

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Post-Conviction Relief

Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2014-001640

Bobby Russell, Jr.,..... Petitioner,

vs.

State of South Carolina,Respondent.

PETITION FOR WRIT OF CERTIORARI

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June 15, 2015

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S.C. Supreme Court

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basis that Petitioner's plea was not entered into freely, voluntarily,
knowingly and intelligently.**

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QUESTION PRESENTED

That the Court erred in denying Post Conviction Relief on the basis that Petitioner's plea was not entered into freely, voluntarily, knowingly and intelligently.

STATEMENT OF THE CASE

The Petitioner was indicted during the August 2009 term of the Dorchester County Grand Jury for two counts of Committing or Attempting a lewd Act upon a Child (2009-GS-18-1097-1275) and Criminal Sexual Conduct with a Minor in the First Degree (2009-GS-18-9990). Petitioner was represented by Paul N. Uricchio, III, Esq. and Chad W. Fuller, Esq. On November 8, 2010, Petitioner appeared before the Honorable Diane Goodstein and pled guilty to three counts of Committing or Attempting to Commit a Lewd Act upon a Child. Pursuant to plea negotiations between Petitioner and the State, Judge Goodstein sentenced Petitioner to fifteen years imprisonment suspended upon the service of three years imprisonment followed by five years of probation for each count, with all three sentences to be served concurrently. No direct appeal was filed.

The Petitioner filed an Application for Post Conviction Relief on November 7, 2011. The Respondent made its Return on January 18, 2012, requesting an evidentiary hearing be held. An evidentiary hearing was convened on May 21, 2013 at the Orangeburg County Courthouse and on October 18, 2013 at the Calhoun County Courthouse. Petitioner was present at the hearing and was represented by counsel, Tommy A. Thomas, Esq. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

STATEMENT OF THE FACTS

The Petitioner was charged with three counts of Lewd Act, Committing or Attempting Lewd Act Upon Child Under 16. He entered into a guilty plea before the Honorable Diane S. Goodstein on November 8, 2010.

The Petitioner was in the Dorchester Count jail for over two years. (App. p. 66, lines 15-16) Petitioner contended that he was innocent of the charges. He retained the Uricchio Law Firm to represent him (App. p. 69, line 16) and was represented by Paul N. Uricchio and Chad W. Fuller.

In preparation for Trial, counsel hired Dr. William Burke to evaluate the Petitioner. (App. p. 71, lines 5-6) There was no DNA or finger prints tying the Petitioner to the scene. (App. p. 72, lines 4-7) In addition, a forensic interview was performed but showed concern that the victims had been coached on what to say. (App. p. 72, lines 7-13)

The Petitioner was charged with three separate offenses on three separate victims. However, these offenses happened at two different locations on two separate occasions. There were two victims as the second location.

The Petitioner's defense was that at the first location, the family owned Pit bulls and therefore, he could not have entered the premises undetected (App. p. 72, lines 24-25, p. 73, lines 1-11) In the second location, his defense was that the victim's Mother had a history of making unfounded allegations and that he had a witness to this effect. Also the forensic interview of victims 2 and 3 was unreliable and showed that the children had been coached as to what to say.

The Petitioner was offered a number of plea offers. The last offer by the State was a plea that would have resulted in the Petitioner going to the Department of Corrections for a short period of time. What the Petitioner called a turn around. (App. p. 75, lines 2-24)

The Petitioner attempted to enter a plea of North Carolina v. Alford, but the Judge would not accept the plea. (App. p. 81, lines 1-11) A guilty plea was entered by the Petitioner.

The Petitioner stated that he first heard about the Sexually Violent Predator Program (SVP) in the Courtroom during the Plea. (App. p. 83, lines 10-15) The Petitioner was advised about SVP by the Plea Judge but he was not concerned about it because he was told that he did not meet the criteria for the Program. (App. p. 84, lines 2-19) This belief was based on the fact that Dr. Burke had found that he was safe to be released (App. p. 86, lines 6-7) and that both Attorneys told him that he did not need to worry about the program (App. p. 87, lines 4-22) He further believed that he did not need to worry about the program because of the comments of the Judge (App. p.89, lines 3-25) regarding the conditions of his Probation.

