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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

DIDIER VAN SELLNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-002472

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner was denied his Sixth Amendment right to effective assistance of counsel where plea counsel advised Petitioner to plead guilty to the offense of armed robbery even though he merely handed the bank clerk a note stating that he would "shoot" but had no representation of a deadly weapon required to support a conviction for armed robbery under S.C. Code Ann. § 16-1-330(A), as analyzed in State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002)?

STATEMENT OF THE CASE

On March 6, 2012, Sellner waived presentment and pled guilty to the offense of armed robbery before the Honorable Edgar W. Dickson. App. 12, ll. 13 – 13, l. 5. Sellner was represented by Margaret Hinds, and the State was represented by assistant solicitor Donald Sorenson. App. 1. Judge Dickson accepted Sellner's guilty plea and sentenced him to twelve years incarceration. App. 16, ll. 17-24; App. 21, ll. 8-11.

On February 11, 2013, Sellner filed an application for post-conviction relief. App. 23 – 34. The State filed its Return on May 7, 2013. App. 35 – 41. On May 29, 2014, an evidentiary hearing was held before the Honorable Maité Murphy. Sellner was represented by Michael Culler, and the State was represented by Assistant Attorney General Megan Harrigan Jameson. App. 42. Judge Murphy issued her Order of Dismissal on September 29, 2014, denying Sellner's PCR application. App. 76 – 83.

This Petition for Writ of Certiorari follows.

ARGUMENT

Petitioner was denied his Sixth Amendment right to effective assistance of counsel where plea counsel advised Petitioner to plead guilty to the offense of armed robbery even though he merely handed the bank clerk a note stating that he would "shoot" but had no representation of a deadly weapon required to support a conviction for armed robbery under S.C. Code Ann. § 16-1-330(A), as analyzed in State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002).

Relevant Facts

Plea counsel Hinds was deficient in advising Sellner to plead guilty to armed robbery because his conduct did not meet the elements of the offense. Sellner admitted that he entered a bank and passed the clerk a note that requested cash and threatened "to shoot" if she did not comply, but maintained that he was not armed with a weapon or any item that could be reasonably believed to be a weapon. App. 11, ll. 1-16; App. 17, l. 9 – 18, l. 4; App. 46, l. 6 – 47, l. 4. This Court made clear in State v. Muldrow, 348 S.C. 264, 269, 559 S.E.2d 847, 850 (2002), that "words alone are not sufficient under the second prong [of S.C. Code Ann. § 16-1-330(A)] to support a conviction for armed robbery." Had he gone to trial Sellner would have been entitled to a directed verdict on the charge of armed robbery and could have requested an instruction on the lesser included offense of common law robbery, also known as strong armed robbery. Muldrow, 348 S.C. at 269-70, 559 S.E.2d at 850. A conviction on the lesser offense would have only subjected him to a sentencing range of zero to fifteen years and would not have qualified Sellner for life imprisonment without the possibility of parole. See S.C. Code Ann. § 16-11-325; S.C. Code Ann. § 17-25-45. Thus, Sellner was prejudiced by Hinds' deficient advice.

Guilty Plea Hearing

There were no negotiations or recommendations with respect to Sellner's guilty plea, exposing him to a sentence of ten to thirty years incarceration. App. 7, ll. 12-25. Hinds told the plea judge that she believed it was in Sellner's best interest to plead guilty because "there was a

potential here for the State to seek life without parole if they had wanted to do that."[1] App. 10, ll. 17-25. Sellner expressed his desire to plead guilty but stated that "some of the numbers that she [plea counsel] was talking about I felt were kind of excessive, considering that there was no weapon and no resisting arrest." App. 11, ll. 1-16.

In its recitation of the facts that it would prove at trial, the solicitor said that the incident occurred on September 8, 2011, at approximately 10:00 a.m. at the South Carolina Bank and Trust ("SCBT"). Sellner went up to one of the tellers at the bank, Ms. Hildebrandt, and handed her a note "requesting her to give him Three Thousand Dollars in used bills, indicating to her not to give him any dye packs, and that if she did not comply he would shoot her." App. 13, ll. 11-21. The teller gave Sellner $492.00, after which he fled the scene. App. 13, l. 22 – 14, l. 1. Sellner was found at a local motel, allegedly wearing the same clothes worn during the robbery. App. 14, ll. 1-5. Sellner gave an incriminating statement, admitting his involvement, to law enforcement. App. 14, ll. 6-9. The State also noted Sellner's prior record, primarily from New York, which included several robbery convictions since 1995 and drug convictions, for which he spent approximately ten years incarcerated.[2] App. 14, ll. 10-14.

