

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Anderson County

APR 27 2016

Edgar W. Dickson, Circuit Court Judge

S.C. SUPREME COURT

STEVEN McELRATH,

PETITIONER,

- Vs. -

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2015-001081

PRO. SE. BRIEF

STEVEN McELRATH, #328413

McC.I. F.1-244-B

386 REDEMPTION WAY

McCORMICK, SC 29899

-PETITIONER PRO.SE.

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OVERVIEW

• This Court issued Notice on March 21, 2016 that within forty-five (45) days thereof Petitioner ('McElrath') could file a pro se response to the 'Petition for a Writ of Certiorari' and accompanying 'Petition To Be Relieved As Counsel', both filed by Appellate Defender Kathrine H. Hudgins ('Appellate Defender Hudgins'), pursuant to Johnson v. State, 294 S.C. 310, 364 S.E. 2d 201 (S.C. 1988), regarding claims alleged in the June 15, 2010 Evidentiary Hearing upon McElrath's Application for Post-Conviction Relief ('PCR') before the Honorable R. Lawton McIntosh ('PCR Judge McIntosh'). Noted PCR claims were alleged before PCR Judge McIntosh in reference to the adequacy of Guilty Plea Counsel Scott Robinson ('Plea Counsel Robinson')'s conduct surrounding McElrath's alleged Plea of Guilty before the Honorable J.C. Nicholson ('Plea Court Judge Nicholson') on May 19, 2008.

McElrath's instant Pro. Se. Brief Moves for this Court to Deny Appellate Defender Hudgins' Petition To Be Relieved As Counsel, *inter alia*, and Moves for Remand back to the PCR Court for PCR Judge McIntosh to issue 'findings of fact and conclusions of law' pursuant to the progeny of Bryson v. State, 328 S.C. 236, 439 S.E. 2d 500 (S.C. 1997), as matters would've been subject of Original Appeal.

ARGUMENTS

I. - McElrath asserts that Appellate Defender Hudgins' Petition To Be Relieved As Counsel should be Denied, as to the matter asserted in her Johnson Petition, where the premises underlying her argument must be viewed as inadequate for McElrath's record-based position of:

(a) - McElrath's PCR claim clearly alleged Plea Counsel Robinson "... was Ineffective For failing to object to the consecutive sentences given by the Court pursuant to 17-25-50 ..." < see App., Pg. 60, ln.(s) 7-9 (In relevant Part) > and that "Counsel should have objected and Motion the Court for a Concurrent Sentence," < Id., at ln.(s) 15-16 (In relevant Part) > .

(i) - Noted S.C. Code Ann. § 17-25-50 (Supp. 2004)

provides:

"In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point

of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses."

(ii)- Construction of the mandate "... the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time..." allows McElrath's argument for a 'concurrent' sentence upon the kidnapping and Criminal Sexual Conduct convictions due to the established record illustrating that the alleged offenses occurred on February 8, 2007 at the same time < accord App., Pg. 14, In. 16 to App., Pg. 17, In. 7 ; App., Pg. 30, App., Pg. 32 >; as well, the use of the word "shall" in § 17-25-50 "... indicates the legislature's intent to enact a mandatory requirement." (see Collins v. Doe, 352 S.C. 462, 470, 574 S.E. 2d 739, 743 (S.C. 2002); Bradley v. Doe, 374 S.C. 662, 634, 649 S.E. 2d 153, 160 (S.C. App. 2007) (citing Collins)). Recently, the U.S. District Court denied Habeas relief to a challenge of error in failing to issue concurrent sentencing pursuant to § 17-25-50 because

the "... crimes were not one act or series of acts under South Carolina law mandating concurrent sentences", and that "... crimes to which the petitioner pled guilty involved five different victims over a more than three year period..." (see Jeter v. Cartledge, 2015 WL 5546651, * 14 (D.S.C. 2015) (Quoted in Relevant Part)).

