

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUL 27 2015

Certiorari to Horry County
Kristi Lea Harrington, Circuit Court Judge

S.C. Supreme Court

NELSON H. CASTRO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000021

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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ISSUE PRESENTED

Trial counsel erred in failing to object to the trial judge's retaliatory sentence handed down in the case because it was clear that petitioner was being punished for rejecting the state's plea offer and exercising his right to a jury trial.

STATEMENT

Petitioner Nelson H. Castro was found guilty of trafficking in cocaine per a jury trial held during the April 2010 term of the Horry County General Sessions Court before Judge Larry B. Hyman. Petitioner was sentenced to imprisonment for a period of fifteen years. App. 1 – 297. A sentencing reconsideration hearing was held before Judge Hyman on June 17, 2010, but the motion to reconsider petitioner’s sentence was denied. See Supp. App. 1-17. Petitioner was represented by William I. Diggs at trial and at the sentencing reconsideration hearing. Assistant Solicitor Scott Graustein appeared at the plea proceeding on behalf of the state, and Assistant Solicitor Beverly BJ Landrum represented the state during the sentencing reconsideration hearing.

Petitioner appealed, but his conviction and sentence were affirmed. See State v. Castro, Op. No. 2012-UP-378 (S.C. Ct. App. filed June 20, 2012). See Supp. App. 19-20. Katherine H. Hudgins, Esquire, of the Office of Appellate Defense, represented petitioner on direct appeal.

On March 18, 2013, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 299 – 307. The respondent filed a return dated September 19, 2013, requesting that a hearing be held in response to petitioner’s PCR action. App. 308- 313.

A PCR hearing was convened on August 27, 2014, at the Horry County Courthouse before Judge Kristi L. Harrington. App. 314 – 347. Petitioner was present at the hearing and represented by Daniel A. Selwa, and Assistant Attorney General Joshua L. Thomas appeared on behalf of the state. On October 8, 2014, Judge Harrington issued an Order of Dismissal denying petitioner’s allegations of ineffective assistance of counsel in the case. App. 349-353.

Petitioner appealed. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to the trial judge's retaliatory sentence handed down in the case because it was clear that petitioner was being punished for rejecting the state's plea offer and exercising his right to a jury trial.

Prior to trial, the state offered petitioner a seven-year plea deal. This was an undercover drug buy case. State's witness and confidential informant Christopher Norris testified that he assisted Police Officer Joseph Necessary in a controlled drug buy on August 28, 2009, when he went to petitioner's home and bought three ounces of cocaine from petitioner. App. 139, l. 8 – p. 154, l. 19; App. 38, l. 5 – p. 51, l. 25.

On direct appeal, the following issues were raised:

1. Did the judge err in refusing to declare a mistrial when the confidential informant improperly testified about prior purchases of marijuana and cocaine from appellant and appellant was prejudiced by the improper testimony?

2. Did the judge err in punishing appellant for exercising his right to a trial by jury and sentencing him to fifteen years when the judge told appellant he was inclined to sentence him to seven years if he pled guilty but not if he went to trial?

The South Carolina Court of Appeals issued an Opinion in the case on June 20, 2012, affirming petitioner's conviction and sentence by ruling on the two issues as follows:

1. As to whether the circuit court erred in denying his motion for a mistrial when the confidential informant testified about prior purchases of marijuana and cocaine from Castro: State v. Wilson, 389 S.C. 579, 698 S.E.2d 862, 865 (Ct. App. 2010) (“The decision to grant or deny a mistrial within the sound discretion of the [circuit] court. The [circuit] court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” (Internal citations and quotation marks omitted)); id. at 585-86, 698 S.E.2d at 865 (“A mistrial should only be granted when absolutely necessary, and the defendant must show both error and prejudice in order to be entitled to a mistrial. Insubstantial errors that do no impact the result

of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence.” (internal citations and quotation marks omitted)).

2. As to whether the circuit court improperly penalized Castro for exercising his Sixth Amendment right to trial by jury: State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (noting that the South Carolina Supreme Court “has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review”); State v. Huggins, 336 S.C. 200, 203 n.2, 519 S.E.2d 574, 575 n.2 (1999)(applying preservation requirements to constitutional arguments). Supp. App. 20.

During the PCR hearing, petitioner testified that his chief complaint concerned trial counsel’s error in failing to object to the retaliatory sentence imposed by the trial judge because he rejected the seven-year plea deal and exercised his right to a trial by jury; and that although the retaliatory sentencing issue was raised on direct appeal, it received no appellate review since trial counsel failed to preserve this question for appellate review by not objecting to the same at trial and at the sentencing reconsideration hearing. App. 329, l. 21 – p. 330, l. 12; App. 330, l. 10 – p. 332, l. 2.

Trial counsel testified at the PCR hearing and explained that he did not object to petitioner’s sentence as being retaliatory because “he didn’t think that [petitioner] was punished because of going to trial” and that “it never struck [him] that [petitioner] was going to be punished [by going to trial] so he didn’t raise [an objection] to the sentence.” App. 341-342.

However, ultimately, trial counsel admitted error at the PCR hearing as follows

Q. Mr. Diggs, had you objected to that, would he have been able to address that on appeal?

A. The punishment for going to trial?

Q. Yes.

A. Yeah, I -- yeah.

Q. I'm sorry?

A. Yes. It would have been preserved. It could have been pursued.

Q. And it wasn't thought; right?

A. Right. App. 343, lines 3-11.

The PCR judge ruled that petitioner "failed to meet his burden of proving trial counsel ineffective for failing to object to the sentence" because there was no showing that the trial judge punished him for exercising his right to a jury trial. App. 352-353.