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[1] Pursuant to S.C. Code Ann. § 17-25-45, the solicitor has the discretion to seek life without the possibility of parole ("LWOP") for a defendants charged with a crime classified as "most serious offense" or "serious offense" based on the defendant's prior convictions. The solicitor must provide written notice of his or her intention to seek LWOP not less than ten days prior to trial. If the defendant is subsequently convicted, the trial court has no discretion to issue a lesser sentence.

[2] Sellner also told the plea court about a prior attempted murder charge in New Jersey, for which he served eight and a half years. App. 4, ll. 2-4. At the PCR hearing, he stated that he was just being honest with the plea judge, but that Hinds told him that the attempted murder offense did not appear on his "rap sheet" and could not be considered without the State going through an additional process with the State Attorney General in New Jersey due to it being sealed. App. 59, l. 3 – 61, l. 6.

Terry Chapman, an employee of SCBT, also addressed the court, indicating that though it may not seem like "the most sophisticated and threatening robbery that the Court has ever seen, it was to Ms. Hildebrandt and all the bank employees that were present." App., 13, ll. 9-10; App. 14, ll. 2-25. He said the Ms. Hildebrandt is eighty-two years old and that this was a traumatic event for her. App. 15, ll. 1-3.

Sellner addressed the court and clarified that he did not "target" Ms. Hildebrandt and just went to the teller whose window was open after waiting in line. He also indicated that the reason he left with only $492.00 was because she was counting slowly and asked "is that enough" after giving him that amount. He never made any additional threat to her beyond what was written in the note. App. 17, l. 9 – 18, l. 4.

Judge Dickson sentenced Sellner to twelve years incarceration. App. 21, ll. 8-11.

Post-Conviction Relief Hearing

Sellner contended that plea counsel Hinds was ineffective in advising him to plead guilty to the offense of armed robbery when he did not have a weapon during the robbery and was only "armed" with a threatening note. App. 44, ll. 16-23. Sellner admitted that he committed a crime, but said that the crime was not armed robbery. He testified: "I robbed a bank with a note and I did state that I had a gun and Ms. Hinds claims that because I said I had a gun that it fit the elements of Armed Robbery." App. 46, l. 6 – 47, l. 4. Hinds told him that they "were pretty much stuck." The armed robbery could not be reduced, so he would have to plead guilty or get life in prison based on his prior record. App. 47, l. 18 – 48, l. 4; App. 50, ll. 3-13.

During his incarceration after his plea hearing, Sellner conducted research that he said indicates that to commit armed robbery, "you have to present a representation or something that would be considered reasonably a weapon." App. 53, l. 23 – 54, l. 3. Sellner had nothing in his

hand and did not stick his hands in his pockets or make any other action to indicate that he had a weapon. App. 43, ll. 3-7; App. 43, ll. 15-19; App. 56, l. 11- 57, l. 11. Thus, he testified that, at most, he could be charged with entering a bank with intent to steal. App. 47, ll. 5-10. Hinds did not clarify that distinction to Sellner and told him that "this met all the elements [of armed robbery]" "because [he] said [he] had a gun." App. 43, ll. 7-9; App. 57, ll. 6-13. Sellner testified that had he understood that his conduct did not satisfy the elements of armed robbery, he would not have pled guilty to that offense. App. 53, ll. 23-25.

Hinds testified that Sellner "told [her] from day one that he didn't really have a gun." App. 66, ll. 12-13. They discussed the elements of armed robbery and it was her belief then, and at the time of the PCR hearing, "that the representation was the note." App. 66, ll. 13-15; App. 70, ll. 3-7. She confirmed that the Orangeburg Department of Public Safety report and the supplemental report of Sergeant Hay both indicated that Sellner ***was not armed*** and made ***no representation*** that he was armed other than the note. App. 66, l. 23 – 67, l. 21. During Sellner's interview with Orangeburg police and the FBI, he admitted his involvement but gave no indication that he was armed or represented that he was armed other than the note. App. 67, l. 22 – 68, l. 5. The Orangeburg Department of Public Safety checklist indicated, under the heading of robbery, "no mask, threats, intimidation, no weapon." App. 68, ll. 6-13. Hinds also confirmed that not only did none of the tellers say Sellner was armed or represented that he was armed other than the note, one of them affirmatively said that she did not see a gun. App. 68, ll. 17-24. Additionally, none of the eyewitness statements referenced any movement of Sellner's hands to represent a weapon. App. 68, l. 25 – 69, l. 4. Hinds confirmed that she was referring only to the note when she said that Sellner "did not have a weapon although he did make the teller think he had a weapon" at the plea hearing. App. 69, ll. 5-8.

Assistant Attorney General Harrigan argued that Sellner committed "an armed robbery despite the fact that he might not have made a physical manifestation." App. 71, ll. 5-8. Harrigan said that the South Carolina armed robbery statute is "very clear that a representation of a deadly weapon either by actions or words that he's armed is enough." App. 71, ll. 9-11. She argued that because Sellner was "appropriately charged," his attorney cannot be found deficient. App. 71, ll. 15-20.

