

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

ANTHONY MAURICE LOUNDS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000124

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Trial counsel erred in failing to inquire into and communicate to petitioner the state's plea offers presented in the case.

II. Trial counsel erred in failing to call defense witnesses Brigham Young and Zeldric Vance, both of whom testified at the PCR hearing, to testify at trial because both of these witnesses would have provided favorable testimony for the defense by offering testimony that petitioner was not guilty as neither a principle nor an accomplice liability, and by presenting testimony that the case was a drug deal gone awry rather than a robbery in the first place.

STATEMENT

Petitioner Anthony Maurice Lounds was convicted of armed robbery and possession of a weapon during the commission of a violent crime during the November 2010 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Petitioner received a sentence of life without parole on the armed robbery conviction and five years on his conviction of possession of a weapon during the commission of a violent crime. App. 1 – 237. Scott Robinson represented petitioner at trial, and Assistant Solicitors George Campbell and Sloan Ellis appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed on appeal. See State v. Lounds, Op. No. 2013-UP-289 (S.C. Ct. App. filed June 26, 2013). Susan B. Hackett, of the Office of Appellate Defense, represented petitioner on direct appeal.

On August 3, 2013, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 239 – 245. The respondent filed a return dated April 8, 2014, requesting that a PCR hearing be held in the case. App. 246 – 249.

A PCR hearing was convened on October 21, 2014, at the Greenville County Courthouse before Judge Letitia H. Verdin. App. 251 – 322. Petitioner was present at the hearing and represented by Mills Ariail, and Assistant Attorney General Karen Ratigan appeared on behalf of the state. On November 8, 2014, Judge Verdin signed an Order of Dismissal in the case therein denying petitioner's allegations of ineffective assistance of trial counsel. App. 324 – 333.

Petitioner appealed Judge Verdin's Order. This petition follows.

QUESTION I

Trial counsel erred in failing to inquire into and communicate to petitioner the state's plea offers presented in the case.

Petitioner testified at the PCR hearing and explained that his trial attorney was not his only appointed counsel. Originally, Nihar Patel, Esquire, was assigned to petitioner's case, but he was relieved as counsel for petitioner on December 8, 2010. On December 31, 2010, trial counsel was assigned to petitioner's case. Petitioner's case was tried before a jury on July 12, 2011. App. 257, l. 10 – p. 260, l. 10. Petitioner testified that he later learned that plea offers were extended to him on May 17, 2010, when Patel was his attorney, and on January 26, 2011, while trial counsel represented him. Petitioner added that he might have accepted either of the offers had he known of them. App. 273, l. 11 – p. 276, l. 20. Note that two solicitors prosecuted petitioner: George Campbell and Sloan Ellis.

Trial counsel addressed this issue at the PCR hearing as follows:

Q. Do you recall ever having received a plea offer from the State while you represented Mr. Lounds?

A. I don't recall independently. I actually took the precaution of calling Sloan Ellis. Sloan Ellis did not recall any plea offer being made in this matter.

Q. Just for the Record, Sloan Ellis is who?

A. He was the assistant solicitor who prosecuted the case with Mr. Campbell in this matter. I don't believe – I think Mr. Lounds – whatever the plea offer would have been, it would have been 15 or so, approximately 15 charges that were outstanding at that point. I can't imagine that plea offer would have been something he would've taken.

Q. But you don't have any independent recollection that there was a plea offer?

A. I don't. I don't believe there was.

Q. As part of your general practice, what do you do when you get a plea offer from the state?

A. Take it to the client. That's why I think that either myself or Mr. Silvaggio would have done that. But I believe that – if any offer actually did take place, it would have been a very high, very significant offer in this matter. I don't believe Mr. Lounds would ever take it. App. 309, l. 22 – p. 310, l. 22.

Additionally, reprinted below from page three (3) of the supplemental appendix is a paragraph from a letter written by appellate counsel to petitioner during the direct appeal verifying the fact that plea offers were made in his (petitioner's) case. The letter confirms as follows:

“I [Direct Appeal Counsel] spoke to George Campbell of the Greenville Solicitor's office...[who] stated that ...[he] did find in his computer system.....offers made on May 17, 2010 and January 26, 2011.”

Apparently, trial counsel contacted Solicitor Ellis regarding plea offers, but failed to contact Solicitor Campbell, who was also a prosecutor in the case, about plea offers. Also, counsel failed to contact former counsel Patel, who was previously assigned to represent petitioner, about plea offers. These omissions constituted error.

