

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO DORCHESTER COUNTY

The Honorable Diane S. Goodstein
Circuit Court Judge

Case No. 2007-CP-18-0202

ERIC D. PHILLIPS, JR.

RESPONDENT / PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

PETITIONER / RESPONDENT.

RESPONDENT / PETITIONER'S PRO SE
RESPONSE TO ANDERS' BRIEF

Eric Phillips, Jr.
Pro Se Respondent/Petitioner
McDougall Corr. Facility
1516 Old Gilliard Road
Ridgeville, SC 29472

RECEIVED

APR 15 2011

S.C. SUPREME COURT

COUNSEL OF RECORD:
Ms. Lanelle C. DuRant
Appellate Defender
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

QUESTIONS PRESENTED

- I. DID THE POST-CONVICTION COURT CORRECTLY DETERMINE THAT PHILLIPS WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO COMMUNICATE TO PHILLIPS THE STATE'S PLEA OFFER OF A TEN YEAR MAXIMUM SENTENCE TO ABHAN, WHEN PHILLIPS FACED A POSSIBLE MAXIMUM SENTENCE OF FORTY-FIVE YEARS IF HE REJECTED THE STATE'S PLEA OFFER AND PLEAD NOT GUILTY?

- II. UNDER RULE 404(a)(2), SCRE, DID THE POST-CONVICTION COURT PROPERLY FIND THAT COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE FOR ADMISSION OF PHILLIPS'S TESTIMONY WITH REGARD TO THE VIOLENT CHARACTER AND REPUTATION OF THE VICTIMS?

- III. WAS THE POST-CONVICTION COURT CORRECT IN ITS DETERMINATION THAT COUNSEL WAS INEFFECTIVE PURSUANT TO U.S. vs. CRONIC, 104 S.CT. 2039, THEREBY OBTIATING THE NECESSITY OF AN INDEPENDENT FINDING OF PREJUDICE?

STATEMENT OF THE CASE

The Respondent, Eric Phillips (Phillips), was indicted by the Dorchester County Grand Jury on two counts of assault and battery with intent to kill (ABWIK) and one count of possession of a weapon during the commission of a violent offense. On October 16, 2006, Phillips proceeded to trial before the Honorable James C. Williams and a jury. Phillips was represented by the late Gene Dukes, Esquire. The jury returned a verdict of guilty on each charge as indicted. Judge Williams sentenced Phillips to fifteen (15) years on each ABWIK count, and five (5) years on the possession of a weapon charge. (App. p.516; p.521; and p.526. All sentences were to be served concurrently. Phillips did not seek a direct appeal.

On February 6, 2007, Phillips filed an application for post-conviction relief (PCR). The state filed a return on July 27, 2007. Phillips filed an amended PCR application on June 10, 2009. An evidentiary hearing was held on June 10, 2009, before the Honorable Diane S. Goodstein, before whom Phillips and the State presented evidence and arguments. At the conclusion of the hearing, Judge Goodstein directed both parties to submit proposed orders for her consideration and review.

On January 25, 2010, Judge Goodstein issued an order granting Phillips's PCR application, and ordering a new trial. Judge Goodstein also granted Phillips a belated appeal pursuant to White vs. State, 208 S.E.2d 35 (1974). The state appealed, and on October 11, 2010, the Attorney General's Office filed a Petition for Writ of Certiorari.

Phillips's appellate counsel filed a Return to the State's Petition on March 2, 2011. Further, Phillips's counsel filed an Anders Brief with regard to Phillips's direct appeal issues. On March 3, 2011, the Supreme Court notified Phillips that he was allowed forty-five (45) days in which to submit a Pro Se brief on the facts and arguments now before the Court. This Pro Se brief follows the Court's March 3, 2011, directive.

