

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Newberry County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

JUN 28 2018

S.C. SUPREME COURT

DERRICK EUGENE VELASQUEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001986

PETITION FOR WRIT OF CERTIORARI

VICTOR R. SEEGER
Appellate Defender

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Counsel was ineffective for not stressing to the trial court that private counsel Littlejohn was Petitioner’s Sixth Amendment attorney of choice, and that Littlejohn had agreed to represent Petitioner if the judge granted a continuance, since the trial court incorrectly reasoned Petitioner was only attempting to delay his trial, and there is a reasonable likelihood the continuance would have been granted if properly argued.....4

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ISSUE PRESENTED

Whether counsel was ineffective for not stressing to the trial court that private counsel Littlejohn was Petitioner's Sixth Amendment attorney of choice, and that Littlejohn had agreed to represent Petitioner if the judge granted a continuance, since the trial court incorrectly reasoned Petitioner was only attempting to delay his trial, and there is a reasonable likelihood the continuance would have been granted if properly argued?

STATEMENT

During the June 2015 term, the Newberry County Grand Jury indicted Petitioner for Trafficking in Cocaine, 400 grams or more, and Trafficking in Crack Cocaine, between 10 and 28 grams. App. 172 – 173. Petitioner’s trial was held on August 3, 2015 in front of the Honorable Eugene C. Griffith. App. 1. Dale Scott and Taylor Daniel represented the state. Id. Charles Verner represented Petitioner. Id.

Prior to trial, defense counsel made a continuation motion because Petitioner wanted to hire a different attorney, Littlejohn, who was present at the hearing.¹ App. 5, ll. 4 – 13. Judge Griffith denied the continuation motion because after hearing defense counsel’s argument Judge Griffith determined the continuation motion was a delayed tactic and that “this case is ready, [defense counsel] is ready, your client is ready.” App. 156, ll. 1 – 4. Petitioner was forced to proceed with an attorney he did not want representing him. App. 12, ll. 4 – 11. After a jury was impaneled, defense counsel made three suppression motions regarding the alleged illegal searches of Petitioner and a Jackson v. Denno 378 U.S. 368, 84 S. Ct. 1774 (1964) motion to suppress a statement made by Petitioner. App. 29, l. 13 – 30, l. 5. Judge Griffith denied all four motions. App. 27, l. 22 – 28, l. 19; App. 148, l. 11 – 155, l. 9.

After the denial of Petitioner’s pretrial motions, he pled guilty to trafficking crack cocaine, between 10 and 28 grams, as a second offense, and trafficking cocaine 28 to 100 grams, as a second offense. App. 156, ll. 7 – 19. The state recommended 15 years imprisonment. App. 156, ll. 19 – 22.

¹ Undersigned counsel contacted Wayne Floyd, Petitioner’s post-conviction relief counsel, who advised that Mr. Littlejohn was in fact seasoned criminal defense attorney Cam Littlejohn.

Judge Griffith found Petitioner made a, “free, knowingly, and intelligent plea of guilt,” to both offenses. App. 165, ll. 15 – 24. Judge Griffith sentenced Petitioner to 15 years imprisonment on both charges. App. 167, l. 24 – 168, l. 2.

Petitioner filed an application for post-conviction relief. App. 170 – 177; App. 186 – 206. On November 1, 2016, the state filed its return. App. 178 – 181. On April 19, 2017, Petitioner filed an amendment to his PCR application. App. 183 – 184. An evidentiary hearing was held on June 6, 2017 in front of the Honorable Thomas Cooper, Jr. App. 207. Wayne Floyd represented Petitioner. Id. Judah VanSyckel represented the state. Id.

By an order filed on August 24, 2017, Judge Cooper denied Petitioner’s application for post-conviction relief because Petitioner “failed to establish any constitutional violations or deprivations” that would require the Court to grant his application for post-conviction relief, and that Petitioner failed to show how defense counsel’s performance was deficient. App. 282 – 297.

This petition follows.

