

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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ORIGINAL

THE STATE,

RESPONDENT,

V.

FAVIAN A. HAYES,

APPELLANT

APPELLATE CASE NO. 2009-129706

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Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

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Opinion No. 2018-UP-025

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PETITION FOR REHEARING

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SC Court of Appeals

On January 17, 2018, this Court affirmed Appellant's convictions for armed robbery, conspiracy, and possession of cocaine base. State v. Hayes, Op. No. 2018-UP-025 (S.C. Ct. App. filed January 17, 2018). This Court held Appellant's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on a conflict of interest was unpreserved because Appellant made a different argument on appeal than he made during the plea hearing. Id. Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for rehearing in light of the significant points overlooked and misapprehended by this Court.

### *1. Background Facts*

Towards the beginning of the hearing, the plea judge asked Appellant if he was “pleading guilty of [his] own free will and accord.” R. 18, ll. 19-20. Appellant responded that he was pleading guilty only because he believed his attorney’s ineffectual representation rendered a guilty verdict at trial a foregone conclusion. R. 18, ll. 21-25. Without receiving an affirmative answer, the judge interrupted Appellant and inquired whether Appellant was satisfied with his lawyer’s representation. R. 19, ll. 4-9. Appellant ultimately moved to relieve counsel arguing counsel had a conflict of interest arising from his simultaneous representation of an individual named Stacy Rhodes. R. 19, l. 10 – 22, l. 1; See R. 22, ll. 9-10.

Appellant explained that Rhodes had been among a group of people Appellant had been with after the armed robbery for which he was pleading guilty, and that Rhodes was expected to testify against him at trial. R. 23, ll. 2-10; R. 26, ll. 13-21. The assistant solicitor confirmed that, following Appellant’s arrest, Rhodes was arrested for interfering with police arising from his conduct during the investigation into the robbery. R. 27, ll. 2-17; App. 28, ll. 3-6. She also admitted that Rhodes was “a possible witness in this case” and that she was “bringing him back [from the Department of Corrections where he was currently incarcerated] to testify” if Appellant proceeded to trial. R. 27, ll. 6-21.

The solicitor’s recitation of the facts supporting Appellant’s plea made obvious that Rhodes was going to be called as a witness at trial and that he would be an important witness for the state. R. 35, l. 6 – 40, l. 19. The solicitor claimed that within minutes of the robbery Appellant and his codefendant, Brandon McFadden, were seen by Detective Curtis Hodge, the first responding officer, leaving McFadden’s house, which was “exactly three homes away” from the convenience store that was robbed. R. 36, ll. 3-8. Detective Hodge was suspicious of the

men because they were sweating and in the vicinity of the robbery, but he had no probable cause to detain them. After law enforcement reviewed the surveillance footage, an officer, who had arrested McFadden as juvenile, identified McFadden as a possible suspect. R. 36, ll. 9-25.

On August 2, 2007, two days after the robbery, Appellant was a passenger in a car that was stopped for a traffic violation. R. 37, ll. 1-22. During the stop, an officer searched Appellant and allegedly found an Advil bottle containing a small amount of cocaine base. R. 37, ll. 8-16. The officer also found three hundred eighty-five dollars in cash and a key to a motel room at the Mount Vernon Inn in Sumter. R. 37, ll. 16-19.

Law enforcement then raided the Mount Vernon Inn motel room. When police forced open the door, four men attempted to flee the room, including Stacy Rhodes. All four were detained. Rhodes told police that Appellant and McFadden “had let them know about the room.” R. 37, l. 20 – 38, l. 3. Rhodes also told police that Appellant and McFadden “both had an excessive amount of money over the past couple of days.” R. 38, ll. 3-4. Moreover, during a search of the motel room, law enforcement recovered a gun matching the description of the revolver used in the robbery. Rhodes claimed this firearm belonged to Appellant. R. 38, ll. 4-10.

The motel room was rented by Appellant approximately two hours after the robbery. R. 38, ll. 10-15. A disposable camera was also seized during the search of the motel room. While Appellant was not in any of the pictures developed from the camera, the four men arrested at the motel room, including Rhodes, all told police Appellant had been with them. R. 38; l. 17 – 39, l. 2. When interrogated by police, McFadden admitted to committing the robbery with Appellant. Appellant, on the other hand, denied any involvement in the robbery, but admitted he was with McFadden that night. R. 39, l. 18 – 40, l. 1.

As noted, Appellant's counsel simultaneously represented Rhodes. To complicate matters, during a meeting between plea counsel and Rhodes, which took place during the term of court immediately prior to Appellant's guilty plea, Rhodes saw a portion of Appellant's discovery materials, which counsel had just received from the assistant solicitor. These materials included incriminating photographs of Rhodes taken while he was in the motel room rented by Appellant. R. 19, l. 10 – 22, l. 19.