PCR counsel argued that the statute must be construed narrowly against the State and that the actions taken by Sellner do not fall under the ambit of the statutory language. App. 73, ll. 9-23. He argued that "Sellner was under some duress about the potential life sentence that he thought he was facing and he relied on the advice of his counsel." However, plea counsel's advice was in error because Sellner's crime did not meet the statutory requirements for armed robbery and he detrimentally relied on her advice in accepting the plea offer. App. 74, ll. 1-7.

Order of Dismissal

The PCR court found that Sellner failed to prove that Hinds' performance fell below the standard required and there was no resulting prejudice from the alleged deficiencies. The PCR court noted that Sellner "concedes that he entered the bank and passed the teller a note demanding money and threatening to shoot her if she did not comply." The court found that "[b]y passing the teller a note threatening her with a deadly weapon, Applicant's conduct comported to the armed robbery statute by alleging with words that he was armed with a deadly weapon." Therefore, the PCR court found that Hinds was not deficient for advising Sellner to plead guilty to armed robbery. App. 81. The PCR court also found that Sellner failed to establish any resulting prejudice because Sellner testified that "he pled guilty to avoid a mandatory life sentence and that he was guilty of the

conduct giving rise to the charge." App. 82. Accordingly, Judge Murphy denied Sellner's PCR application.

Discussion

Standard of Review and Right to Effective Assistance of Counsel

The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014). This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Id.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the

result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970).

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

Deficiency of Plea Counsel's Representation

The basis of the PCR court's determination that Hinds' conduct did not fall below the standard required was its own flawed interpretation of the armed robbery statute. The PCR judge erred as a matter of law in determining that "by passing the teller a note threatening her with a deadly weapon, Applicant's conduct comported to the armed robbery stature by alleging with words that he was armed with a deadly weapon." App. 81.

The relevant portion of the South Carolina armed robbery statute states:

> A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed ***while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon***, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence.

S.C. Code Ann. § 16-11-330(A) (emphasis added). This Court considered the language and requirements of the armed robbery statute in State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002). In Muldrow, the defendant entered a store and asked the clerk for a pack of cigarettes. 348 S.C. at 267, 559 S.E.2d at 848-49. He then passed a note to clerk that read: "Give me all your cash or I'll shoot you." Id. When the clerk asked if he was serious, Muldrow responded "yes" and told her to hurry up before he shot her. Id. at 267, 559 S.E.2d at 849. On appeal, Muldrow argued that "his motion for a directed verdict should have been granted because there was no evidence he was armed with a deadly weapon or that he used a representation of a deadly weapon as required under S.C. Code Ann. § 16–1–330(A)." Id.

In analyzing the statute, this Court found that the State can prove armed robbery be establishing the commission of a robbery along with one of two additional elements: "(1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, ***while using a representation of a deadly weapon or any object*** which a person present during the commission of the robbery reasonably believed to be a deadly weapon." Id. at 267-68, 559 S.E.2d at 849 (emphasis added). Under the first prong, the presence of a weapon may be inferred from circumstantial evidence. Id. at 268, 559 S.E.2d at 849. However, the issue of whether words alone are sufficient to establish the element of a deadly weapon was one of first impression. Id. This Court held that, in line with the general rule, "words alone are not sufficient under the first prong of the statute." Id.

It then considered whether words alone are sufficient under the then newly added second prong of § 16–11–330(A), finding that resolution would turn on the meaning of the phrase "while using a representation of a deadly weapon." Id. General rules of statutory construction require that "the words of a statute must be given their plain and ordering meaning without resort

to subtle or forced construction to limit or expand the statute's operation." Id. The Court is also bound to construe a penal statute strictly against the State and in favor of the defendant. Id. (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). This Court found that "[a] plain reading of the statute indicates words alone are not sufficient under the second prong to support a conviction for armed robbery." Id. at 269, 540 S.E.2d at 849-50. If the legislature had intended for the statute to include "simply an allegation of being armed, it would have stopped after the phrase 'while alleging, either by action or words, he was armed.'" Id. The addition of the second prong was instead intended to ensure that use of an object that is not actually a deadly weapon will support a conviction for armed robbery. Id. at 269, 540 S.E.2d at 850. Thus, even under the second prong, "the State must still show evidence corroborating the allegation of being armed *i.e.*, the use of a physical representation of a deadly weapon, to establish armed robbery." Id. Accordingly, this Court found that there was "no evidence of a deadly weapon or a physical representation of a deadly weapon" in Muldrow, where the threat to shoot was made in a note and verbally. Id.

