

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2014-000694
Lower Court Case No. 2010-CP-32-1122

Rikam Ikkesh Dozier,.....Petitioner,

v.

State of South Carolina,.....Respondent.

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether petitioner's trial counsel was not ineffective in the underlying proceedings by finding that the cumulative effect of trial counsel's errors in failing to establish neither counsel nor petitioner had a full understanding of the consequences of his plea and the charges against him, failing to provide full and fair representation of petitioner's rights under counsel's Constitutional obligation, and failing to investigate the petitioner's mental capacity which resulted in prejudice to petitioner?

STATEMENT

On February 27, 2008, petitioner was arrested for Armed Robbery, Conspiracy and Kidnapping. On April 2, 2009, before the Honorable R. Knox McMahon, Petitioner pleaded guilty to Armed Robbery and received a sentence of fifteen (15) years. Bradley B. Hansen, Esquire (hereinafter "Counsel") was trial counsel. On advice of counsel no direct appeal as filed.

Petitioner filed an application for post-conviction relief on March 10, 2010. He alleged trial counsel's representation fell below a reasonable professional standard including multiple errors regarding his representation. An evidentiary hearing was held before the Honorable Edgar W. Dickson on November 15, 2012. Petitioner was present and was represented by Aimee J. Zmroczek, Esquire. Respondent was represented by Karen C. Ratigan, Assistant Attorney General. Petitioner testified in his own behalf and he called trial counsel to testify.

On July 1, 2013, Judge Dickson issued an email outlining his findings. A written order signed on February 5, 2014, denying and dismissing the application for post-conviction relief.¹ On August 20, 2014, a petition for writ of certiorari was filed with this Court. Respondent filed a return dated November 20, 2014. On January 15, 2015, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

¹Petitioner asserts that the Order signed by the Circuit Court Judge (App. p.186-194) does not accurately reflect what was directed in the email (App. p. 183-184).

ARGUMENT

Trial Counsel Was Ineffective In Failing To Establish Neither Counsel Nor Petitioner Had A Full Understanding Of The Consequences Of His Plea And The Charges Against Him, In Failing To Provide Full And Fair Representation Of Petitioner's Rights Under Counsel's Constitutional Obligation, In Failing To Investigate The Petitioner's Mental Capacity Resulting In Cumulative Errors

A. Strickland v. Washington Analysis

A claim of ineffective assistance of counsel which must be examined under the standard established in Strickland v. Washington, 466 U.S. 668 (1984) (holding that to establish a claim of ineffective assistance of counsel, a PCR applicant must meet a two prong test by showing (1) that counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness, and (2) that counsel's error was prejudicial, meaning that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). The Sixth Amendment right to counsel is violated where an applicant can show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In this case, if not for the cumulative effect of the ineffective assistance of counsel during his plea, Petitioner would have not entered into his guilty plea, which rendered his guilty plea involuntary.

When determining issues relating to guilty pleas, this Court considers the entire record, including the transcript of the guilty plea and the evidence presented at the hearing on an application for post-conviction relief. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000). To meet this standard, an applicant must demonstrate that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." Id. at 687; accord. Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007). Stated differently, the applicant first "must show that counsel's representation fell below an objective standard of reasonableness," which must be

judged under “prevailing professional norms.” Id. at 687-88. The Court held that the proper standard for judging counsel’s conduct is “simply reasonableness under prevailing professional norms.” Id. at 688 (The Court commented that, while no definitive checklist for accepted professional practices exists, standards such as the American Bar Association’s Standards for Criminal Justice could perhaps serve as useful guides.) Id. at 688-89. Second, the defendant must prove the infliction of prejudice due to counsel’s deficient performance. Id. at 689. To satisfy the prejudice prong, the defendant must prove that counsel’s deficiency was so serious that it deprived the defendant of a fair trial or result. Id. (emphasis added on result)

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. He must also have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 405 S.E. 2d 391 (1991) (citing State v. Hazel, 287 S.C. 392, 271 S.E. 2d 602 (1980)). To ensure the defendant understand the consequences of his guilty plea, the court asks about the punishment imposed. Id., at 435, 405 S.E.2d at 392. The record should indicate the defendant was fully aware of the consequences of the guilty plea. State v. Lambert, 266 S.C. 574, 225, S.E. 2d 340 (1976).

Here, Petitioner was indicted for and pleaded to one count of armed robbery which carries 10-30 years. In the plea transcript, Judge McMahon indicated he could have received a minimum of 30 years to a maximum of 90 years, even though he was never charged nor indicted for more than one armed robbery. (App. p. 29, lines 15-16) At the PCR hearing, when asked what the negotiations were, Counsel testified that several kidnapping charges were dropped.

