State Of South Carolina

In the Supreme Court

Certiorari to York County

Honorable Paul M. Burch, Circuit Court Judge

Dennis Rodger Davis, Jr.

Petitioner

V.

State of South Carolina, Respondent

Appellate Case NO. 2016-001447

Pro Se Brief For Writ of Certiorari

Dennis Rodger Davis, Jr. #288558

Petitioner

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S.C. SUPREME COURT

Issues Presented

PCR Court did err in not finding Plea Counsel ineffective for failing to Challenge the use of Petitioner's Prior Conviction for simple Possession of marijuana second offense, which was a misdemeanor, to enhance the offense of distribution of Marijuana to a third? PCR Court did err in not finding Counsel ineffective for failing to object to prosecutor's statements which resulted in an abuse of descretion during sentencing. PCR Court also erred in not finding Plea Counsel ineffective for giving erroneous advice to petitioner.

Statement of the Case

On March 12, 2015, Petitioner Davis filed an application for Post Conviction Relief (PCR). The state filed a return on August 7, 2015. An evidentiary hearing was held on January 20, 2016 before the Honorable Paul M. Burch. Davis was represented by Leah B. Moody, and the state was represented by Justin Hunter. At the PCR hearing, Petitioner Davis testified that his plea attorney advised him to plead guilty but Davis wanted to go to trail. Davis felt that he should have been charged with second offenses and not third distributions. Davis argued that he had done research and learned the simple possession of marijuana Could not be used to enhance to a third offense because it was a misdemeanor Charge and unconstitutional. He said: "the prior 2009 Conviction is not a felony Possession and is Classified differently." Because he did not know the law, he had no choice but to plead guilty. He

was represented by Counsel on his prior Simple possession of marijuana Conviction. Davis argued that his plea Counsel was ineffective because he did not object to the 2009 simple Possession of marijuana second offense being used to enhance the distribution of marijuana Charges to a third offense. The distribution Charge should have been a Second offense, because he Served time on the prior simple Possession of marijuana, it Could not be used for enhancement because its Considered an unconstitutional Conviction. Davis' plea Counsel testified at the PCR hearing that he believed that the State was not acting inappropriately by using the prior drug Conviction of Davis to enhance the distribution of marijuana Charges to third offenses. He admitted that it was a Complicated issue." Counsel explained that Davis had a Conviction for Trafficking Crack in 2002. He also pled guilty to simple possession of marijuana 2nd offense in 2009. Counsel thought both of these Charges Could be used to enhance the Current Charges. Counsel testified that Davis had a plea offer of six years but refused to take it. Davis was "adamant" about going to trail. The PCR Judge issued an order on June 6, 2016 denying Davis' PCR application and dismissing it with prejudice. In his order, the Judge found Davis' testimoney to not be Credible, but found Counsel's testimony to be Credible and persusive on all matters. The Judge wrote that Davis failed to prove that plea Counsel was ineffective and that he was prejudiced. That he would not have pled guilty but would rather gone to trail. The Judge dismissed the PCR application. This appeal follows.

Argument

The PCR Court did err in not finding plea Counsel ineffective for failing to Challenge the Use of Petitioner Davis' prior Conviction for Simple possession of marijuana 2nd offense which was a misdemeanor and is an unconstitutional Conviction used to enhance the offense of distribution of marijuana to a third. If plea Counsel had of investigated Davis' prior Convictions, He would have Known that the simple possession of marijuana Second Offense was an invalid Conviction and fall under a different Category than a felony Conviction. IN State V. Robinson, 380 S.C. 201, 669 S.E. 2d 588 it was determined by the Supreme Court that a prior misdemeanor Conviction Could not be used to enhance a subsequent offense if the Conviction was uncounseled or the person was actually imprisoned for the offense. Robinson was sentenced to Community Service but ultimately Served a Jail Sentence for failing to Complete his Community Service. For this Prior Conviction in 2009 for Simple Possession of Marijuana Second Davis was not allowed to Pay the fine and was sentenced to 1 year imprisonment by the Honorable Judge Hayes. In State V. Sosbee 371 S.C. 104, 637 S.E. 2d 571 this Conviction was properly used for purposes of Sentencing enhancement under "two strikes" Statute absent any evidence that the defendant was actually incarserated for that prior Conviction. The only evidence before the Court was his testimony of Probationary Period. During the PCR Hearing Plea Counsel testified that this situation was Complicated and Murky! Which means it wasn't Clear that the Prior 2009 Conviction of Simple possession of Marijuana Second Could actually be used. But ultimately testified he thought the state Could use it because I

had Counsel and wasn't sentenced to a term of imprisonment. Well; this is Contradictory to plea Counsel's testimony he had investigated properly! If so Counsel would have known that Davis' 2009 Conviction Could not be used do to the fact he was actually imprisoned. Also the Statute provides that a Second Offense for simple Possession of Marijuana is a misdemeanor. It's a Known fact that misdemeanor offenses are Categorized differently from felony offenses. The use of an unconstitutional Conviction legally Cannot stand. The PCR Judge also erred in not finding Plea Counsel ineffective for failing to object to prosecutors prejudicial testimony made during the plea hearing, Causing the Judge to abuse his discretion by imposing a much harsher sentence for Petitioner exercising his right to trail. On pg 22 of the plea transcript lines 14 through 21 the prosecutor states, "I understand why mitigation like that is presented, but we would also just like to address the fact that the offer was given prior to the C.I.'s identity be revealed and that is very important to the State. Citizens help us out and we try to make offers that reflect protecting there identity. That offer was rejected and the identity was revealed and we are here for a trail!" (emphasis Added) By right of the Constitution of this State and United States I have a right to face my accuser. So the prosecutor was in error in making this misleading statement. Also we were no longer in a trail, this was a plea Hearing. Prosecution's remark were stated harsh and were prejudicial to the Court. Before sentencing Petitioner to a harsher and lengthier sentence based on these Comments made from the Prosecution, the Court states