(b)- M^cElrath's PCR testimony discloses that "[a]fter researching, I came across some things that I thought they should have run them concurrent according to the code of laws that I came across. Yes, sir, I feel like he should have objected to the sentence I was given." < see App., Pg. 81, ln.(s) 15-18 >, in reference to a strict construction of § 17-25-50; whereas, on the other hand, Plea Counsel Robinson's PCR testimony is that, among other things said, the § 17-25-50 would not have worked in M^cElrath's situation because "[a]ccording to the Solicitor, there was an attack of rape and then the person was taken against their will, kept in a room." < see App., Pg. 89, ln.(s) 11-13 specifically; compare App., Pg. 89, ln.(s) 1-17 >. M^cElrath submits here that initial PCR Judge M^cIntosh's Findings and Conclusions on M^cElrath's claim < see App., Pg. 103

to App., Pg. 104 > is not supported by the PCR record, whereas Plea Counsel Robinson's PCR testimony reveals his lack of knowledge regarding the mandatory language of § 17-25-50 existing in the word 'shall', and lack of knowledge as to the reach and/or applicability of a statutory provision indicates a Failure of counsel regarding the obligation to conduct a factual and legal investigation in accords with Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), thereby evincing the actual basis of why Plea Counsel Robinson could not 'Object to the Sentence or File Motion for Reconsideration' as alleged.

Further, Plea Counsel Robinson's explanation is not sufficient when faced against the clear mandate of § 17-25-50, so PCR Judge Mcintosh's Order is an abuse of discretion on denying McElrath PCR relief on ground of Plea Counsel Robinson being Ineffective for failing to object to the consecutive sentences given McElrath.

(c)- Based on the above, Appellate Defender Hudgins' Petition To Be Relieved As Counsel should be Denied.

II. - M^cElrath asserts that PCR Judge M^cIntosh's Order of Dismissal should be reviewed for abuse of discretion regarding M^cElrath's specific claim of Plea Counsel Robinson being Ineffective for failing to object to the sentence received'.

(a) - To avoid the redundancy of matters M^cElrath submitted above < see I (b) >, PCR Judge M^cIntosh's assessment of M^cElrath's Ineffective Assistance of Counsel claim regarding Plea Counsel Robinson failing to object to the consecutive sentences given by the Court pursuant to 17-25-50' where Counsel should have objected and Motion the Court for a Concurrent Sentence', based on the mandatory provision(s) of § 17-25-50, must fail as an erroneous decision of PCR Judge M^cIntosh, rendered at App., Pg. 103 to App., Pg. 104 (under "Failure to Object to the Sentence or File Motion for Reconsideration"), because PCR Judge M^cIntosh gave credibility to Plea Counsel Robinson's PCR testimony that § 17-25-50 would not apply to M^cElrath despite crimes happening at the same time. M^cElrath's position is that PCR Judge M^cIntosh committed an abuse of discretion by crediting Plea Counsel Robinson's testimony about the inapplicability of § 17-25-50 in light of the mandatory term "shall" included therein.

III. - McElrath submits that this Court should Remand back to the PCR court for findings of fact and conclusions of law consistent with Bryson v. State on McElrath's claim of Guilty Plea being Involuntary due to Plea Court failing to advise McElrath of the Nature and Crucial Elements of Charges McElrath pled guilty to.

(a) - McElrath initially brought this matter before the PCR Court in the 'Amended PCR Supplemental Complaint' < see App., Pp. 64-66 >, and in responding to a question during PCR Hearing concerning whether Plea Counsel Robinson explained the elements of the charged offenses, prior to the plea or at any time, McElrath testified that he was "... never set down and explained the elements ..." < App., Pg. 79, ln.(s) 12-13 ; accord ln.(s) 17-22 >. Considerably, the entire colloquy of McElrath's Guilty Plea record fails to show where Plea Court Judge Nicholson advised McElrath of the nature and crucial elements of the charges McElrath was pleading guilty to.

(b) - The applicable law surrounding McElrath's claim derives in large measure from the U.S. Supreme Court's holding in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969) which, in applying the requirements of Federal Rules of Criminal Procedure

Rule 11 to the States, allows McElrath to assert the portion of Rule 11 relative to his claim of Involuntary Guilty Plea:

"Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: ... (G) the nature of each charge to which the defendant is pleading..."

