

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Cordell Maddox, Circuit Court Judge

HENRY ANTONIO BURGESS,

ORIGINAL
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S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000740

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

Trial counsel erred in coercing petitioner to plead guilty to second degree burglary in order to obtain a lesser sentence and avoid a greater sentence via a first burglary charge under the misapprehension that a first degree burglary charge could materialize because the structure unlawfully entered was a building (not a dwelling), which meant that a first degree burglary charge was not an option in the case.3

CONCLUSION.....7

ISSUE PRESENTED

Trial counsel erred in coercing petitioner to plead guilty to second degree burglary in order to obtain a lesser sentence and avoid a greater sentence via a first degree burglary charge under the misapprehension that a first degree burglary charge could materialize because the structure unlawfully entered was a building (not a dwelling), which meant that a first degree burglary charge was not an option in the case.

STATEMENT

Petitioner Henry Antonio Burgess pled guilty to second degree burglary, malicious injury to electric utility lines, and possession of burglary tools during the November 2015 term of the Lexington County General Sessions Court before Judge Clifton Newman. Sally J. Henry represented petitioner and Assistant Solicitor Sutania A. Radlein appeared on behalf of the state. Judge Newman sentenced petitioner to imprisonment for an aggregate period of fifteen years. App. 1-33. Petitioner did not appeal his convictions and sentences.

On May 20, 2016, petitioner filed a PCR application within the Lexington County Office of the Clerk of Court. 35-41. The respondent filed a return requesting that a PCR hearing be held in response to petitioner's PCR action. App.42-48.

A PCR hearing was convened on December 14, 2017, at the Lexington County Courthouse before Judge J. Cordell Maddox, Junior. App. 50-77. Petitioner was present at the hearing and represented by Aimee J. Zmroczek, and Assistant Attorney General Melody Jane Brown appeared on behalf of the state.

On March 30, 2018, Judge Maddox issued an Order of Dismissal in the case. App.79-87. Petitioner appealed Judge Maddox's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in coercing petitioner to plead guilty to second degree burglary in order to obtain a lesser sentence and avoid a greater sentence via a first degree burglary charge under the misapprehension that a first degree burglary charge could materialize because the structure unlawfully entered was a building (not a dwelling), which meant that a first degree burglary charge was not an option in the case.

During the plea proceeding, the solicitor apprised the plea judge of the facts of the case. The state alleged that on December 10, 2014, petitioner cut the electric lines of the El Cheapo gas station in Lexington, South Carolina, and then used burglary tools to make a large enough hole through the cinder/cement blocks to enter the store, and then entered the store and grabbed money and other items (cigarettes, candy, etc.), and fled thereafter. The alarm was tripped and police arrived at the scene shortly thereafter and reviewed the entire incident caught on the store's video surveillance cameras. The police arrested petitioner minutes later near the crime scene whereinafter he gave a full confession. App. 3, l. 21- p. 6, l. 9.

At the PCR hearing, petitioner testified that he was pressured and forced to plead guilty to second degree burglary because he was told he would get a thirty-year sentence (presumably if the offense was elevated from a second degree burglary charge to a first degree burglary charge), so he gave in and pled guilty as charged. App. 63, l. 18- p. 64, l. 10; App. 66, l.18 – p. 67, l. 8. App. 57, l. 16- p. 60, l. 22. Trial counsel testified during the PCR hearing and explained that the state offered a plea on the burglary charge and agreed to dismiss the remaining charges, but petitioner insisted on a trial; and that on the day of the trial, petitioner decided to plead guilty without a plea bargain. App. 74, l. 15-p. 75, l. 14.

Apparently, petitioner was coerced into pleading guilty under the misadvice that he was in danger of being charged with the higher crime of first degree burglary in the case.

During the plea proceeding, the solicitor stated the following:

MS. RADLEIN: Your Honor, the State could have straight indicted for first degree burglary in this case because of the two priors, but I decided to go with the burglary second violent. So it makes it a violent per the two priors and makes it a violent because of the nighttime occurrence breaking into a building. App. 7, l. 2-7.

This case involved an entering into a building (El Cheapo) and not a dwelling; and therefore, first degree burglary could not have been charged with the two priors. The point of confusion was based on petitioner's prior burglaries. S.C. Code Ann §16-11-311 states that:

- (A) A person is guilty of burglary in the first degree if the person enters the dwelling without consent and with intent to commit a crime in the dwelling, and either:
 - (1) When, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
 - (a) is armed with a deadly weapon or explosive; or
 - (b) causes physical injury to a person who is not a participant in the crime; or
 - (c) uses or threatens the use of a dangerous instrument; or
 - (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
 - (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
 - (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann §16-11-312 states that:

- (A) A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein.
- (B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:
 - (1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
 - (a) is armed with a deadly weapon or explosive; or

- (b) causes physical injury to any person who is not a participant in the crime; or
- (c) uses or threatens the use of a dangerous instrument; or
- (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or

(2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or:

(3) the entering or remaining occurs in the nighttime.

