

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable John C. Hayes, Circuit Court Judge

RECEIVED

NOV 06 2017

S.C. SUPREME COURT

DAVID ISRAEL SMITH,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001823

PETITION FOR WRIT OF CERTIORARI

DAVID ISRAEL SMITH
Pro se' Petitioner

386 Redemption way
McCormick SC. 29899

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

The Honorable John C. Hayes, Circuit Court Judge

Case No: 2012-GS-10-02533

Appellate Case No. 2015-CP-10-1855

THE STATE,

RESPONDENT,

V.

DAVID ISREAL SMITH,

APPELLANT,

CERTIFICATE OF SERVICE

I, David Isreal Smith, certify that I have served the Petition For Writ of Certiorari and Designation of Matter on Respondent by depositing two copies of the same in the United States Mail, postage prepaid, addressed to:

ALAN WILSON

MARY S. WILLIAMS

Office of the Attorney General
Post Office Box 11549
Columbia, S.C. 29211
(803)734-3727

I further certify that all parties required by Rule to be served have been served. This 31 day of Oct, 2017

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Issues Presented

1. Was Plea Counsel ineffective assistance for strongly suggesting that the Defendant plea to the charge of Assault and Battery of a high and aggravated nature, instead of challenging the indictment of Attempted Murder in regard to the necessary elements of Malice Aforethought and Specific Intent to Kill?

2. Did the Plea Judge abuse his discretion in sentencing the Defendant to the maximum twenty year sentence following a guilty plea to the lesser included offense of Assault and Battery of a high and aggravated nature, where the the victims injuries were classified not serious and non life threatening which would have required a sentence if any at all to be pursuant to SECTION 16-3-600. Subsection (C)(1) not to exceed ten years?

3. Was Plea Counsel ineffective assistance for failing to inform Defendant of his right to a direct appeal from a guilty plea pursuant to Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995) after receiving the maximum twenty year sentence?

4. Did the PCR Judge err in finding that Petitioner was not entitled to a belated direct appeal, pursuant to White v. State, from his guilty plea to Assault and Battery of a high and aggravated nature when Petitioner received the maximum twenty year sentence, and Petitioner motion to reconsider sentence was denied?

ARGUMENT

Plea counsel was ineffective assistance for not challenging the indictment of Attempted Murder in regard to Malice Aforethought, and Specific Intent to kill.

The burden of proof in regard to the necessary element of Malice Aforethought could not have been met by the state. Malice Aforethought is defined as "Ill Will; an evil condition of mind as in associated with the doing of a wrongful act...Pre-meditated and not the result of chance."

Mr. Smith and the victim were clearly in a relationship if not at the time the incident took place then certainly not very long before it. There was evidence of both love and affection between Mr. Smith and the victim, even if only in regard to Mr. Smith and not the victim at the time of the incident. There is definitely evidence disproving hatred, ill will and a evil condition of mind or Malice Aforethought toward the victim by Mr. Smith. (see Appendix page 27 lines 13-18..."The letters were not threatening in nature, but consistent with a love letter."

Plea counsel was also ineffective assistance for not challenging the indictment of Attempted Murder in regard to the necessary element of Specific Intent to Kill.

The burden of proof in regard to the necessary element of Specific Intent to Kill could not have been met by the state. There was evidence suggesting that there was not a Intent to kill.

The victims medical reports classified her injuries as "Moderate" and "not serious"...the injuries were not consistent with an Intent to kill.

Furthermore, the wounds of the victim were classified "a one time treatment and subsequent observation", which is not considered "Moderate" bodily injury.

Moderate bodily injury does not include one time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care. (see Appendix page 27 lines 22-25..."but I would not characterize the wounds as life threatening in nature, we are dealing with lacerations to the hands and arm.") ...see also victims medical reports included in the Designation of Matter.

Attempted Murder is defined by statute as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of Attempted Murder." B 16-3-29 (emphasis added). The statute became effective on June 2, 2010 and replaced the former common law statute of Assault and Battery with intent to kill, formerly S.C. CODE ANN. B 16-3-620.

The statute defining Attempted Murder requires a Specific Intent to Kill. In State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), the South Carolina Supreme Court declined to recognize the offense of Attempted Murder which had not yet been codified.

The court, in its reasoning, observed that an attempt to commit murder requires a specific intent to kill.

