

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

—————  
Certiorari to York County

RECEIVED

Honorable Alison Renee Lee, Circuit Court Judge  
—————

MAR 03 2017

S.C. SUPREME COURT

ORTAVIOUS R. MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002232  
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PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR Court erred in failing to specifically advise Petitioner of the hazards of being represented by plea counsel at the post-conviction hearing such that Petitioner's purported consent to such an arrangement was invalid?

## STATEMENT OF THE CASE

On October 13, 2011, the York County Grand Jury indicted Petitioner Ortavious Mitchell for one count of trafficking cocaine, one hundred grams or more. App. 366.

On May 21-22, 2013, Mitchell appeared for trial before the Honorable John C. Hayes, III. App. 1. Mitchell was represented by Reginald Lloyd, and the state was represented by assistant solicitors Jennifer Colton and Matthew Shelton. App. 1. The defense's motion to suppress the drug evidence seized by police was denied following a pre-trial hearing. App. 6 – 230. After selection of a jury, the solicitor advised the court that Petitioner would plead guilty to the lesser-included offense of trafficking cocaine, twenty-eight to one hundred grams, for a negotiated sentence of ten to fifteen years. App. 253, l. 19 – 254, l. 5. Mitchell pled guilty and Judge Hayes sentenced him to thirteen years incarceration. App. 254, l. 6 – 265, l. 25.

On May 22, 2014, Mitchell filed an application for post-conviction relief ("PCR"), alleging that he was being held unconstitutionally because the trial judge erred in the denial of his motion to suppress. App. 288. The state filed its return on September 24, 2014. App. 294. On November 17, 2014, an evidentiary hearing was held before the Honorable Alison Renee Lee. Mitchell was represented by Reginald Lloyd, his plea attorney who prepared the PCR application. The state was represented by assistant attorney general J. Rutledge Johnson. App. 300.

At the outset of the PCR hearing, the state requested that the court inquire as to the waiver of any claims of ineffective assistance of counsel against Lloyd. App. 303, ll. 18-22. As discussed more fully *infra*, a brief exchange followed and Mitchell indicated his desire to proceed with Lloyd as counsel at the PCR hearing. App. 305, l. 7 – 308, l. 25.

The state also made a motion for summary judgment, arguing that the issue raised in the application was a direct appeal claim waived by the entry of Mitchells' guilty plea. Judge Lee decided to take the state's motion under advisement and hear Mitchell's testimony and further argument of the parties. App. 303, ll. 23-24; App. 309, l. 4 – 312, l. 12. At the close of the hearing, Judge Lee provided both parties with the opportunity to file memorandums, specifically asking them to address whether the claim raised was cognizable under the PCR Act. App. 343, l. 10 – 344, l. 8. Both parties submitted their respective memorandums on December 1, 2014. App. 346; App. 355.

On October 3, 2016, Judge Lee filed an order denying Mitchell's PCR application. App. 360. Judge Lee ruled that "[p]ost-conviction relief was not the proper forum for the Applicant in this case, to address the Trial Judge's ruling on his motion to suppress evidence." App. 363. She found that the Adams<sup>1</sup> case, cited by the defense was not analogous and did not announce a new rule or specify that it should be applied retroactively. Thus, any error in the trial court's ruling could have been pursued on direct appeal. App. 363 – 365.

This petition follows.

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<sup>1</sup> State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014).

## ARGUMENT

**The PCR Court erred in failing to specifically advise Petitioner of the hazards of being represented by plea counsel at the post-conviction hearing such that Petitioner's purported consent to such an arrangement was invalid.**

### *Relevant Facts*

Following the calling of the case for the PCR hearing, the State asked the Court to inquire as to the waiver of any claims of ineffective assistance of counsel Mitchell could have raised against Lloyd because he served as both plea counsel and PCR counsel. App. 303, ll. 18-22.