sternly, "Some how the cycle has got to be broken now Mr. Davis!" The abuse of discretion happened when petitioner was sentenced based on the offer being rejected, the informants Identity being revealed, and us being here for a trail prior to this plea hearing as Stated in the transcript. Thus amounting in an abuse of discretion during sentencing for me exercising my Constitutional right to trail. State V. Hazel, 317 S.C. 368, 453 S.E. 2d 879 determined it was an abuse of discretion when the trail Court erred in Sentencing taking into Consideration Hazel exercised rights to a trail. State V. Pavone, 104 N.C. App 442, 410, S.E. 2d1 also determined the Judge abused his discretion by sentencing Pavone for not pleaing but exercising a Constitutional right to trail. A Clear picture Can be seen that the Judge took into Consideration that Petitioner exercised his right to trail. The prosecutor as well as plea counsel stated they felt 6 years was a resonable penalty for the Crime not 125 months! I was given an extra 4 years and 5 months for going to trail, or trail tax as some lawyer's say. The PCR Court also erred in not finding Counsel ineffective for giving Davis erroneous advice about me being no parolable or violent. Plea Counsel stated during the PCR hearing that he advised me I would be 85% or violent which by law or statute is impossible. Statute 44§53-370 (b)(2) States Not-withstanding any other provision of law a person Convicted and Sentenced pursuant to this item for a third or subsequent offense in which all prior offenses were for possession of a Controlled Substance pursuant to subsections (c)(d), may have the sentence suspended and Probation Granted, and is eligible for Parole,

Supervised furlough, Community Supervision, Work release, Work Credits, education Credits, and good Conduct Credits. In all other Cases the sentence must not be suspended nor Probation granted." 44-53-370 was amended in 2010 with the Omnibus Crime Reduction and Sentencing Reform Act of 2010. Certain language was added to the Statute 44-53-370 (b)(2) to repeal and make the offense Parolable instead of a no-parole offense. This is Clear and unambiguous in the language of the amended statute. One of the main Objectives of this Act was to give inmates Convicted of less serious offenses earlier release dates and parole. That is why Notwithstanding any other provision of law was added to 44-53-370 to take it out of the violent or no-parole offenses Category. The legislative intent to do so has been documented in Bolin V. S.C. Dept. of Corrections, S.E.2d, 2016 WL 732535. Plea Counsel stated during the PCR Hearing, "he was under the impression the Dept. of Corrections would treat my offense as no parole if parole wasn't granted", but should have Known that the DOC can't make laws and nor was my offense/Crime violent. This shows plea Counsel's advice was erroneous and he isn't furthering his legal education as mandated by the Codes of professional Conduct for a lawyer. It Clearly States not to suspend the sentence nor grant probation if you don't meet the (c)(d) Criteria. Simply meaning you must go to Jail if you don't meet the (C)+(D) Clause but your entitled to everything else in the law. The Omnibus Crime Reduction and Sentencing Reform Act of 2010 was inacted to preserve public Safety, reduce Crime, and use Correctional resources most effectively. It is therefore, the Purpose of this Act to reduce

recidivism, Provide fair and effective sentencing options, employ evidence based practices for smarter use of Correctional funding and improve Public safety. Hence the main objective of the Act was to Conserve tax payers dollars by allowing earlier release dates for inmates Convicted of less serious offenses. This shows the intent of the legislature as well as the added language notwithstanding any other provision of law. The intent was to repeal any other provision of law especially the No-parole or violent sentence imposed on non-violent Crimes and offenders. This can be easily interpreted from the language in 44-53-370 (b)(2) That Petitioner was not violent or Non-parolable. On pg 42 of the PCR transcript lines 5 through 6 The Honorable Paul M. Burch Stated, "The other thing I caught in looking over your file, you're up for parole in three and a half months." I Couldn't have been violent or Non-parolable with a parole date. Instead of Plea Counsel admitting his error he tried to place the blame on SCDC stating they would treat me as a no-parole offense if Parole was not granted. Plea Counsel is an interpreter of the law and this is his Job, even if SCDC told him they would treat my offense as a no parole offense he should have Corrected them and told them that was against the law.

Conclusion

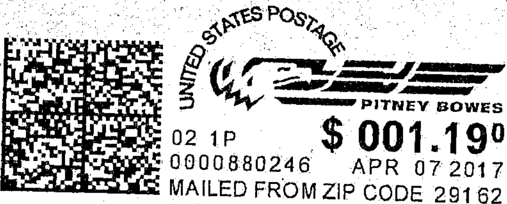
Based on the foregoing, Certiorari Should be granted, the order of the PCR Court reversed and the Case remanded for resentencing, a new trail or any other relief the Court may see fit.

/s/ Dennis Davis

This 6th day of April, 2017. Dennis Davis

Petitioner

HWY.



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