In general, "attempt is a specific intent crime."...the act constituting the attempt must be done with the intent to commit that particular crime. Id. see also Wharton's Criminal Law §§ 694-695 (1996) ("to constitute attempt, there must be an attempt to commit that particular crime...Although murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.") In the context of a specific intent crime, specific intent means that the defendant consciously intended the completion of the acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. United States v. Calloway 116 F.3d 1129 (6th Cir. 1997). **Attempted Murder would require the specific intent to kill and conduct toward that end.** Sutton, 340 S.C. at 397, 532 S.E.2d at 285. (footnote omitted) (Emphasis Added).

Plea counsel was ineffective assistance for not challenging the Attempted Murder Indictment in regard to the necessary elements of Malice Aforethought and Specific intent to kill.

The failure was deficient and prejudicial to the defendant. Had the defendant not entered the unintelligent plea of guilty to the lesser included offense of Attempted Murder as Plea counsel strongly and overly suggested, and continued with the jury trial that had been three years in preparation, the state could not have met the burden of proof in regard to the

The Plea Judge was aware that the victims injuries were not life threatening in nature and abused his discretion in sentencing the Defendant to Twenty years when Statute 16-3-600 (C)(1) states..."A person commits the offense of Assault and Battery in the first degree if the person unlawfully: (a) injures another person and the act is accomplished by means likely to produce death or great bodily injury; or...(2) A person who violates this subsection is guilty of a felony, and upon conviction, must be imprisoned for not more than ten years. Therefore the Plea judge abused his discretion in sentencing the Defendant to the maximum twenty year sentence following his guilty plea to the lesser included offense of Assault and Battery of a high and aggravated nature, where there was no evidence of a Specific intent to kill, and where there was evidence that the victims injuries were classified not serious and non life threatening and should have required a sentence if any at all to be pursuant to section 16-3-600. subsection (C)(1) not to exceed ten years.

 Plea counsel was ineffective assistance for failing to inform Defendant of his right to a Direct Appeal from a guilty plea pursuant to Weathers v. State, 319 S.C. 59, 459 S.E. 2d 838 (1995) after receiving the maximum twenty year sentence..

necessary elements Malice Aforethought and "Specific" Intent to kill.

For the forementioned reasons Plea counsel was ineffective assistance for strongly suggesting that Mr. Smith plea to the charge of Assault and Battery of a high and aggravated nature, instead of challenging the Attempted murder Indictment, where there was evidence presented that showed there was no ill will toward the victim and neither was there an Intent to kill.

The Plea Judge abused his discretion in sentencing the Defendant to the maximum twenty year sentence following his guilty plea to the lesser included offense of Assault and Battery of a high and aggravated nature.

"Moderate bodily Injury" means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.

The victims injuries were classified as "a one time treatment and subsequent observation" which is not considered "Moderate" bodily injury according to B 16-3-600 (A)(2)...see MUSC report included in designation of matter. Plea counsel was aware of this fact...(see Appendix page 27 lines 22-25..."I would not characterize the wounds as life threatening in nature, we're dealing with lacerations to the hands and a arm".)

Plea counsel should have discussed an Appeal with Mr. Smith following the unsuccessful motion to reconsider sentence. Mr Smith desired an appeal as any rational defendant would have desired an appeal after receiving the maximum sentence following a guilty plea to Assault and Battery of a high and aggravated nature. Plea Counsel testified at the PCR hearing "I thought he could get- I was expecting to get somewhere less than the max for pleading guilty".

"Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of a right to a direct appeal from a guilty plea." Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). Counsel has a duty to advise a defendant about an appeal when there is reason to think either: (1) a rational defendant would want an appeal; or (2) this particular defendant reasonably demonstrated that he was interested in appealing. Roe v. Flores -Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).--In determining whether a rational defendant would have desired an appeal, "the court must consider such factors as whether the defendant received the sentence bargained for as a part of the plea and whether the plea expressly reserved or waived some or all appeal rights."Flores -Ortega, supra.

Counsel had a duty to advise Petitioner about an appeal following the unsuccessful motion to reconsider sentence. A rational defendant would have desired an appeal. Plea counsel admitted that he did not expect the Petitioner to receive the maximum sentence following a guilty plea. Petitioner testified that he did not know that he could file an appeal until he arrived

CONCLUSION

Based on the above argument, this Court should grant the petition for certiorari, reverse the PCR courts decision and grant the petitioners belated appeal.



David I. Smith
Pro se' petitioner

This 31 day of Oct, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID ISREAL SMITH,

APPELLANT,

Case No. 2012-GS-10-02533

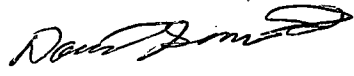
Appellate Case No. 2015-CP-10-1855

DESIGNATION OF MATTER TO BE
INCLUDED ON RECORD ON APPEAL

Appellate proposes the following be included in the Record on Appeal:

- (1) MUSC Health Report (Patient Grayson)
- (2) Ninth Circuit Public Defender Letter dated-
October 18, 2013.