(App. p. 66-67, lines 24-1) On cross when asked about Petitioner's charges and subsequent indictments, Counsel admitted that Petitioner was only ever charged with armed robbery, conspiracy, and kidnapping, however the kidnapping charge was not true billed by the grand jury. (App. p. 71, lines 1-23). When questioned if Petitioner understood his penalty, which Petitioner understood in his mental evaluation to be 15 years, Counsel "let the documents speak for themselves" (App. p. 74, lines 3-12). Counsel failed to provide an explanation as to why he didn't correct the plea Judge McMahon when he said Petitioner was facing 30-90 years. (App. p.75, lines 7-22) Additionally, Counsel could not explain why he wrote a letter to Petitioner after the plea explaining he was facing 90 years. (App. p. 76, 84-85, lines 13-23, p.) Petitioner testified that counsel told him the maximum he was facing was fifteen (15) years. (App. p. 83-84, lines 23-2) Petitioner said that counsel encouraged him to take the plea which was ten (10) years or his case would go to trial. (App. p.84, lines 14-23) Petitioner testified Counsel advised him not to appeal because he was facing 90 years. (App. p. 85, lines 7-19, p. 86, lines 12-15) Petitioner testified about his prejudice of not knowing what he was facing and was even told he would receive ten (10) years. (App. p. 88, lines 5-16)

B. Lafler v. Cooper Analysis

The U.S. Supreme Court significantly expanded the right to counsel in a pair of decisions issued in March 21, 2012, that established defendants' right to the effective assistance of a lawyer during plea negotiations. The Supreme Court recently recognized a new right of defendants to effective assistance of counsel during the plea-bargaining process. Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012). The U.S. Supreme Court held that defense counsel's legal advice conveyed to a defendant during the plea process must be legally sound and accurate. Id.

Here, Counsel was aware of Petitioner's age. (App. p.17, lines 11-12) Counsel asserts that he asked the Solicitor to remand Petitioner's case to family court. (App. p.72, lines 14-23) There was no documentation or proof of this request. (App. pp.72-73, lines 24-6)

Petitioner was prejudiced because his case was not asked to be remanded to family court. S. C. Code Ann. Section 63-19-20 (2008) states that “. . . a person sixteen years of age who is charged with a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.” Furthermore, S.C. Code Ann. Section 63-19-1210 (3) (2008) states that “. . . when an action is brought in a circuit court which, in the opinion of the judge, falls within the jurisdiction of the family court, he may transfer the action upon his own motion or the motion of any party.” Counsel should have asked or documented the inquiry allegedly made to the solicitor to have the case remanded to the family court and allow it to hear the case. The Solicitor gives no indication that this request was made. (App. p.15, lines 16-21; App. p.16, lines 10-15) Additionally, counsel should have argued that Petitioner's case fell within the jurisdiction of the family court. Successfully establishing the jurisdiction of the family court would have allowed counsel to then have the case transferred to family court on his own motion. Petitioner testified he did not understand the differences with Family Court and General Sessions. (App. p.83, lines 1-9) Additionally, Counsel admitted to having “red flags” regarding Petitioner's competency. (App. p. 24, lines 14-24) It is obvious that Counsel did not read the report since it contained obvious errors as to Petitioner's understanding of his crimes and penalties. (App. p.116) Counsel admitted that he did not raise Petitioner's competency after having him evaluated. (App. p.78, lines 5-16)

Counsel continuously provided improper information regarding the charges. To be valid,

a plea must be entered into knowingly, voluntarily and intelligently. See, e.g., Moore v. State, 399 S.C. 641, 647, 732 S.E. 2d 871, 873 (2012) (citing Patton v. United States, 281 U.S. 276, 312-13 (1930), overruled on other grounds by Williams v. Florida, 399 U.S. 78 (1970)). Counsel communicating proper information to a defendant is critical to an intelligent plea. (emphasis added) When counsel advises his client as to any plea offers his guidance and legal conclusions must be completely competent in order to reach the standard of effective assistance. Lafler, 132 S. Ct. 1376 (2012). The U.S. Supreme Court held that defense counsel's legal advice conveyed to a defendant during the plea process must be legally sound and accurate. Id. Here, the record is wrought with Petitioner's misunderstanding because of Counsels providing incorrect or incomplete advice regarding plea offers from the mental evaluation (App. pp. 73-74, lines 21-8; App. p.108-118;) to the charges he was facing (App. p.32-38; App. pp.75-76, lines 7-20; App. p.180; App. p. 120) Sentencing questions are involved in all plea discussions between defendants and defense counsel. While the U.S. Supreme Court has not issued a formal opinion on the question of whether a defendant receives ineffective assistance if defense counsel provides incorrect sentencing information during a plea, the Court's holdings in related ineffective assistance cases indicate a willingness to expand the scope of the Sixth Amendment. Hill v. Lockhart, 474 U.S. 52 (1985), (the defendant alleged he was provided misinformation regarding parole eligibility.) In order to protect defense counsel from unintentionally providing defendants incorrect sentencing information, attorneys should advise the defendant to be prepared to serve the entire sentence. Defense counsel must ensure that the client understands and is aware of the potential amount of prison time he or she is facing, notwithstanding any potential credits or parole approval. Additionally, the elements of the crime and length of the sentence it carries clearly relate directly to the crime and are necessary for a client to make a

knowing and intelligent plea.