I. THE POST-CONVICTION COURT CORRECTLY DETERMINED THAT PHILLIPS WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO COMMUNICATE TO PHILLIPS THE STATE'S PLEA OFFER OF A TEN YEAR MAXIMUM SENTENCE TO ABHAN, WHEN PHILLIPS FACED A POSSIBLE MAXIMUM SENTENCE OF FORTY-FIVE YEARS IF HE REJECTED THE STATE'S PLEA OFFER AND PLEAD NOT GUILTY

On December 14, 2003, Phillips was charged with two counts of assault and battery with intent to kill, and one count of possession of a weapon during the commission of a violent offense. Following his release on bond, Phillips retained Gene Dukes to represent Phillips on all counts. On February 7, 2006, the Solicitor for Dorchester County proffered a plea agreement to Mr. Dukes in which Phillips would plead guilty to one count of ABWIK, one count of ABHAN, and the weapons charge was to be dismissed. All charges were to run concurrent, with no recommendations from the State as to sentence length. (Apx. p.483). This recommendation was not communicated to Phillips prior to his trial. (Apx. p.396, LL.9-12).

Assistant Solicitor Russell Hilton testified at Phillips's post-conviction relief (PCR) evidentiary hearing that subsequent to the February 7, 2006, plea offer, the State proffered a second plea offer to Phillips's attorney several weeks prior to Phillips's trial. The second plea offer would have required Phillips to plead guilty to two counts of ABHAN, to run concurrently, and dismissal of the weapons charges. Solicitor Hilton stated that Phillips likely sentence would have been ten years, though the plea was "straight-up", and could have been less. (Apx. p.441, L.11, thru p.442, L.12). Again, counsel failed to communicate this second plea offer to Phillips. The case went to trial on October 16, 2007, and Phillips was found guilty on all counts, and sentenced to an aggregate sentence of fifteen (15) years. (Apx. p.350, LL.13-22).

At his PCR hearing, Phillips testified that he was not interested in accepting a plea to the violent offense of ABWIK, but he would have accepted a plea offer of ten years to ABHAN, which non-violent. (Apx. p.400, LL.9-22). In regard to the plea offers from the State, only Phillips and Asst. Solicitor Hilton offered testimony, as counsel Dukes passed away some ten months following Phillips's trial. (Apx. p.384, LL.20-25). Though Phillips testified at the PCR hearing that counsel Dukes conveyed vague plea offers to Phillips during the trial, the specific nature of those plea offers were never revealed to Phillips, but only the number of years offered. (Apx. p.401, L.1). Consequently, it was the pre-trial plea offers substantiated by Asst. Solicitor Hilton which was the focus of the PCR Court's decision to grant Phillips relief.

The State has argued in its Petition For Certiorari that, because Phillips received a fair trial (an opinion with which Phillips does not agree), he cannot show prejudice from counsel's failure to communicate the State's plea offer. In support of that position, the State advances two theories: First, a dissenting opinion from Williams vs. Jones, 571 F.3d 1086, 1104 (10th Cir. 2009), which states ("Absent a loss of a legal entitlement, the defendant can claim no prejudice). (State's Brief, p.16).

Second, the State proffers an opinion from the Missouri Court of Appeals, Bryan vs. State, 134 S.W.3d 795 (2004), which holds ("...the complaint that he [Bryan] was deprived of an opportunity to plead guilty tends to support the jury's determination that he was guilty of the offenses charged." (State's Brief, p.16). However, the State's conclusion that Phillips cannot show prejudice, because he received a fair trial, is based on fallacious reasoning. The State's theories fail to acknowledge the bifurcated nature of the guilty plea process, or to correctly apply prevailing law to the facts of Phillips's case.

The State argues that whether Phillips plead guilty or was found guilty, the result of the proceeding was reliable [or that the outcome of the proceedings were not altered]. (State's Brief, p.16). The State's conclusions, however, rest on a fallacy of false division, for this type of argument oversimplifies the complexity of the plea bargaining process by eliminating the possibility of an answer between two extremes. The fact that Phillips would have remained convicted, whether through the determination of a jury or a guilty plea, does not obviate the methods to arrive at that conviction.