ARGUMENT

Counsel was ineffective for not stressing to the trial court that private counsel Littlejohn was Petitioner's Sixth Amendment attorney of choice, and that Littlejohn had agreed to represent Petitioner if the judge granted a continuance, since the trial court incorrectly reasoned Petitioner was only attempting to delay his trial, and there is a reasonable likelihood the continuance would have been granted if properly argued.

Relevant Facts

The state alleges the facts as follows: on May 2, 2015, police officers set up a safety traffic checkpoint in Newberry County. App. 160, ll. 11 – 13. Petitioner was a passenger in the backseat of a car that passed through the safety traffic checkpoint. App. 160, ll. 17 – 18. After the car was pulled over, the driver did not provide the police a driver's license. App. 160, ll. 21 – 22. The officers at the checkpoint claimed to smell marijuana as the car pulled up. App. 160, ll. 22 – 23.

The officers took the driver out of the car and questioned her about the smell of marijuana. App. 109, l. 25 – 110, l. 15; App. 160, l. 23. The officers at the checkpoint claimed that Petitioner, who remained in the backseat of the car, presented an ash tray with marijuana in it out the window to Lieutenant Johnson. App. 38, l. 25 – 39, l. 5; App. 160, l. 25 – 161, l. 3. Because the officers claim that Petitioner showed them marijuana, that allowed the police to: take Petitioner out of the car, pat him down, and find a small bag of crack cocaine. App. 161, ll. 2 – 4. The officers arrested Petitioner for simple possession and performed a search incident to the arrest of the car, which produced a larger amount of cocaine from a bookbag under the front passenger seat of the car. App. 112, l. 25 – 114, l. 3.

Defense counsel made three suppression motions regarding the alleged illegal searches of Petitioner and a Jackson v. Denno 378 U.S. 368, 84 S. Ct. 1774 (1964) motion to suppress a statement made by Petitioner. App. 29, l. 13 – 30, l. 5. Petitioner testified during the suppression hearing and provided an alternative recollection of the checkpoint stop.

Petitioner testified that he did not hand Lieutenant Johnson an ashtray with marijuana in it. App. 133, l. 4 – 134, l. 16. He asserted that his first interaction with the officers was when Lieutenant Johnson asked Petitioner for his identification. App. 132, ll. 9 – 13. Then immediately after getting Petitioner’s ID, Johnson, “opened the backdoor and told me to step out and put my hands behind my back.” App. 132, ll. 15 – 17. Johnson then patted Petitioner down. App. 132, ll. 18 – 19. Petitioner testified that, “[A]s soon as I was escorted out of the car I was placed in handcuffs. And Sergeant Babb’s [report] indicates I was placed in handcuffs. I was searched and then Lieutenant Johnson produced the blue ashtray out of the vehicle.” App. 133, ll. 5 – 10. Petitioner further testified that the officers did not ask for consent to search the car and that Petitioner never gave them consent to search the car. App. 134, ll. 13 – 19. Petitioner was never presented with a search warrant for the car or its contents. App. 136, ll. 13 – 15. The also record showed that Petitioner’s car was pulled over; however, the record also showed that other cars were waived on, making the checkpoint suspect under Vickery.² App. 137, ll. 17 – 24.

Defense counsel also made a pretrial motion for a continuance at the request of Petitioner. App. 5, ll. 4 – 5. Defense counsel mentioned that Petitioner would like more time to prepare and is “attempting to retain” Mr. Littlejohn to represent him, but that Petitioner would really, “just like a little bit more time to prepare.” App. 5, ll. 10 – 13. Defense counsel also opined that Petitioner’s case was factually “fairly simple.” App. 5, l. 8. Judge Griffith heard

² State v. Vickery, 399 S.C. 507, 732 S.E.2d 218 (2012)

defense counsel's reasons for requesting the continuance and denied it because the reasons that defense counsel gave when he argued for the continuance made the request appear, "unnecessary," and for the purposes of delay App. 155, ll. 18 – 20; App. 156, ll. 1 – 4. Defense counsel never mentioned that Littlejohn already agreed to represent Petitioner or that Littlejohn was Petitioner's Sixth Amendment counsel of choice. Moreover, defense counsel **never** disputed the Judge's assertion that Petitioner's continuation request was for the purposes of delay.

