State of South Carolina

In The Supreme Court

Certiorari to Richland County

Honorable Tanya A Cee Circuit Court Judge

Nathaniel Murray
Petitioner

v.

State of South Carolina
Respondent

Appellate Case No. 2016-000901

Pro se Johnson Petition for Writ of Certiorari

Nathaniel Murray
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Col, S.C. 29210

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Statement Of the Case

Petitioner was convicted of failure to stop for a blue light and two counts of armed robbery after a jury trial held before the Honorable L. Casey Manning on October 12-14, 2009 in Richland County. A sentence of three (3) years was imposed for failure to stop for a blue light and life without parole was imposed for the armed Robbery Charges. Mark E. Schnee, Esquire was defense Counsel. Luck Campbell and Aaron Joplin were assistent solicitors

Petitioner appealed his convictions and the appeal was dismissed in April 12, 2012. Opinion No. 2012-UP-228

Petitioner filed an Application for Post Conviction Relief on December 4, 2014, and Evidentiary hearing was held on August 27, 2015, before the Hon. Tanya A Gee, Petitioner was represented by Jonathan D. Walker, Esquire, on January 19, 2016 Judge Gee issued an Order denying and dismissing petitioner's Application for Post Conviction Relief.

This Pro se petition follows.

Issues Presented

Did the PCR Court err when the Court ruled that Trial Counsel was not ineffective when he failed to require a hearing to determine which charges could be used, when the State wanted to seek sentence enhancement under S.C. Code Ann. 17-45-25?

Did the P.C.R. Court err when it ruled that trial Counsel was not ineffective when he failed to request a charge on a lesser included offense or a Directed Verdict, when the evidence introduced at trial did not support the charge in the indictment?

Did the PCR Court err when the Court ruled that Trial Counsel was not ineffective, when he failed to appeal sentence pursuant to Rule 29 of South Carolina Rules of Criminal Procedure?

Did PCR Court err when the Court ruled that Trial Counsel was not ineffective when he failed to request the Trial Court to Poll the Jury on whether Petitioner was guilty of Armed Robbery with a weapon or without a weapon?

ARGUMENT

Did PCR COURT ERR WHEN THE COURT RULED THAT TRIAL COUNSEL WAS NOT INEFFECTIVE WHEN HE FAILED TO REQUIRE A HEARING TO DETERMINE WHICH CHARGES COULD BE USED, WHEN THE STATE WANTED TO SEEK SENTENCE ENHANCEMENT UNDER S.C. CODE ANN. 17-45-25?

ONCE THE STATE HAS PROVEN A PRIOR CONVICTION, THAT THE STATE SEEKS TO USE UNDER A SENTENCE ENHANCEMENT STATUTE, THE DEFENDANT MUST PROVE IT IS CONSTITUTIONALLY DEFECTIVE OR OTHERWISE INVALID BY A PREPONDERANCE OF THE EVIDENCE. SEE KOON V. STATE 643 SE2d 680

At trial petitioner's prior convictions were never proven, there was only a discussion on the record between the court and the State, SEE TRIAL TRANS. P. 240 L. 10-16. THERE WAS NO EFFORT ON THE PART OF THE STATE TO PROVE PETITIONERS' PRIOR CONVICTIONS, WHEN DICUSSING THE PETITIONER'S RECORD, AND THUS DID NOT DESIGNATE WHICH ITEMS APPEARING ON PETITIONER'S "RAP SHEET" HE WOULD NOT CONSIDER. DESPITE BROAD

discretion left to the trial court in ass-
essing background information for sentencing
purposes the defendant retains the right not
to be sentenced on basis of invalid pre-
mises. See State v. Rich 239 S.E.2d 731. Pet-
itioner was denied a hearing when his Counsel
failed to request a hearing where he could
challenge the sentence enhancement. Such a re-
sult whether caused by carelessness or design, is
inconsistent with due process of law and such
a conviction cannot stand. Petitioner was never
afforded a hearing where he could have challenged
the unambiguous timing feature of a "conviction"
under 17-25-50 "Considering closely connected offenses
as one offense 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. See Bryant v.

State 683 SE2d 280. Petitioner Contrues the Language of 17-25-50 to preclude a life with-out Parole sentence when the Multiple Offense are inextricably connected and share an immediate Temporal proximity. It is Apparent from the Record, See Trial Trans. P. 240 L. 10-16. that the petitioner was sentence based on the instant offenses (the Court and the State agreed not to use Petitioners out of State Record).

Trial Counsel was ineffective when he failed to Request a hearing on the sentence enhancement by the State. See State v. Stewart 22 SE2d 628. Had Counsel Requested a hearing Petitioner would not have been sentenced to life with out Parole.

The P.C.R. Court erred when deciding this Claim when the Court overlooked S.C. Code 17-25-50 and the Evidence that was introduced at Trial.

Did the P.C.R. Court Err when it ruled that Trial Counsel was not ineffective when he failed to request a charge on a lesser included offense or a Direct Verdict, when the evidence introduced at trial did not support the charge in the indictment?

At trial Mr Hampton (the victim) testified" during the encounter D grabbed Petitioners by the jacket" "D step back and grabbed Petitioner Again" when Hampton grabbed the Petitioner the first time "the jacket popped open buttons and Everything" see Trans. P. 85 Ln. 6-25, P. 86 Ln. 1-6. P. 92 Ln. 18-24.

At trial Mr. Langford (victim) testified "did Petitioner point a gun at you" Mr. Langford answered "no" "D never see it" Trans P. 144 L. 6-14.

