

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Greenville County
Robin B. Stilwell, Circuit Court Judge

WILLIAM GLADNEY HARDEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT I	4
ARGUMENT II	6
CONCLUSION	7

I

The PCR judge erred in denying petitioner's argument that the sentence he received was excessive due to trial counsel's failure to investigate properly into his criminal record because had he done so, then he would have been able to correct numerous inaccuracies raised by the solicitor regarding his (petitioner's) prior record at sentencing.

II

The PCR Court erred in allowing petitioner to proceed pro se in the PCR case without first advising petitioner of the dangers and disadvantages of pro se representation because without the same there was no valid waiver of petitioner's right to PCR counsel in a case.

STATEMENT

Petitioner William Gladney Harden pled guilty to defrauding a federally chartered financial institution during the March 2009 term of the Greenville County General Sessions Court before Judge Victor C. Pyle. Petitioner was sentenced to imprisonment for a period of five years, suspended upon the service of three years and five years probation. App. 1-16. Petitioner did not appeal his conviction and sentence. Petitioner was represented at the plea proceeding by Randy Chambers.

On February 15, 2010, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 18-27. The respondent filed a return requesting that a hearing be held in response to petitioner's PCR application. App. 28-31. An amended PCR application was filed on February 8, 2010. App. 32-33

A PCR hearing was convened on February 25, 2011, at the Greenville County Courthouse before Judge Robin B. Stilwell. App. 34-66. Daniel Farnsworth was listed as counsel at the PCR hearing, but petitioner appeared pro se. On April 1, 2011, Judge Stilwell issued an order of dismissal in the case. App. 68-75.

Petitioner appealed Judge Stilwell's order.

ARGUMENT I

The PCR judge erred in denying petitioner's argument that the sentence he received was excessive due to trial counsel's failure to investigate properly into his criminal record because had he done so, then he would have been able to correct numerous inaccuracies raised by the solicitor regarding his (petitioner's) prior record at sentencing.

The state alleged that petitioner deposited eight checks drawn on four closed accounts from Suntrust and Wachovia and deposited those into his (petitioner's) account and then withdrew all the funds before the checks could be returned as being on closed accounts. App. 6, ll. 12-24. Defense counsel argued that petitioner never intended to defraud because when he found out that the checks were no good, he wanted to re-pay, but he was picked up on an outstanding warrant before he could do so. App. 7, l. 20 – p. 8, l. 23.

Then, at sentencing, petitioner stated that the prior record the solicitor read to the trial judge was incorrect. Petitioner stated that he did not have a crack cocaine conviction or a sex conviction.¹ App. 13, l. 20 – p. 14, l. 7.

¹ Mr. Campbell: Your Honor, we have this prior record here and it is significant. It starts back in 1977 with five counts of forgery and house breaking, possession of marijuana, contributing to the delinquency of a minor, furnishing narcotics to a minor; 1982, obtaining goods by fraud, simple possession of marijuana; 1991, contributing to the delinquency of a minor, possession with intent to distribute marijuana; 1992, possession with intent to distribute a Schedule 1, 2, or 3 substance, third offense; 1993, contributing to the delinquency of a minor, simple possession of marijuana, unlawful possession of prescription drugs, seven counts; 1998, possession with intent to distribute a Schedule 1, 2 or 3 drug, contributing to the delinquency of a minor, possession with intent to distribute crack cocaine; 2006, distributing obscene material to a minor under 18 years of age; 2008 a violation of a sex offender act; 2002, a federal charge for sex offense; 1999 in Georgia we have theft by deception and 1981 in 1981 Georgia there were three counts of theft. App. 12, l. 7 – p. 13, l. 1.

During the PCR hearing, petitioner testified in effect that counsel's failure to secure a copy of his prior criminal record before the plea proceeding commenced and his omission in failing to object to the state's incorrect listing of his prior offenses, which included offenses he did not commit, constituted ineffective assistance of counsel in his case. Petitioner added that he would not have received the lengthy sentence that he received had counsel properly represented him in this respect at the sentencing phase of his guilty plea proceeding. App. 44, ll. 4-7; App. 46, l. 19 – p. 49, l. 19. Petitioner stated that he informed counsel of the inaccuracies in his criminal record on the eve of the plea proceeding. App. 56, l. 21 – p. 57, l. 2.

