

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

S.C. SUPREME COURT

Thomas A. Russo, Circuit Court Judge

GREGORY PENCILLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO 2016-000412

PRO SE RESPONSE

Gregory Pencille
990 Wisacky Highway
Bishopville, SC 29010

PETITIONER

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QUESTIONS PRESENTED

1. How can any question of law be ascertained with an inaccurate record?
2. Did the Common Pleas Court err in holding that Petitioners trial counsel was not ineffective in failing to inform Petitioner the elements of the crime in which he pled guilty?
3. Did the Common Pleas Court err in holding that Petitioners PCR counsel was ineffective infailing to object to Petitioners self-representation and withdraw representation considering client-attorney arguments?
4. Did the Common Pleas Court err in holding that Petitioners trial counsel was not ineffective in failing to reasonably assist petitioner?

STATEMENT OF THE CASE

August 9, 2010, petitioner Gregory Pencille signed a sentencing sheet in the presence of only his counsel of record, G. Scott Bellamy, with no other witnesses, as an agreement to serve a cap of 30 years imprisonment for one count of CSC First.

August 10, 2010, Petitioner's counsel motions for court to reconsider sentence based on the allegations that the courts decision for sentencing was influenced by false and/or misleading information provided by the Assistant Solicitor. - Notice of Appeal filed.

April 3, 2012, General sessions 15th Judicial Circuit judge Hyman rules no mandatory GPS and Motion to Reconsider Sentence is DENIED.

November 8, 2013, petitioner files PCR with horry County Court of Common Pleas.

June 10, 2014, State of South Carolina, Respondent, files a Return in The Court of Common Pleas.

March 20, 2015, Petitioner requested PCR attorney to file PCR ammendment "Issue J".

September 23, 2015, PCR counsel refused to amend PCR with Ammendment "Issue J".

November 9, 2015, PCR hearing held for petitioner in front of Judge Russo. Petitioner counsel tried to remove himself as counsel in concurrence with petitioner, court DENIED removal of counsel. PCR DENIED being ruled on the side of caution because the Judge couldn't decide.

December 3, 2015, Petitioner Requests counsel to file Rule 59(e) Motion.

January 15, 2016, Order of Dismissal ordered by Judge Russo with court of Common Pleas.

January 25, 2016, Order of Dismissal filed with Horry County Court of Common Pleas.

February 9, 2016, Petitioner submits to Horry County Clerk of Court his request to file Rule 59(e) Motion through his counsel.

February 22, 2016, Petitioner requests copy of Order of Dismissal from Horry County Clerk of Court.

August 15, 2016, Petitioner inquires to Appellate Defender Katherine Hudgins about the filing of the Rule 59(e) Motion.

October 14, 2016, Jhonson Petition for Writ of Certiorari filed by Appellate Defender. Appellate Defender Katherine Hudgins never sent reply regarding the Rule 59(e) filing.

FACTS

DECLARATION

NOW COMES Gregory Pencille, who being duly sworn, deposes and states:

"ISSUE I.

The transcripts for the ORDER OF DISMISSAL filed on January 25, 2016 (App. p.164-171) are inaccurate. The written record should be a verbatim of what was said and what conspired in the court room. The courts function is to review the written record to ascertain whether the law was applied properly. Any issue raised must be in the written record of the proceedings.

Regarding the reservation of issues, when considering factors in determining finality in appealable matters upon review, the transcripts of the proceedings in this matter are necessary because the appeal involves issues of fact and evidence. I, the petitioner, intend to urge on appeal that findings or conclusions by the court are contrary to law. I must include in the record a transcript of the evidence relevant to such findings or conclusions.

Upon review of the transcripts for the ORDER OF DISMISSAL, I have determined they are inaccurate. I have submitted to the Court and to my Attorney of record, motions seeking Stay and Leave to seek relief under Rule 60 of the South Carolina Rules of Civil Procedure. Because I am represented by counsel, the Court will not take action on my motions. And my Attorney, despite my instruction, will not file the motions on my behalf because of her view of professional judgment. The motions, which I have included in the PRO SE APPENDIX attached hereto, detail some of the error which I have discovered within the erroneous transcript. (PRO SE App. p.1-16).

The absence of accurate and reliable written records prevents meaningful review of facts or evidence on particular points which denies me opportunities for the ascertainment of the truth to which I am entitled, and impairs my appeal, consequently inflicting prejudice.

