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JUN 17 2016

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Court of Common Pleas, Richland County
Honorable G. Thomas Cooper

Circuit Court Case No. 2013-CP-40-07337
Appellate Case No. 2016-001229

Marcus Mageed, 289646, ... Appellant,

v.

State of South Carolina, ... Respondent.

RULE 243 STATEMENT AS TO TIMELINESS
(PCR CASE)

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Rule 243 Statement as to the Timeliness of this PCR action.

The Applicant's claim arises out of the State's use of two guilty pleas entered in 2002 as basis for a life without parole sentence (LWOP) on a 2013 murder conviction. When the Applicant plead guilty to the prior charges, he did so under the belief that neither of the charges were either "serious" or "most serious". The Applicant's plea counsel actively misinformed him as to the classification of the charges. The Applicant was further misled as to the classification of the charges by the discussion between plea counsel and the court during the guilty plea. In addition, the sentencing sheets failed to indicate the classification of the charges after having been discussed on the record during the plea proceedings. The Applicant's belief neither of the charges to which he entered pleas were either serious or most serious was therefore entirely reasonable.

The Applicant testified that he did not know until 2013, when he was served with notice of the State's intent to seek LWOP under S.C. Code Ann. § 17-25-45, that the two prior guilty pleas would subsequently subject him to statutory LWOP. Based on the sentencing sheets and discussions during the pleas, the Applicant could not have known to include that challenge in his earlier PCR. Within one year of his discovery of the recidivist nature of the prior plea (through the State's application of the two guilty pleas as enhancements for LWOP) the Applicant filed

the present PCR action alleging that his plea on those two pleas were not knowingly and intelligently entered. The application is this case therefore constitutes an exception to the general rule as to the statute of limitations and the bar to successive applications.

In the present case the post conviction court found that the Applicant was aware of the recidivist nature of the charges at his first PCR because his attorney in the first PCR questioned his criminal defense counsel on "this exact issue." This was in error as the first PCR addressed the issue of counsel's advise on parole eligibility, not the applicability of the LWOP statute. (PCR App. pp. 104-105). Statements relating to the classification of the offenses were made incidental to the issue of parole eligibility only. (PCR App. pp. 104-105). The classification was never the subject of questioning, but rather quoted from the plea transcript as a means of discussing the parole eligibility. A review of the first PCR application shows clearly that the LWOP application was not raised at the first PCR. 27-34. Nor did the amended order of dismissal from the first PCR address the LWOP issue. PCR App. p. 133-117. Although classification of the carjacking was mentioned during the questioning of defense counsel in the first PCR, it was never the subject of the inquiry as it relates to the application of the LWOP statute. Nor was there anything existing at that time that would have given rise to the issue or

put Applicant Wright on notice that either of the two pleas would later be used to enhance under the LWOP statute. The PCR court in this case was therefore in error holding that the recidivist nature of the pleas was the exact subject matter on which defense counsel was questioned.

The application of the LWOP statute in the Applicant's 2013 case rests on the two prior convictions which were the result of guilty pleas entered on December 13, 2002, before the Hon. Henry F. Floyd. The sentencing sheets do not indicate that either of the charges would be treated as a "serious" or "most serious" offense. More importantly, a review of the plea transcript shows that during the plea, counsel and the court actually discussed whether or not the car-jacking charge should be "serious." During the plea, defense counsel stated that the statute did not indicate that it was a "serious" offense. The sentencing sheets were not altered, and it is unclear from the plea as to whether the car-jacking charge was clearly determined to be even "serious" for the purpose of the plea. (PCR App. p. 4). There is no question that a "most serious" offense was never discussed nor recorded on either sentencing sheet.

A reading of the plea colloquy makes clear that at the time of entering the plea, the Applicant was led to believe that neither of the charges were "most serious." The confusion created by defense counsel, and the resulting discussion

as to whether car-jacking was a "serious," was sufficient to lead the Applicant to believe that neither of the charges would have recidivist effect under the LWOP statute. This is especially true considering that the sentencing sheets were not corrected to show either charge as either a "serious" or "most serious" offense. The objective evidence shows that Applicant was not only uninformed as to the consequences of the plea, but actually mislead by defense counsel and the discussions between counsel and court during the plea.

