

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC SUPREME COURT

Certiorari to Spartanburg County
R. Scott Sprouse, Circuit Court Judge

CHADWICK D. ANDERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001936

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did plea counsel labor under an actual conflict of interest where he represented Petitioner and his co-defendant simultaneously during the guilty plea proceedings despite the two having different charges with different levels of involvement in the criminal offenses?

STATEMENT

On June 17, 2011, a Spartanburg County grand jury indicted Petitioner for six counts of armed robbery (2011-GS-42-3055; -3057; -3059; -3061; -3063; -4356) and two counts of accessory after the fact to armed robbery (2011-GS-42-3066; -3067). App. 154-155; App. 157-158; App. 160-161; App. 163-164; App. 166-167; App. 169-170; App. 172-173; App. 175-176. On July 15, 2011, Petitioner and his co-defendant, Xavier Perry, appeared before the Honorable Roger L. Couch to enter their pleas. App. 1. Michael Morin represented the state. App. 1. James Cheek appeared on behalf of Petitioner and Perry. App. 1. No other counsel appeared on behalf of the defendants. App. 1.

The guilty plea hearing

Judge Couch advised ten defendants, including Petitioner and his co-defendant, of their constitutional rights *en masse*. App. 3- 11. Thereafter, the judge reviewed the charges, including the maximum and minimum sentences, first with the co-defendant and then with Petitioner. App. 13, l. 8 – App. 19, l. 23. The judge then asked the co-defendant and Petitioner about plea counsel’s representation. App. 19, l. 24 – App. 20, l. 25.

After the judge reviewed the co-defendant’s personal information, he inquired of Petitioner regarding his education, marital status, and family life. App. 24, l. 23 – App. 26, l. 10. The solicitor then told the judge about a series of convenience store robberies between August 31, 2010, and January 30, 2011. App. 26, l. 24 – App. 29, l. 24. According to the solicitor, generally, the co-defendant entered the stores with the intent to rob, and “[f]or the most part” Petitioner “was the driver.” App. 27, ll. 1-4. However, the solicitor claimed, “[t]here were occasions when [Petitioner] also entered the store.” App. 27, ll. 4-5. The solicitor recommended the sentences be served

concurrently, but made no recommendation as to the number of years for sentencing purposes. App. 30, ll. 17-18.

The judge then accepted the guilty pleas. App. 34, ll. 1-9. Plea counsel spoke on behalf of Petitioner and his co-defendant simultaneously. App. 34, l. 12 – App. 37, l. 8. Plea counsel asked for a “sentence near the lower range as opposed to what is allowed in the discretion of the Court.” App. 36, ll. 1-4. Plea counsel asked for “mercy” for the defendants. App. 36, l. 5; App. 36, l. 25; App. 37, l. 8. He noted both were gifted as songwriters and singers. App. 36, ll. 7-16. The co-defendant then addressed the plea judge. He admitted committing the robberies and explained he needed money to assist in supporting his mother. He also asked for mercy. App. 39, l. 16 – App. 40, l. 4.

Petitioner addressed the judge next, also asking for mercy. He explained how he lost his job due to downturn in the economy. App. 40, ll. 6-21. He described his struggles to get help and find employment. Petitioner told the judge that his actions were a product of his efforts to take care of his wife and children. He apologized to the victims and explained there was never any intent to hurt anyone. App. 40, l. 22 – App. 45, l. 24; App. 46, ll. 5-8.

After the defendants, including Petitioner, presented their case in mitigation, the judge heard from Sam Ringle, a district manager of one of the convenience stores, who said his company’s policy is “to lock them up.” App. 46, ll. 15-22. He asked for the maximum sentences to be imposed. App. 47, ll. 4-5. Marquisha Whitemire, one of the store managers, also addressed the judge explaining how scary the experience was. She too asked for imposition of the maximum sentences. App. 47, l. 8 – App. 48, l. 11.

The judge then sentenced the co-defendant to ten years’ imprisonment on one count of armed robbery, which was to be served consecutively to the other sentences: App. 50, l. 23 – App.

51, l. 1. He sentenced the co-defendant to thirty years' imprisonment on all other counts, which were to be served concurrently. App. 51, ll. 2-3. Finally, he sentenced Petitioner to ten years' imprisonment on one count of armed robbery, which he ordered to be served consecutively to the other sentences imposed. App. 51, ll. 4-6; App. 156. He also sentenced Petitioner to thirty years' imprisonment on all other counts of armed robbery, and to fifteen years' imprisonment for the two accessory offenses. He ordered these sentences to be served concurrently. App. 51, ll. 7-9; App. 159; App. 162; App. 165; App. 168; App. 171; App. 174; App. 177.