Rhodes became upset, took the photographs from plea counsel and refused to return them. R. 19, l. 10 – 22, l. 19. Appellant told the plea judge that when Rhodes returned to the detention center he still possessed some of his discovery materials and was showing them to other inmates. R. 19, l. 10 – 22, l. 19. Plea counsel disputed this and claimed that he believed all of the materials were recovered prior to Rhodes returning to the detention center. R. 19, l. 10 – 22, l. 19.

Plea counsel maintained that there was no conflict of interest. R. 22, ll. 20-22. Appellant continued to argue that there was a conflict of interest and noted that he had unsuccessfully contacted the circuit public defender, the chief county public defender, and the "Lawyers Conduct Board" in an effort to have his concerns with plea counsel addressed, including the conflict of interest. R. 22, l. 23 – 25, l. 19; R. 28, l. 12 – 39, l. 20.

The plea judge rejected Appellant's efforts to have plea counsel relieved. He asserted:

Well, this is not the time. The time to tell me right now is whether you're willing to advise me that you're satisfied with his representation of these charges for armed robbery and this charges, and we're talking about the Young's [robbery] at this time and the charge of the drugs and if you're not, I can tell you this as far as his representation is concerned. *He's representing you on these charges and he's also representing you on [Appellant's other pending armed robbery charge].* You do not get your choice of public defenders. . . .

So, if you wish to withdraw your plea because you're not happy with Mr. Sullivan [plea counsel] on this, don't think that's going to get you a new lawyer, because it's not. You don't have your choice of lawyers when it comes time to try the case. ***I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer.*** Is that, that's your call if you don't want to plead guilty, fine. I'm sure the State is ready to go forward. ***They got the other charges that they are going to call I think shortly and you can go to trial on this charge, this armed robbery, that is the Young's armed robbery, or you can go to trial and go to trial on the drug charges, you can go to trial on both of those and I have not accepted your plea yet and if you are not comfortable pleading guilty to these charges with Mr. Sullivan as your lawyer, now is the time to tell me and he'll stand you aside and Ms. Fant [the assistant solicitor] can call the case to trial and it can go before a jury. It's your call, which way you want to go?***

R. 31, l. 11 – 32, l. 14 (emphasis added). Appellant responded that, faced with those options, he would “go with the plea.” R. 32, l. 14. The plea judge reiterated that if Appellant wished to withdraw his plea, plea counsel would remain his lawyer and the trial would begin immediately. R. 32, l. 24 – 33, l. 3. The judge then accepted Appellant's plea and sentenced him to twenty five years for armed robbery, five years concurrent for conspiracy, and five years concurrent for possession of cocaine base.

## *2. This Court Erred by Holding Appellant's Argument is Unpreserved*

Respectfully, this Court erred by holding Appellant's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on a conflict of interest is unpreserved. When the plea judge asked Appellant whether he was “satisfied with the manner in which your lawyer has advised and represented you,” Appellant immediately asserted counsel had a conflict of interest and explained how he had only recently learned from Stacey Rhodes, an important witness for the state if Appellant proceeded to trial, that *plea counsel also represented Rhodes*. R. 20, l. 8 – 21, l. 13.

Appellant complained about Rhodes obtaining a portion of his discovery materials from counsel, which only occurred because counsel simultaneously represented both Appellant and Rhodes. R. 20, l. 8 – 22, l. 1. *On at least three other occasions*, Appellant asserted plea counsel had a conflict of interest. R. 24, ll. 23-25; R. 25, ll. 4-6; R. 28, l. 7 – 29, l. 12. He also told the judge he wrote to the circuit public defender, the chief county public defender, and the “Lawyers Conduct Board” to complain about counsel’s conflict of interest in an effort to have counsel relieved. R. 24, l. 25 – 25, l. 17; R. 31, ll. 3-5. Petitioner also asked counsel before the plea hearing to move to be relieved as counsel, but counsel failed to do so. R. 25, ll. 11-12.

As seen, Appellant raised plea counsel’s conflict of interest *repeatedly* with the plea judge prior to the judge accepting Appellant’s guilty plea. However, the judge flatly refused to appoint Appellant a new, conflict free attorney or to delay Appellant’s trial, which was scheduled to begin that day. R. 30, l. 16 – 32, l. 14. The judge asserted, “You don’t have your choice of lawyers when it comes time to try the case. I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan’s going to be your lawyer.” R. 31, l. 24 – 32, l. 2.