I certify that this designation contains no matter which is irrelevant to this appeal.



David Isreal Smith
Pro'Se Petitioner

NINTH CIRCUIT PUBLIC DEFENDER
BERKELEY & CHARLESTON COUNTY

O.T. WALLACE COUNTY OFFICE BUILDING
101 MEETING STREET, 5th FLOOR
CHARLESTON, SC 29401-2214
(843) 958-1850
(843) 958-1860 (fax)
publicdefender@charlestoncounty.org

BY HAND DELIVERY

October 18, 2013

David Israel Smith, Inmate #61870
Charleston County Detention Center

More proof that I
was prepared for trial
NOT TO PLEA

RE: State of South Carolina vs. David Israel Smith
Warrant (s): I601373; W10110325

Dear Mr. Smith:

This letter is in response to your letters and motion. As the Judge stated last Thursday October 10th, South Carolina does not recognize hybrid representation. This means that you cannot both have a lawyer (me), who files motions for you, and represent yourself and file your motions on your own behalf. Until you hire another lawyer, I am your lawyer. If you wish to fire me and represent yourself, that is also an option, but I do not think it is a wise one. I cannot control your actions, but I urge you to stop trying to communicate with the court and Ms. Grayson. As you saw on Thursday, anything you send to Ms. Grayson, she gives to the solicitor, and those communications can be used against you. Similarly, anything you send to the court is not protected by attorney-client privilege and can also be used against you by the solicitor.

I apologize for not seeing you as quickly and as often as you would like. I wish I could see all my clients as quickly and as often as they would like. However, when I am not in the jail speaking to you, I am working on your case and others. This includes responding to your grievance to the disciplinary counsel, investigating cases, speaking to clients and their family members on the phone, writing letters to clients in the jail, researching case law, writing motions and briefs, negotiating with solicitors, preparing cases for pleas or for trials, petitioning for funds to conduct forensic testing, attending and preparing for evaluations, attending and preparing for court hearings, entering pleas, and trying cases.

I am on your side. I don't think you are guilty of attempted murder. I believe I have sent you all of your discovery, but I will double check and send it again if need be. You asked me to tell you what you can and can't do. You can write to me and tell me what you think you need, and I appreciate you doing so, but you cannot act as your own lawyer, or force me to file motions or get records I think are frivolous. If I think a motion needs to be filed, or a record needs to be obtained, I will do so.

When we are on a trial docket, I will come see you and go over your case in detail with

D. Ashley Pennington, Esquire
Ninth Circuit Public Defender

Lorelle D. Proctor, Esquire
Deputy Public Defender

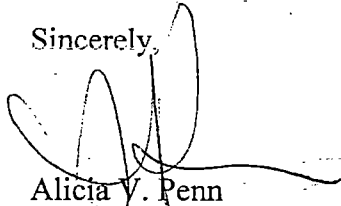


NINTH CIRCUIT PUBLIC DEFENDER
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you, and I will try to explain our strategy, how trial procedure works, and what to expect. We will also go over courtroom behavior. You did not do yourself any favors on Thursday when you appeared agitated, kept shaking your chains in front of the judge, interrupted her and kept speaking when she told you to stop. These things made you either look crazy, or like a very rude person. Neither is something we want the jury thinking about you, so I suggest you practice controlling your actions and words while you are in the jail.

Sincerely,



Alicia V. Penn
Assistant Public Defender

D. Ashley Pennington, Esquire
Ninth Circuit Public Defender

Lorelle D. Proctor, Esquire
Deputy Public Defender

Name: _____ Age: 46 Sex: M
MRN: _____ Acct #: _____
Temp: 37.2 Pulse: 86 BP: 24/13 RR: 16 Pulse Ox: _____ Wt: _____
Provider: _____ Prov #: _____ Time Secu: 7305