However, the evidence in Muldrow was legally sufficient to sustain a conviction on the lesser include offense of strong armed robbery because it does not contain the element requiring the use of a deadly weapon. Id. at 269-70, 540 S.E.2d at 850. Armed robbery is the commission of common law robbery with a deadly weapon.[3] Id. (citing State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985)). This Court noted that "[w]here the evidence is insufficient to sustain a conviction on the greater offense but is legally sufficient to support a conviction on the lesser,

[3] "Strong arm robbery is defined under common law 'as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'" Abney v. State, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014) (quoting State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003)).

the Court on appeal may direct the entry of judgment on the lesser offense." Id. Thus, it remanded the case for entry of judgment on the charge of strong arm robbery and sentencing on that charge. Id.

Similarly in the present case, the evidence indicated that Sellner presented a note that threatened to shoot the teller but had no physical representation of a deadly weapon or any object which a person might reasonably believe to be a deadly weapon. App. 13, l. 11 – 14, l. 1; App. 66, l. 23 – 69, l. 4. Hinds confirmed that there was no allegation that Sellner actually had a weapon or made any motion to make anyone believe that he had a weapon. App. 69, ll. 5-8. Nonetheless, she believed, both at the plea hearing and at the PCR hearing, that the note that Sellner passed to the teller constituted "the representation" required under the statute. App. 66, ll. 13-15; App. 70, ll. 3-7. Given Muldrow's explicit holding that the armed robbery statute requires more than mere words or a note, the PCR court erred in finding that Sellner's conduct comported to the armed robbery statute. See App. 81. Thus, the court's consequential finding that counsel was not deficient in advising Sellner to plead guilty to armed robbery was also in error.

Prejudice Resulting from Deficient Representation

The second step in the analysis of counsel's ineffectiveness is whether the petitioner was prejudiced by the deficient representation such that there is a reasonable probability that the outcome would have been different had the deficiency not occurred. Strickland, 466 U.S. at 694. In the context of a guilty plea, the petitioner must show "that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011).

The court found that Sellner failed to establish a reasonable likelihood that the result of the proceeding would have been different or that he would have proceeded to trial because Petitioner

testified that he "pled guilty to avoid a mandatory life sentence and that he was guilty of the conduct giving rise to the charge." App. 82. This finding was in error because, as discussed supra, the conduct admitted to by Sellner did not constitute armed robbery, which is what he repeatedly asserted. Further, Sellner testified that had he understood that his conduct did not meet the elements of armed robbery, he would not have pled guilty to that offense. App. 53, ll. 23-25. As discussed infra, had he proceeded to trial as originally charged, any conviction for the lesser included offense of strong armed robbery would not have made Sellner eligible for life without parole. Muldrow, 348 S.C. at 269-70, 559 S.E.2d at 850; S.C. Code Ann. § 17-25-45. Thus, Sellner was prejudiced by plea counsel's deficient conduct.

Had Hinds read Muldrow and properly advised Petitioner, he could have requested a charge on the lesser included offense of strong armed robbery, and more so, successfully moved for a directed verdict as to armed robbery. Muldrow, 348 S.C. at 269-70, 559 S.E.2d at 850; see also Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (1991) (holding that counsel was ineffective where he failed to advise petitioner that if he went to trial, he could have requested a charge on the lesser offense and but for counsel's failure to advise petitioner of the lesser offense, he would not have pled guilty). Instead, Hinds advised Petitioner that he could not be charged with anything lesser and that if he did not enter the plea to armed robbery, he would get a life sentence at trial. App. 47, ll. 18-21; App. 49, ll. 7-11; 53, ll. 11-17; App. 59, l. 1. A conviction on the lesser offense would have only subjected Sellner to a sentencing range of zero to fifteen years. See S.C. Code Ann. § 16-11-325. Even more significantly, a conviction for common law robbery would not have qualified as a "most serious offense" or "serious offense" under S.C. Code Ann. § 17-25-45 such that Sellner would not have faced the possibility of life imprisonment without the possibility of parole based on his prior record.

Sellner is accordingly entitled to the grant of post-conviction relief because plea counsel was deficient in failing to advise him that his conduct did not meet the elements of armed robbery. The PCR court erred as a matter of law in interpreting the armed robbery statute to include robbery by a threatening note and in finding that plea counsel's conduct fell within the range of competence required in criminal cases. Sellner was prejudiced in that, based on counsel's improper advise, he pled guilty to an offense carrying a potential sentence of ten to thirty years and which qualified him for life without the possibility of parole upon conviction were the State to file the requisite notice. Had he instead proceeded to trial, he could have only been convicted of the lesser included offense of strong armed robbery and faced a potential sentence of only zero to fifteen years.

CONCLUSION

For the reasons set forth herein, Petitioner Didier Van Sellner respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of May, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

DIDIER VAN SELLNER,

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STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-002472

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan Jameson, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Didier Van Sellner, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 12th day of May, 2015.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of May, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.