At Trial Mr Woods (victim) testified "that he pushed Petitioner away from him" see Tran P. 118 Ln 8-15.

Under Section 16-11-330 (A)3 the State may prove Armed Robbery by Establishing the Commission of a Robbery and Either one of two additional Elements the State must Prove Either (1) The Robber

WAS ARMED WITH A DEADLY WEAPON OR (2) THE ROBBER ALLEGED HE WAS ARMED WITH A DEADLY WEAPON, EITHER BY ACTION OR WORDS WHILE USING A REPRESENTATION OF A DEADLY WEAPON OR ANY OBJECT WHICH A PERSON DURING THE COMMISSION OF A ROBBERY WOULD REASONABLY BELIEVE TO BE A DEADLY WEAPON.

NONE OF THE VICTIMS TESTIFIED THAT THEY EVER SAW A GUN OR WHAT APPEARED TO BE A GUN. IN FACT NONE OF THE VICTIMS SHOWED ANY FEAR OR THREATEN BY PETITIONER. MR HAMPTON, GRABBED APPELLANT TWICE. HE COULD NOT HAVE FELT THE PETITIONER HAD A GUN IF HE WAS TO GRAB HIM TWO TIMES. MR LANGFORD, STATED "HE NEVER SAW A GUN". MR WOODS WHEN CONFRONTED BY PETITIONER PUSHED HIM AWAY TWICE. IF THE PETITIONER HAD A GUN HE WOULD HAVE SHOWN IT! NONE OF THE VICTIMS SHOWED ANY FEAR OF THE PETITIONER WHICH IS APPARENT FROM THEIR ACTIONS

IN STATE V. MULDROW 559 S.E.2d AT 269 THIS COURT FOUND THAT WORDS ALONE ARE NOT SUFFICIENT TO SUPPORT A CONVICTION FOR ARMED ROBBERY Id AT 269. AS A RESULT THIS COURT HELD THE STATE MUST SHOW EVIDENCE CORROBORATING THE ALLEGATION OF BEING ARMED

i.e. the use of a physical representation of a deadly weapon to establish Armed Robbery. Facts presented by the State did not include the requisite corroborating evidence for Armed Robbery, nor did it allege Petitioner took any type of action which would allow a victim to reasonably believe that he was armed. Facts produced at trial prove that trial Counsel was ineffective when he failed to request a charge on a lesser included offense, because the facts show that there was no gun shown or found at the beginning or after this incident. Had Counsel requested a charge on the lesser included offense there is a reasonable probility that the verdict would have been different. The trial court is required to charge a jury on a lesser included offense, if there is any evidence from which it could be inferred the lesser, rather than the greater offense was committed See State v. Goundine 472 S.E2d 241, State v. Smith 446 SE2d 411, See Also Didier Van Sellner v. State 2016 WL 3595804

Counsel's failure to request a direct verdict on the charge of Armed Robbery, based on the lack of evidence that supports the charge, made counsel ineffective. Petitioner was denied his 6th Amendment right to effective assistance of counsel Had counsel requested that the court give a jury charge on the lesser included offense and or a direct verdict, because of the lack of evidence that supports the charge of Armed Robbery there is a reasonable probability that the outcome would have been different.

Did the P.C.R. Court err when the Court ruled that Trial Counsel was not ineffective, when he failed to appeal Sentence pursuant to Rule 29 of South Carolina Rules of Criminal Procedure.

Trial Counsel failed to appeal Petitioner's Sentence based on Actual Innocence under Rule 29 S.C.R.C.P., because there was no weapon was presented prior to the incident and no weapon was found after the incident pursuant to S.C. Code Ann. 16-11-330(A). Counsel was deficient for failure to file Motion under Rule 29 within 10 days. Had Counsel filed this Motion because there was no gun there is reasonable probability that the out-come would have been different.

Did the PCR Court ERR when the Court ruled that Trial Counsel was not ineffective when he failed to request the trial Court to poll the jury on whether petitioner, was guilty of Armed Robbery with a weapon or without a weapon?

After the verdict, the trial Court poll the jury on two questions, regarding their verdict, were these your verdict? And are they still your verdicts? SEE TRANS. P384 LN 18-25 and P. 385 L. 1-8.

Petitioner, was prejudiced when Counsel by his failure to poll the jury on whether Appellant was found guilty of Armed Robbery with or without a weapon, because without a weapon the offense is a lesser included offense, but with a weapon the crime is violent, evidence was legally sufficient to convict on lesser offense of Strong Arm Robbery, given that evidence was convicted by jury of Armed Robbery, but insufficient evidence supported finding that defendant either used deadly weapon or representation of deadly weapon, Armed Robbery included all elements of Strong Arm Robbery Code 1976 16-11-330(A)

STATE v. DANIEL, 77 S.C. 53, 57 S.E. 639 (S.C. 1907)
WHERE A JURY PUBLISHES THE VERDICT, AND SIGNIFIES
ON BEING POLLED, IT MAY BE SENT BACK TO AMEND
THE VERDICT TO CONFORM TO THE FINDINGS.

CONCLUSION

This Court gives great deference to the factual findings of the PCR Court and will uphold them if there is any evidence of probative value to support them Jordan v. State 752 S.E.2d 538. Questions of law are reviewed de novo and we will reverse the PCR Courts decisions when it is controlled by an error of law Jamison v. State 765 S.E.2d 123

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Certificate of Service

Petitioner declares under the penalty of perjury that he mailed a copy of his Pro Se Johnson Brief to the parties listed below, by placing in the U.S. Mail clearly addressed as below.

Respectfully #313891
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Dated.
CC: File