The right to counsel attaches at critical stages of the criminal process. See: O'Brian v. Maroney, 423 F.2d 865, 868 (3rd Cir. 1970). It is well established law that entering a guilty plea to an indictment is a critical stage of the proceedings. Further, since a defendant is entitled to the effective assistance of counsel when determining how to plead, it would follow that a decision to reject a plea bargain and proceed to trial is also a vitally important decision, and must be considered a critical stage of the proceedings such that the right to counsel attaches. (See Judge vs. State, 471 S.E.2d 146 (S.C. 1996). The final decision to reject a plea bargain offer and proceed to trial is a decision for the accused to make, and when counsel fails to convey a plea offer to his client, it is a gross deviation from accepted professional norms. See: U.S. ex rel. Caruso vs. Zelinsky, 689 F.2d 438.

The State's contention that Phillips cannot show prejudice based on counsel's failure to communicate the plea bargain was addressed by the Third Circuit Court of Appeals, in Caruso, supra. As in Phillips's case, the State argued in Caruso that because Caruso received a fair trial, he was not entitled to habeas relief, even if he could prove that counsel was ineffective for not communicating the plea offer to Caruso. However, the Third Circuit found the State's argument untenable with regard to the plea bargaining issue, because

failure to communicate a plea offer to a defendant deprives a defendant of the opportunity to present a plea bargain for the court's consideration, and upon its acceptance, to enter a guilty plea in exchange for a lesser sentence. Moreover, a subsequent fair trial does not remedy that deprivation. Cf. Rose vs. Mitchell, 443 U.S. 545, 557, 99 S.Ct. 2993, 3000, 61 L.Ed.2d 739 (1979).

Where defence counsel has failed to inform a defendant of a plea offer, ...the federal courts have been unanimous in finding that such conduct constitutes a violation of the defendant's Sixth Amendment Constitutional Right to the effective assistance of counsel. See: U.S. vs. Rodrigues, 929 F.2d 747 (1st Cir. 1991); Johnson vs. Duckworth, 793 F.2d 888 (7th Cir. 1989); and Barentine vs. U.S., 728 F.Supp. 1241 (W.D.N.C.), aff'd. 908 F.2d 968 (4th Cir. 1990).

The ABA Standards for Criminal Justice, 2nd Ed. 1980, Standard 406.2(a), provides that, "...the lawyer has the duty to communicate fully to the client the substance of the [plea bargain] discussions." The application of this Standard was addressed in Becton vs. Hun, 516 S.E.2d 762 (W.Va. 1999). In Becton, the State argued precisely the same position now advanced by the South Carolina Attorney General's Office; "...that even if the plea offer were presented to and accepted by the trial court, the defendant would be in the same position he was in after trial.... Therefore, the outcome of the proceedings were not altered." This argument was rejected by the court, because the "...argument ignores the fact that the outcome of the sentencing phase of the proceedings were altered. There is a great difference between 40 years and 10 years." Becton, Id. (emphasis added). See also: State vs. Simmons, 65 N.C.App. 294, 309 S.E.2d 493, 497 (1983); and Gary vs. State, 579 N.E.2d 605, 607 (Ind. 1991).

The guilty plea process is bifurcated; the guilt phase and the sentencing

phase. Hence, the Court's ability to accept a defendant's guilty plea on one day, yet postpone sentencing until a late date. The State is correct in its assertion that the guilt phase would not be altered by counsel's failure to communicate the plea bargain to Phillips. However, the guilt phase was greatly altered.

Phillips received a aggregate sentence of fifteen years, at eighty-five percent, incarcerating Phillips for approximately thirteen years. Had Phillips been presented with the State's plea agreement to plead guilty to one count of ABHAN, the maximum sentence was ten years, at fifty-one percent, given all available good time credits. Consequently, for the State to allege that the result of the proceedings were not altered by counsel's failure to convey the plea bargain is clearly fallacious reasoning. Every court to review this question has found the defendant prejudiced by counsel's failure to communicate the government's plea offers to the Defendant. This Court, too, should find Phillips was prejudiced by counsel's deficient performance.