The "serious" and "most serious" nature of the Applicant's prior pleas were not discovered until the State served notice of its intent to apply the LWOP sentence in January of 2013. There was no way for the Applicant to know prior to the serving of LWOP notice that either prior offense to which he pled guilty in 2002 could be used as LWOP enhancements. This action was filed within one year of discovery of the recidivist effect of the charges. It is therefore timely as an exception to the general rule as to timeliness and successive applications.

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Our Supreme Court has held that, "in addition to the requirements of Boykin, a defendant entering a guilty plea must be aware of

the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (*citing* Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991); State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). A plea made in ignorance of its direct consequences is entered in ignorance and is invalid. Hazel, 275 S.C. 392, 271 S.E.2d 602.

A defendant who pleads guilty on the advice of counsel may collaterally attack the voluntariness of his plea only by showing that (1) counsel was ineffective and that (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997). Applicant alleges that he was misinformed of the recidivist nature of the offenses and had he been properly informed, he would not have entered a plea on those charges. He therefore has timely alleged a *prima facia* case of ineffective assistance of counsel.

The next analysis is to determine whether the plea colloquy properly informed the Applicant and corrected any failure on the part of plea counsel. "When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured

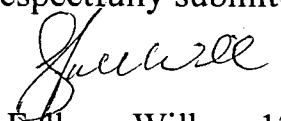
any possible error made by counsel." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). Here, the plea transcript shows that the plea judge failed to clearly correct the misstatement by defense counsel as to classification of the charges and thus the recidivist impact of the pleas in light of the LWOP statute. Applicant's claim therefore remains viable.

The next analysis normally involves whether the lack of knowledge or understanding involved a direct or collateral consequence of the plea. Here, under present case law it is uncertain whether the "serious" or "most serious" nature of the offenses is considered to be a direct or collateral consequence of the plea in South Carolina. In Taylor v. State, 404 S.C. 350 (2013) the court recognized the question as to the recidivist nature of a charge as novel in South Carolina. Although the Taylor court left the question open, the classification of whether the recidivist nature of the offense is treated as a direct or collateral effect has no effect on the outcome of this case, as the record shows that the Applicant was given incorrect advice, as opposed to no advice at all. Even if collateral, the Applicant is entitled to relief. Although counsel is not generally required to give advice on the collateral effects of a plea, where advice on a collateral effect is given, it must be correct. *See* Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979). Here, the Applicant is entitled to have his plea vacated because he was *actively*

misinformed about the recidivist nature of the offenses. "[A] guilty plea is not knowingly and voluntarily made when the defendant has been misinformed" as to a crucial aspect of his case. U.S. v. Fisher, 11-6781 (4th Cir. 4-2-2013).

Here the record is clear that the Applicant was actively misinformed during the plea proceedings as to the recidivist nature of the charges. He brought the present action within one year of his discovery of the nature of the charges after service of the LWOP notice in 2013. Therefore, even if a collateral consequence, the Applicant has alleged sufficient grounds to entitle him to an evidentiary hearing in this post conviction relief action under S.C. Code Ann. § 17-27-45(C). *See* Coats v. State, 352 S.C. 500 (2003). Based on the transcript and sentencing sheets from the prior pleas, the transcript and documents from the first PCR, there was nothing to put Wright on notice that the two pleas would be used to enhance under the LWOP statute until Wright was actually served with the notice of enhancement by the State. He filed this action within one year of being served with the notice that the State would seek life under the LWOP statute. His action in this case is there timely.

Respectfully submitted,



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June 14, 2016.

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CERTIFICATE OF SERVICE

I certify that on June 14, 2016, I served Appellant's Rule 243 Statement on the Respondent, and others if indicated, by placing a copy in the U.S. Mail, first class, postage prepaid, addressed as follows, and by electronic means if indicated:

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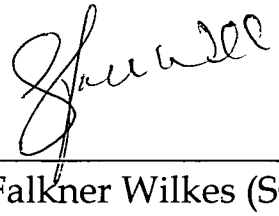
Respectfully submitted,



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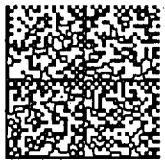

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