Direct appeal

Petitioner, through plea counsel, filed a notice of appeal on July 27, 2011. App. 53-54. On that date, plea counsel provided an explanation of the appeal pursuant to Rule 203(D)(1)(B), SCACR. According to plea counsel, "No issues were raised during the guilty plea; however, the client insisted upon an appeal." App. 55-56. Petitioner wrote to the Court of Appeals on September 27, 2011, explaining the issues he believed should be addressed on appeal. App. 57. The Court of Appeals dismissed the appeal on October 21, 2011. App. 58. Remittitur was sent on November 30, 2011. App. 59.

Post-conviction relief proceedings

Petitioner filed an application for post-conviction relief (PCR) on May 17, 2012 (2012-CP-42-2096). App. 60-67. On July 16, 2012, Petitioner amended his application. App. 68-72. The state filed a return. App. 73-81. On June 8, 2015, the Honorable R. Scott Sprouse presided over an evidentiary hearing concerning the application. App. 82. Suzanne White represented the state, and John Brandt Rucker represented Petitioner. App. 82.

Petitioner acknowledged that he and his co-defendant were represented by plea counsel during their guilty pleas. App. 92, l. 1. He was unaware of plea counsel requesting an on-the-

record waiver of the conflict of interest. App. 92, ll. 2-9. At the time of the guilty plea hearing, he was also unaware of any potential conflict in having the same counsel as his co-defendant. App. 92, ll. 10-12. Petitioner was entirely dependent upon plea counsel's "judgment" and "professionalism" regarding advice concerning the conflict. App. 92, ll. 13-15. However, plea counsel never informed him of any conflict. App. 92, ll. 16-18. According to Petitioner, plea counsel's conflict affected his representation. App. 92, ll. 19-21.

Plea counsel explained that in his role at the Spartanburg County Public Defender's office, he assisted the other public defenders with bond hearings and in the coordination and presentation of guilty pleas out of the jail and the Department of Corrections. App. 110, ll. 6-15; App. 123, l. 10 – App. 124, l. 5. Cases were not assigned to him for trial purposes, and in fact, Petitioner was represented by another attorney, Tanya Jones. App. 110, ll. 17-20; App. 124, ll. 6-13; App. 124, l. 21 – App. 125, l. 1. Plea counsel said he spoke to Petitioner "about four times prior to the plea at the jail." App. 111, ll. 19-20. He spoke to the co-defendant "likewise." App. 111, ll. 20-21. Of this he was especially certain "since there was going to be the issue of a conflict." App. 111, ll. 21-22. He claimed "if there would be any kind of conflict, [he] discussed that with both of them." App. 111, ll. 22-23; App. 125, ll. 9-15. Concerning any conflict, plea counsel said Petitioner and the co-defendant were not "pointing the finger at" each other "in the sense that they both acknowledged that they were involved." App. 114, ll. 17-19. According to plea counsel, he told both of them that he thought "it was in their best interest, given the situation, that they enter the plea together, that the state was making an offer of concurrent sentencing in the case." App. 111, l. 23 – App. 112, l. 2.

Plea counsel claimed that when the state made an offer of concurrent sentencing, Petitioner's attorney, Jones, asked him to communicate the offer to Petitioner and ask if he wanted

to investigate a negotiated sentence. App. 113, ll. 14-21; App. 124, ll. 6-13. Plea counsel said neither Petitioner nor the co-defendant expressed an interest in negotiating a sentence. App. 113, ll. 21-22. “[B]oth indicated that they would rather go forward with a plea, as they say, an open plea on the concurrent issue alone.” App. 114, ll. 2-4.

The PCR judge ruled from the bench that Petitioner “failed to meet his burden of showing ineffective assistance of counsel” and, therefore, he denied Petitioner relief. App. 134, ll. 6-13. By an order filed August 6, 2015, the judge issued a written order of dismissal in which he denied Petitioner relief from his convictions and sentences. App. 139-153. Concerning Petitioner’s claim that plea counsel had a conflict of interest, the PCR judge found the claim “meritless” and cited Jackson v. State, 328 S.C. 345, 354, 495 S.E.2d 768, 773 (1998) for the proposition that counsel’s failure to advise a defendant of a potential conflict of interest does not affect the constitutionality of the conviction. App. 148. Further, the PCR court cited State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005) for the proposition that a “mere possibility of a conflict of interest is insufficient to impugn a criminal conviction.” App. 148. Finally, the Court explained that Petitioner was required to show his plea counsel had an actual conflict of interest in order to obtain relief. App. 148-149.

