

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Post Conviction Relief

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JUL 21 2017

S.C. SUPREME COURT

Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No.: 2016-001914

CONNIE MURRAY DUMAS,..... Petitioner,

vs.

State of South Carolina,Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CASES

Butler v. State, 286 S.C. 441, 334 S.E. 2d 813 (1985)

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)

Davie v. State, 381 S.C. 601, 675 S.E. 2d 416 (2009)

Frasier v. State, 351 S.C. 395, 570 S.E. 2d 172 (2002)

Griffin v. Martin, 278 S.C. 620, 300 S.E. 2d 482 (1983)

Pitman v. State, 337 S.C. 597, 524 S.E. 2d 623 (1999).

State v. Hazel, 275 S.C. 392, 271 S.E. 2d 602 (1980)

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674, 692 (1984)

QUESTION PRESENTED

1. Did the Lower Court erred in not granting Post-Conviction Relief on the basis that trial counsel failed to move to suppress video evidence as a result of the state losing a crucial piece of video evidence?
2. Did the Lower Court erred in not granting Post Conviction Relief on the basis that trial counsel failed to adequately advice the Petitioner regarding the potential risk of taking the case to trial and by not objecting to the Solicitors failure to honor an agreement regarding sentencing?

STATEMENT OF THE CASE

The Petitioner is incarcerated in the South Carolina Department of Corrections pursuant to the York County Clerk of Court's Orders of Commitment. Petitioner was indicted by the November, 2010 term of York County Grand Jury for Armed Robbery (2010-GS-46-3853) and Possession of a Weapon During the Commission of a Violent Crime (2010-GS-46-3854). Michael Atwater, Esq. represented the Petitioner. On May 26, 2011, the Petitioner proceeded to a Jury Trial at which time she was found guilty as Indicted. The Petitioner had previously proceeded to trial and received a hung jury. This was the second trial of this case.

The Honorable Paul M. Burch sentenced the Petitioner to confinement for eighteen (18) years for Armed Robbery and five (5) years concurrent for Possession of a Weapon During the Commission of a Violent Crime.

The Petitioner filed a Direct Appeal. The South Carolina Court of Appeals affirmed the Petitioner's conviction and sentences. (State v. Dumas 2013-UP-150, filed April 10, 2013.) Petitioner then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court on January 23, 2014, a Remittitur was issued on February 25, 2014.

The Petitioner then filed an Application for Post-Conviction Relief on April 23, 2014, a Return was filed on or about October 2, 2014 and an Evidentiary Hearing was convened on January 20, 2015. The Petitioner was represented by Leah Moody, Esq. Rutledge Johnson, Esq. was present on behalf of the State of South Carolina. An Order of Dismissal was filed on August 24, 2016. A timely Notice of Intent to Appeal was filed.

STATEMENT OF THE FACTS

The Petitioner is currently housed at Leath Correctional Institution. She is serving an eighteen (18) sentence for Armed Robbery and Possession of a Weapon during the Commission of a Violent Crime. These sentences are running concurrently. Petitioner originally went to trial

and was represented by Michael Atwater. The first trial resulted in a mistrial. Petitioner was tried a second time on May 20, 2011 and was found guilty by a Jury.

Petitioner filed a Post-Conviction Relief Action alleging in part that Trial Counsel failed to:

1. That the authorities lost a video recording of Petitioner at the location. That this video clearly showed that Petitioner was at the location of the crime, but that she did not have any type of weapon and showed that Petitioner was not involved in the alleged Robbery (App. p. 673, lines 18-21) Counsel failed to move to suppress all video evidence.
2. That the Petitioner was offered a plea of ten (10) and six (6) years. Defense Counsel persuaded her not to accept the plea and failed to adequately advise her of the exposure of trial verses acceptance of the plea.

The Petitioners basic defense was that she left her home on the day in question around noon. That she had been at her house and that she had taken money out of her safe that she had in their home. She and her daughter were going shopping that day. Petitioner went by the Bank to withdraw additional money from the ATM. The Bank was located behind the One Stop convenience store, which is where the incident in question occurred. The amount of money that she had taken from her safe was a hundred dollar bill. This money was from a settlement that she had received for her and her children as a result of a automobile accident.