The retaliatory sentencing was an issue in this case because of the pre-trial remarks made by the trial judge regarding petitioner's rejection of the state's seven-year plea offer and his choice to exercise his right to a jury as follows:

The [solicitor] has agreed to allow you to plead to one indictment, and that is an indictment for trafficking in cocaine, twenty-eight to one hundred grams. Your exposure on that would be seven to twenty-five years. Upon your plea, he would be dismissing the other charges that you are looking at. I have pre-tried this with your attorney, and I will tell you I am inclined to sentence on a plea seven years. Also, you would, regardless of how this trial comes out, you would still be looking at the other three charges as well for which you could be tried and would be tried. Now, your attorney tells me that you do not wish to accept this offer by the State, that you want to go to trial on this charge, and ultimately for all the charges. Is that what you want to do, Mr. Castro? Are you sure that's what you want to do?

Mr. Castro: Yes, Your Honor. App. 6, lines 5 – 24.

Then, at the close of the case after the jury found petitioner guilty as charged, the trial judge again commented on petitioner's decision to exercise of his right to a jury trial as follows:

Solicitor: [petitioner] was offered to plead to a minimum sentence..[but] chose to reject that plea offer

The Court: In addition, he was given the concession of dismissal of several other pending charges that have not been tried?

[Solicitor]: That is correct, Your Honor, if he [had] pled guilty... The State does not seek or request any mercy on this Defendant.

The Court: Mr. Castro, this is classified by the Legislature in this State as not only a violent crime, but a most serious offense. It has a no probation, no suspension of sentence clause in the sentence.

You are different from these other defendants in that they have cooperated and they have acknowledged their responsibility for the crimes that they have committed. Mr. Castro, this is, as I said, an extremely serious offense. The State has had to take you to trial on a case where there was overwhelming evidence of your guilt. The jury has found you guilty, and I sentence you to incarceration...for a period of fifteen years. App. 275, lines 2 – p. 276, l.19.

Finally, at the sentencing reconsideration hearing, the solicitor reminded the trial judge of petitioner's jury trial request in the case as follows:

Solicitor: The State ...offered [petitioner] to plead to the charge with a recommendation of seven years; and that he refused that plea....wanted a trial and...prior to trial...the [trial judge] informed him that he would likely get seven years if he pled....[but] he did not plead.....Supp. App. 11. L. 25 – p. 12, l. 6.

It is patently obvious that the trial judge (and the solicitor) were clearly miffed and perturbed over petitioner's rejection of the seven-year plea offer and his pursuit of a jury trial instead. The trial judge in effect expressed verbally his dismay prior to trial and after the trial over petitioner's decision to be tried by jury. Although petitioner did not receive the maximum twenty-five-year sentence; clearly, the fifteen-year sentence was twice the prison sentence presented per the plea bargain offer and undoubtedly punishment for rejecting the offer and moving forward with a trial.

No right is more fundamental than to put the state to its burden of proof. State v. Sloan, 278 S.C. 435; 298 S.E.2d 92 (1982). A trial judge cannot consider the defendant's election to exercise his right to a jury trial at sentencing by punishing him via a greater sentence because he failed to

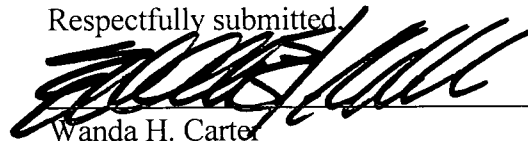
plead guilty. State v. Browner, 346 S.C. 275, 550 S.E.2d 915 (Ct. App. 2001); State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995). See Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999), where PCR relief was granted because counsel failed to object to the trial judge's improper consideration of petitioner's exercise of the right to a jury trial.

Trial counsel's error in not objecting to the trial judge's retaliatory sentence as punishment for petitioner since he exercised his right to a jury trial constituted deficient legal representation at trial because but for the failure to object to the same, a reasonable probability exists that petitioner's sentence might have been different; or in the alternate, his sentence would have received appellate review after which time a reversal on appeal would have been likely. Hence, the prejudice emanating from trial counsel's error here was obvious. An objection must be made on a specific ground in order to preserve an issue for appellate review. State v. Stahlnecker, 386 S.C. 609, 690 S.E.2d 565 (2000). Counsel's error on this issue raised in this case violated petitioner's Sixth Amendment right to effective assistance of counsel in a criminal case. See Strickland v. Washington, 466 U.S.668 (1984).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this petition be granted and full briefing allowed on the issue raised above.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Kristi Lea Harrington, Circuit Court Judge

NELSON H. CASTRO,

PETITIONER,

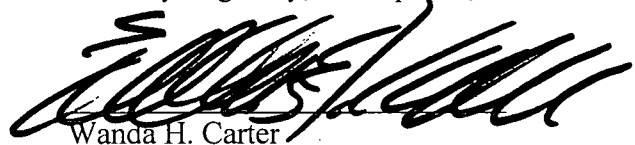
V.

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RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Joshua L. Thomas, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Nelson H. Castro #340257, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010 this 27th day of July, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

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

Marie Mendel (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.