ISSUE II.

My trial counsel never discussed with me the elements of the crime in which I was convicted. I would not have taken a guilty plea had I been properly informed of the elements of the crime (App. p.138 L.20 Thru p.139 L.9; p.57 #5, #7).

ISSUE III.

I complained to the Judge about how my PCR Attorney and I never formulated issues or a strategy for court (App. p.100 L.2-17) My PCR Attorney and I had many disagreements on how and what to proceed with (App. p.91 L.10-13) wherefore the 59(e) Motion (PRO SE App. p. 17-22) and Issue J (App. p. 99 L.22 - p.100 L.17) were never addressed because the Judge said we should proceed and that I can put up what I want to put up. So I was to address the issues my attorney was at odds with, leaving me to litigate them with an Attorney who is both unsupportive and unprepared while the court found my testimony to not be credible (App. p.167 L.22). If there is to be any lack of credibility, my trial lawyer Mr. Bellamy's testimony should be scrutinized. At first, he states 'at no time, Judge, was this going to be a trial' (App. p.20 L.10). Then when being cross examined by Mr. Hunter, Hunter asked if it is fair to say this was always going to be a plea, Bellamy said 'No.' (App. p.130 L.5+16). Attorney Scott Bellamy LIED under oath and the Judge believed him (App. p.168 L.5-6).

It was in the best interest of my PCR Attorney and myself for him to relieve his duties as an attorney in this case.

ISSUE IV.

I was under duress by my trial attorney, Scott Bellamy (App. p.61 #10). He told me what to say and what not to say. Everything I said was rehearsed, as well as my fathers testimony (App. p.149 L.9-16, p.160 L.6). The PCR Judge did not believe me (App. p.160 L.6-10). I pled guilty because Mr. Bellamy threatened my life if I did not plea (App p. 142 L.17-20; p.147 L.2-3)."

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and understanding.

December 30th 2016

Date



Gregory Pencille
990 Wisacky Highway
Bishopville, SC 29010

ARGUMENT I.

HOW CAN ANY QUESTION OF LAW BE ASCERTAINED WITH AN INACCURATE RECORD?

In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the **reason** for the courts decision, be preserved in the record of the case, Rule 220(b) SCAER.

The appellant is responsible for compiling adequate record from which court of appeals can make intelligent review, and court will not consider facts that do not appear in transcript of record Goodson v. American Bankers Ins. Co. of Florida 368 SE2d 687, 295 SC 400.

The transcripts contain inaccuracies, areas within them where the construction may be materially flawed or if the appearance of words are not subject to attack.

The [petitioner's] ability to effect meaningful appeal cannot be attained because the transcripts errors are material to the proper determination of the appeal. State v. Moore, 6-875 La. App. 5 Cir. 4/11/07 WL1077253 (La. Ct. App. 5th Cir. 2007).

Without an accurate transcript, assignment of error is deprived, impairing the petitioner's appeal which inflicts prejudice.

THEREFORE, any determination of finality in regards to this proceeding prior the correction of the record shall violate petitioner's State and Federal Constitutional rights to Due Process, resulting in a Miscarriage of Justice.

STANDARD FOR
INEFFECTIVE ASSISTANCE OF COUNSEL

The Court applies a two-pronged test in evaluating allegations of Ineffective Assistance of [] counsel. Cherry v. State, 300 S.C. 115, at 117. First applicant must prove counsels performance was deficient. Id. Under this prong, the court measures counsels performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsels deficient performance must have prejudiced the applicant such that "There is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different" Id. at 117-18.

ARGUMENT II.

COUNSEL WAS INEFFECTIVE IN FAILING TO INFORM PETITIONER THE ELEMENTS OF THE CRIME IN WHICH HE PLED GUILTY.

To find a guilty plea is voluntarily and knowingly entered into, the records must establish the petitioner had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433.

In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke 282 S.C. 131.

In this case, petitioners trial counsel never discussed the elements of the crime with the petitioner (App. p.138 L.20 thru p.139 L.4) (There is no record of colloquy in the guilty plea transcript regarding elements.) Which provides trial counsels deficient performance meeting the standard of the first prong for an ineffective assistance of counsel claim. Because the petitioner would have gone forward with a jury trial had he been properly informed by trial counsel of the elements (App. p.139 L.8-9), if not for trial counsels unprofessional errors, the outcome of the case would have likely been different. Which provides the requirement of the second prong for the standard of the ineffective assistance of counsel two-prong test.