(C)(1) Burglary in the second degree pursuant to subsection (A) is a felony punishable by imprisonment for not more than ten years.

Counsel was ineffective in failing to advise petitioner that first degree burglary did not apply in his case because the structure entered was a building and not a dwelling; and thus there was no reason to have been coerced into a plea of guilty to the lesser offense of second degree burglary because of any fear that a higher charge, i.e. first degree burglary, which carried a greater sentence, would have been charged against him. In order to qualify one's plea as given voluntarily and intelligently, a defendant must be aware of the nature and crucial elements of the offense charged. Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999); Barnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003). Counsel's failure to explain what charge applied in his case and what charge did not apply in his case constituted deficient legal representation at a plea proceeding in violation of the Sixth Amendment of the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1984). Hence, the PCR judge's ruling, which follows, was erroneous:

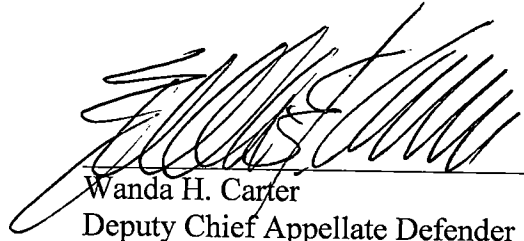
Applicant has not shown counsel was deficient in her representation of him, and there is no credible evidence of any undue or improper pressure on Applicant to plead guilty to the charges. Rather, the plea transcript shows a knowing and voluntary plea on facts that well-support the crime and the sentence handed down. In particular I note the overwhelming evidence of guilt including the video evidence and confession of guilt, along with the fact that "the State could have straight indicted for first degree burglary in this case because of the two priors..." (Guilty Plea Tr. p. 7, lines 2-4). The record supports Applicant was already receiving a benefit from the charging decisions, and made the decision to plead guilty in hopes of a lesser sentence on the lesser charge, not from and ineffective assistance. [The petitioner] has failed in his burden of proof. App. 84-85.

The threat of a first degree burglary charge being filed against petitioner and receipt of a greater sentence should not have been used as leverage to coerce petitioner into pleading to second degree burglary because first degree burglary was not an applicable crime that could have been charged in the case. The question to be answered in resolving a complaint of claimed coercion in pleading guilty is whether under all of the facts and circumstances one's guilty plea was voluntarily and understandingly entered. State v. Smith, 255 S.C. 417, 179 S.E.2d 210 (1971), citing to Sweet v. State, 255 S.C. 293, 178 S.E.2d 657 (1971). Even though a guilty plea may not be held invalid if the defendant was motivated to plead in order to receive a lesser penalty; nonetheless, the long-standing test for determining the validity of a guilty plea is whether the plea is a voluntary plea among the alternate courses of action open to the defendant because some circumstances indeed present intrinsically coercive situations. Gustine v. State, 325 S.C. 123, 480 S.E.2d 444 (1997), citing to Hill v. Lockhart, 474 U.S. 52 (1985) and Brady v. United States, 397 U.S. 742 (1970). Therefore, "the better approach is to determine on a case-by-case basis whether a defendant knowingly and voluntarily enter[ed] a plea of guilty." See Gustine v. State, *supra*.

In the case at bar, petitioner was forced to plead guilty to second degree burglary in order to avoid a greater charge and a greater sentence on a first degree burglary charge, which he could not have been indicted for in the first place in the case. Counsel's failure to explain which charge was applicable and which charge did not apply constituted deficient legal representation in violation of petitioner's right to effective assistance of legal counsel guaranteed under the Sixth Amendment to the United States Constitution in a plea case (See Hill v. Lockhart, 484 U.S. 52 (1985)). Per these circumstances in the instant case, petitioner did not plead guilty voluntarily.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition and allow full briefing on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of December, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Cordell Maddox, Circuit Court Judge

HENRY ANTONIO BURGESS,

PETITIONER

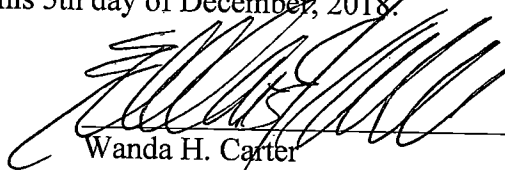
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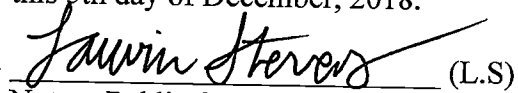
CERTIFICATE OF SERVICE

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 Kelly Oppenheimer, 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 Henry Antonio Burgess, #294411, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 5th day of December, 2018.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 5th day of December, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.