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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

REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Petitioner Didier Van Sellner raised the following issue in his Petition for Writ of Certiorari: "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)?"

As more fully discussed in the Petition for Writ of Certiorari, this case is about the PCR court's error 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 (Order of Dismissal, p. 6). Based upon this erroneous determination, the PCR court found that plea counsel was not deficient in advising Sellner to plead guilty to armed robbery. App. 81 (Order of Dismissal, p. 6).

Respondent contends that Sellner mischaracterized the evidence on pages 6 and 7 of the Petition for Writ of Certiorari and avers that "Petitioner made no mention of the location of his hands or any indication that he had a weapon; rather Petitioner testified that he made threats to shoot if the bank teller gave him a dye pack." Respondent's Return to Cert., p. 7 n. 1. Respondent further contends that Sellner's testimony was not sufficient to meet the requisite burden of proof and that "Petitioner never testified that there was no physical representation of a weapon." Respondent's Return to Cert., p. 10 and 11. On the contrary, Sellner testified at the PCR hearing: **"I had nothing in my hand. I had -- and I made no actions to even indicate that I had a weapon. I just said**

it to get the money. I didn't act like I had one." App. 54, ll. 3-7 (emphasis added).[1] Further, in its findings of fact, the PCR court found that Sellner contended at the PCR hearing that "he did not have a weapon or make any physical representation of having a weapon, and therefore he was not guilty of armed robbery." "He testified that ... his actions did not amount to armed robbery due to the lack of a weapon." App. 77 – 78 (Order of Dismissal, p. 2-3). The PCR Court likewise found that plea counsel "testified that Applicant... was adamant that he did not have a weapon." App. 78 (Order of Dismissal, p. 3). Plea counsel further testified that based on her interpretation of the armed robbery statute, Sellner's "passing the teller a note threatening to shoot if she did not comply" constituted a "representation of a deadly weapon." App. 78 – 79 (Order of Dismissal, p. 3-4). It was that misunderstanding of the law that Sellner was required to prove, which he did. App. 66, ll. 12-15.

The State continues to contend that the note used by Sellner was a sufficient "representation" for the purposes of the armed robbery statute. Respondent's Return to Cert., p. 10-11.[2] They maintain this position despite this Court's holding in State v. Muldrow, 348 S.C. 264, 268-69, 559 S.E.2d 847, 849-50 (2002), that "words alone are not sufficient" to support a conviction under the armed robbery statute. Respondent attempts to distinguish the present case

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[1] In footnote 1 of Respondent's Return, the State pointed out a scrivener's error in the Petition for Writ of Certiorari. Specifically, Petitioner erroneously cited to page forty-three (43) of the Appendix three times on page 7 of the Petition. The correct page reference of the Appendix is page fifty-four (54).

[2] In footnote 2 of Respondent's Return, the State avers that Petitioner cited to page 13 of the Appendix in support of the proposition that "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." A review of the Petition for Writ of Certiorari reveals that the complete citation in support of that statement was to App. 13, l. 11 – 14, l. 1; App. 66, l. 23 – 69, l. 4. It is the testimony from the PCR hearing that confirms that none of the evidence provided to plea counsel in discovery indicated that Petitioner made any physical representation of a deadly weapon; rather, he had only the note. App. 66, l. 23 – 69, l. 4.

from Muldrow based on the fact that Sellner pled guilty to armed robbery and specified in his note that he actually had a weapon. However, Respondent failed to provide any explanation as to how Sellner's guilty plea would make Muldrow inapplicable. Sellner's arguments at the PCR hearing and in his Petition were based on the fact that in light of Muldrow, his plea counsel's advice to plead guilty to armed robbery was deficient. The State further argues that the content of the note affects the analysis. In Muldrow, the robber passed the clerk a note that said "Give me all your cash or I'll shoot you." 348 S.C. at 267, 559 S.E.2d at 848-49. 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. This is almost identical to the facts of the present case, except that Sellner's note included the words "I have a gun" and there was no allegation of any verbal threat. App. 56, ll. 17-22. Though not explicitly stated, the averment of possession of a weapon certainly seems implicit in the note from Muldrow, as one generally shoots with a gun.

Regardless, the Muldrow decision made clear that it is a **physical representation** of a deadly weapon that is required to support a conviction for armed robbery, stating:

> If the phrase "representation of a deadly weapon" includes the use of words, as the Court of Appeals held, this portion of the statute would read: " *while alleging,* either by action or words, he was armed *while using words* conveying the thought that he has a deadly weapon." This construction creates a redundancy which essentially eliminates the additional element of a "representation" of a weapon, thus improperly expanding the statute's operation to embrace conduct not clearly within its terms. **Had the legislature intended armed robbery 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."** A plain reading of the statute indicates words alone are not sufficient under the second prong to support a conviction for armed robbery.
>
> . . .
>
> Before the second prong was added, evidence the object used in a robbery was in actuality not a deadly weapon created a jury issue and entitled the defendant to a charge on the lesser included offense of strong arm robbery. The legislature's amendment to § 16–11–330(A) simply ensures that the use of **a[n] object** which is in fact not a deadly weapon will support a conviction for armed robbery. Under this 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.