A defendant has a right to effective assistance of counsel during the plea bargaining process. In Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), the Court held that the Sixth Amendment regarding effective assistance of counsel applied to the plea bargaining process also. Judge was overruled on other grounds by Jackson v. State, 342 SC 95, 535 S.E. 2d 926 (2000), to the extent that a statement by a client that he was prejudiced by counsel's deficient performance at the plea bargaining process can satisfy the prejudice prong of the two-pronged test to be met in ineffective assistance of counsel cases. See Missouri v. Frye, 132 S.Ct. 1399 (2012), where counsel was found ineffective in failing to convey to the defendant the plea offer before it expired. See also Davie v.

State, 381 S.C. 601, 675 S.E.2d 416 (2009), where the Court held that counsel was ineffective in failing to communicate a plea offer to the defendant. In Davie, the Court held that counsel's failure to inform the defendant of a written plea offer that was substantially less than the sentence he received after pleading guilty constituted ineffective assistance of counsel because the defendant was unaware of the existence of the plea offer (due to counsel's error) until after the plea offer had expired, and that he would have accepted the plea offer had it been communicated to him. In Lafler v. Cooper, 132 S.Ct. 1376 (2012), the Supreme Court held that petitioner was prejudiced by counsel's deficient performance in advising petitioner to reject a plea offer and go to trial.

A guilty plea must represent a voluntary and intelligent choice among alternative courses of action open to the defendant. Hill v. Lockhart, 474 U.S. 52 (1985). Here, counsel's error regarding the failure to communicate to petitioner the state's two plea offers prior to trial violated petitioner's right to receive effective legal assistance in his criminal case by guarantee of the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, supra. Petitioner was prejudiced by counsel's negligence because he stated at the PCR hearing that he would have considered and maybe accepted either of the plea offers had they been made know to him, and note that a reasonable probability existed that the outcome of his convictions and sentences might have been different but for counsel's error in this regard.

QUESTION II

Trial counsel erred in failing to call defense witnesses Brigham Young and Zeldric Vance, both of whom testified at the PCR hearing, to testify at trial because both of these witnesses would have provided favorable testimony for the defense by offering proof that petitioner was not guilty as neither a principle nor an accomplice, and by presenting testimony that the case was a drug deal gone awry rather than a robbery in the first place.

At trial, Bryan Workman testified that he spent the night in a Motel 6 Hotel room on September 5, 2009, and had been waiting for a female companion to appear during that time when he heard a car door sound. Workman stated that he exited his room and saw petitioner walking towards him. Workman stated that petitioner asked for “dope” and then minutes later, petitioner placed a gun in [his midsection] and told him to go back into the hotel room. While they were inside the room, Workman stated that petitioner took his checkbook and fled. Workman realized subsequently that some checks, which he presumably had not authorized to be cashed, had cleared on his account. Workman identified petitioner as the perpetrator by selecting his photograph from a police line-up he viewed. Note that there was a videotape in existence of two men who allegedly cashed one of Workman’s checks at a grocery store, but Workman could not identify petitioner on the tape. App. 61, l. 11 – p. 78, l. 15. Note further that there were no other eyewitnesses in the case who were available to corroborate Workman’s testimony. Finally, note that although petitioner did not testify at trial or present any defense witnesses at trial, petitioner gave a statement to police after viewing the grocery store video revealing that he was the person seen at the grocery store on camera. App. 25, lines 6-12.

During the PCR hearing, petitioner testified in effect that trial counsel erred in failing to call two defense witnesses, who could have testified at trial, that petitioner was not guilty as a principle

an accomplice. Petitioner explained at the PCR hearing that trial counsel was aware of the existence of Brigham Young and Zeldric Vance, who would have testified as witnesses for the defense. Young and Vance would have corroborated petitioner's version of the facts via his (petitioner's) PCR testimony, which was that he (petitioner) took Young to Workman's hotel room because Young wanted drugs, and that Workman paid for the drugs via his (Workman's) checkbook. Petitioner's PCR testimony was that no robbery occurred. App.262, l. 23 – p. 263, l. 18. Young and Vance, who both testified at the PCR hearing, confirmed that no robbery occurred, but rather a drug transaction between Workman and Young occurred, and that petitioner had no role in the drug deal between the men. App. 261, l. 19 – p. 269, l. 25; App. 270, l. 13 – p. 271, l. 2. Nonetheless, in the event the jury interpreted the case to be an armed robbery, even if Young and Vance had testified; clearly, Vance's and Young's testimony would have established that petitioner was not a principal or an accomplice to any alleged robbery.

Brigham Young testified at the PCR hearing and explained that petitioner gave him a ride to the hotel, and that upon arriving there he (Young) asked Workman for the money owed, and that Workman paid him by turning over his checkbook. Then, Young stated that he took the checkbook to Ingles grocery store and cashed a check. Young added that Lounds simply gave him a ride to the hotel not knowing the reason for giving him a ride, and that no robbery even occurred in the case. App. 287, l. 7 – p. 294, l. 17.