II . UNDER RULE 404(a)(2), SCRE, THE POST-CONVICTION COURT PROPERLY FOUND THAT COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE FOR ADMISSION OF PHILLIPS'S TESTIMONY WITH REGARD TO THE VIOLENT CHARACTER AND REPUTATION OF THE VICTIMS

At trial, Phillips testified that, "And when they [the victims] followed me, the reason why, you know, I wanted to come back out to the [police] precinct, or whatever, because, you know, I heard about things they had did." (Apx. p.226, LL.15-18). The State objected to Phillips's testimony, at which point the Court convened an in camera hearing on Phillips's proposed testimony.

Phillips's revealed to the Court that he was aware of a shooting perpetuated by John Griffin (one of the victims), in which Griffin had "shot up" the Villa Apartments. Phillips stated that based on his knowledge of Griffin's reputation for carrying a gun, and his propensity to use a gun, Phillips was afraid of Griffin. (Apx. p.229, LL.11-19). The Court overruled the State's objection to Phillips's earlier testimony, but ruled that the defense would go no further into the matter of Griffin's reputation. (Apx. p.230, LL.3-5). Counsel Dukes did not object to the Court's ruling, or attempt to proffer argument in support of further testimony regarding Griffin's violent reputation.

The PCR Court correctly found that counsel was ineffective in failing to proffer testimony and/or argument to the trial court regarding Phillips's knowledge or opinion of the victim's propensity toward violent behavior. While in the presence of the jury, Phillips's merely stated that, "I heard about things they had did [sic]." (Apx. p.226, L.18). Phillips did not state that Griffin had a violent reputation, and that was why Phillips was afraid of him for that reason. Nor did Phillips testify that he was afraid of Griffin based on Griffin's propensity toward violence, or the manner in which Griffin resolved

disputes. Consequently, the jury was left unaware of Griffin's violent reputation, because counsel Dukes failed to make the least effort to place that evidence before the jury.

Though defense counsel was prohibited by Rule 404(b) from introducing evidence of Griffin's specific acts of violence to prove the character of Griffin in order to show Griffin's actions were in conformity therewith, counsel "could" introduce such evidence in order to demonstrate Phillips's state of mind at the time of the shooting. At least four persons confronted Phillips at the Waffle House, based on the testimony of one of the victims. (Apx. p.110, LL.5-8). John Griffin had threatened Phillips's life when the two men had argued earlier at the club. (Apx. p.213, LL.15-19). Finally, Gerold Griffin, the second of the two victims, testified that John Griffin was being restrained from attacking, or charging, Phillips just prior to the shooting. (Apx. p.111, LL.5-13). This evidence, combined with Phillips's knowledge of Griffin's reputation of violence, would have altered the jury's verdict in the case, and counsel was ineffective for not attempting to place the basis of Phillips's fears before the jury.

In Maggitt vs. Wyrick, 533 F.2d 383, 385 (1976), the Eighty Circuit Court of Appeals found that,

"Many Courts, in self-defense cases, permit the introduction of evidence relating to the defendant's knowledge of specific acts of violence directed by the victim against persons other than the defendant; the purpose is to permit the jury to develop a greater appreciation for the reasonableness of the defendant's fear."

Maggitt, at 385.

This same opinion was voiced in U.S. vs. Burks, 470 F.2d 432, 434 (D.C. Cir. 1972), in which the court held, "Evidence of the alleged victim's violent character was admissible on the issue of whether or not the defendant reasonably

feared he was in danger of imminent great bodily harm." Specific evidence of the victims' propensity for violence was admissible, yet counsel made no effort to gain admission of the evidence which would have demonstrated to the jury the basis of Phillips's fears and apprehension.

