

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No.: 2015-002282

RECEIVED

JUL - 8 2016

SC SUPREME COURT

Devin M. Nimmons #355132..... Petitioner,

vs.

State of South Carolina,Respondent.

PETITION FOR WRIT OF CERTIORARI

Tommy A. Thomas, Esq.
Attorney for Petitioner
SC Bar No.: 5536
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Other Counsel of Record:

Johanna Valenzuela, Esq.
Attorney for Respondent
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

July 8, 2016
Irmo, SC 29063

INDEX

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS 1

ISSUE PRESENTED..... 3

1. Did the Lower Court err in not granting Post-Conviction Relief on the bases that plea counsel was ineffective for his failure to advise the Petitioner to accept the State's initial plea offer of a recommendation of twelve (12) year aggregate sentence?

2. Did the Lower Court err in not granting Post-Conviction Relief on the basis that Plea Counsel was ineffective for his failure to properly address the conflict of interest created by Plea Counsel and Attorney Sarah Drawdy?

ARGUMENT NO. 1 4

ARGUMENT NO. 2 6

CONCLUSION..... 8

STATEMENT OF THE CASE

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted by the August 2011 term of the Anderson County Grand Jury for three counts of accessory/accessory before the fact to a felony (2011-GS-04-1364; -1365; -1366) and conspiracy (2011-GS-04-0527). Applicant was represented by W. Norman Epps, III., Esq. On April 23, 2013, the State called its case. Applicant entered guilty pleas to burglary, second -degree, violent (-1364); strong armed robbery (-1356), kidnapping (-1366) and conspiracy (-0527). The Honorable R. Lawton McIntosh sentenced Applicant to fifteen (15) years imprisonment for burglary, second-degree, violent, fifteen (15) years imprisonment for strong armed robbery, fifteen (15) years imprisonment for kidnapping. The sentences were to be served concurrently. Judge McIntosh further sentenced Applicant to five (5) years imprisonment for conspiracy suspended on the service of five (5) years' probation. The conspiracy sentence was to be served consecutively. Applicant did not appeal his sentence or conviction.

STATEMENT OF THE FACTS

The Petitioner filed a Post-Conviction Relief Application on July 31, 2013. The Respondent filed responsive pleadings and an evidentiary hearing into this matter was convened on February 18, 2015 in Anderson County. The Applicant was present at the hearing and was represented by Hugh Welborn, Esq. Respondent was represented by Walt Whitmire, Esq. of the office of the Attorney General. This case was heard by The Honorable J. Cordell Maddox, Jr., presiding Judge for the Eleventh Judicial Circuit.

The Petitioner alleged in his PCR Application that he was being held in custody unlawfully for the following reasons:

- (a) Ineffective assistance of counsel for failing to interview Heather Campbell;
- (b) Ineffective assistance of counsel for failing to interview the arresting officers;
- (c) Ineffective assistance of counsel for failing to advise Applicant to accept the State's initial plea offer of recommended twelve (12) year aggregate sentence;
- (d) Ineffective assistance of counsel for failing to address the conflict of interest created by Attorney Sarah Drawdy;
- (e) Ineffective assistance of counsel for failing to move to recuse Judge McIntosh from presiding over the plea;
- (f) Ineffective assistance of counsel for failing to file a notice of appeal.

Testimony was presented on these issues by plea counsel W. Norman Epps, III, the Applicant, Devin Nimmons and Applicant's Mother, Lisa McBride. An Order of Dismissal was signed by The Honorable J. Cordell Maddox, Jr., on October 28, 2015 denying all grounds of relief as presented to the Court.

In Section C, the Petitioner alleged that counsel was ineffective for failing to advise the Applicant to accept the State's initial plea offer of a recommended twelve (12) year aggregate sentence. In addition, in Section D, the Petitioner alleges that counsel was ineffective for failure to address a potential conflict of interest created by his plea counsel and his consultation with attorney Sarah Drawdy.