The following exchange took place on the record:

THE COURT: And before we get that far, I think as I understand Mr. Johnson what you want me to clarify with Mr. Mitchell is that his Post Conviction Relief application does not assert any claims of ineffective assistance of counsel, and as I understand the basis for the Post Conviction Relief application it is arising out of after the motion to suppress was denied by the Court and the trial was prepared to go forward. Mr. Mitchell took advantage, I guess, of a plea offer that was extended to him that reduced the charges and therefore reduced the exposure to jail time. He decided to accept that offer and I read the plea portion as well. And so Mr. Lloyd I think during the sentencing made reference to the fact there is no conditional plea in South Carolina which means that by pleading guilty to the reduced charge that he would be giving up the opportunity to appeal any rulings that were made by the judge during the course of the motion to suppress. And so, as I understand Post Conviction Relief applications they can assert other constitutional basis to seek relief in addition to ineffective assistance of counsel; is that correct?

MR. JOHNSON: Yes.

THE COURT: Is that your understanding?

MR. LLOYD: Yes, Your Honor, that is our understanding of the PCR statute.

THE COURT: Just to make sure, Mr. Mitchell, you heard the conversation that we have been having. Do you understand generally what we have been discussing so far?

MR. MITCHELL: Yes, ma'am.

THE COURT: And it is my understanding that Mr. Lloyd did represent you during the course of – in connection with these charges and represented you during the course of the motion to suppress and the trial that was to take place back in May of 2013, is that correct?

MR. MITCHELL: Yes, ma'am.

THE COURT: And you've asserted a claim of Post Conviction Relief and actually it was signed by Mr. Lloyd so I believe he raised it on your behalf; is that correct?

MR. MITCHELL: Yes, ma'am.

THE COURT: And as I understand your application you were challenging the constitutional issues relating to the stop that do not affect Mr. Lloyd's -- how he represented you and you are not making any claim that he did anything that was inappropriate or that waived your right or did anything in essence to cause you a deprivation of any of your liberties?

MR. MITCHELL: No, ma'am.

THE COURT: And do you understand that by coming here and having Mr. Lloyd represent you that you would still be giving up that opportunity to be able to in the event that you thought of something or somehow or another there was some other issue that may come to light during the course of the proceeding you're giving up that the opportunity by having him represent you at this particular point by raising that particular claim?

MR. MITCHELL: Yes.

THE COURT: All right.

MR. LLOYD: If I may I just wanted to let the Court know I did discuss that issue with Mr. Mitchell and I wanted to make sure that he understood the Court would colloquy on that issue and that he was free to in fact raise that even now if he felt like he needed to and that obviously we would address that with the Court if he needed separate counsel to counsel him on that.

THE COURT: And at this time Mr. Mitchell do you have any issues that you need to raise with respect to that?

Mr. Mitchell do you at this particular time have any issue that you wish to raise with respect to the matter in which Mr. Lloyd has represented you in connection with these particular charges either pretrial, during the course of the trial, during the course of the hearing on the motion to suppress or at this particular point?

MR. MITCHELL: No, ma'am.

THE COURT: And do you wish to go forward today with Mr. Lloyd representing you as it relates to the claims that you raised in your application?

MR. MITCHELL: Yes, ma'am.

THE COURT: Is there any additional questions you wish to ask?

MR. JOHNSON: I just ask that he be sworn in just for the record.

THE COURT: Do you solemnly swear or affirm all the answers that you have giving to me have been the truth so help you God?

MR. MITCHELL: I do.

THE COURT: Thank you. Anything further? Any additional questions Mr. Lloyd that you feel need to be asked of him at this time?

MR. LLOYD: On that issue no, Your Honor.

App. 305, 1. 7 – 308, 1. 25. The PCR hearing proceeded and the only issue raised related to the trial court's failure to suppress the drug evidence. App. 309 – 344.