One of the elements of self-defense is the defendant's reasonable belief that his use of force was necessary. And it is the basis of a defendant's fears and beliefs which render Rule 404(b) inapplicable to Phillips's case. "Rule 404(b) does not apply when a defendant seeks to introduce evidence that he knew of a victim's other acts to show the defendant's state of mind." See: U.S. vs. Saenz, 179 F.3d 686 (9th Cir. 1999). In Saenz, the court pointed out that the District Court in U.S. vs. James, 169 F.3d 1210 (9th Cir. 1999) ruled that the defendant could testify about the victim's prior acts of violence to show her state of mind. Saenz, at 689.

The 9th Circuit went on to conclude that the District Court erred in Saenz's case, when it held that Saenz could not, as a matter of law, show his state of mind at the time of his attack, by testimony that he (Saenz) knew about the victim's propensity for violence. The Court further held that,

"Moreover, the error was not harmless. By excluding the evidence, the District Court prevented Saenz from supporting his claim of self-defense. Error cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense."

(Saenz, at 689)

In Saenz, the District Court excluded evidence that the victim had recently been carrying brass knuckles and a length of pipe. At Phillips's trial, evidence was available that John Griffin was responsible for indiscriminately firing a gun into an apartment complex. Counsel Dukes was negligent in failing to attempt to gain admission of such evidence, and if not the specific act, at

least testimony that Phillips was aware of previous acts of violence by the victim. Consequently, the PCR court did not error in granting Phillips relief on this issue.

THE POST-CONVICTION COURT WAS CORRECT IN ITS DETERMINATION THAT COUNSEL WAS INEFFECTIVE PURSUANT TO U.S. vs. CRONIC, 104 S.CT. 2039, THEREBY OBTAINING THE NECESSITY OF AN INDEPENDENT FINDING OF PREJUDICE

The PCR Court granted Phillips relief on this issue not because counsel Dukes was an incompetent attorney, or because counsel Dukes lacked the skills, experience, or knowledge required of a dedicated advocate of his client's interests. No, the PCR Court granted Phillips relief under U.S. vs. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), because counsel was terminally ill, and physically incapable of performing at his customary high level of advocacy. Not only did counsel Dukes fail to subject the prosecution's case to any degree of meaningful adversarial testing, but for all intent and purposes, counsel was technically absent from critical stages of Phillips's trial; not physically absent, but intellectually.

The right to counsel is the right to the effective assistance of counsel, for attorney's in criminal cases are necessities, not luxuries. (Cronic, at p.2043-44). In its review of Cronic, supra, the United States Supreme Court held,

"Thus, the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. The right to the effective assistance of counsel is through the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. But if the [trial] process loses its character as a confrontation between adversaries, the Constitutional guarantee is violated."

(Cronic, at p.2044-45).

The State presented eight witnesses at Phillips's trial, and defense counsel's examination of each witness was merely to confirm what the witness had testified on direct. In no instance did the defense extract previously unknown

information, or develop new lines of thought. When the victims were questioned by defense counsel, their testimony acted to confirm what was stated to the jury on direct. This is not the adversarial testing envisioned by the Court in Cronic supra.

It is well established law that no criminal defendant is guaranteed a perfect trial or a perfect advocate. However, it is also well established law that, where one or two errors by the defense may be excused, a cumulative effect develops at some point making it impossible for a defendant to receive a fair trial. By the same token, when the instances of counsel's lapses in judgement reach a threshold number, it becomes difficult to imagine a defendant receiving a fair trial. In Phillips's case, those lapses in defense counsel's judgement include:

1. Assistant Solicitor Russell Hilton testified that counsel Dukes asked Hilton prior to Phillips's trial: "You really believe Mr. Phillips shot those guys?". Counsel Dukes failed to remember that the question before the court was not whether Phillips shot John and Gerold Griffin, but whether Phillips did so in self-defense. Counsel Dukes was unable to recollect the crux of the case.

