

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

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JUL 15 2015

S.C. Supreme Court

EDDIE J. PILCHER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000406

BRIEF OF PETITIONER

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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. Petitioner pled guilty as charged, and Judge Couch sentenced him to concurrent sentences of twenty-five years. App. 13, line 1—App. 17, line 4; App. 21, lines 4-11; App. 27, lines 14-16.

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. On February 20, 2014, the PCR court issued an order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 168-179.

ARGUMENT

THE RECORD DOES NOT SUPPORT THE PCR COURT'S FINDING THAT PLEA COUNSEL'S SUBSEQUENT REPRESENTATION OF PETITIONER'S CODEFENDANT IN A PLEA DID NOT ADVERSELY AFFECT HIS PERFORMANCE BECAUSE COUNSEL HAD A DUTY TO MOVE THE COURT TO RECONSIDER PETITIONER'S SENTENCE, BUT HE COULD NOT WITHOUT PREJUDICING THE CODEFENDANT.

FACTS

Evidence showed that on September 9, 2010, at approximately 12:30 a.m., Petitioner, his codefendant Jonathan 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.

Within days Petitioner voluntarily turned himself in to police, and on October 5, 2010, he gave them a full statement. App. 25, lines 23-24; App. 163. He identified both Wilkie and Goss, explaining that shortly before the crimes he was driving them around in a car he was borrowing from his girlfriend. All three began talking about how they had little money, which Petitioner specifically needed for rent. According to Petitioner, Wilkie had the idea to rob the cookout, and Wilkie and Goss chose to carry the two firearms. Petitioner twice stated that he never carried one. App. 163.

On the day of Petitioner's plea, plea counsel represented both Petitioner and Goss. Petitioner pled first, and he told the Judge Couch that he did not carry a firearm. App. 19, lines 14-23. Judge Couch responded that he was still legally liable for armed robbery under

the hand-of-one-hand-of-all rule. App. 20, lines 2-7. Plea counsel stated he was twenty-seven years old, but he only reached the ninth grade in school. App. 16, lines 8-13. He explained that he recognized his misbehavior and took responsibility for it:

. . . I should have been more of a man instead of allowing some younger individuals to coerce me into something I knew was better, and I have a codefendant in the box, Your Honor, and I just pray and ask that you just look out for him.

I mean if I got to take all the load, just be lenient on him, Your Honor, cause I should have stopped him. I mean I was the one had the car. I could of said I don't want to go, I'm not taking y'all. So, I blame myself, Your Honor, and I apologize. I should have been a better man.

App. 25, lines 14-25.

Plea counsel spoke and told the judge that Wilkie “orchestrated everything.” App. 22, line 18—App. 23, line 6. He said that Wilkie “appear[ed] 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. He related that Wilkie had already been convicted and received concurrent sentences of twenty-five years for the same offenses. App. 19, lines 5-10. Plea counsel asked the judge to consider Petitioner less culpable than Wilkie: “I . . . ask the court to please distinguish his involvement, his planning, his knowledge of everything from the sentence that Mr. Wilkie got, Your Honor. We respectfully ask the Court to consider sentencing him on the armed robbery charge and consider a suspended sentence on the attempted burglary charge.” App. 24, line 23—App. 25, line 3.

After Petitioner's plea, plea counsel represented Goss in a plea to the same charges before Judge Couch. App. 54, lines 23-24; App. 122; App. 134, lines 20-22. Goss was nineteen and reached the twelfth grade in school. App. 136, lines 12-15. 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 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. Goss stated that Wilkie and Petitioner carried a gun, and he did not. App. 138, lines 7-11. Solicitor Balsa informed Judge Couch that "upon apprehension by the Greer Police," Goss gave a statement naming his codefendants. App. 137, lines 7-10. Noting his "lack of prior record, your cooperation with the police in the investigation of this matter, apparent lack of leadership in this endeavor, as well as even the words of your prior [co]defendant" Judge Couch sentenced Goss to twelve years' incarceration for armed robbery and twenty years suspended to twelve for attempted first degree burglary. App. 135, lines 5-10; 148, lines 5-22.

At his PCR hearing, Petitioner predicated his claim of ineffective assistance on plea counsel's representation of both Petitioner and Goss at their pleas. App. 49, lines 4-15. Petitioner testified that plea counsel never sought from him a release or waiver or otherwise addressed the conflict of interest with Petitioner. App. 49, lines 19-23. Plea counsel testified that he told Petitioner that Goss was thinking about a plea, but he was not sure he would be representing Goss until just before his plea:

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, plea counsel 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. Counsel testified he was aware that Petitioner had always maintained he never had a gun. App. 106, 13-14.

The PCR court's order of dismissal 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 pled, "nothing that Counsel said at Goss' plea affected

the outcome of Applicant's plea." App. 174.

