

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

S.C. Supreme Court

EDDIE J. PILCHER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000406

PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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

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ISSUE PRESENTED

Was plea counsel ineffective for representing Petitioner despite the conflict of interest in him representing both Petitioner and his codefendant?

STATEMENT

On March 25, 2011, the Spartanburg County Grand Jury indicted Petitioner Eddie James Pilcher, Jr. on one count of armed robbery and one count of attempted first-degree burglary. App. 180-184. On June 21, 2011, Petitioner appeared at a plea hearing before The Honorable Roger L. Couch. James Cheek represented Petitioner and Derrick Balsa represented the State. App. 1.

Also present for a plea was one of Petitioner's two codefendants, Jonathan Goss. App. 4, lines 3-23. The State alleged that on September 9, 2011, at approximately 12:30 a.m., Petitioner, Goss, and a third codefendant, Curtis "Tony" Wilkie, kicked in the door of a residence in Greer. An alarm system activated, and a security camera filmed the three men fleeing. App. 17, lines 12-24; App. 19, lines 5-10; App. 152; App. 163. Later that night, around 10:30 p.m., the same three men accosted a group of people at a cookout in the backyard of a residence. Using firearms, the men demanded valuables and left with a wallet and cell phones. App. 18, lines 4-15; App. 19, line 19—App. 20, line 10.

After a routine plea colloquy, Petitioner pled guilty, and the court accepted the plea. App. 13, line 1—App. 17, line 4; App. 21, lines 4-11. During allocution, plea counsel told the judge that Wilkie "orchestrated everything." App. 22, line 18—App. 23, line 6. ". . . [He] appears to be the person that is amendable [sic] to everybody in that community, introduced these two young men, one who will come before you very briefly, Your Honor, to also enter a plea, into this whole situation and they followed him." App. 23, lines 9-13. The court sentenced Petitioner to two concurrent sentences of twenty-five years. App. 27, lines 14-16.

Shortly thereafter, Goss went before Judge Couch to plea; plea counsel also represented Goss. App. 54, lines 23-24; App. 122; App. 134, lines 20-22. During Goss's allocution, plea counsel told Judge Couch that Goss was a "young man" who cried, "not try[ing] to be so hard and

tough and worried of what the other inmates up there in the cell were thinking.” App. 140, line 23—App. 141, line 6. He stated that Goss’s mother and grandmother were present. App. 141, lines 7-24. He asked Judge Couch “take into account [Goss’s] youth” before deflecting culpability to Petitioner: “[H]e . . . allowed himself to get caught up with this guy, Eddie Pilcher . . . who was before this Court most recently, Your Honor. . . . [T]his young man right here allowed himself to be drawn into this scheme.” He also stated Goss’s girlfriend warned him about the other two and advised him not to join up with them. App. 142, lines 4-24.

He tells me . . . once he wanted to back out of the situation that the comments were made to him we know where you live, we know who your are, we know your family, and we will make sure you don’t tell nobody about this. You go with us. You’re either with us or you’re against us, and in a lack of judgment he went with them, Your Honor.

App. 143, lines 11-17. Noting his “apparent lack of leadership in this endeavor,” Judge Couch sentenced Goss to twelve years for armed robbery and twenty years suspended to twelve for burglary. App. 148, lines 5-22.

On November 21, 2011 Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 29-36. On February 20, 2013, the State filed a return. App. 39-43. On September 17, 2013, Petitioner filed an amended PCR application. App. 37-39. On October 1, 2013, Petitioner appeared at an evidentiary hearing before The Honorable J. Derham Cole. Cristopher D. Brough represented Petitioner and Suzanne H. White represented the State. App. 44.

Petitioner claimed ineffective assistance because plea counsel represented both Petitioner and Goss at their pleas. App. 49, lines 4-15. He testified that counsel never sought from him a release or waiver or otherwise addressed the conflict of interest with Petitioner. App. 49, lines 19-23.

Solicitor Balsa testified that he thought the dual representation was “odd,” and he notified the public defender’s office when he noticed it. His records showed that Dick Whelchel was thereafter substituted. App. 85, lines 3-8.

Plea counsel testified that he told Petitioner that Goss was thinking about a plea, but he was not sure he would be representing him because Goss not comfortable.

I think that Mr. Hall or someone was going to enter that plea but after I represented Mr. Pilcher [sic]. And after the outcome of Mr. Pilcher’s sentencing Mr. Goss decided he’[d] go ahead and enter a plea. So I took some time and prepared him for his plea.