Judge Griffith denied Petitioner's suppression motions. App. 155, l. 6. He ruled that the justification for the effectiveness of the checkpoint was, "clearly proved by the State." App. 149, ll. 14 – 21. That the police officers did not violate the Fourth Amendment by searching Petitioner's person because they testified to smelling marijuana when the car first pulled up, and one officer testified that the ashtray was given to him by Petitioner. App. 152, ll. 11 – 14. That the police officers did not need to get a warrant to search the private contents of the car because an officer testified to Petitioner trying to conceal the bag in the back under the front passenger seat. App. 152, ll. 15 – 19; App. 152, l. 25 – 153, l. 4. That the police officers did not need to Mirandize Petitioner once they smelled marijuana as the car pulled up to the checkpoint because the police only questioned the driver about the marijuana not Petitioner; therefore, there was no need to Mirandize him before then. App. 153, l. 25; App. 154, ll. 10 – 23.

After the denial of the suppression motions the court recessed until the next day, August 4, 2015, where Petitioner tendered a plea to trafficking crack cocaine between 10 and 28 grams, second offense, and trafficking cocaine between 28 and 100 grams, second offense. App. 156, ll. 7 – 23. The state recommended a sentence of imprisonment for 15 years. App. 156, ll. 19 – 22. The court accepted Petitioner's guilty plea as freely, knowingly and intelligently made and sentenced him to fifteen years' imprisonment. App. 165, ll. 15 – 19; App. 167, l. 24 – 168, l. 2.

Petitioner filed an application for post-conviction relief that alleged ineffective assistance for failure to obtain a continuance because his trial was called abnormally quickly and he wanted to hire a different attorney. App. 170 – 177; App. 183 – 184; App. 186 – 206.

At the post-conviction relief hearing, defense counsel’s testimony indicated disbelief about how quickly Petitioner’s trial was called. “I doubt he would have been called for trial two months later. That sounds more like a roll call. That sounds unlikely that he would have been called to trial two months after his arrest.” App. 211, l. 25 – 212, l. 3. Defense counsel believed that he was prepared for the case, but that it seemed like a, “very quick turn around,” and it was, “quicker than [defense counsel] remembered.” App. 212, l. 25 – 213, l. 3. Defense counsel recollected making the continuation motion at trial at the request of Petitioner. App. 213, ll. 8 – 11.

Petitioner testified at the post-conviction relief hearing that he did not think defense counsel was prepared to try the case. App. 257, ll. 22 – 23. Petitioner maintained his innocence defense at the post-conviction relief hearing and stated,

“I was willing to put everything on the line. But after I was represented, the way I was represented I kind of knew that things were not going to turn out right because after all I was only given 66 business days before I was sent to prison. And I had an attorney who was going to take the case. Verner indicated to the court that he was satisfied and that he was ready to proceed. And I believe that the Judge took that instruction and just moved ahead. But I never wanted Verner to represent me whatsoever. And I was forced by not being given a continuance to have the Judge label [the] request for a change of counsel..., and for a continuance, a delay tactic.

App. 261, l. 14 – 262, l. 2.

Petitioner explained that Littlejohn, Petitioner’s counsel of choice, was present at trial, but could not take Petitioner’s case if a continuance motion was not granted. App. 262, ll. 3 – 9.

PCR counsel asked Petitioner if the court had granted his continuance request would he have hired Littlejohn, to which Petitioner responded, “[A]bsolutely.” App. 262, ll. 10 – 12.

If not for Verner’s representation, Petitioner would have approached the case differently in that he would have, “gotten competent counsel first that would have went through hall of the evidence... I would have attempted to go through the file with this attorney. I never wanted Verner, I told Verner I didn’t want him... So I told him I was going to hire an attorney. So that is what I went to go do but they didn’t give me a continuance so that I could hire Mr. Littlejohn.” App. 264, l. 19 – 265, l. 6.