“To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’” North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Holden v. State, 393 S.C. 565, 572-73, 713 S.E.2d 611, 615 (2011). Counsel fell below the Sixth Amendment standard in failing to take the time to consider and offer competent advice regarding the consequences of the plea.

Petitioner was prejudiced by this because he did not understand his elements nor the potential penalties. Additionally, this misinformation induced Petitioner into not filing a motion to reconsider the sentence or appealing the same. (App. pp.23-30) When something does go wrong at the plea stage, a direct appeal from a plea is not automatic. Under South Carolina Appellate Court Rule 203(d)(B)(iv), the defendant appealing from a plea must show that there is an issue that can be reviewed on appeal. He must file, within 10 days of the notice of appeal, a written explanation identifying the factual basis for the appeal, the issues, and how the issues were raised and ruled upon below, or, if not raised and ruled upon below, an explanation for how the issues can be reviewed on appeal with citation to legal authority. Defense counsel should advise their clients regarding the limitations of a direct appeal from a plea.

Clarifying what the State and defense believe to be the specific aspects of the plea prior to going on record will limit any confusion for the defendant. the first aspect is more egregious because a criminal defendant, informed that a prosecutor expects a particular sentence to be

imposed, is likely to conclude that a prosecutor would only have such an expectation in certain circumstances, such as, if the prosecutor intended to act consistently with that expectation, thus suggesting to the defendant that a deal had been reached on what the prosecutor would argue at a later sentencing proceeding. Or, if the prosecutor expects a certain sentence to be imposed, then presumably, regardless of whether a deal had been made as to what he intended to advocate at the time of sentencing, his expectation would be a product of his experience and the known record of the sentencing judge in similar cases.

Counsel indicated that the negotiation with the Solicitor was ten (10) years. (App. p. 67, lines 15-22) Counsel then admitted to “Judge Shopping” to receive that negotiation instead of placing it on the plea record. (App. p 67, lines 7-13) The Solicitor went to the line of outlining the negotiation without clearly stating it on the record. (App. pp.15-16, lines 24-5) Petitioner was prejudiced because he was led to believe he was receiving a ten (10) year sentence. (App. p.88, lines 5-6) Here, the solicitor acknowledged in the plea that he did not oppose the minimum ten (10) years (App. p.9, lines 15-20, p.15-16, and lines 23-2) and that was communicated to Petitioner who indicated that is what he understood the plea agreement to be. Had Petitioner known he would receive more than ten (10) years, he indicated he would not have gone forward with the plea. (App. p. 85, lines 5-11)

Counsel’s ecclesiastical approach to criminal cases calls into question his ethical obligations under the ABA and South Carolina Rules of Professional Conduct. (App. 68, lines 11-22; App. p.183) Counsel’s approach to criminal representation conflicts with his Constitutional obligation to provide full and fair representation. The Sixth Amendment right to counsel requires not only that a person accused of a crime have the assistance of counsel for his defense, but also that such assistance be “effective.” This is so whether the defendant’s counsel is

appointed or retained. Am. Jur. 2d, Criminal Law § 1223. Petitioner asserts this includes evaluation of all the evidence, not simply negotiating a plea. “[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases.” Mathews v. Eldridge, 424 U.S. 319, 344 (1976). Thus, the required elements of due process are those that “minimize substantively unfair or mistaken deprivations” by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266-67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 120 S. Ct. 1579 (2000) (amendment of judgment to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute). The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel. Here, Counsel explains his unique approach to criminal cases which does not seem to comport with constitutional requirements. Petitioner was prejudiced because he could not consider the impact this may have on trial. In Premo v. Moore, after Moore pleaded guilty on advice of counsel, he alleged that trial counsel was ineffective in advising him to plead guilty without first moving to suppress his statements to the police. 131 S. Ct. 733; 178 L. Ed. 2d 649 (2011). Petitioner did not understand what Constitutional rights he was waiving by agreeing to hire this approach by Counsel.