Trial counsel testified at the plea proceeding and explained that he “had no way of knowing what [petitioner's] prior criminal record was other than what was submitted to [him].” App. 57, ll. 10-16. Counsel added that he “[doesn't] ever investigate anybody's criminal record unless it is going to involve a sentence enhancement of some sort.” App. 58, ll. 15-21.

The PCR judge ruled that petitioner failed to present any evidence that either the information about his prior record was inaccurate or that the information prejudiced him in some way. App. 73.

In State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976), where the defendant's record included prison infractions which had been dropped and probation charges for which he had not been tried, the Court cited to Townsend v. Burke² in ruling that a sentence cannot be predicated upon false information. Here, the trial judge was presented with false information regarding petitioner's prior record at the sentencing phase of the proceeding, which in turn more likely than not, ultimately affected the sentence handed down in this case. Here, petitioner argued that the

sentence handed down was lengthy due to the trial judge's receipt of false information regarding his sentence. A sentence that is arbitrary can be reviewed by an appellate court. State v. Franklin, supra.

Trial counsel erred in failing to investigate into petitioner's sentencing record so that he could be prepared to object to the sentencing inaccuracies listed at the sentencing stage of the plea proceeding held in the case. This deficient performance violated petitioner's Sixth Amendment right to effective assistance of counsel during a plea proceeding. See Hill v. Lockhart, 484 U.S. 52 (1985). Petitioner was prejudiced because but for counsel's negligence, a reasonable probability exists that his sentence in the case would have been different.

ARGUMENT II

The PCR Court erred in allowing petitioner to proceed pro se in the case without first advising petitioner of the dangers and disadvantages of pro se representation because without the same there was no valid waiver of petitioner's right to PCR counsel in a case.

Prior to the hearing, the following colloquy occurred regarding self-representation:

MR. FARNSWORTH: Judge, Mr. Harden has informed me he would like to proceed as his own counsel in this matter but would like to have me sit here as, uh, standby counsel which I will agree to do.

THE COURT: Okay. Good enough. We'll do that. Okay.

Mr. Harden, you have a motion, sir?

MR. HARDEN: Just to serve as my own counsel.

THE COURT: Okay. Sure. I'll let you do that. No problem. No problem. Now, Mr. Harden, I'll ask you this. Again, I told you this before, I don't mean to discourage you from going forward. It seems

² 334 U.S. 736 (1948)

to me that if you already out of jail and, uh, - - are you on probation now?

MR. HARDEN: I am.

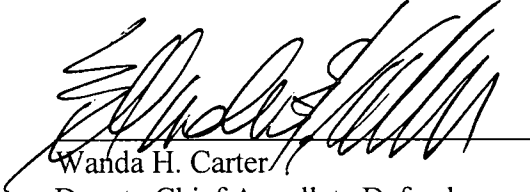
App. 41, l. 24 – p. 42, l. 16.

Rule 71.1(d) SCRPC mandates the appointment of counsel for indigent PCR applicants and that right exists unless the applicant waives the right to counsel after he is made aware of the dangers of self-representation. Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992). No such advice or warnings were issued to petitioner in the case. Therefore, there was no valid waiver by petitioner to proceed without counsel at the PCR hearing. This violated petitioner's right to counsel in his PCR case. The PCR Court erred in allowing petitioner to proceed pro se in the PCR case without a waiver of the right to counsel.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of March, 2012.

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IN THE SUPREME COURT

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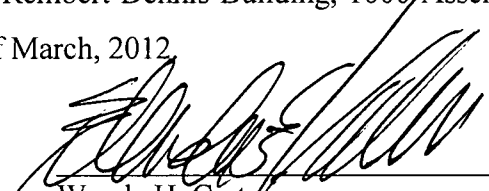
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of March, 2012.

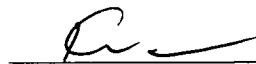


Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of March, 2012.

_____(L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013.