App. 107, lines 10-14. In explaining his statements in the allocutions, he stated that Petitioner “had the wherewithal, the knowledge and experience on how to get it done.” However, he also explained that Petitioner had generally been exhibiting commendable behavior though Wilkie had recently become a bad influence on him:

[Petitioner] was associated with a very good friend of mine’s relative and was dating her and had a good job over there, a very impressive recovery effort after he got out of prison the previous time and had a good job. He talked about how he had gone over and restood [sic] and waited at the meat market or one of those locations to get a good job. And he’d done real well and was really on a good path. And then he met Antonio Wilkie and thing went sour after that for him.

App. 107, line 23—App. 108, line 6.

On February 20, 2014, the PCR court issued its order of dismissal. App. 168-179. The order concluded Petitioner failed to demonstrate that any conflict of interest adversely affected plea counsel’s performance. It also stated that because Petitioner pled before Goss, “nothing that Counsel said at Goss’ plea affected the outcome of Applicant’s plea.” App. 174.

ARGUMENT

THE RECORD DOES NOT SUPPORT THE PCR COURT'S FINDING THAT PLEA COUNSEL'S CONFLICT OF INTEREST DID NOT ADVERSELY AFFECT HIS PERFORMANCE BECAUSE COUNSEL DID NOT PRESENT MITIGATING INFORMATION OF PETITIONER'S RECENT, POSITIVE BEHAVIOR, WHICH WOULD HAVE FRUSTRATED HIS BLAME-SHIFTING STRATEGY DURING GOSS'S ALLOCUTION.

The record does not support the PCR court's finding that plea counsel's conflict of interest did not adversely affect his performance because he did not present mitigating information of Petitioner's recent, positive behavior, which would have frustrated his blame-shifting strategy during Goss's allocution. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001).

[A]n actual conflict of interest occurs . . . when a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting *Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984)). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief." *Staggs v. State*, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007).

The general duty to investigate includes presenting any mitigating evidence to both the prosecution before trial as well as to the trial court for purposes of sentencing. *Id.* at 524-25 (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing”) (quoting 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982)). The trial judge in return has a duty to consider any mitigating evidence in sentencing a defendant:

If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and give serious consideration to any information material to punishment.

State v. Franklin, 267 S.C. 240, 245-46, 226 S.E.2d 896, 897 (1976).

In this case, as an initial matter, an actual conflict of interest existed because Goss’s interests in connection with his sentencing were adverse to Petitioner’s. Goss’s interest was in reducing his culpability by portraying himself as young, impressionable, vulnerable, and a victim of Petitioner’s negative influences. Solicitor Balsa even testified that he thought the dual representation could be problematic. Of course, this portrayal would increase Petitioner’s culpability.

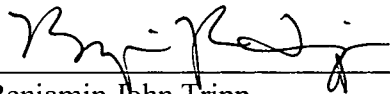
This conflict of interest adversely affected counsel’s allocution for Petitioner. Plea counsel could not in good faith present mitigating information of Petitioner’s recent, positive behavior because doing so would have reduced his credibility while attempting to shift blame to Petitioner during Goss’s allocution. During Petitioner’s allocution, he merely told Judge Couch that Wilkie orchestrated the incidents and was “amendable” to everybody in that community. However, plea counsel never mentioned, as he described at the PCR hearing, how he had a personal connection to Petitioner and how Petitioner had gainful employment and “a very impressive

recovery effort.” Indeed, plea counsel could not in good faith stand up for Petitioner as a well-meaning member of society when minutes later he would have to blame him as lawless and predatory in exculpating Goss. Thus, the PCR court was mistaken in concluding that because Petitioner pled before Goss, “nothing that Counsel said at Goss’ plea affected the outcome of Applicant’s plea.” The record shows plea counsel’s dual representation actually adversely affected his allocution for Petitioner, and the PCR court’s decision was unsupported.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his Petition for Writ of Certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

EDDIE J. PILCHER,

PETITIONER,

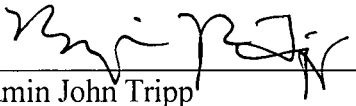
V.

STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

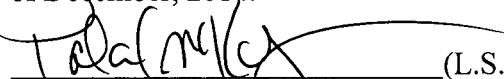
I certify that a true copy of the petition for writ of certiorari in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of December, 2014.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of December, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.