

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 14 2015

Certiorari to York County

S.C. Supreme Court

J. Ernest Kinard, Jr., Circuit Court Judge

JAMES E. DIAGO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002109

JOHNSON PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ISSUE PRESENTED

Did plea counsel render ineffective assistance by failing to object to Petitioner being convicted of and sentenced for two counts of possession of a firearm during the commission of a violent crime in violation of the Double Jeopardy Clause where the offenses arose out of a single course of conduct?

STATEMENT

On March 22, 2012, a York County grand jury indicted Petitioner for murder (2012-GS-46-1260), possession of a firearm during the commission of a violent crime (2012-GS-46-1260A), attempted murder (2012-GS-46-1261), possession of a firearm during the commission of a violent crime (2012-GS-46-1261A), and possession of a firearm by a person convicted of a felony (2012-GS-46-1262). App. 155 – 156; App. 159- 160; App. 163-164. On December 17, 2012, Petitioner entered guilty pleas to all counts. Harry Dest and Phil Smith represented Petitioner. Kevin Brackett and Willy Thompson represented the state. App.1. The Honorable Michael Nettles sentenced Petitioner to forty years' imprisonment for murder, thirty years' imprisonment for attempted murder, and five years' imprisonment for each of the firearms charges. He ordered all sentences to be served concurrently. App. 57, line 9 – App. 58, line 5; App. 157 – 158; App. 161-162; App. 165. Petitioner did not appeal.

On June 7, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 87-96. The matter proceeded to an evidentiary hearing on August 4, 2014 before the Honorable J. Ernest Kinard. W. Michael Hemlepp, Jr. represented Petitioner. J. Rutledge Johnson represented the state. App.102. By an order filed on September 26, 2014, Judge Kinard denied Petitioner relief from his convictions and sentences. App. 145-154.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Plea counsel rendered ineffective assistance by failing to object to Petitioner being convicted of and sentenced for two counts of possession of a firearm during the commission of a violent crime in violation of the Double Jeopardy Clause where the offenses arose out of a single course of conduct.

Relevant Facts

Petitioner and Jackie Craine were romantically involved and had a daughter in common. When Jackie ended the relationship and threatened to remove the daughter from Petitioner's life permanently, Petitioner was devastated. Petitioner met with Jackie on the morning of January 5, 2012 to discuss the future of their relationship. App. 10, lines 5 – 17. Jackie, Petitioner, their daughter, and Jackie's son left in the same car. After taking their daughter to daycare, Jackie dropped Petitioner off at a friend's apartment. App. 10, line 23 – App. 11, line 7. However, Petitioner took the keys preventing Jackie from leaving. App. 11, lines 7 – 13. Jackie called the police while Petitioner walked away. Petitioner returned shortly – armed with a gun. Petitioner shot into the car, killing Jackie. App. 11, lines 13 – 20. Jackie's son, Jackel C., climbed out the car's window. Although Jackel C. was shot in the knee, he managed to run away. App. 11, lines 20 – 25. The police arrived very quickly. Petitioner turned himself in immediately and admitted what he had done. App. 12, lines 2 – 20.

At the guilty plea proceeding, Petitioner entered guilty pleas to murder, possession of a weapon during the commission of a violent crime, attempted murder, possession of a weapon during the commission of a violent crime, and possession of a weapon by a person previously convicted of a violent crime. App. 12, line 25 – App. 13, line 15. In short, Petitioner pled guilty to

two counts of possession of a weapon during the commission of a violent crime for conduct arising out of the same course of conduct.

At the PCR hearing, Petitioner faulted plea counsel for allowing him to plead guilty to two counts of the same offense arising from the exact same incident. App. 107, lines 10 – 12; App. 115, lines 1 – 25. According to Petitioner, plea counsel never discussed with him the elements of possession of a weapon during the commission of a violent crime. App. 116, lines 7 – 11. The record revealed, and Petitioner informed the PCR judge, that plea counsel failed to object to his pleading guilty to both offenses on the basis of double jeopardy. App. 117, lines 1 – 16.

Plea counsel admitted he failed to object to the guilty plea encompassing two counts of possession of a weapon during the commission of a violent crime. Plea counsel did not think Petitioner's convictions violated double jeopardy. Plea counsel explained his reasoning:

Under the law I don't think it would be found to be double jeopardy. It's my understanding one count applied to the shooting of Ms. Craine and one count applied to the shooting of the juvenile. Both of those are considered violent acts under our law and both of those occurred while in the possession of a handgun. So just as he could be charged both for shooting her and him, he could be charged as to possessing a firearm during both those separate instances.

App. 133, lines 17 – 25. Plea counsel explained that his understanding of double jeopardy law would require an examination of the elements of the offenses. App. 140, lines 2 – 7. When confronted with the fact that the two offenses at issue had the same elements, plea counsel responded that one element was different – the violent crime. For one charge, the violent crime alleged was murder and for the other the violent crime alleged was attempted murder. App. 140, lines 8 – 25.