348 S.C. at 268-69, 559 S.E.2d at 849-50 (internal citations omitted) (emphasis added). Thus, no matter what the content of the note, it cannot be sufficient to establish the elements required for an armed robbery conviction.

In the present case, Sellner and plea counsel both corroborated at the PCR hearing that Sellner did not have a gun or any physical representation of a gun. App. 54, ll. 3-7; App. 54, ll. 15-19; App. 66, l. 12 – 67, l. 11; App. 67, l. 22 – 69, l. 8. Plea counsel reviewed the Orangeburg Department of Public Safety report, which was previously provided to her in discovery. Plea counsel agreed that there was nothing in that report to indicate that Sellner was either armed or represented that he was armed other than by a note. App. 66, l. 23 – 67, l. 11. She also reviewed a FBI report related to the incident, and agreed that there was no indication that Sellner was armed "other than the note." App. 67, l. 22 – 68, l. 5. Plea counsel also testified that the Orangeburg Department of Public Safety checklist listed under the heading of robbery it states "no mask, threats, intimidation, no weapon." App. 68, ll. 6-13. She also reviewed the witness statements of all of the tellers and agreed that none of them stated that Sellner was armed or represented that he was armed other than that he had the note. Further, one of them indicated that she did not see a gun. None of them indicated that he put his hands anywhere to represent a weapon either. App. 68, ll. 17 – 69, l. 8.

Respondent states that "Petitioner never denied that he made Ms. Hilderbrandt [the bank teller] believe that he had a weapon," citing to a portion of the guilty plea colloquy when plea counsel was addressing the Court. Respondent's Return to Cert., p. 11. However, it is clear from the testimony at the PCR hearing that plea counsel was referring to the note, as she considered the note. App. 69, l. 5-8 (PCR counsel: "So, in the transcript when you say he did not

have a weapon although he did make the teller think he had a weapon, you're referring to the note?" Plea counsel: "Yes."). As discussed supra and in the Petition for Writ of Certiorari, plea counsel's understanding of the law was incorrect.

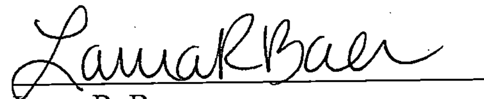
Lastly, Respondent asserts that "it is uncontroverted that Petitioner's prior record made him eligible for an enhanced life without parole (LWOP) sentence pursuant to S.C. Code Ann. § 17-25-45." However, as argued in the Petition for Writ of Certiorari, had Sellner been properly charged with common law, strong arm robbery, he would not have been eligible for LWOP under S.C. Code Ann. § 17-25-45 because the charged offense would not have qualified as a "most serious offense" or "serious offense." Petition for Writ of Certiorari, p. 14. Moreover, it is notable that the solicitor did not serve an LWOP notice in Sellner's original case, raising a question of vindictiveness were they to attempt such in the future. Thus, in the event Sellner is granted relief, he does not concede that his prior convictions make him eligible for LWOP or that the State can present the necessary proof of his prior convictions or their qualification under the recidivist statute.

In conclusion, this case really comes down to the misapprehension of the law by plea counsel and the PCR court. There was no contention at the PCR hearing that Sellner used anything other than the note when he entered the bank. On the contrary, PCR counsel testified that it was her understanding that the note was enough to constitute armed robbery. The PCR court erred as a matter of law in finding that plea counsel's understanding and advice to Seller were accurate where the case law is clear that words alone are not sufficient to support an armed robbery conviction. Plea counsel's deficiency resulted in Sellner entering a guilty plea to a greater offense than his conduct required, which he would have not entered otherwise. Therefore, Petitioner met his burden of proving ineffective assistance of counsel and is accordingly entitled to vacation of his guilty plea.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioner Didier Van Sellner respectfully requests this Court grant certiorari to allow full briefing on the issue raised in his Petition.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of July, 2015.

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DIDIER VAN SELLNER,

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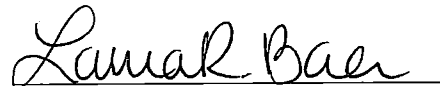
CERTIFICATE OF SERVICE

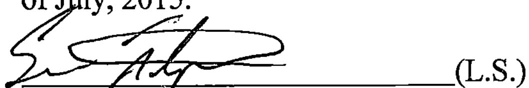
I certify that a true copy of the reply to state's return to petition for writ of certiorari in this case have been served on Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Didier Van Sellner, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 27th day of July, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of July, 2015.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.