Zeldric Vance testified at the PCR hearing also and explained that Workman wanted "weed," so he asked Young to supply Workman with the "weed," and that he saw Workman give Young the checkbook as payment. Vance stated that petitioner merely gave Young a ride to the hotel where Workman had a room. Vance added that no robbery that occurred. App. 297, l. 10 – p. 303, l. 11.

Trial counsel testified during the PCR hearing and explained that he did not recall being informed of the existence of Vance or Young as witnesses, but that the presentment of petitioner's case as a drug deal rather than a robbery might not have been the best strategy. App. 306, l. 13 – p. 309, l. 3; App. 314, l. 1 – p. 315, l. 21. Contrary to counsel's testimony, the record revealed that although counsel did not have Vance present to testify at trial as a potential witness, it was clear that counsel had Young present at trial, but Young could not testify based on the trial judge's ruling that counsel failed to list him as a potential witness prior to trial. App. 188, l. 1 – p. 190, l. 5.

Under the state's version of the facts, petitioner was portrayed as a principle. A principle in a crime is one who perpetrates the crime. State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010). However, even though petitioner did not testify at trial, he pled not guilty to armed robbery, which in effect meant he did not admit guilt as a principle, and his PCR testimony confirmed this.

Alternately, despite petitioner's and Vance's and Young's PCR testimony, there was wiggle room for the state to assert petitioner's guilt as an accomplice because petitioner drove Young to the location where the incident (robbery or drug deal) took place, and because there was a tape in existence showing Young and someone else suspected to be petitioner at a grocery store cashing one of Workman's checks, and because Young confessed to appearing at the grocery store and cashing one of Workman's checks, and because petitioner confessed that he was on the videotape at that grocery store when said check was cashed. As a rule, accomplice liability occurs when one joins with another to accomplish an illegal purpose where there is a common design or intent to commit a crime, which is committed by the accomplice via an overt act. State v. Mattison, supra. The accomplice must have acted with the intention of encouraging and abetting the commission of the offense, and the accomplice must have knowledge of the principle's criminal conduct, although prior knowledge that a crime is going to be committed without more is insufficient evidence to

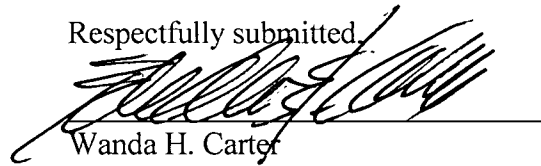
render one guilty. State v. Mattison, supra. Also, although presence at the crime scene by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle, the accomplice's mere presence at the scene is not sufficient evidence to establish guilt as an accomplice. State v. Mattison, supra. Nevertheless, in light of Vance's, and Young's PCR testimony, the state's accomplice liability theory regarding the incident, albeit a drug deal or robbery, would have been nullified because their testimony would have established that petitioner had no knowledge and no intent to aid and abet in a drug deal or a robbery even if the jurors believed the state's position that this was a robbery case. Clearly, petitioner was merely present at the crime scene by way of offering Young a ride to a hotel where unbeknownst to him a drug deal (or robbery) was about to occur, and where unbeknownst to him payment by way of forged checks would also occur per Young's future actions.

A defendant has a right to have witnesses presented in his defense at trial. Crane v. Kentucky, 476 U.S. 683 (1986). Trial counsel erred in failing to present witnesses Young and Vance to testify on petitioner's behalf at trial in order to establish that there was no intent or knowledge associated with and connected to petitioner that would render him a principle or an accomplice during the drug deal/robbery at issue. This error constituted deficient legal representation in petitioner's criminal case in violation of the Sixth Amendment to the United States Constitution. See also Strickland v. Washington, 466 U.S.668 (1984). But for counsel's neglect and omission in this regard, a reasonable probability exists that had the defense witnesses in question been presented at trial, the outcome of petitioner's case would have been different.

CONCLUSION

Based on the foregoing arguments, petitioner requests that this Court grant the petition and allow full briefing on the issues raised above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of September, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

ANTHONY MAURICE LOUNDS,

PETITIONER,

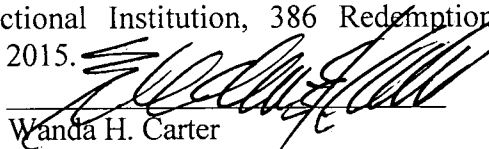
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STATE OF SOUTH CAROLINA,

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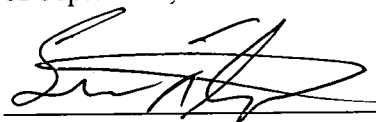
CERTIFICATE OF SERVICE

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 Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Anthony Maurice Lounds #227456, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of September, 2015.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of September, 2015.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.