The PCR judge found plea counsel’s testimony that he advised Petitioner of the potential conflict of interest to be credible. App. 149. Additionally, the PCR court found “no actual conflict of interest occurred.” App. 149. As a result, the PCR court concluded Petitioner “failed to present any credible evidence that an actual conflict of interest occurred by the dual representation.” App. 149.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Plea counsel labored under an actual conflict of interest where he represented Petitioner and his co-defendant simultaneously during the guilty plea proceedings despite the two having different charges with different levels of involvement in the criminal offenses.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to conflict-free counsel. Mickens v. Taylor, 535 U.S. 162, 168 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). In post-conviction proceedings, a criminal defendant must show his counsel had an actual conflict of interest that adversely affected his performance in representing him. Cuyler, 446 U.S. at 348; Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 691 (2007); Fuller v. State, 347 S.C. 630, 633, 557 S.E.2d 664, 665 (2001); Thomas v. State, 346 S.C. 140, 142, 551 S.E.2d 254, 255 (2001); Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998); Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984). Where an actual conflict of interest exists, Petitioner need not show prejudice resulting from that conflict. Cuyler, 446 U.S. at 348-350; Duncan, 281 S.C. at 438, 315 S.E.2d at 811. This Court explained 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 the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan, 281 S.C. at 437-438, 315 S.E.2d at 810-811 (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)). The rationale of the test is rooted in the “belief that the Sixth Amendment requires that a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client.... This possibility is sufficient to constitute an actual

conflict as a matter of law.”” State v. Gregory, 364 S.C. 150, 153, 612 S.E.2d 449, 450-451 (2005)(quoting Zuck, 588 F.2d at 440)).

This Court held two defendants, who were husband and wife, were represented by conflicted counsel where both were charged with trafficking drugs and the solicitor offered a plea bargain that would allow the charge against one spouse to be dismissed if the other spouse would plead guilty to the entire amount of drugs. Thomas v. State, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001). In that case, this Court held “[t]he conflict arose because it was in each spouse’s best interest for the other spouse to take the entire responsibility for the cocaine.” Id.

In a similar case, this Court held a lawyer suffered under an actual conflict of interest that adversely affected her performance where she represented a husband and wife in a drug conspiracy. Lomax v. State, 379 S.C. 93, 103, 665 S.E.2d 164, 169 (2008). The lawyer admitted she spent more time preparing Husband’s case despite the fact that Wife was pleading guilty to a majority of the offenses and faced a more severe sentence. Id. at 102, 665 S.E.2d at 168. Additionally, the lawyer argued for leniency in Husband’s case and asked the judge to reconsider the sentence, but did not make such arguments on behalf of Wife. Id. Further, during the plea hearing, the lawyer argued for leniency for Husband by comparing his involvement in the crimes to Wife’s involvement. Id. This court held the lawyer’s “approach essentially pitted Husband against [Wife], which was clearly detrimental to [Wife]’s interests.” Id.

This Court held an attorney acted under a conflict of interest where he advised his client not to testify at his trial based on his concerns of how the testimony may affect other clients. Staggs v. State, 372 S.C. 549, 552, 643 S.E.2d 690, 692 (2007). Although the defendant testified the attorney advised him not to testify so that the attorney could preserve the right to final closing argument, the defendant’s father and sister-in-law testified the attorney said the defendant should not testify

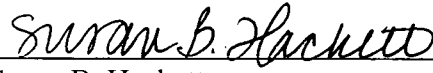
because it could hurt other members of the family, who were also charged in the crimes and were also represented by the same lawyer. Id. at 550-551, 643 S.E.2d at 691. According to the defendant's family members, the lawyer explained that anything the defendant said could hurt the family members and anything the family members said could hurt the defendant, therefore, it was best that nobody said anything about anybody. Id. at 552, 643 S.E.2d at 691.

Plea counsel labored under a conflict of interest by representing Petitioner and his co-defendant simultaneously during the guilty plea proceedings. Although Petitioner and his co-defendant had over-lapping charges, some charges were distinct. Further, Petitioner's culpability was arguably less than the co-defendant because Petitioner's conduct was that of a driver, not the individual actually robbing the stores. However, due to the dual representation, plea counsel was unable to argue the differing levels of culpability during the guilty plea hearing. Unsurprisingly, Petitioner and his co-defendant received identical sentences on the charges that were over-lapping. Clearly, plea counsel labored under a conflict of interest by representing Petitioner and his co-defendant, which adversely affected his representation by preventing argument on relative culpability.

CONCLUSION

Petitioner respectfully requests this Court grant the writ and order full briefing on the issue presented. In the event this Court grants the writ and dispenses with briefing, Petitioner respectfully requests this Court vacate his guilty pleas and order a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of May, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
R. SCOTT SPROUSE, CIRCUIT COURT JUDGE

CHADWICK D. ANDERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

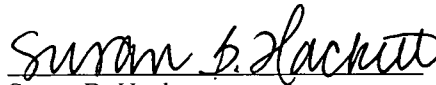
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Chadwick D. Anderson states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on July 8, 2015. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Chadwick D. Anderson.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of May, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

R. Scott Sprouse, Circuit Court Judge

CHADWICK D. ANDERSON,

PETITIONER,

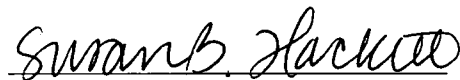
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Chadwick D. Anderson, #346881, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of May, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of May, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.