

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

Maite Murphy, Circuit Court Judge

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SC SUPREME COURT

DIDIER VAN SELLNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-002472

REPLY TO STATE'S BRIEF OF RESPONDENT

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ARGUMENT IN REPLY

This Court granted certiorari to review the following issue:

“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. § 16-11-330(A), as analyzed in State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002)?”

Contrary to Respondent’s assertion that the PCR court’s “findings are supported by ample evidence in the record,” the PCR court’s findings were premised on an error of law. See Brief of Respondent (“BOR”), p. 8. In State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002), this Court held that “words alone are not sufficient under the second prong [of S.C. Code Ann. § 16-11-330(A)] to support a conviction for armed robbery.” Thus more fully discussed in the Brief of Petitioner, the PCR court erred in finding that “by passing the teller a note threatening her with a deadly weapon, Applicant’s conduct comported to the armed robbery statute by alleging with words that he was armed with a deadly weapon.” App. 81 (Order of Dismissal, p. 6). It was based upon that erroneous determination that the PCR court found that plea counsel was not deficient in advising Sellner to plead guilty to armed robbery.

Respondent’s argument that Sellner failed to meet his burden of proof is based on a mischaracterization of Sellner’s testimony and apparent misunderstanding or ignorance of plea counsel’s testimony that she advised Sellner that words alone were enough. Despite the record, Respondent continues to argue that “Petitioner never testified as to the location of his hands” and “never testified as to whether he had anything in his pockets or under his clothing that could have created the appearance of a weapon and led Ms. Hildebrandt [the

teller] to reasonably believe Petitioner was armed.” BOR, pp. 7-9. 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). On cross-examination, Sellner reiterated:

She [plea counsel] never fully clarified the main point is that I had to have representation or something that would indicate. **And if you look at all the statements, everyone said they saw no weapon. Even police reports said robbery by threats intimidation, no weapon.**

See, I wasn’t clear on that point. She just said well, because you said you had a gun, that’s what she said. And I just went with that. She never clarified that. She just said because you said it, that makes it so.

App. 57, ll. 1-13 (emphasis added); see also App. 77 – 78 (Order of Dismissal, p. 2-3).

Beyond Sellner’s testimony, there was the testimony of plea counsel that Sellner **“told [her] from day one that he didn’t really have a gun.”** App. 66, ll. 12-13 (emphasis added); App. 78 (Order of Dismissal, p. 3). PCR counsel then asked plea counsel specifically about the discovery provided to her, including the Orangeburg Department of Public Safety reports, an FBI report, and the witness statements. Plea counsel agreed that none of the discovery gave any indication that Sellner was armed “other than the note.” App. 66, l. 23 – 69, l. 8. Had Respondent become aware of some contrary evidence during the more than fifteen months that passed between the filing of Sellner’s PCR application and the evidentiary hearing, the State could have presented that at the PCR hearing.¹ 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) (emphasis added); App. 66, ll. 13-15; App.70, ll. 3-7. It was that **erroneous advice** that Sellner was required to prove, which he did.

Despite this Court’s holding in State v. Muldrow, the State continues to contend that the note used by Sellner was a sufficient “representation” for the purposes of the armed robbery statute. BOR, pp. 11-13. Respondent attempts to distinguish the present case from Muldrow based on the fact that Sellner pled guilty. Respondent argues in a footnote that because Sellner pled guilty, there was no testimony presented by the witnesses at the plea hearing that affirmatively mentioned whether there was any physical representation that might have led the teller to reasonably believe that Sellner was armed. BOR, pp. 12-13 n. 2. Indeed, Muldrow was a direct appeal involving a directed verdict issue rather than a post-conviction case. Nonetheless, the differing posture of the two cases certainly does not alter the applicability of Muldrow to Sellner’s claim of ineffective assistance of counsel. Rather, Sellner was required to present evidence in support of his allegation and did so through his testimony and the testimony of plea counsel. App. 53, l. 20 – 54, l. 19; App. 56, l. 11 – 57, l. 13; App. 66, l. 8 – 70, l. 7. Notably, the State presented no contradictory evidence. In fact, the Assistant Attorney General asked only one question of plea counsel, which was whether it was her belief both at the time of the plea hearing and at the time of the PCR hearing “that under the South Carolina Armed Robbery Statute 16-11-330, **the note was enough** to be a representation or words that he was armed?”