This appeal follows:

ISSUES PRESENTED

- 1. Did the Lower Court err in not granting Post-Conviction Relief on the bases that plea counsel was ineffective for his failure to advise the Petitioner to accept the State's initial plea offer of a recommendation of twelve (12) year aggregate sentence?**
- 2. Did the Lower Court err in not granting Post-Conviction Relief on the basis that Plea Counsel was ineffective for his failure to properly address the conflict of interest created by Plea Counsel and Attorney Sarah Drawdy?**

ARGUMENT #1

Did the Lower Court err in not granting Post-Conviction Relief on the bases that plea counsel was ineffective for his failure to advise the Petitioner to accept the State's initial plea offer of a recommendation of twelve (12) year aggregate sentence?

In this case, the Petitioner argues that he was not properly advised regarding a twelve (12) year plea offer. That counsel had advised him that this was a good case for trial and it was only on the date that this case was called for trial that counsel told Petitioner that he did not have a good case and that he had to accept a plea offer, which was at that time, 0-15 years.

The Petitioner was asked at his Post-Conviction Relief hearing whether he would have accepted the twelve (12) year plea offer. The Petitioner responded that if plea counsel would have advised him properly, that he would have accepted the deal. Petitioner stated that Plea counsel had him "pumped like, we you know, we had a good argument for the trial." Petitioner further testified that if counsel would have come to him and told him that he did not have a good chance at winning this case at trial, and had a very large exposure should he be convicted by the Jury, that he would have accepted the twelve (12) years that was offered (App. p. 116). The Petitioner went further to say that he turned that plea down based upon the advice of plea counsel. Petitioner stated that Plea counsel told him not to take the deal that they are offering. Let's try the case and that you have a good case (App. p. 117).

Plea counsel testified at PCR that the State was difficult to deal with on these charges. That they were not willing to come down on the sentencing or negotiate a lower sentence. That he did get an offer for twelve years if the Petitioner was to plea to everything, they would offer him twelve (12) years straight up. (App. 82-83) Trial Counsel further testified that he was

looking at mandatory minimums on the Burglary 1st and the Armed Robbery. Plea Counsel testified that he advised him that he was looking at fifteen (15) to life and the Petitioner declined the twelve (12) year offer (App. p. 83). Plea Counsel also testified at the PCR hearing that there were certain difficulties with the case. One being that the Co-Defendant's were going to testify against him as well as the fact that the Petitioner had given a statement that he helped plan the crime, that he had given them a gun, and that he recommended the location. However prior to the complete execution of this crime, that he backed out, left and went home (App. p. 83)

The Petitioner's Mother, Mrs. McBride also testified that she had had contact with plea counsel regarding the plea offer. She asked him whether the twelve (12) year plea offer is something that her son needed to take. Was this in his best interest and sought out his advice. She testified that both she and her son were told, I've got good arguments, I am not going to show my whole hand right now and that there were reasons that he felt like he had a good argument and that she and her son trusted that (App p.126).

The Sixth Amendment right to affective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to all critical stages of the criminal proceedings Missouri v. Frye 132 S. Ct 1408 (2012).

To show prejudice from ineffective assistance of counsel in a case involving a plea offer, the Petitioner must demonstrate a reasonable probability:

1. That they would have accepted the earlier plea offer had they been afforded effective assistance of counsel; and
2. That the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it. Merzbacher v. Shearing 134 S.Ct. 725, 187 L Ed 2d 580 (2013).

Petitioner would assert that he has demonstrated a reasonable probability that he would have accepted the plea offer of twelve (12) years, had he been advised properly by defense counsel. The Petitioner points out that at a later stage, he wanted to go to trial when the State's Plea offers were 0 – 20 and then later reduced to 0-15. That had he been willing to accept that plea, then he would have accepted the earlier offer of twelve (12) years (App. p. 114). That it was only at the last stage where Plea Counsel told the Petitioner that he was basically unable to win the case, and that his likelihood was an extensive sentence at trial, that he was forced to accept the plea.