After the testimony at the post-conviction relief hearing was concluded, PCR counsel further argued some of the points made during the hearing. “I think several deficiencies were noted throughout the testimony. First of all, I think we would all agree this was a very quick trial, from May to July, for a big case, for a case of trafficking in 400 grams. I know of none that have been that quick and maybe Your Honor often has it that quick, I have never known one of these that quick. So there is a question there of whether or not everything was done properly in order to assure continuances long enough for Mr. Verner to get prepared for Mr. Velasquez to retain a private lawyer, as he had a private lawyer there that day.” App. 272, l. 1 – 273, l. 10.

By an order filed on August 24, 2017, Judge Cooper denied Petitioner’s application for post-conviction relief because Petitioner failed to establish any constitutional violations or deprivations that would require the Court to grant his application for post-conviction relief, and that Petitioner failed to show how counsel’s performance was deficient. App. 282 – 297.

That was an error, and it prejudiced Petitioner.

Discussion

The Sixth Amendment protects one's right to choose his own counsel to defend him at trial. "[The Sixth Amendment] commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by counsel he believes to be best." United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 2562 (2006). In this case, Petitioner requested a continuance from the court so that he could exercise his Sixth Amendment right to hire the counsel of his choice. Defense counsel provided ineffective assistance when he failed obtain that continuance because he failed to properly explain the particular reason why Petitioner requested the continuance. Namely, that Petitioner's wanted to exercise his Sixth Amendment right to choose his own counsel.

The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon "a showing of good and sufficient legal cause." Rule 7(c), SCRCrimP. As such, "[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

"It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," the decision must rest upon, "the circumstances present in

every case, *particularly in the reasons presented to the trial judge at the time the request is denied.*” Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 850 (1964). (emphasis added)

In State v. Bailey, 298 S.C. 1, 377 S.E.2d. 581 (1989) this Court held that the trial court did not abuse its discretion when it denied Bailey’s motion for a continuance because two alibi witnesses could not be located prior to the rescheduled trial date. This Court held that, “[B]ecause the appellant was not prevented from using an alibi defense, and since any testimony by additional alibi witnesses would have been cumulative, the trial judge did not abuse his discretion in denying the appellant’s motion for a continuance.” Id. at 5, 377 S.E.2d at 584.

In the instant case, Petitioner requested for a continuance to exercise his Sixth Amendment right to hire the counsel of his choice to represent him. Therefore, his case is distinguishable from Bailey because Bailey had the ability to substitute the missing alibi witnesses’ testimony with the alibi witness testimony that was present at trial. Whereas here, Petitioner did not have an alternative way to exercise his Sixth Amendment right to the counsel of his choice. Moreover, defense counsel did not properly argue that Petitioner requested a continuance to exercise his Sixth Amendment right. Defense counsel never even used the words “Sixth Amendment” when he told the trial court the reasons for the continuation request. Therefore, defense counsel provided ineffective assistance because the continuance request rested, “particularly in the reasons presented to the trial judge at the time,” and defense counsel failed to explain to the judge that the continuance was to allow Petitioner to exercise his Sixth Amendment right to the counsel of his choice, which was the strongest reason for the continuance request to be granted. Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 850 (1964).

In U.S. v. Gonzales-Lopez, 548 U.S. 140, 126 S. Ct. 2557 (2006), the Supreme Court held that a defendant has a Sixth Amendment right to the counsel of his choice and that the trial court's erroneous deprivation of that right entitled him to the reversal of his conviction. Gonzales-Lopez, at 152, 126 S. Ct. at 2566. In that case, Gonzales-Lopez's family hired an attorney, John Fahle, to represent him. Id. at 142, 126 S. Ct. at 2560. After the arraignment, Gonzales-Lopez called a different attorney Joseph Low and eventually hired him. Id.

At a subsequent evidentiary hearing before a Magistrate Judge, the Magistrate accepted Low's provisional appearance and permitted him to participate in the hearing. Id. However, at the hearing the Magistrate revoked Low's provisional acceptance on the ground that, by passing notes to Fahle, Low violated a court rule restricting the cross-examination of a witness to one counsel. Id.