The Petitioner wanted to have the hundred dollar bill broken in small amounts so she proceeded into the One Stop. The Petitioner was told that they could not open the register without a purchase. So the Petitioner proceeded back to the coolers to get something to purchase. When she came back the hundred dollar bill that she had laid on the counter was

missing. She inquired about this to the cashier. The cashier indicated that she did not know where it was. The Petitioner believed that the cashier had taken the money. At this point the cashier opened the cash drawer and said here is all the money that I have, there is not a hundred dollar bill in here. The Petitioner told the clerk, all I want is my money. The cashier gave her a hundred dollars back. (App. p. 709, lines 17-25, p. 710, lines 1-24)

ARGUMENT #1

The Petitioner testified that she had the opportunity to view the discovery which included a video from the convenience store. (App. p. 672, lines 14-25) That she first saw the video at the first trial.

That the video showed:

“me walking up to the Counter. And you can just see me at the cashier talking and – me looks like I had hand her something, she hands me something back and I walk out.” (App. p. 673, lines 2-25)

The Petitioner further testified that a video was introduced at the second trial but it was not the same one as described above. (App. 674, 1 4-25). She stated that the video used by the state at the second trial does not depict the Petitioner handing the Clerk something and the cashier handing something back. (App. 675, line 5-10) She was told by counsel that the video which showed her handing something to the Clerk had been lost (App. p. 672, line 19-25, App. p. 673, line 1)

It is unclear from the trial attorney’s testimony at the PCR hearing, which video was lost and when it was lost. The State asked counsel if he failed to properly investigate the lost video evidence of the store from the first and second Trials. And why he didn’t argue to have the video evidence excluded pre-trial in the second trial? (App. 715, line 1-6) Counsel states that he cross-examined the “IT Lady” from the One Stop (App. p. 715, lines 9-20) and covered this issue in

closing. Counsel also seems unclear as to whether the video was lost prior to or after the first trial. (App. p. 721, line 22)

The PCR Court finds that Counsel testified that “a surveillance video from the convenient store was lost some time after the first trial...None of Counsel’s actions concerning the video evidence rose to the level of deficient performance and that the (Petitioner) has failed to prove that he was ineffective in this regard.” (App. p. 753)

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E. 2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. “Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed. 2d 674, 692 (1984); Butler, 334 S.E. 2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. 117, 386 S.E.2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong; courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that “there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625.

The Due Process clause of the Fourteenth Amendment to the United States Constitution guarantees a Defendant's fundamental right to a fair trial. In this case, counsel was ineffective by his failure to move to suppress all of the video evidence.

ARGUMENT #2

The Petitioner stated that she discussed the issue of going to trial verses taking a plea with Defense Counsel. She remembered that the plea offer was for ten (10) years but defense counsel told her "why would you want to take that when you can leave with no time." (App. p. 677, lines 12-14. The Petitioner stated:

"If I was found guilty, I didn't know the charges –the level and severity of the charges, that wasn't even possible." (App. p. 677, line 15-19)

Trial counsel testified there were several plea offers. That the best offer she eventually recieved was for six (6) years. (App. p. 714, lines 17-22) Counsel believed the six year offer was for a lesser included offense. But the Petitioner rejected all of the plea offers. (App. p. 714, lines 23-24) Counsel testified that the plea negotiations were discussed pre-trial and that the Solicitor made an offer of six (6) years.

Counsel further testified that the Solicitor stated that he would make a recommendation at the end of trial for "that" six years. (App. p. 728, lines 1-6)

Counsel testified at the PCR hearing:

Q: "Then if you got a guilty verdict, he was still going to recommend six years.