He was later screened for the program and was placed into the Sexually Violent Predator program.

ARGUMENT

That the Court erred in denying Post Conviction Relief on the basis that Petitioner's plea was not entered into freely, voluntarily, knowingly and intelligently.

The Petitioner in this case entered into a guilty plea on the advice of his counsel that turned out to be incorrect. The Petitioner believed that by pleading to the charges that he would receive a sentence that would allow him to return home in a very short period of time. The plea was represented to the Petitioner as a "turn around", in that he would go to the South Carolina Department of Corrections for a very short period of time and then be released to probation. The Petitioner had always contended that he was not guilty of this crime and from the start the case was being set up for a trial. Counsel, on behalf of the Petitioner had attempted to set the plea as an Alford plea, but Judge Goodstein was unwilling to accept an Alford plea.

During the course of the plea colloquy, Petitioner was advised by the Court that he would have would have to register as a sex offender. (App. p. 7, lines 18, 19) That if he was determined to meet the criteria for the Sexually Violent Predator Program, that he could be forcibly held and treated as such time as the abnormality or risk to the community no longer existed. (App. p. 8, lines 15-25 and p. 9, lines 1-13) and finally that he could possibly be required to be monitored under GPS monitoring as a result of Megan's Law. (App. p. 9, lines 14-18)

Petitioner believed that he had viable defenses to the charges. That there were three crimes, but only two incidences. That in the first crime, victim 1, the home in which the alleged crime took place, had pit bull dogs. The Petitioner believed that it would have been impossible for him to have come into the home unannounced as a result of the dogs being present. He therefore believed that he had a viable defense to these allegations.

In the second situation, victim 2 and 3, the Petitioner believed that these charges were purely made up on a retaliatory basis. That there was animosity between he and the victim's parents. In addition, the victim's Mother had a history of making false allegations. That she had made allegations of a similar nature against her father, Mr. Lewellen. The father was available to testify at trial regarding her credibility and truthfulness. (App. p. 80, lines 4-6)

At the Post Conviction Relief hearing, plea counsel for Petitioner, Mr. Fuller, testified that he was surprised that the Petitioner had agreed to accept the plea. That it was his understanding that this case was always going to be a trial. (App. p.123, lines 1-8)

The Petitioner testified that he was unaware of the Sexually Violent Predator Act until he was in the Courtroom. He testified that he spoke with counsel Mr. Uricchio about this matter and counsel advised him not to worry about the Sexually Violent Predator act because he did not meet the criteria to be placed in this program. Although he was advised by the Court that he could very possibly meet the threshold for an evaluation, he was not concerned about these comments, because his counsel advised him that he did not meet the criteria. (App. p. 84, lines 14-19)

The Petitioner was asked on the stand by the State about his guilty plea being an admission of guilt. The Petitioner responded that he made these admissions on the advice of his attorney. He was advised by counsel that if he did not admit these crimes that the Court would not accept his plea, and that this plea would allow him to come home. (App. p. 96, lines 1-23)

The evidence presented at Post Conviction Relief supported the claim of the Petitioner. He testified that it was his understanding that he was not going to be eligible for the Sexually Violent Predator Program. That pursuant to this plea, that he would serve a little over 100 days in the South Carolina Department of Corrections and then be released. That Dr. Bill Burke had

performed a pre-plea evaluation and it was Dr. Burke's opinion that he was not a danger to the community. (App. p. 86, lines 6-7) That there was no evidence such as DNA or finger prints and that the forensic interview of the children in the second case showed that the children's statements had been coached. (App. p. 72, lines 4-13)

