

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Daniel D. Hall, Circuit Court Judge

RECEIVED

OCT 17 2016

S.C. SUPREME COURT

Kenneth Darrell Rivera,

Petitioner,

v.

State of South Carolina,

Respondent

Appellant Case NO 2016-000737

Pro Se Response

Kenneth D. Rivera
Petitioner

FS-A121

386 Redemption Way
McCormick, SC 29899

JAM JACOBI
RECORDS

Statement

During its July 2014 term, a Greenville County Grand Jury indicted Petitioner for Possession of a Firearm by a Person convicted of a crime of violence (2014-GS-23-8139). Additionally, Petitioner was charged with armed robbery (2014-GS-23-16896) and Possession of a Firearm by a Person convicted of a crime of violence (2014-GS-23-10897), both crimes are not True Bills. On March 5, 2015, Petitioner entered Guilty Pleas to those charges, in which he wasn't aware that he was not indicted. He was represented by Dorothy A. Manigault. Mark L. Moyer represented the State which he wasn't present. The Honorable R. Scott Sprouse accepted the Guilty Pleas. Judge Sprouse sentenced Petitioner to 'fifteen years' imprisonment for armed robbery and to 'five years' imprisonment for ~~each~~ OF the weapon charges. Petitioner did not file a direct appeal.

On May 20, 2015, Petitioner filed an application for Post-conviction Relief (PCR). The State filed a return. On February 16, 2016, the matter proceeded to an evidentiary hearing before the Honorable Daniel D. Hall. Karen C. Retigan represented the State, and Cardine M. Horlbeck represented Petitioner. At the conclusion of the hearing Judge Hall found that Petitioner had not met his burden although evidence proves how the State was in violation. Judge Hall denied the application for relief. By an order filed on March 15, 2016, Judge Hall formally denied Petitioner relief. Petitioner filed a notice of appeal. This Pro Se response follows.

MAIN ROOM
ROOM 1100

Argument

Plea counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to ensure Petitioner understood the terms of the plea agreement and/or ensure the plea agreement was placed on the record accurately.

Relevant Facts

A Greenville County Grand Jury indicted Petitioner for Possession of a Firearm by a Person Convicted of a Crime of Violence (2014-GS-23-5139). Although Petitioner was also charged with armed robbery and Possession of a Weapon during the commission of a violent crime (2014-GS-23-10896) and Possession of a Firearm by a Person Convicted of a Crime of Violence (2014-GS-23-10897), he was not indicted for those offenses. Petitioner was also charged with Unlawful Carrying of a Pistol (2014-GS-23-4934) and Possession of a Stolen Pistol (2014-GS-23-10895).

On March 5, 2015, Petitioner pled guilty to three counts of a firearm by a convicted felon and armed robbery. Petitioner signed the plea deal not knowing he was yet to be indicted for armed robbery and Possession of a Weapon during the commission of a violent crime. He also was found guilty of charges that were supposed to be dismissed as part of the plea deal, Possession of a Weapon during a Violent Crime (2014A 2330208979) and Possession of a Stolen Pistol (2014A 2330208982). The state recommend a sentence of 'fifteen years' incarceration.

JAM JARR
MOORE JAM

At the conclusion of the hearing, Judge Sprouse sentenced Petitioner to 'Fifteen Years' imprisonment for the armed robbery and to 'Five Years' imprisonment for each of the weapon charges. He ordered the sentences to be served concurrently.

During the PCR hearing, Petitioner explained that the plea offer from the state was that if he would plea guilty to armed robbery and possession of a firearm by a person convicted of a violent crime, the all other charges would be dismissed by the solicitor indicating that if he pled guilty to those two charges, then the state would dismissed the charge of possession of a weapon during a violent crime and possession of a stolen pistol. This document was entered as Applicant's Exhibit #1. Upon receipt of this offer, Petitioner accepted the state's term not knowing he wasn't indicted for armed robbery. However, at Petitioner's guilty plea hearing, the state informed the judge that Petitioner was pleading guilty to three charges: Armed robbery and two counts of possession of a firearm by a person convicted of a violent crime. Petitioner admitted that the offer was "good" because he was looking at over "20 years" had he not entered the guilty plea, even if the terms was not expected. Additionally, Petitioner explained that his attorney did not mention he was indicted before the hearing, and that the state did not dismissed those charges pursuant to the plea agreement.

According to plea counsel, Petitioner was arrested for two counts of weapons charges, Petitioner was not arrested for criminal domestic violence. While out on bond, Petitioner was arrested for armed robbery and three more (not two) weapon charges. In total, he had six charges, five of which were weapons violations.

