

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Charleston County

Roger E. Henderson, Family Court Judge

DARRYL GRANT,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002182

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
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South Carolina Commission on Indigent Defense
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QUESTION PRESENTED

Whether plea counsel operated under a conflict of interest?

STATEMENT

On March 2, 2006, petitioner appeared before the Honorable R. Markley Dennis, Jr. in Charleston County and pled guilty to armed robbery. A fifteen (15) year sentence was imposed. Alan Toperek, Esq. was plea counsel. Petitioner filed a motion for reconsideration of his sentence on March 10, 2006. That motion was not denied until January 10, 2014¹. (App. p. 26)

Petitioner filed an application for post-conviction relief on March 12, 2014. (App. p.2-p.25) Respondent filed a return dated June 3, 2015. (App. p. 26- p.31) An evidentiary hearing was held on July 21, 2015, before the Honorable Robert E. Henderson. Petitioner was present and was represented by Rodney D. Davis, Esq. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 32-p.74) On September 18, 2015, Judge Henderson issued an order denying and dismissing the application for post-conviction relief. (App. p. 75 – p.84)

This petition follows.

¹ Because of the lapse of time no transcript of the guilty plea is available.

ARGUMENT

Plea counsel operated under a conflict of interest.

Petitioner alleged in his post-conviction relief application that plea counsel had a conflict of interest. (App. p .4) Petitioner testified at the evidentiary hearing that he found out after he got to prison there was a pending motion to reconsider his sentence. He tried to file two applications for post-conviction relief and they were dismissed without prejudice because of the pending motion to reconsider. He got plea counsel to resolve the pending motion so he could file this current application for post-conviction relief. (App. p. 42, line 21 – p. 45, line 18). Petitioner said prior to pleading guilty he met with counsel two times. No potential defenses were discussed. Counsel did tell him about his right to go to trial but petitioner did not feel counsel was prepared or interested in going to trial. He never got a copy of his discovery from counsel. (App. p. 45, line 22 – p. 46, line 12) Petitioner gave a statement to law enforcement and he discussed the statement with counsel but no mention was made of suppressing the statement if they went to trial. (App. p. 47, line 20 – p. 48, line 4) Petitioner was seventeen (17) when he was arrested. (App. p. 48, lines 10-12) He said nothing was ever mentioned about a plan until the day he pled. (App. p. 48, lines 22-24)

Petitioner said during the plea itself, plea counsel told everyone in the courtroom he was friends with the victim. Petitioner did not know this beforehand. If he had known it he would have asked counsel to be relieved. (App. p. 53, line 15-p.54, line 9)

Plea counsel testified that he did know the victim. He said he did not realize it until the day before the plea. He was not sure exactly when he told petitioner. He said the victim's name was James Frisch. He grew up with a Randy Frisch right down the street from him. Counsel said Frisch was about (10) years older than he was and he was a very popular guy. He found out the day before the plea that James Frisch and Randy Frisch were the same person. (App. p. 63, line 23 – p. 64, line

11) Counsel said during the plea, he told the judge that he knew Frisch and that his heart went out to him. He said he was a gentleman and they come no finer. (App. p. 65, lines 2-5)

In Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) the Court wrote:
The test used to determine when a conflict of interest results in a violation of sixth amendment rights is found in *Cuyler v. Sullivan* 446 U.S. 335, 348-350, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980):

In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance...

[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief...But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir. 1979), states that an actual conflict of interest occurs:

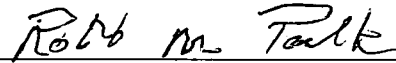
...when a defense attorney places himself in a situation inherently conducive to divided loyalties...If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that that attorney owes a duty to the defendant to take some action that could be detrimental to his other client. 281 S.C. at 437-438, 315 S.E.2d 810-811.

In this case plea counsel owed a duty to his client, not the victim. He was supposed to provide mitigation for his client and not tell the judge what a great guy the victim was. That was the conflict of interest – counsel's friendship with the victim. As petitioner testified if he had known of the friendship, he would have asked counsel to be relieved.

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of January, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger E. Henderson, Family Court Judge

DARRYL GRANT,

PETITIONER,

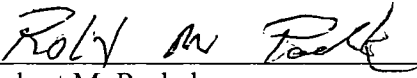
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Darryl V. Grant, #314123, at Abbeville County Prison, 59 Old Calhoun Falls Road, Abbeville, SC 29630, this 6th day of January, 2016.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of January, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.