### *Discussion*

“A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both.” Brannon v. State, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001); see also Spooone v. State, 379 S.C. 138, 142, 665 S.E.2d 605, 607 (2008) (holding that a waiver of collateral-attack rights will be held effective only if it is knowing and voluntary). In Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20, 21 (1987), this

Court held: “Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.” This Court further ruled that in the future, “when applicants appearing at hearings on post-conviction relief are represented by their trial counsel, the court shall examine the applicant concerning the waiver of the issue of ineffective assistance of counsel.” 293 S.C. at 530, 362 S.E.2d at 22. Specifically, “[t]he court shall advise the applicant that the dual representation will result in the waiver of any claim of ineffective assistance of counsel.” Id. “The applicant shall then state on the record whether he wishes to proceed, thereby waiving the issue.” Id.

It is notable that Mitchell was only twenty-seven years old at the time of guilty plea hearing. App. 260, ll. 22-23. His only serious prior criminal convictions were for assault and battery of a high and aggravated nature and indecent liberties with a female, related to an incident with his underage girlfriend, to which he pled guilty. He received a suspended sentence to five years of probation, which he successfully completed. App. 261, ll. 2-15; App. 275 – 280; App. 323, l. 22 – 324, l. 22. Thus, Mitchell was relatively young and certainly inexperienced with the collateral review process.

While not as egregious as the failure to conduct any colloquy whatsoever, the basic colloquy conducted in the present case failed to advise Mitchell that his claims of ineffective assistance of plea counsel were potentially the only viable claims he had to raise. As this Court explained in Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001):

Allegations of trial court error are not cognizable on PCR. **In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.** A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding.

(internal citations omitted) (emphasis added). As such, Mitchell's continuing to proceed with Lloyd as PCR counsel and waive any claims against him was effectively a waiver of collateral review of his guilty plea.

The PCR court's statements and questions to Mitchell did not impart the gravity and importance of his decision whether to proceed with Lloyd. Rather, Judge Lee's mentioning that she understood that "Post Conviction Relief applications . . . can assert other constitutional basis to seek relief in addition to ineffective assistance of counsel" coupled with the response of both attorneys that such was their understanding, insinuated that the type of claim raised in the application prepared by Lloyd may have been cognizable under the PCR Act. See App. 305, 1. 24 – 306, 1. 7. Judge Lee should have known from her initial review of the guilty plea colloquy and the PCR application that there was no merit to the direct appeal claim raised in the application that Lloyd prepared. Thus, it was incumbent upon her to be honest with Mitchell and make sure that he understood that a waiver of his ineffective assistance of counsel claims was effectively a waiver of his PCR. See, e.g., Stevenson v. State, 337 S.C. 23, 26, 522 S.E.2d 343, 344–45 (1999) (holding that Faretta inquiry was insufficient where plea judge clearly advised petitioner that she had a right to counsel but no one specifically informed her of the dangers and disadvantages of proceeding *pro se*). Certainly had Judge Lee made the consequence of the waiver plain, such that it could be understood by Mitchell, he would not have proceeded with

Lloyd as PCR counsel. Without that warning, Mitchell's purported waiver of his ineffective assistance claims against Lloyd was not knowing and voluntary. Mitchell is accordingly entitled to remand for a new PCR hearing where he can be represented by an independent attorney and raise claims of ineffective assistance of plea counsel.

**CONCLUSION**

Based on the foregoing, Petitioner Ortavious R. Mitchell respectfully requests that this Court grant certiorari to review the issue raised herein and allow further briefing.



Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of July, 2017.

STATE OF SOUTH CAROLINA  
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Certiorari to York County  
Honorable Alison Renee Lee, Circuit Court Judge  
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ORTAVIOUS R. MITCHELL,

PETITIONER


V.

STATE OF SOUTH CAROLINA,

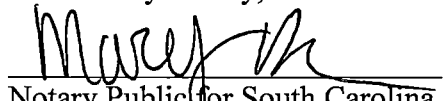
RESPONDENT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Ortavious R. Mitchell, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 3<sup>rd</sup> day of July, 2017.

  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 3rd day of July, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027