WARRIOR
WARRIOR
WARRIOR

Attorney duties at the Plea Bargain stage a defense attorney has several functions at the Plea bargain stage. Number one is making sure that a client understands and is informed about everything that is going on in the case. An attorney should always explain each aspect of the case, including: the strengths and weakness of the case, the probable outcome of a trial the terms of the offer, and the possible sentences. An attorney should also advise a client whether or not to plead by explaining the risks and benefits of going to trial. A defense attorney should help a client reach a strategic decision by analyzing the strength of the case. If the evidence against a client is strong and conviction at trial is likely, then the attorney has a duty to negotiate a plea bargain, unless the client on going to trial. Missouri v. Frye, 132 S.Ct. 1399-182 L.Ed.2d. 379 (2012).

During Plea negotiations defendants are entitled to the effective assistance of competent counsel. LaFlair v. Cooper, 132 S.Ct. 1376 (2012). As a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Missouri v. Frye, 132 S.Ct. 1399-182 L.Ed.2d 379 (2012). Sixth Amendments requirements that accused have right to assistance of counsel was made obligatory on states by Fourteenth Amendment. Anders v. State of Cal, 386 U.S. 738 87 S.Ct. 1396. No indictment may be true billed by grand jury when circuit court lacks jurisdiction, since grand jury's jurisdiction is co-extensive with criminal jurisdiction of court in which it is impaneled and for which it is to make inquiry. State v. McClure, 289 S.E.2d 158, 277 S.C. 432. Presumption arises from the foreman's signature on indictment that the grand jurors were sworn. State v. Griffen, 285 S.E.2d 631, 277 S.C. 193. A defendant who failed to properly execute waivers of indictments before pleading guilty to an indictment which had not been presented

To the Grand Jury would have his guilty Pleas vacated.

Sumner v. State, 278 S.C. 255, 294 S.E. 2d 344 (1982).

Where a defendant Pleads guilty upon the advice of counsel, Post-conviction relief is available only when the applicant proves the advice he received from counsel fell below an objective standard of reasonableness and that but for counsel's deficient representations, he would not have Pleaded guilty. Berry v.

State, 381 S.C. 630, 675 S.E. 2d 425 (2009). State

Constitution requires a person be indicted by Grand Jury before standing trial for a crime. State v. Owens, 552

S.E. 2d 745, 346 S.C. 637 (2001). A defendant cannot be convicted of a crime for which he is not indicted if it is not a lesser included offense to that charged in the indictment. State v. Green, 539 S.E. 2d 419, 343 S.C. 207 (2000).

The PCR Judge erred in concluding Petitioner had not met his burden of proof concerning Plea Counsel's ineffective assistance. Petitioner's misapprehension of the Plea offer, which was based upon Plea Counsel's failure to ensure that he understood the terms, rendered his guilty Plea involuntary. Petitioner provided documentation to support his understanding - the written Plea offer from the State. Petitioner's Plea Counsel never discussed evidence, never showed up to his Preliminary hearing, never informed him of the two charges that wasn't a True Bill. Plea Counsel failure to advise Petitioner adequately and correctly of the Plea offer and/or to ensure the Plea was placed on the record accurately amounted to ineffective assistance of counsel rendering Petitioner's guilty Plea involuntary. As a result, this court should reverse the PCR court decision and hold that Plea Counsel's advice fell below the standard of reasonableness and prejudiced Petitioner.

JAMES J. MOORE

Conclusion

Petitioner respectfully requests this court grant his Pro Se response and order full briefing on the issues presented. In the event this court decides to grant the Pro se and Petition, Petitioner respectfully requests this court find Plea Counsel ineffective, reverse his convictions, and remand for a new trial.

Kenneth D. Rivera
Kenneth D. Rivera
Petitioner

October 5, 2016

JAM JAOEL
MOOR JAM

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Daniel D. Hill, Circuit Court Judge

Kenneth Darrell Rivera,

Petitioner,

v.

State of South Carolina,

Respondent

Pro Se Response TO Counsel Petition TO Be Relieved

Petitioner Kenneth Darrell Rivera states:

1. He is the Petitioner in this action.
2. Appellant Defender never reviewed the elements with the Petitioner to which argument will be strong enough for the writ of Certiorari.
3. Pursuant to Anders v. State of Cal, 386 U.S. 738 87 S.Ct. 1396. Appointed counsel's role as advocate requires that he support his client's appeal to the best of his ability.

Therefore, Counsel should not be relieved as counsel for the Petitioner.

Respectfully Submitted,

Kenneth D. Rivera

Kenneth D. Rivera
Petitioner

October 5, 2016

JAM JARBI
LEON BOON
MOON JAM

Certificate of Service

The undersigned hereby certifies that the original and copy of Petitioner Pro Se response was placed in the U.S. Mail to be delivered to the following address:

South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Kenneth Rivera

Kenneth D. Rivera #318979
FS-A121
386 Redemption Way
McCormick, SC 29899

Subscribed and Sworn To Before Me

This 10 Day of October, 2016

J. Frankler

Notary Public For South Carolina

My Commission Expires: 12-16-2019

JAM JAGBI
JAGOR JAM