ARGUMENT #2

Did the Lower Court err in not granting Post-Conviction Relief on the basis that Plea Counsel was ineffective for his failure to properly address the conflict of interest created by Plea Counsel and Attorney Sarah Drawdy?

There is extensive testimony in the PCR transcript regarding the potential conflict that arose when plea counsel decided to in his own words “co-counsel” with Sarah Drawdy (App. p. 78). It appears that Sarah Drawdy was originally representing Petitioner's step-brother, who was a co-defendant, Alex McBride, in charges that stemmed from the Starlight Movie Theater attempted armed robbery. Plea counsel testified that the Petitioner had given him permission to talk with Sarah Drawdy and that this was like a co-representation of the Petitioner and his step-brother together in the attempted Armed Robbery of the movie theater (App. p. 78). They agreed to do a joint preliminary together. Plea Counsel testified that he and Ms. Drawdy had discussed in particular, the Starlight Movie Theater and that this subsequently became a problem when Sarah Drawdy started representing both Jacob Tubbs and Alex McBride (App. p. 78-79).

Mr. Tubbs was the co-defendant in the home invasion case and at a later point, Ms. Drawdy took Mr. Tubbs down to law enforcement to make a statement. In this statement, Jacob Tubbs said that he remembered everything that the Petitioner did and that the Petitioner went into the house and participated in the crime (App. p. 79).

Plea Counsel attempted to repair this damage by writing a letter to Sarah Drawdy asking her to recuse herself from the case. The response that he received from her was "that she did not have any duty to his client" (App. p. 80).

Plea Counsel further testified that he believed that this was a direct conflict with his client and it concerned him because he had agreed collectively to work with Mrs. Drawdy in the armed robbery case. That there was some overlap with statements and evidence from the home invasion case that they had discussed. So he had a big concern about this issue (App. p. 80). Counsel also indicated that he had discussed this issue with the Solicitor's office (App. p. 81) and that he eventually filed a Motion to Quash the Indictment. This Motion was denied by the Court (App. p. 87).

The Petitioner would assert that Plea Counsel was ineffective for allowing the Petitioner to Waive attorney client privilege by discussing this matter with a Co-Defendant's attorney. That counsel should have known that she, Ms. Drawdy, would have been free to use this information in any manner that she deemed fit. That Counsel further should have asked and received a written waiver from his client before undertaking this type of activity and/or executed a written agreement between he and co-counsel as to how this information was to be used.

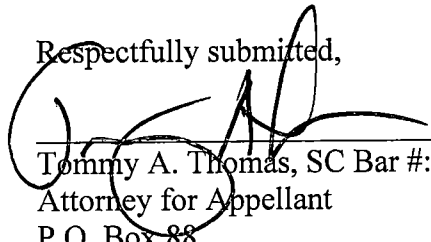
Petitioner would also assert that the Plea Counsel was ineffective in his filing of a Motion to Quash the Indictment. It would appear that this would have been an improper Motion and thus would have been denied by the Court. That the proper Motion to have filed would have

been a Motion to Suppress Testimony of Mr. Tubbs. That it would have been Mr. Tubbs testimony that would have been damaging to the Petitioner and was privy to confidential attorney client information.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,



Tommy A. Thomas, SC Bar #: 5536
Attorney for Appellant
P.O. Box 88
Irmo, S.C. 29063
(803) 732-5507

Irmo, South Carolina
July 8, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No.: 2015-002282

Devin M. Nimmons #355132..... Petitioner,

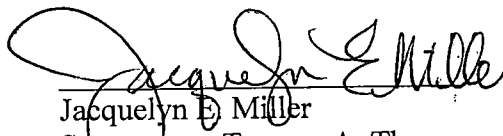
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for Petitioner in the above referenced case, hereby certify that I placed in the United States Mail, a copy of a Petition for Writ of Certiorari and Appendix with postage prepaid and the return address clearly shown on said envelope to:

Johanna Valenzuela, Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jacquelyn E. Miller
Secretary to Tommy A. Thomas
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

July 8, 2016