Barcode
P49614967
TRAUMA
VICTIM PT
EAdm:12/31/12 M2863302

Chief Complaint: _____

MODE OF ARRIVAL: POV Ambulance Immobilized
SOURCE: Patient Family Member Friend _____
TIMING: Began Occurred PTA _____ hrs ago _____ days ago this morning this afternoon this evening during the night
LOCATION OF INJURY: None Head Face Mouth Neck Chest Back Abdomen Pelvis
Right: Shoulder Humerus Elbow Forearm Wrist Hand Hip Thigh Knee Lower Leg Ankle Foot
Left: Shoulder Humerus Elbow Forearm Wrist Hand Hip Thigh Knee Lower Leg Ankle Foot
CONTACT: None Recreational Alcohol Use Illicit Drug Use
TYPE OF ACCIDENT: MVC MCA Peds vs. Auto Assault Other _____
MVC: Unrestrained Restrained: (Airbag/ Shoulder Strap/ Lap Belt) Driver / Passenger
 Single Vehicle / Multi Vehicle Head-On Side Impact (Driver Side / Passenger Side) Rear Impact / Roll-Over
 Ambulatory At The Scene / Non-Ambulatory / Ejected
ASSAULT: Alleged Assailant's Name: Unknown Dave Israel Smith
Method of Assault: Punched Kicked Struck with Object stabbed
PRE-HOSPITAL GCS: 15 At Scene: 15 During Transport _____
INTERVENTION PRIOR TO ED: None IV Splint Intubation Immobilization with: C-Collar / Backboard
SEVERITY: Mild Moderate Severe Pain Free 1 2 3 4 5 6 7 8 9 10 Unable to quantify
DURATION OF SYMPTOMS: _____ Min _____ Hr _____ Day _____ Wk Intermittent / Continuous in Nature Currently Present / Absent
MODIFYING FACTORS: A = Aggravated by R = Relieved by N = No change with (A R N) nothing (A R N) C-Collar (A R N) Icepack
(A R N) Lifting (A R N) Activity (A R N) Weight-bearing (A R N) Backboard (A R N) Immobilization
(A R N) Movement (A R N) Splint (A R N) Medication(s): _____

ASSOCIATED SIGNS & SYMPTOMS: (+) = Report (-) = Denies None (+) LOC (+) SOB (+) Bleeding (+) FIA
(+) Abdominal Pain (+) Back Pain (+) Neck Pain (+) Laceration (+) Chest Pain pt is a type 1 diabetic
healthy HAF who increased multiple stab wounds to R arm R hand & L hand
pt denies weakness, numbness, CP, SOB, full range of motion of arms & hands
 Unable to obtain additional information from patient. Reason: _____ PCP#: None

ROS: _____
CONST: Wt Loss Night Sweats GI: Abdominal pain / N/D PSYCH: _____
EYES: _____ GU: _____ ENDO: _____
ENT: _____ MS: _____ HEMA/LYMPH: _____
CV: Chest pain SKIN: _____ ALL/IMMUN: _____
RESP: SOB NEURO: _____ OTHER: _____

PAST MEDICAL/FAMILY/SOCIAL HISTORY
PMH ALLERGIES: NKDA PCN Sulfa Codeine Iodine / IVP Dye
MEDICATIONS: See Nurse's Note none
PAST/CURRENT ILLNESSES: None Diabetes
SURGERIES/PROCEDURES: None Appy laparoscopic surgery unknown
IMMUNIZATIONS: TD Tetanus >5yrs Tetanus >10yrs up to date
PH: Negative
SH OCCUPATION: works in shop LIVING SITUATION: Cherokee
HABITS: Alcohol Y N H/O Tobacco Y N H/O Drugs Y N H/O Counseling Given

PHYSICAL EXAM
CONSTITUTIONAL VITAL SIGNS: Normal Abnormal Orthostatic APPEARANCE: Well Ill Poor Hygiene / Grooming
✓ Airways: Normal Inhaled Obstructed
✓ Breathing: Normal Bagged Agonal
✓ Circulation: Carotid Pulse Present Pulseless
PSYCHIATRIC: Normal
SKIN: Normal Multiple lacerations on R hand & R arm
EYES: Normal Raccoon's Eye _____
H/P/ENT: Normal Hemotympany Midface Instability Malocclusion

Barcode
EDVISIT

STATE OF SOUTH CAROLINA RECEIVED
IN THE SUPREME COURT NOV 06 2017

S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY

HONORABLE JOHN C. HAYES, CIRCUIT COURT JUDGE

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PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE No. 2016-001823

AFFIDAVIT OF MAILING

DAVID I. SMITH

PRO SE PETITIONER

386 REDEMPTION WAY
McCormick SC. 29849

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 3^h DAY OF October, 2017

J. Frankles

NOTARY OF SOUTH CAROLINA

MY COMMISSION EXPIRES 12-16-2019

David I. Smith

10 I SMITH 360603

Wmick Correctional Institute
redemption Way
Wmick, SC 29889



THE SUPREME COURT OF SOUTH CAROLINA

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04