2. Counsel Dukes failed to object to a single one of the State's forty-one exhibits. (Apx. p.29, LL.22-24). There is no evidence that counsel Dukes viewed those exhibits prior to trial. Nor did defense counsel's file contain evidence of witness examination sheets, a Rule 5 motion, any type of pre-trial motion, or other preparatory material. (Apx. Vol 2, p.513).

3. Counsel stated in his opening statements to the jury that Phillips first had a gun, and then did not have a gun. (Apx. p.41, LL.1-13).

4. Counsel stated in both opening and closing arguments that Phillips fired the gun eight times, bolstering the State's theory of Phillips as the aggressor. (Apx. p.282, LL.14-16).

5. Counsel Dukes placed Phillips on the witness stand and allowed, even encouraged, Phillips to deliver a nine page narrative of events. (Apx. p.212 thru p.221).

6. Defense counsel's closing argument was grossly defective. It was merely a restatement of the witnesses' testimony. Counsel did not argue for the lesser included offense of ABHAN, nor did counsel argue a true theory of self-defense. Only once did counsel even reference self-defense; Apx. p.283, L.17.
7. Counsel failed to convey not one, but two plea offers to Phillips. (Apx. p. 441-442), at least one of which Phillips would have accepted. (Apx. p. 400, LL.14-18).
8. Counsel failed to file a Notice of Intent to Appeal at Phillips's request. (Apx. Vol 2, p.511).
9. Counsel failed to argue for admission of opinion or reputation evidence, which would have revealed the violent nature of John Griffin. (Apx. pp.25-27).

In Nance vs. Ozmint, 626 S.E.2d 878, 367 S.C. 547 (SC 2006), this Court recognized the principle that prejudice is presumed when an attorney fails to subject the prosecution's case to meaningful adversarial testing. Our State's Supreme Court has recognized that a trial is unfair if a defendant is denied counsel at any stage of the proceedings, an opinion which concurs with that of Burdine vs. Johnson, 262 F.3d 336 (5th Cir. 2001).

In Burdine, the Court held that a presumption of prejudice was appropriate when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings. The record amply supports the conclusion that counsel Dukes, though present in body, was absent in mind from the trial of Phillips. As noted in Burdine,

"We conclude ... that a defendant must have the actual assistance of counsel at every critical stage of a criminal proceeding for the court's reliance on the fairness of that proceeding to be justified. The Court in Cronic supra, was not concerned with the cause of counsel's absence, but rather the effect of such absence on the fairness of the criminal proceeding."

(Burdine at 345-46)

Counsel Dukes could not subject the prosecution's case to meaningful adversarial testing, because counsel Dukes illness rendered him intellectually absent from Phillips's trial. Counsel Dukes was both emotionally and analytically detached from Phillips's trial, and irrespective of the form of argument, one single idea forces itself to the forefront: Counsel Dukes was too ill to function at his normally high level of advocacy. This Court should affirm the decisions of the post-conviction court with regard to this issue.

CONCLUSION

WHEREFORE, having shown good and just cause, the Respondent respectfully requests this Court to affirm the decisions of the lower Court, granting Phillips post-conviction relief.

Respectfully submitted,

Dated: 4/11/11.
Ridgeville, South Carolina

/s/ Eric D. Phillips
Eric D. Phillips, Respondent

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO DORCHESTER COUNTY

The Honorable Diane S. Goodstein
Circuit Court Judge

Case No. 2007-CP-18-0202

ERIC D. PHILLIPS, JR.

RESPONDENT / PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

PETITIONER / RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served upon the
Petitioner/Respondent a true copy of Respondent/Petitioner's PRO
SE RESPONSE TO ANDERS BRIEF by placing same into the United
States Mail, first class postage affixed and addressed as follows:

Ms. Mary S. Williams
Asst. Attorney General
Post Office Box 11549
Columbia, SC 29211

Dated: 4/11/11 .
Ridgeville, South Carolina

/s/ Eric D. Phillips Jr.
Eric Phillips, Jr.
Pro Se Respondent/Petitioner
McDougall Corr. Facility
1516 Old Gilliard Road
Ridgeville, SC 29472