C. United States v. Cronin Cumulative Analysis

“The Court is concerned that the cumulative effect of these errors of counsel may have

prejudiced the Applicant. However, our Courts have not recognized cumulative errors of counsel as cognizable grounds for relief under the PCR Act.” (App. p. 183) In his email, Judge Dickson found numerous instances of ineffective assistance of counsel the combination of which prejudiced the Applicant.” (App. p. 183) Judge Dickson indicates he would have found counsel ineffective in failure of counsel and applicant to understand potential sentencing range at the time of his guilty plea, in failing to fulfill his Constitutional obligation to provide full and fair representation, including preparing for the possibility of trial, and to fully explore applicant’s mental capacity combined with his age. (App. p.183)

The language of the Strickland opinion suggests that the Supreme Court anticipated that appeals would involve multiple claims of deficiency by counsel and that courts should review the resulting prejudice cumulatively. John H. Blume & Christopher Seeds, Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1165 (2005)(citing United States v. Bagley, 473 U.S. 667, 683 (1983)). In the deficiency prong of the two-part test, the Court specifically focused on defense counsel’s “performance.” Strickland, 466 U.S. at 687. As Professor Blume and Christopher Seeds argue, the “cumulation [of deficiencies] begins in the first prong.” Blume & Seeds, supra, at 1169 n.58 (citing Strickland, 466 U.S. at 690). Additionally, the Court elaborated on the overall performance of counsel during representation, holding that a defendant proves deficient performance by showing that “counsel made errors so serious” that the defendant was deprived of the constitutionally adequate representation guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687 (emphasis added).

This Court had the opportunity most recently to address the issue in a recent decision, but declined to do so because the case was decided on other grounds. Walker v. State, 407 S.C. 400,

405, 756 S.E.2d 144, 146 (2014). Here, Judge Dickson cited several cases wherein the issue has been in front of the Court, but yet to decide the issue. In Green this Court wrote, “Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.” Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002), compare State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (accumulation of errors warranted reversal, but this Court also found each individual error caused prejudice), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), with State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together).” 351 S.C. at 197, 569 S.E.2d at 324. Here, Judge Dickson incorrectly found that, in this case, the multiple errors by trial counsel denied respondent the right to adequate representation.

Strickland provides an almost “insurmountable test” Martin C. Calhoun, Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 GEO. L.J. 413, 414-15 (1988) for criminal defendants attempting to prove ineffective assistance of counsel. Id.; see also Strickland, 466 U.S. 668, 687 (1984). The odds are against challenges for ineffective counsel primarily because of the U.S. Supreme Court’s firm directive that “[j]udicial scrutiny of counsel’s performance must be highly deferential” to the professional soundness of defense counsel’s conduct at trial. Id. Indeed, to prevail under Strickland, criminal defendants must overcome the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.

Although faced with another opportunity to utilize cumulative analysis a year later, this Court took a different path in assessing ineffective assistance of counsel in Nance v. Frederick,

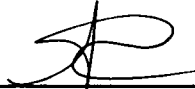
358 S.C. 480, 490 596 S.E.2d 62, 67 (2004), vacated and remanded by Ozmint v. Nance, 543 U.S. 1043, 1043 (2005). In that case, after the defendant exhausted his direct state appeals and the PCR court denied him relief on numerous claims of ineffective counsel, Id. At 483, this Court reversed and remanded for a new trial, applying the Cronic per se prejudice analysis. See Id. at 490, 596 S.E.3d at 67 (quoting United States v. Cronic, 466 U.S. 648, 656-57 (1984)). Instead of analyzing each claim of ineffective counsel under Strickland, this Court correctly utilized its 1984 companion and concluded that counsel's performance was so egregious that his "trial presentation, in its entirety, represent[ed] a classic Cronic ineffectiveness case ... because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of [the defendant's] trial." Id. at 488, 596 S.E.2d at 66 (citing Cronic, 466 U.S. at 658-59). This Court again revisited, but did not reach cumulative analysis in Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) in which the PCR judge found cumulative prejudice resulting from multiple nonprejudicial deficiencies. See Id. at 527, 657 S.E.2d at 775.

Judge Dickson incorrectly found that the cumulative effective of Counsel's errors independently established prejudice and deprived Petitioner of the right to adequate counsel. Judge Dickson's finding that Petitioner was not prejudiced by the cumulative effect of multiple errors committed by trial counsel is not supported by the record. The finding must be reversed.

CONCLUSION

Based on the foregoing argument, Petitioner's guilty plea should be set aside.

Respectfully submitted,



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A.J.Z. Law Firm, LLC
Attorney for Petitioner

This the 19th day of March, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

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State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Walter Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served upon Mr. Rikam Dozier#334052, Lee Correctional Center Sumter NS 2254, 990 Wisacky Highway, Bishopville, SC 29010 on this 19th day of March, 2015.



Aimee J. Zamroczek
A.J.Z. Law Firm, LLC

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of March, 2015.

Christina Metz (L.S.)

Notary Public for South Carolina

My Commission Expires: 9/25/16.