After taking a short break to consider Appellant’s motion to relieve counsel and his argument that counsel had an actual conflict of interest, the plea judge found:

**I find that the Defendant’s [Appellant’s] decision to plead guilty after going very carefully with him on the record in this matter is freely and voluntarily given.** That he has had the advice of counsel, with while has indicated some complaints about he readily admits to his guilt of this crime and does advise that Mr. Sullivan [plea counsel] has represented him and has been in touch with him about this matter. Specifically, I want to make the finding that there was no prejudice to the Defendant as a result of the situation where the photographs got into the hands of another individual. If I had thought that there was any prejudice resulted to this Defendant, as a result to that instance, my willingness to take this plea might have been different, but I can perceive of no way that that resulted in any prejudice to him and his counsel does not see any way that that resulted in any [prejudice] to him. **I also find that there was no conflict of interest. Mr. Rhodes, as far as this matter was concerned, was nothing more than a witness whom Mr. Sullivan [plea counsel] would have had the right to talk to, to learn what he**

**knew about this matter and the fact that Mr. Sullivan represented him on a completely unrelated matter is no conflict of interest whatsoever and I could find that in my view that there was no conflict of interest.**

...

**There's no question in my mind that the Defendant's [Appellant's] decision to enter this plea as we have set forth is freely and voluntarily given.** Another factor that convinces me of the fact - - of that fact, is the fact that he did not admit to the armed robbery at the Kangaroo store and I have not accepted that plea and have handed that back to the solicitor and that matter will go forward. **So there's no question in my mind** that after having been fully advised of his rights by me and his lawyer and being well represented by his appointed counsel **that the plea in this case is freely and voluntarily given and the Court is going to accept the plea with the stipulations that I have put on the record** with regard to or the matter that I have put on the record with regard to . . . any prejudice arising out of the matter that he had discussed or **any conflict of interest is simply not there.**

R. 54, l. 5 – 56, l. 17 (emphasis added).

It is apparent from this ruling and from the colloquy that preceded it, that the plea judge understood the nature of Appellant's objection and his argument as to why counsel had a conflict of interest.

“Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review.” State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010) (citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)). “Instead, *a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.*” Brannon, 388 S.C. at 502, 697 S.E.2d at 595-596 (citing Hubbard v. Rowe, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939)) (emphasis added).

Appellant unequivocally argued plea counsel had a conflict of interest and explained why and how counsel had a conflict. Appellant clearly explained to the judge that counsel simultaneously represented both Appellant and an important witness for the state, who the solicitor confirmed was expected to testify against Appellant at trial. Consequently, Appellant

fairly raised the issue to the plea judge, thereby giving the judge ample opportunity to rule on the issue as required. This is further evidenced by the plea judge's detailed finding that plea counsel did not have a conflict of interest and that Appellant's guilty plea was freely and voluntarily given. See R. 54, l. 5 – 56, l. 17

Therefore, this Court erred by holding Appellant's argument that he did not freely, voluntarily, and intelligently plead guilty because the plea judge improperly denied his motion to relieve counsel based on an actual conflict of interest was unpreserved. This Court must have overlooked or misapprehended the portions of the record identified above where Appellant argued counsel had an actual conflict of interest and the reasons why. Appellant respectfully requests this Court grant rehearing, find the argument is preserved for appellate review, and ultimately hold the plea judge improperly denied Appellant's motion to relieve counsel because of counsel's actual conflict of interest.

3. *Appellant did not Freely, Voluntarily, and Intelligently Plead Guilty Where the Plea Judge Improperly Denied his Motion to Relieve Counsel based on an Actual Conflict of Interest*

Once Appellant objected to being represented by plea counsel and established that plea counsel had an active of conflict interest due to his representation of Rhodes, the plea judge should have allowed him to withdraw his guilty plea and ordered the appointment of conflict free counsel. The judge's failure to do so constitutes reversible error.

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Faretta v. California, 422 U.S. 806, 807 (1975); See Gideon v. Wainwright, 372 U.S. 335, 339-340 (1963). “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects

his ability to assert any other rights he may have.” United States v. Cronin, 466 U.S. 648, 654 (1984) (internal citation omitted).

Inherent in the right to counsel is the right to conflict free counsel. While an indigent defendant is not entitled to counsel of his choice, the state and federal constitutions guarantees of equal protection of the laws means that an indigent defendant is entitled to conflict free representation. U.S. Const. Amend. XIV; S.C. Const. Art. I, § 3 and § 19.

Our Supreme Court has held that an actual conflict of interest occurs when an attorney owes a duty to a party whose interests are adverse to those of the defendant. Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (citing Zuck v. Alabama, 588 F.2d 436, 43 (5th Cir. 1979)). The interests of another client and the defendant are sufficiently adverse if it is shown the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. Id.; See Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995) (finding an actual conflict of interest where counsel convinced the solicitor that Edgemon’s codefendants were less culpable).

Since trial judges typically will not proceed with a guilty plea when the defendant makes an objection, almost all of South Carolina’s case law addressing when plea counsel’s conflict of interest requires reversal arise out post-conviction relief actions. However, the logic sustaining these decisions applies with equal force to direct appeals when a timely objection has been lodged.