The following week, Gonzales-Lopez informed Fahle that he wanted Low to be his only attorney. Id. Low filed for admission *pro hac vice*, but the district court denied his application without comment. Id. Fahle filed a motion to withdraw as counsel and for a show-cause hearing to consider sanctions against Low for violating the Missouri Rule of Professional conduct that prohibits a lawyer from communicating about the subject of the representation with a party... represented by another lawyer. Id.; Mo. Rule of Professional Conduct 4-4.2 (2003). Low filed a motion to strike. Id. The District Court granted Fahle's motion to be relieved and a continuance so Gonzales-Lopez could find new representation. Id. at 143, 126 at S. Ct. at 2560. Gonzales-Lopez retained a local attorney, Karl Dickhaus. Id.

The District Court then denied Low's motion to strike and, "for the first time, explained that it denied Low's motions for admission *pro hac vice* primarily because, in a separate case

before it, Low had violated Rule 4-4.2 by communicating with a represented party. Id. Gonzales-Lopez proceeded to trial with Dickhaus and the jury found him guilty. Id.

Gonzales-Lopez appealed and the Eighth Circuit vacated the conviction. Id. at 143, 126 at S. Ct. at 2561. The Eighth Circuit held that the lower court erred in interpreting Rule 4-4.2 to prohibit Low's conduct and therefore the denial of Low's motion for admission *pro hac vice* was, "erroneous and violated respondent's Sixth Amendment right to paid counsel of his choosing." Id. at 143 – 144, 126 at S. Ct. at 2561. The Supreme Court affirmed the Eighth Circuit's decision and held in Gonzales-Lopez, that:

[W]here the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. *Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.* To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Id., at 148, 126 S. Ct. at 2563. (emphasis added)

In the instant case, defense counsel provided ineffective assistance when he failed to properly argue Petitioner's continuation motion and obtain a continuance. Defense counsel never mentioned that Littlejohn already agreed to represent Petitioner or that Littlejohn was Petitioner's Sixth Amendment counsel of choice. Moreover, defense counsel **never** disputed the Judge's assertion that Petitioner's continuation request was for the purposes of delay. That failure resulted in the deprivation of Petitioner's Sixth Amendment right to the counsel of his choice.

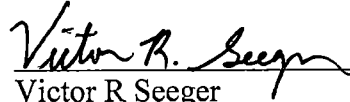
A continuance request may be granted upon a showing of good cause. Rule 7(c), SCRCrimP. Defense counsel failed to present the court with good cause when he did not raise

Petitioner's Sixth Amendment right to the counsel of his choice as the **particular** reason for the continuance request. While the Court in Gonzales-Lopez recognizes the discretion of the trial court to control its own docket, the need for expediency was not present in this case. The record reflects that the case was called abnormally quickly and there is no evidence to suggest Petitioner's request for a continuation was with the intent to simply delay the trial. App. 211, l. 25 – 212, l. 3; App. 212, l. 25 – 213, l. 3. Therefore, had defense counsel properly argued the reason for Petitioner's continuance request, the court would have granted the motion, and Petitioner would have been able to be represented by the counsel of his choice as guaranteed by the Sixth Amendment.

Therefore, defense counsel provided ineffective assistance when he failed to obtain a continuance because he failed to argue the particular reason for the continuance request and that the denial of the continuance request would result in Petitioner's Sixth Amendment right to being represented by the counsel of his choice being violated.

CONCLUSION

Based on the foregoing reasons, Petitioner's petition for writ of certiorari should be granted, and his case remanded for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

DERRICK EUGENE VELASQUEZ,

PETITIONER

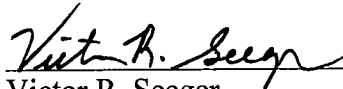
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

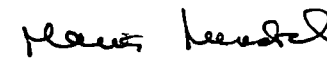
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Derrick Eugene Velasquez, #365000, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of June, 2018.



Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of June, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023