DISCUSSION

The record does not support the PCR court's finding that PLEA counsel's subsequent representation of Petitioner's codefendant in a plea did not adversely affect his performance because Counsel had a duty to move the court to reconsider Petitioner's sentence, but he could not without prejudicing the codefendant. 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 judge 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)). A plea 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). Information material to punishment includes a defendant’s actual role in the offense independent of his legal liability for the acts of others, including whether defendant was essential to the offense or assumed a leadership role. *See, e.g., U.S. v. Amaya*, 519 Fed. Appx. 784, 785 (4th Cir. 2013) (per curiam); *State v. Benbow*, 309 N.C. 538, 546, 308 S.E.2d 647, 652 (1983); *State v. Lattimore*, 310 N.C. 295, 299, 311 S.E.2d 876, 879 (1984).

In this case, plea counsel’s dual representation created an actual conflict of interest because plea counsel had a duty to move Judge Couch to reconsider Petitioner’s sentence. All of the information material to Petitioner’s culpability showed it was on par with Goss’s culpability, but Goss received effectively half the sentence. Nevertheless, plea counsel could not have made the motion without raising the question of whether Goss’s sentence was too lenient.

Petitioner and Goss had the same level of culpability. The criminal plans were hatched while the three codefendants were riding together in a car discussing the same

motive. If any person rose to the level of leader, it was Wilkie, the social hub of the three who led Petitioner astray of his recent, commendable behavior and who suggested the cookout as a target. From his first statement to police, Petitioner maintained he did not carry a firearm to the robbery, but the other two did. Goss claimed he was the one without a gun.

By voluntarily reporting to police, Petitioner took responsibility for his actions, showed remorse, and helped police to a far greater extent than Goss. Within days after the crimes, Petitioner voluntarily turned himself in to police and gave a full statement identifying both Wilkie and Goss. Goss only gave a statement in cooperation after he was apprehended. On balance, Goss did not have the prior record Petitioner had.

Some information only superficially suggested Petitioner was more culpable than Goss. Although Petitioner was eight years older than Goss, the disparity in their social and mental development was likely small considering Goss had reached the twelfth grade and Petitioner never made it past the ninth. Thus, both could legitimately claim to have been drawn into the situation by the others.

Nevertheless, plea counsel stressed the superficial differences between Petitioner's and Goss's situations in his allocutions. For Goss, plea counsel argued that Petitioner was in the leadership position because Goss "allowed himself to get caught up with" Petitioner. Plea counsel also stated that Petitioner was coerced into participating by threats, even though only Goss made the self-serving allegation and never actually identified Petitioner as making them.

Consistently, Judge Couch relied on the superficial differences in issuing Goss a greatly reduced sentence. Judge Couch cited Goss's "apparent lack of leadership," seeming

to misinterpret Petitioner's attempt to take responsibility for his own wrongful actions as taking responsibility for leading Goss to make wrongful choices. Petitioner stated that he "should have been more of a man instead of allowing some younger individuals to coerce me into something." In other words, Petitioner admitted he should have resisted succumbing to Goss's negative influence. In taking full responsibility for *his own* actions, including driving the car, Petitioner did not attempt to shift blame but "fell on the sword," telling Judge Couch he was ready to "take all the load." Thus, Petitioner explained that he understood that through his own actions he could have defused the situation. However, in no way did he take responsibility for Goss's decisions. And by instructing Petitioner that he was liable for armed robbery regardless of whether he personally carried a firearm, Judge Couch also seemed to consider Petitioner's actual use of a firearm in determining his culpability while he did not for Goss.

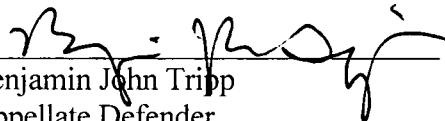
Petitioner and Goss had similar levels of culpability. Neither appeared to have culpability similar to Wilkie. Nevertheless, Judge Couch issued Petitioner a sentence equal to that of Wilkie and effectively twice that of Goss. Plea counsel therefore had a duty to ask Judge Couch to reconsider Petitioner's culpability and issue him a sentence more consistent with Goss's. However, plea counsel could not argue Petitioner was less culpable without contradicting Judge Couch's conclusion that Goss had the lowest culpability of the three based on his cooperation with police, his lack of leadership, and Petitioner's endorsement. This conflict actually prevented plea counsel from acting in Petitioner's best interest, and the PCR court was mistaken in concluding that "nothing that Counsel said at Goss' plea affected the outcome of Applicant's plea" simply because Petitioner pled before Goss. The

record shows plea counsel's dual representation actually adversely affected his performance, and the PCR court's decision was unsupported.

CONCLUSION

For the foregoing reasons, Appellant Eddie J. Pilcher respectfully requests that the Court reverse the ruling of the PCR court and vacate his conviction.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

EDDIE J. PILCHER,

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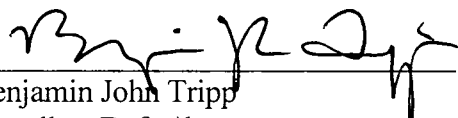
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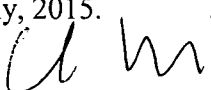
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Suzanne H. White, Esquire, this 15th day of July, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day
of July, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.