- Federal Rules of Criminal Procedure, Rule 11(b)(1)(G) (Quoted in Relevant Part).

- The proper application of Rule 11(b)(1)(G) follows a Judge's assurance of the defendant being advised of the nature of the accusation(s) (see, e.g., Kercheval v. U.S., 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927) ("Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with

full understanding of the consequences."); accord U.S. v. Gigot, 147 F.3d 1193, 1198, n.5 (10th Cir. 1998); U.S. v. Mook, 60 Fed. Appx. 58, 59, 2003 WL 675650 (9th Cir. 2003); U.S. v. Bah, 587 Fed. Appx. 752, 754 (4th Cir. 2014) (District Court adequately explained nature of bank fraud offense to which defendant pled guilty, as required for guilty plea to be knowing and voluntary, after "defendant acknowledged at plea hearing that he received copy of indictment, discussed charges with his attorney, and understood charges against him, although plea agreement did not include description of nature of charges or elements of offense, statement of facts, referenced in plea agreement, stipulated that allegations set forth in indictment were true, and at plea hearing, defendant responded "yes" to court's question as to whether he read and understood statement of facts, and as to whether, to best of defendant's knowledge, information contained therein was true."), and McElrath's Guilty Plea record, lacking indicia of Plea Court Judge Nicholson advising McElrath of the Nature and Crucial Elements of Charged offenses, renders his guilty plea Involuntarily entered.

(c)- PCR Judge McIntosh's Order of Dismissal quotes the Guilty Plea Transcript, yet fails to quote where

in the Guilty Plea transcript Plea Court Judge Nicholson advised McElrath of the Nature and Crucial Elements of the Charged Offenses; thus, McElrath submits that the required 'findings of fact and conclusions of law' (see, e.g., Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992); S.C. Code Ann. § 17-27-80 ; South Carolina Rules of Civil Procedure 52(a)) are lacking in PCR Judge McIntosh's Order, calling for this Court to Remand back to the PCR Court for "... proper findings of fact and conclusions of law" (see Bryson v. State, 328 S.C. 236, 439 S.E.2d 500 (S.C. 1997)) to be made upon McElrath's noted claim.

CONCLUSION

WHEREFORE, based upon the above-outlined points of facts and legal authorities, McElrath submits that this Court should Deny Appellate Defender Hudgins' Petition To Be Relieved As Counsel, should review PCR Judge McIntosh's Order of Dismissal for an abuse of discretion (on the specific claim of Plea Counsel Robinson failing 'to object to the sentence received') and thus Remand back to the PCR Court for that and PCR Judge McIntosh's failure to comply with existing laws requiring findings of fact and conclusions of law as to McElrath's claim of Involuntary Guilty Plea, pursuant to Bryson v. State.

Respectfully Submitted,

151 Steven McElrath

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4 - 22 - 16
DATE

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AFFIDAVIT OF SERVICE

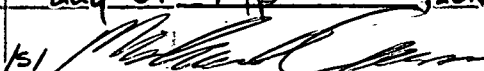
I Certify and Declare before below-signed Notary Public on below-noted date that I Did deposit an Original Draft of my 'Pro.Se. Brief' into the custody of the M.C.I. Mail Room Clerk (below-signed Notary Public) to be immediately Forwarded by sufficient U.S. Postage to 'Clerk, S.C. Supreme Court, P.O. Box 11330, Columbia, SC 29211', and 'Mr. Alan M. Wilson, Esq., S.C. Atty. Gen., P.O. Box 11549, Columbia, SC 29211'.

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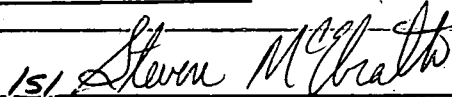
Sworn and Subscribed to
before me this 22nd
day of April, 2016

APR 27 2016

S.C. SUPREME COURT

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Notary Public, South Carolina

* My Commission Expires: July 09 - 2026

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