THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post-Conviction Relief

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2018-000646

Lewis Chisolm #196380,..... Appellant,

vs.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF CERTIORARI

Tommy A. Thomas, Esq.
Attorney for Petitioner
7588 Woodrow Street
P.O. Box 88
Irmo, S.C. 29063
(803) 732-5507

Christian Saville Esq.
Office of the Attorney General
Attorney for Respondent
P.O. Box 11549
Columbia, SC 29211-1549

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TABLE OF CASES

QUESTION PRESENTED

Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner did not enter into his plea freely and voluntarily?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Court of General Sessions. Petitioner was indicted during the September 2015 term, the Beaufort County Grand Jury indicated Applicant for criminal sexual conduct with a minor, second-degree. (2015-GS-07-1529). Jared Newman, Esq. represented Petitioner. Assistant Solicitor Julie Kate Keeney prosecuted the case. Applicant plead guilty as indicted before the Honorable Eugene C. Griffith, Jr. On November 9, 2015, Judge Griffith sentenced Petitioner to imprisonment for ten years.

A timely Notice of Appeal was filed. The South Carolina Court of Appeals affirmed Petitioner's conviction on June 6, 2016.

STATEMENT OF FACTS

Petitioner filed a Post-Conviction Relief Application on July 11, 2016 and later amended his application on May 30, 2017, alleging That trial Counsel was ineffective for the following additional reasons:

a. Failure to adequately investigate the case.

b. Failure to adequately explain the State's evidence against Applicant.

c. Failure to investigate and/or use the fact that the Police threatened to take his son away from him unless he admitted to the crime.

d. Failure to adequately investigate and use inconsistent descriptions by the victim of the alleged incident.

e. Failure to adequately present and argue the Motion to suppress the statements at pre-trial hearing. However, there is no evidence that a Pretrial Motion to Suppress was ever held.

3. That the Applicant is informed and believes that his guilty plea was not freely, voluntarily.

4. That the Applicant is informed and believes that he lacked sufficient knowledge to enter the plea knowingly or intelligently.

A Jackson v. Denno, 378 U.S. 368 (1964), hearing was held prior to trial. At issue was that a written statement had been taken after the Petitioner had contacted an attorney. (App. p. 13, lines 8-11) The investigator, John Kelleher, testified at the hearing. He testified that Petitioner was read his Miranda rights (App. p. 16, lines 5-9) Investigator Kelleher testified that he remembers the Petitioner saying that he was going to contact Bruce Marshall, an attorney, as well as on the 18th of September, 2013, that he was contacted by Mr. Marshall, via telephone. Investigator Kelleher stated that he was informed that Mr. Marshall was not representing Petitioner, but that he was requesting a meeting with the Detective and Petitioner and that he did in fact meet with Mr. Marshall. (App. p. 24, lines 1-23) Detective Kelleher testified that he went over to the Petitioner's residence and at that time, the Petitioner gave him a description of what happened and confessed to the crime. (App. p. 30, lines 1-25, p. 31, lines 1-6) Detective Kelleher was questioned by counsel regarding representation by Mr. Marshall. (App. p. 30, lines 1-21) The Detective further testified that he had told the Petitioner that he needed to get this statement down and that he was in a hurry because he was going on vacation and that he needed to have him write the statement out. (App. p. 34, lines 1-12) Detective Kelleher did admit on the stand that he might have told the Petitioner that "if

you don't talk to me know, we are just going to have to take you in. Your son is going to have to be in custody of DSS for some period of time." (App. p. 35, lines 1-9)

Detective Kelleher is somewhat evasive in his response to questions regarding representation by Mr. Marshall. He testified at one time that Petitioner never indicated to him that he wanted an Attorney. (App. p. 34, line 17) Later, he states "that I believe at the time that he said he was going to contact Mr. Marshall, we probably end, we probably did at that time, yes." (App. p. 38, lines 13-15) He then states that he did not recall the Petitioner ever asking for Bruce Marshall when he went to his house on September 19. (App p. 38, lines 16-18)

Petitioner testified at the hearing and stated that he did inform the Detective that he wanted to contact Mr. Marshall and that it was at this point when the Detective started talking about DSS. (App. p. 44, lines 1-3) When asked if he felt like he was coerced or pressured into writing the statement, the Petitioner stated that he was concerned that his son would be taken away. That was the main reason (App. p. 51, lines 19-25) Counsel makes his argument that Petitioner did invoke his right to Counsel when he brought counsel to one of the interviews and that Officer Kelleher did initiate the investigation conversation in the interview on September 19, 2013 which produced the written statement that implicated the Petitioner. (App. p. 55, lines 11-24)

The Court finds that the first two statements were given freely and voluntarily after warning and that the Petitioner waived his rights (App. p. 57, lines 13-15) The Court denies the Motion to Quash the statement. (App. p. 76, lines 1-4) This is based upon the fact that he was not in custody at any time. That there were no warrants at the time of the questioning therefore there was no threat to be carried out regarding arresting the Petitioner. That the Detective stated

that he was not going to try to take the son and that he didn't want to get DSS involved and that the Detective never threatened the Petitioner with anything. (App. p. 77, lines 8-24)

ARGUMENT

Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner did not enter into his plea freely and voluntarily?