The South Carolina Supreme Court requires that a defendant entering a guilty plea be made aware of the nature and crucial elements of the offense Pittman, 337 S.C. at 599, Dover v. State, 304 S.C. 433 (1991), State v. Hazel, 275 S.C. 392 (1980).

Because the petitioner waives several constitutional rights by pleading guilty, and the due process clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently (Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 377 S.C. 597), the petitioners due process rights have been violated (S.C. Const. Art. I, §3; U.S. Const. Amm. XIV) due to ineffectgive assistance of counsel. The PCR court failed to recognize this issue and without the ascertainment of whether the petitioners rights have been violated would constitute a miscarriage of justice.

ARGUMENT III.

COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO PETITIONERS SELF REPRESENTATION AND WITHDRAW REPRESENTATION CONSIDERING CLIENT-ATTORNEY FUNDAMENTAL DISAGREEMENTS.

At PCR Hearing, Petitioner was given leave to bring any issues he wanted (App. p. 107 L.24-25) because he and his counsel had many disagreements on which issues to proceed (App. p.91 L.10 thru p.107 L.25). Petitioner was left to reconstruct and challenge in court issues of law without support or preparedness of counsel, then the court found petitioners testimony to not be credible (App. p.167 L.22).resulting in inadequacy of raising, improperly raised, and abandonment of PCR issues which relief may have been granted, ultimately prejudicing petitioner.

This would not have happened if the PCR attorney reasonably consulted with the client about the means by which the clients objectives are to be accomplished (Rule 1.4(a)(2),(b), Rule 407 SCACR.)

PCR counsel should have objected to petitioners diminished capacity self-representation because the petitioner could not make sound and informed decisions (Rule 1.2(a), SCRPC, Rule 407 SCACR), withdrew his representation pursuant to Rule 1.16(b)(4) SCRPC, Rule 407 SCACR considering thier fundamental disagreements, and the court should have not permitted the petitioner to continue with issues knowing petitioner did not confide in his attorneys representation.

The petitioner provided counsel was deficient by falling short of reasonableness under prevailing professional norms and because of counsels unprofessional errors, the outcome of the PCR proceeding would have likely

been different. Which again denotes the ineffective assistance of counsel standard, additionally court err, violating petitioners South Carolina Constitution Article I §3, §14; United States Constitution Amendment VI, XIV rights.

ARGUMENT IV.

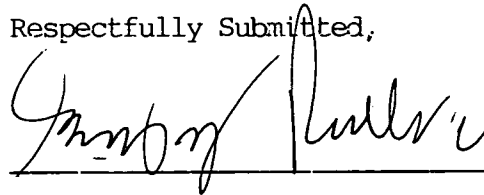
COUNSEL WAS INEFFECTIVE IN FAILING TO REASONABLY ASSIST PETITIONER.

Trial counsel, Scott Bellamy, coached the petitioner or advised dissimulation, which is deficient by falling short of reasonableness under prevailing professional norms. Because of counsel's unprofessional errors, the outcome of the proceeding would have likely been different. Again denoting the ineffective assistance of counsel standard, violating the petitioner's South Carolina Constitution Article I §3, §14 and United States Constitution Amendment VI, XIV rights.

CONCLUSION

For the reasons stated, Petitioner asks this Court to Grant the Petition for a Writ of Certiorari.

Respectfully Submitted,

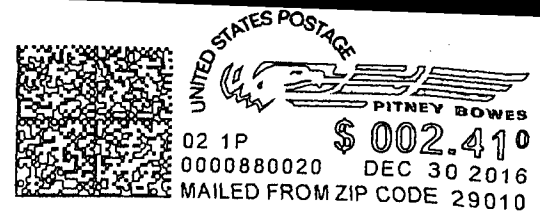


Gregory Pencille
990 Wisacky Highway
Bishopville, SC 29010

December 30th, 2016

Date

Gregory Penville 01255-
Lee CI FSA 166
990 W. 34th Hwy
Bishopville, SC 29010



Clerk of Court, D. Shearouse
PO Box 11330
Columbia, SC 29211