For example, in Thomas v. State, the Supreme Court held that an actual conflict of interest arose when the solicitor offered to dismiss the charges against one spouse if the other spouse pled guilty to possessing the entire amount of cocaine. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). When the offer was extended, Thomas and her husband were represented by the same attorney. Id. at 142-143, 551 S.E.2d at 255. Unlike Appellant, the spouses had previously waived any conflict of interest arising from their joint representation. Id. at 142, 551 S.E.2d at 255.

However, the Court held, “At the moment the solicitor made the plea offer, [Thomas’] and [her husband’s] interests became adverse to one another and counsel should have advised them accordingly.” Id. at 144, 551 S.E.2d at 265.

Here, Appellant’s plea counsel had an active conflict of interest. Stacey Rhodes, who was also represented by counsel, was going to testify against Appellant at trial. R. 27, ll. 17-21. Rhodes’ interests were directly adverse to Appellant’s interests. The assistant solicitor expected Rhodes to testify that Appellant and McFadden had arranged for the motel room where Rhodes was arrested, that both men had “an excessive amount of money” in the days after the robbery, and that the brown revolver found in the motel room, which matched the description of the weapon used in the robbery, belonged to Appellant. R. 37, l. 16 – 38, l. 8.

While plea counsel said his representation of Rhodes concluded with Rhodes’ guilty plea, the conflict of interest remained. The assistant solicitor admitted she believed Rhodes may lie on the witness stand when called to testify against Appellant. R. 27, ll. 17-21. Consequently, during Appellant’s trial, plea counsel likely would have had to advise Rhodes of his Fifth Amendment right to remain silent and of the consequences of perjury in his capacity as Rhodes’ attorney, while then having to cross examine Rhodes while acting as Appellant’s attorney.

Unlike in Thomas, far from waiving the conflict of interest, Appellant objected to the conflict and sought relief from the plea judge. R. 18, l. 19 – 32, l. 14. A non-indigent defendant could avoid the problem Appellant faced by simply exercising his right to counsel of his choice. Cf. State v. Sanders, 341 S.C. 386, 390, 534 S.E.2d 696, 697-698 (2000) (defendant’s right to counsel of his choosing is protected by the Sixth Amendment and courts “must balance the defendant’s right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility.”).

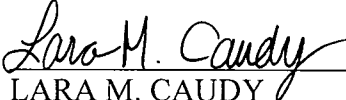
Instead, by virtue of his indigence, Appellant was faced with a Hobson's choice between immediately proceeding to trial represented by an attorney with an active conflict of interest or pleading guilty while represented by an attorney with an active conflict of interest. Appellant's situation represents a total breakdown of the adversarial system bordering on the absurd. See State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996); see also Cronin, 466 U.S. at 654 ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.").

Even after pleading guilty, Appellant still faced charges arising out of a second armed robbery. R. 3, ll. 3-13; R. 12, l. 14 – 16, l. 3. The state intended to seek a sentence of life without parole for the second armed robbery if Appellant pled guilty or was convicted of the armed robbery relevant to this appeal. R. 12, l. 14 – 16, l. 3. Presumably, had the state tried Appellant for the second robbery, Appellant would have faced the possibility of life imprisonment represented by a defense attorney, who owed a duty to Appellant to take some action that could be detrimental to state witness, Stacey Rhodes. See Duncan, 281 S.C. 435, 315 S.E.2d 809.

Under these circumstances, Appellant's guilty plea could not have been freely, voluntarily, and intelligently made. Accordingly, the plea judge committed an abuse of discretion in refusing to allow Appellant to withdraw from the guilty plea and appoint new, conflict free counsel to represent him.

In light of the factors listed above that were overlooked and misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court grant rehearing, hold the plea judge abused his discretion by refusing to allow Appellant to withdraw from the guilty plea and appoint new, conflict free counsel to represent him, and reverse Appellant's convictions and sentence.

Respectfully Submitted,

  
LARA M. CAUDY  
Appellate Defender

This 31st day of January, 2018.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

RECEIVED  
JAN 31 2018  
SC Court of Appeals

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Appeal from Sumter County

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THE STATE,

RESPONDENT,

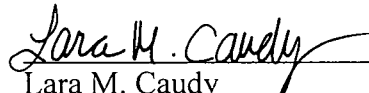
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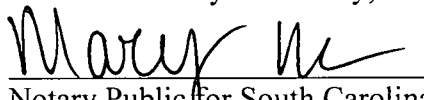
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CERTIFICATE OF SERVICE  
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The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Favian A. Hayes, #293544, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of January, 2018.

  
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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE  
ME this 31st day of January, 2018.

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