¹ Petitioner Sellner’s PCR application was filed February 11, 2013, and the evidentiary hearing before Judge Murphy was held May 29, 2014. See App. 23 and App. 42.

App. 70, ll. 3-7. Plea counsel responded affirmatively that such was her understanding, evidencing her continued misapprehension of the law. App. 70, l. 7.

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

Likely recognizing the weakness of the argument that the note is enough, Respondent discusses two cases where defendants had their hands in their jacket or coat pockets, attempting to analogize them to this case. BOR, pp. 10-11. Contrary to Respondent’s claim otherwise, those cases are not “similar” to the present case. In State v. Jones, this Court reiterated its’ holding in State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct.App.1986), that armed robbery does not require the *display* of a deadly weapon. 342 S.C. 248, 536 S.E.2d 396 (Ct. App. 2000). The defendant in Jones handed a convenience store clerk a note stating “This is a stickup, give me all the money” and “kept his left

hand in his jacket pocket.” Id. at 250-51; 536 S.E.2d at 397. It was the placement of Jones’ hand in his pocket that distinguishes his case from Muldrow and the present case. In Martin v. State, the victim “perceived that Martin had a gun” because he ““had his hand in his left coat pocket.” 592 S.E.2d 483 (Ga. Ct. App. 2003). As discussed more fully in the Brief of Petitioner and *supra*, unlike Jones or Martin, Sellner’s hands were not in his pockets and he did not have any physical representation of a weapon or any other object. All Sellner had was a piece of paper, which conveyed a substantially similar threat to that made in Muldrow. Respondent nevertheless 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 where plea counsel addressed the Court. BOR, p. 7. However, it is clear from the testimony at the PCR hearing that plea counsel was referring to the note, as she considered the note sufficient under the statute. 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.”).

Though the Brief of Respondent generally ignored the prejudice argued in the Brief of Petitioner, Respondent did assert that “Petitioner’s prior record clearly made him eligible for an enhanced life without parole sentence pursuant to S.C. CODE ANN. § 17-25-45 upon conviction of another serious or most serious offense, such as armed robbery.” BOR, p. 7. However, even as indicted, LWOP was an unlikely sentence because Sellner’s prior convictions for “various robbery and drug offenses” that Respondent referred to were for third degree robbery and a seventh degree possession in New York State and would not likely qualify as “serious” or “most serious” offenses under

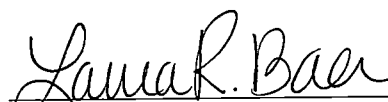
S.C. CODE ANN. § 17-25-45. BOR, p. 7; see N.Y. PENAL LAW §§ 160.05, 220.03. Sellner's prior conviction for attempted murder does not appear on his "RAP sheet" and he was advised by plea counsel that it would be difficult for the State to obtain any documentation of it for the purpose of a sentencing enhancement. App. 3, l. 25 – 4, l. 13; App. 14, ll. 10-16; App. 57, l. 13 – 62, l. 1. Moreover, LWOP eligibility is irrelevant in light of the fact that Sellner's conduct did not amount to armed robbery. Had Sellner gone to trial, his conduct would have only satisfied a conviction for strong arm robbery, which is not a "most serious offense" or "serious offense" under the recidivist statute. See S.C. CODE ANN. § 17-25-45 (providing enumerated lists of the offenses classified as "most serious" and "serious," along with a provision that "any offense which is punishable by a maximum term of imprisonment for thirty years or more which is not referenced in subsection (C)(1)" is also classified as a "serious offense").

In conclusion, Sellner had the burden of proving ineffective assistance counsel. He presented evidence of plea counsel's deficient advice through testimony of both himself and plea counsel, who agreed that Sellner was only accused of using a note to rob the bank and that plea counsel advised him the note was sufficient to support an armed robbery conviction. 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 Brief of Petitioner, Petitioner Didier Van Sellner respectfully requests this Court vacate his guilty plea and grant him a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 6th day of April, 2016.

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Maite Murphy, Circuit Court Judge

DIDIER VAN SELLNER,

PETITIONER,


V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

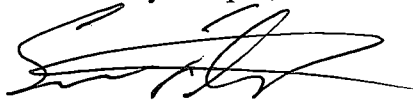
The undersigned attorney hereby certifies that a true copy of the Reply Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Didier Van Sellner, #350065, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472 this 6th day of April, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.