hearing judge to determine whether the Petitioner's prior burglary convictions could be viewed as closely connected offenses for sentencing purposes. See App. p. 90, lines 4-25 - p. 91, lines 1-7.

The PCR court found that "Applicant's two prior convictions were not used to enhance his sentence. Rather, they were presented as an element of the crime of first degree burglary. Although first degree burglary carries a harsher penalty than lesser degrees of burglary, the sentence is greater because of the offense itself. Thus, the 'closely connected offenses' provision of the recidivist statute has no application in a prosecution for first degree burglary where, as here, the State has not sought a sentence under the recidivist statute." See App. p. 106.

The PCR court erred in its finding because, under the statute, evidence of prior convictions alone can enhance a second

degree burglary, which is punishable up to 15 years in prison, to first degree burglary which is punishable up to life in prison. See S.C. Code Ann. §16-11-311. The charge and sentence are enhanced solely because of the recidivistic nature of the offender. Therefore, offenders charged with first degree burglary based on prior offenses are entitled to the same consideration as other recidivist offenders under 17-25-50.

Counsel should have investigated and properly informed the Petitioner of the circumstances of the Petitioner's prior burglary convictions before advising him to plead guilty, the two prior burglary convictions should not have been considered as two separate offenses for sentencing purposes. The Petitioner is entitled to a resentencing hearing and sentenced for second degree burglary.

In Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999), this Court found that the proper procedure for correcting an improper sentence when a prior conviction was improperly used to enhance a sentence is to remand the case for a resentencing hearing.

Plea hearing counsel's failure to investigate the circumstances of the Petitioner's prior convictions was prejudicial to the Petitioner. This Court held in Ard v. Catoe, 642 S.E.2d 590 (S.C. 2007) that "without a doubt, '[a] criminal defense attorney has a duty to investigate'".

The PCR court's interpretation of §17-25-50 was a construction of the statute in a manner not intended by the legislature. The statute make clear that closely connected

offenses are to be considered one offense for sentencing purposes. The offenses in this case could not have been any closer connected. Had counsel brought the terms of S.C. Code Ann. §17-25-50 to the attention of the plea hearing judge, the court would have been required to sentence the Petitioner for second degree burglary, because, the court's primary function in interpreting a statute is to ascertain the intention of the legislature. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). When the terms of a statute are clear and unambiguous, the court must apply them according to their literal meaning. *Id.* Penal statutes must be construed strictly against the state and in favor of the defendant. Brown v. State, 540 S.E.2d 846, 849 (2001)(citing Williams v. State, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991)). The rule that penal laws are to be construed strictly...is founded...on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which defines a crime, and ordain its punishment... *Id.* (quoting United States v. Wiltberger, (18 U.S.) 5 Wheaton76, 95-96 5 L.Ed. 37, 42 (1820))

In note 2, App. p. 106, the PCR court states that the Petitioner "cannot show prejudice" ---- because "the State possessed evidence Applicant was armed with a handgun while committing the burglaries". The PCR Court's analysis of prejudice is misplaced because prejudice is shown where it is evident that the Petitioner could have received no more that 15-years for

second degree burglary if the prior convictions were properly applied. Plus, the State never charged the Petitioner with being armed while committing any burglary, and no gun were recovered by law enforcement officials. Also, there is no eyewitness statement placing the Petitioner at the scene of any burglary and being armed.

Because of the foregoing the Petitioner would not have pleaded guilty. See App. p. 75, lines 13-22.

CONCLUSION

Petitioner received ineffective assistance of counsel during his guilty plea proceedings and he respectfully ask this Court to denied appellate counsel's motion to be relieved and order further briefing on the foregoing issue and any other issue this Court deems necessary for review.

Respectfully submitted,



Donte L. Capers, #296357

PETITIONER, pro-se

This 22 day of Oct., 2014

DONTE LAQUAWN CAPERS #296357

McCI F-4 B-side
386 Redemption Way
McCormick, South Carolina 29899

October 22, 2014

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OCT 29 2014

S.C. SUPREME COURT

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE: Donte L. Capers vs. State of South Carolina
Pro-se Johnson Petition for Writ of Certiorari
Appellate Case No.: 2014-000097

Dear Clerk:

Enclosed for filing is the Pro-se petition for writ of certiorari in reference to the above entitled matter, along with the Certificate of Service.

Please return to me a clock-stamped copy of the enclosed documents at your earliest convenience.

Thank you for your attention and assistance in this very important matter.

Sincerely,



ENCLOSURE(S)

cc: Joshua L. Thomas, Esquire
Personal file

Donte Cayers #296357
MCCI F-4 B-side
386 Redemption Way
McCormick, SC 29899

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

SCDC

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