Trial Counsel testified that it was his understanding that Mr. Marshall and Petitioner were trying to establish an attorney client relationship and that the Detective was going to interview the Petitioner with Mr. Marshall present and was going to respect Detective Marshall wishes. (App. p. 154, lines 1-8) Counsel also testifies that Detective Kelleher either knew or Petitioner made him aware that he had a son who had some fairly serious medical conditions and that he was on disability. (App. p. 154, lines 23-25) Trial Counsel also testifies that according to the Petitioner, the clear implication was that he was going to give his statement "right here and now or his little boy was going to be snatched from him immediately." (App. p. 156, lines 12-15)

Trial Counsel testified that he made an argument at Pre-Trial that the third statement, the admission, was to be suppressed. However, he further states that he thought that the focus of the Pre-trial hearing was not the custody issue (App. p. 157, lines 16-24) The focus was that he had asserted his Sixth Amendment right to counsel. (App. p. 158, lines 1-2)

Petitioner testified at Post-Conviction regarding the third statement, that he was threatened that they would take his son away from him. That his son had a heart condition and that he did not want to put his son through that, so he wrote a statement. (App. p. 176, lines 4-13)

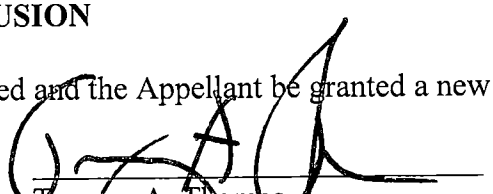
The PCR Court finds that the Petitioner's plea was freely and voluntarily given. The Court cites Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969). By using Boykin to state the record must establish the Petitioner had a full understanding of the

consequences of his plea and the charges against him. The PCR Court in it's Order, further cites Crawford v. United States 519 F2d 347 4th Circuit (1975) in that statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truthfulness of his statement. The Court finds that an adequate guilty plea colloquy is contained in the transcript. Petitioner asserts that his plea was not freely and voluntarily given. That is was only given based on the ineffective assistance of his plea counsel and but for this ineffectiveness, he would have chosen to have gone to trial. Petitioner testified that he only took the plea deal after he was threatened that his son would be taken away from him and given to DSS. That with his son's heart condition that he would cry and say that he was about to have a heart attack and was very emotional about his health issues. (App.p. 180, lines 13-21)

A confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence. State v. Rochester, 301 S.C. 196, 391 S.E. 2d 244 (1990). That the Petitioner would further assert that he was forced and coerced into making the confessional statement and that this coercion continued up and through his guilty plea. That plea counsel was ineffective for his failure to properly object and attempt to have this statement excluded on the issue that it was coerced. That counsel admits through his own statements at Post Conviction that the main focus of his attempts to suppress the statement was based upon the Sixth Amendment issue of right to counsel. Therefore, the Petitioner is informed and believes that the PCR Court should have granted his Post Conviction Relief on the basis of ineffective assistance of counsel and involuntary guilty plea.

CONCLUSION

That the Lower Court's decision be reversed and the Appellant be granted a new trial.



Tommy A. Thomas
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

December 17, 2018

Tommy A. Thomas

ATTORNEY AND COUNSELOR AT LAW

TELEPHONE:
(803) 732-5507
(803) 732-5508

FACSIMILE:
(803) 781-4226

HARRINGTON BUILDING
7588 WOODROW STREET
IRMO, SOUTH CAROLINA 29063

PLEASE REPLY TO:
PO BOX 88
IRMO, SC 29063

INMATE LINE
(803) 732-6542

December 17, 2018

The South Carolina Supreme Court
Clerk, Daniel Shearouse
P.O. Box 11330
Columbia, SC 29211

RE: Lewis Chisolm v. State of South Carolina
Case No.: 2018-000646

Dear Sir or Madam:

Enclosed please find for filing an original and a copy of a Petition for Writ of Certiorari, Petition for Writ of Certiorari pursuant to White v. State, Brief in Support of Petition for Writ of Certiorari pursuant to White v. State and Certificate of Service regarding the above referenced matter.

Please feel free to contact me should you have any questions.

Yours truly,

Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Christian Saville, Esq.
Lewis Chisolm