The Petitioner also points to the comments made by the Plea Judge regarding his release. Judge Goodstein spoke about Dr. Burke and his ability to be helpful for sexual offenders. That he would be participating in Dr. Burke's program (App. p. 42, lines 1-25) and the fact that there were other conditions imposed upon his release, such as 500 hours of community service, random drug and alcohol testing and that he take any medication for any mental illness that he may be suffering from. (App. p. 43, lines 1-25 and p. 44, lines 1-9)

The Petitioner's Mother, Gloria Jean Holcombe testified at the Post Conviction Relief Hearing. Ms. Holcombe testified that she was concerned about the plea, specifically regarding the mention of an evaluation. She stated that she had spoken with his attorney, Mr. Fuller, and Mr. Fuller explained that there was an evaluation that Bobby would have to go through, but that Bobby should be fine. (App. p. 110, lines 1-11)

There was an original allegation of pornography found on the computer in the second incident. This allegation was eventually dropped as the attorneys for the Petitioner hired a forensic computer expert who determined that the alleged pornography was on the computer prior to Mr. Russell's involvement in this case. The Petitioner believed that this helped to demonstrate the untruthfulness of the mother of victims 2 and 3. (App. p. 123, lines 21-25)

Petitioner's attorney testified that there was some concern with the evaluation by Dr. Burke, in that he did show some inappropriate responses. However, it was Dr. Burke's opinion that he could be safely treated in his program. Counsel further testified that he did not

understand why the case was going to a plea. That they had prepared this case for trial and had spent a lot of time and man hours to get ready for trial. (App. p. 123, lines 1-8) Mr. Fuller also testified that he had spoken with the mother of victims 2 & 3 father, Mr. John Lewellen. That he was a possible defense witness and that he would have been used to show lack of credibility for the second case. (App. p. 124, lines 1-14) Mr. Fuller testified that he believed that he had spoken to the Petitioner regarding the Sexually Violent Predator Act, but appeared to be somewhat vague about when he had had an opportunity to speak with the Petitioner about this matter or how long they had discussed it. (App. p. 126, lines 17-25, p. 127, lines 1-14)

On November 8, 2013, additional testimony was taken before the Honorable Edgar W. Dickson. Mr. Lewellen testified that he had trouble with his daughter, the mother of victims 2 & 3, for a number of years. He indicated that he could have testified regarding his daughter's credibility and about her past. (App. p. 157, lines 21-25, p. 158, lines 1-2) He stated that he would be able to testify about the fact that she had made allegations of a similar nature against other people.

In a Post Conviction Relief action, the Applicant has the burden of proving the allegations in the Application. Rule 71.1 (e), SCRPC; Butler v. State, 286 S.C. 441, 334 W.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. 441, 334 S.E. 2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E. 2d 813 (1985). The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E. 2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E. 2d at 625 (citing Strickland). With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

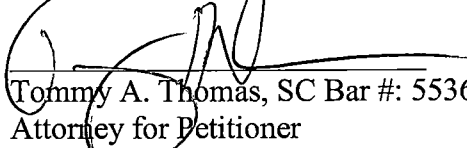
A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E. 2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

CONCLUSION

In this case, Counsel was clearly ineffective for not advising the Petitioner that by entering his plea he would become subject to the Sexually Violent Predator act. Counsel's performance was clearly deficient and there is a reasonable probability that but for counsel's error he would have gone to trial. In this case, the Petitioner's plea was not freely, voluntarily, knowingly or intelligently given.

For the reasons stated above, the Petitioner respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,


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Irmo, South Carolina
June 15, 2015

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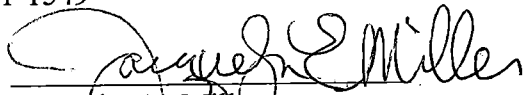
Bobby Russell, Jr, Petitioner,
vs.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Petitioner hereby certify that I placed in the United States Mail, a copy of a Petition for Writ of Certiorari and an Appendix (Redacted), with postage prepaid and the return address clearly shown on said envelope to Megan Harrigan Jameson, Esq. of the Attorney General's Office, at:

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