A: "Yes" (App. p. 728, line 10-12)

In South Carolina there is a substantial number of cases that have developed the body of case law that established which consequences must be explained to a Defendant by counsel, prior

to a plea of guilty. Generally speaking, a Defense attorney must inform the Defendant of any direct consequences of their plea. Griffin v. Martin, 278 S.C. 620, 300 S.E. 2d 482 (1983) Frasier v. State, 351 S.C. 395, 570 S.E. 2d 172 (2002). Direct consequences have a definite, immediate and automatic effect on the range of the Defendant's punishment. In addition, if a criminal Defendant does not properly understand the direct consequences of their plea, then that plea is invalid. State v. Hazel, 275 S.C. 392, 271 S.E. 2d 602 (1980). A Defense Counsel's failure to advise his client of the direct consequences of the guilty plea, constitutes ineffective assistance of counsel. Pitman v. State, 337 S.C. 597, 524 S.E. 2d 623 (1999).

In addition, the Court has held that Counsel's failure to convey a plea offer can also rise to the level of ineffective assistance of counsel. Davie v. State, 381 S.C. 601, 675 S.E. 2d 416 (2009).

Based upon the Court's reasoning in these cases, it would also be reasonable to believe that a Defendant must have all of the information regarding direct consequences in making a decision to take a case to trial, verses accepting a guilty plea. It would also be reasonable to believe that the traditional two-prong Strickland test would also apply in this type of situation. In this case, Counsel implies that all plea offers were conveyed to the Petitioner, which included the six year plea offer to the Petitioner. It can also be assumed from the transcript, that he would have conveyed his belief that the Solicitor was offering to make a recommendation of six (6) years, even after the case went to trial. He stated that the Solicitor did not honor his representations made to Defense Counsel. (App. p. 729, lines 1-6)

At the second trial, the Solicitor stated:

"Your Honor, from the States side before we got into the trial the Court asked the defense attorney and myself to step back into chambers. The Court was interested in what the plea bargain negotiations had been before we got to trial and we relayed that to the Court and Mr. Atwater relayed that he had relayed those to Ms.

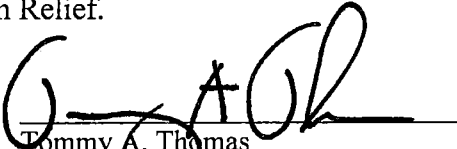
Dumas and that didn't happen. And I told the Court that I was considering making a recommendation if we got to this point. I'll say now, after hearing all the testimony in the trial I have no recommendation to make. I'll leave it in the Court's good judgment." (App. p. 625, lines 16-25, p. 626, line 1)

Trial Counsel did not object to the Solicitor's failure to make a recommendation.

In an application of Strickland, it can be shown that counsel was deficient in his counselling the Petitioner regarding the consequences of accepting the six (6) year plea offer verses the exposure at trial. In addition, it appears that prejudice can be found in that Petitioner's failure to accept the plea offer resulted in her receiving a substantially higher sentence at the conclusion of trial. Petitioner received eighteen (18) years verses the offer of six (6) years on a plea. Therefore Counsel was ineffective in his failure to adequately advise the Petitioner regarding proceeding to trial and by his failure to object to the Solicitor's not honoring his agreement to make a recommendation regarding sentencing.

CONCLUSION

Therefore, based upon the foregoing arguments the Petitioner respectfully requests that the Court grant the Petitioner's request for Post-Conviction Relief.



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July 21, 2017

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S.C. SUPREME COURT

Appeal from York County

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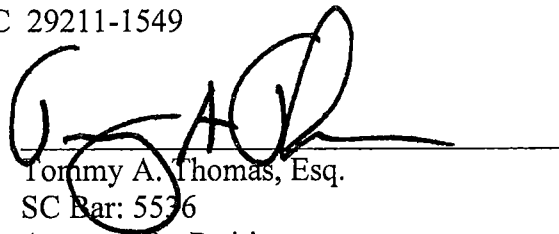
THE STATE OF SOUTH CAROLINA,

RESPONDENT,

CERTIFICATE OF SERVICE

I, Tommy A. Thomas, Attorney for the Petitioner, hereby certify that I hand delivered, a copy of a Petition for Writ of Certiorari and Appendix, to:

Office of the Attorney General
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June 21, 2017