At the conclusion of the evidentiary hearing, the PCR judge explained his reasoning for denying Petitioner relief on this claim. The PCR judge characterized the charge as an “add-on penalty for violent crimes” created by the legislature. Further, he cited State v. Bolden, 303 S.C. 41,

398 S.E.2d 494 (1990) to say “the purpose of double jeopardy was just to prohibit judges from adding greater punishments than the legislature provided.” The PCR judge explained that Petitioner had been charged with two crimes of violence. App. 141, line 25 – App. 142, line 19. Additionally, the PCR judge examined a hypothetical:

So you’ve got two separate counts and if he, for instance, were to have trials and was found guilty of both and then appealed and one of them for set aside, the other one would stand if it was unsuccessful, so I can’t see the double jeopardy argument surviving although it’s reasonable to make.

App. 142, lines 20 – 25. Finally, the PCR judge reasoned that Petitioner suffered “no harm” because the plea judge “did not impose additional penalties.” Essentially, the PCR judge found Petitioner “was not given any active time for it” and, therefore, suffered no prejudice even if plea counsel erred in failing to object. App. 143, lines 1 – 8.

In the order denying relief, the judge noted Petitioner’s allegation that plea counsel provided ineffective assistance by failing to object to the double jeopardy violation in light of the charges arising out of one event and involved the use of only one firearm. App.147. The order further noted plea counsel’s testimony that he did not object to the two indictments “because the charges constituted two separate violent acts under S.C. law.” Further, the order explained that because the sentences were to be served concurrently, Petitioner “incurred no prejudice even if this double jeopardy claim were valid, which it is not.” App. 149

Discussion

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb” U.S. Const. Amend V. Further, the South Carolina Constitution provides “No person shall be subject for the same offense to be twice put in jeopardy of life or liberty....” S.C. Const. Art. I, § 12. “The Double Jeopardy Clause protects against a second prosecution for the same

offense after acquittal or conviction and protects against multiple punishments for the same offense.” State v. Easler, 327 U.S. 121, 130 (1997)(citing Brown v. Ohio, 432 U.S. 161 (1977)).

In Blockburger v. United States, 284 U.S. 299, 304 (1932), the United States Supreme Court explained the test for determining a violation of the double jeopardy clause. That test requires an examination of the elements of the offenses alleged to have been violated. “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other one does not.” Id. Further, the Court provided that “[a] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.” Id. (internal quotations omitted).

According to this Court, “[t]he double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” State v. Bolden, 303 S.C. 41, 44, 398 S.E.2d 494, 495 (1990). After explaining that the legislature “intended to allow cumulative punishment” for possession of a weapon during the commission of a violent crime and the violent crime, this Court held that Blockburger “is not controlling where legislative intent is clear from the face of the statute.” Id. Thus, an individual could be punished for both armed robbery and possession of a weapon during a violent crime. Id.


Petitioner’s argument is easily distinguished from the argument in Bolden. Petitioner does not ask this Court to hold that he could not be punished for murder, attempted murder, and possession of a weapon during a violent crime; rather, Petitioner asks this Court to hold that he cannot be convicted of and sentenced for two counts of possession of a weapon during a violent crime when both counts arise out of a single course of conduct. The state indicted Petitioner for

“possession of a firearm while committing the violent crime of murder” and “possess[ion of] a firearm while committing the violent crime of attempted murder.” App. 156; App. 160. Applying the elements test derived from Blockburger reveals the two charges have the same elements – that Petitioner possessed a firearm during the commission of a violent crime, and therefore, violate the Double Jeopardy Clause. The nature of the alleged violent crime is irrelevant and not an element of the offense. All that was required was for the state to prove that Petitioner possessed the firearm while engaging in a crime of violence. Petitioner engaged in a single course of conduct, which resulted in multiple criminal charges; however, Petitioner’s possession of a weapon during the violent crimes was a single act and should have resulted in a single charge, single conviction, and single sentence.

CONCLUSION

Appellant respectfully requests this Court grant a writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

JAMES E. DIAGO,

PETITIONER,

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STATE OF SOUTH CAROLINA,

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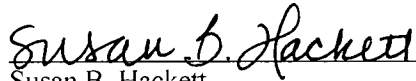
PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Enrico Diago states:

1. She is an 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 August 4, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has 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 James Enrico Diago.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of April, 2015

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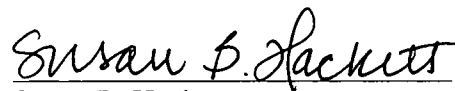
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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

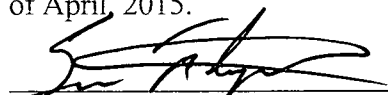
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and James Enrico Diago #200602, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 14th day of April, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of April, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.