

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Horry County

Honorable Thomas A. Russo, Circuit Court Judge

ORIGINAL

ERICK HERNANDEZ,

PETITIONER

RECEIVED

v.

JAN 11 2019

STATE OF SOUTH CAROLINA,

SC Court of Appeals

RESPONDENT

APPELLATE CASE NO 2016-001142

BRIEF OF PETITIONER

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ISSUE PRESENTED

The PCR judge erred in denying petitioner's claim that he was coerced into waiving plea counsel's conflict of interest in the case when counsel admitted that a conflict existed based on his dual representation of petitioner and his co-defendant in a drug conspiracy ring, and the plea judge removed counsel from the case after finding on the record that a conflict of counsel in fact existed in the case, because this meant that his guilty plea was given involuntarily as a result.

STATEMENT

Petitioner Erick V. Hernandez, aka, Pedro Mendoza, pled guilty to trafficking in cocaine (third offense) between 28 to 100 grams¹ during the October 2012 term of the Horry County General Sessions Court before Judge Edward B. Cottingham and was sentenced to imprisonment for a period of fifteen years. App. 1-36. Fran Humphries represented petitioner during the plea proceeding and Assistant Solicitor Donna Elder appeared on behalf of the state. Petitioner did not appeal his conviction and sentence.

On June 11, 2013, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 38 – 44. The respondent filed a return dated October 24, 2013, requesting that a hearing be held in response to petitioner's PCR action. App. 45 – 48.

A PCR hearing was convened on November 13, 2015, at the Horry County Courthouse before Judge Thomas A. Russo. Petitioner was present at the PCR hearing and represented by Tristan M. Schaffer, and Assistant Attorney General J. Croom Hunter appeared on behalf of the state. App. 50 – 98. On April 13, 2016, Judge Russo signed an Order of Dismissal denying petitioner's allegations of ineffective assistance of counsel in the case. App. 105 – 111.

Petitioner appealed Judge Russo's Order of Dismissal and filed a petition for writ of certiorari dated March 1, 2017, which this Court granted on December 12, 2018. This brief of petitioner follows.

¹ Petitioner pled to the lesser cocaine charge of trafficking in 28-100 grams of cocaine, but was indicted for cocaine trafficking in 200 grams or more. App. 19, lines 16 – 19.

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

The Sixth Amendment right to counsel includes the right to effective assistance free of conflicts of interest, and in the case of a single attorney representing multiple defendants free from conflicting interests among each of the defendants.

“To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a [PCR applicant] who did not object at trial must show an *actual* conflict of interest adversely affected his attorney's performance.” Appellate courts reviewing an allegation of a conflict of interest “must determine whether there was an actual conflict of interest and, if so, whether that conflict adversely affected [counsel's] representation of [the petitioner].”

Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013), citing to Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990).

ARGUMENT

The PCR judge erred in denying petitioner's claim that he was coerced into waiving plea counsel's conflict of interest in the case when counsel admitted that a conflict existed based on his dual representation of petitioner and his co-defendant in a drug conspiracy ring, and the plea judge removed counsel from the case after finding on the record that a conflict of counsel in fact existed, because this meant that his guilty plea was given involuntarily as a result.

The indictment in this case alleged that petitioner did “knowingly sell, deliver, purchase, or bring into the state, or [did] aid, abet, attempt to conspire to sell, deliver, purchase or bring into the state, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of cocaine.” App. 112 – 113. Petitioner's original sentencing exposure sans the plea bargain totaled twenty-five years. App. 3, lines 10-21.

Originally, petitioner was indicted on five charges of trafficking in cocaine and ultimately pled to one trafficking charge only; and thereafter, the four remaining trafficking charges were dismissed. App. 3 lines 10 – 13; App. 5, lines 11-16; App. 19, l. 22 – p. 20, l. 4. This case included a wide net cast by state and federal officials involving multiple states and multiple defendants. Petitioner and Karen Viamizar were both arrested as players in a drug scheme/conspiracy. Trial counsel simultaneously represented Viamizar and petitioner, both of whom were allegedly connected to the same drug conspiracy along with codefendants Vargas and Diaz. Hence, the conflict of interest in the case. App. 74, lines 1 – 12.

During the plea proceeding, counsel addressed this issue as follows:

I perceive based on the discovery....that there is or least there is present a potential and dangerous conflict of interest related to another client of mine (Karen Viamizar)...I have told [petitioner] that I have brought these issues with the solicitor up to the Court

and that if I were to make the motion to be relieved based on that conflict of interest....the Court would be inclined to rule in my favor. App. 6, lines 15-23.

Petitioner filed a pro se pretrial motion apprising the judge of the conflict and requesting counsel's removal from the case. In addition, counsel filed a motion to be relieved based on the conflict issue. App. 65, lines 20 – 24.

The plea judge responded to the conflict issue by stating that "I've determined...that there is a conflict," and that "[I am] "appointing a public defender" on the same date (of the plea proceeded) and that he would set the trial date for 60 days later. The motion to relieve counsel was granted. App. 9, l. 10- p.10, l. 20. The solicitor's response was that the state's "theory in the case [was that it was] a conspiracy to traffic" case and that the plea offer expired on the date of the plea proceeding. App. 8, lines 16-20; App. 12, l. 24-25. Note the court's address to petitioner regarding the matter of the conspiracy.²

However, before the close of the same day on which the conflict motion was granted, petitioner indicated that he would waive his right to conflict free counsel and accept the plea offer of fifteen years prison time. The plea judge accepted the waiver, the plea, and sentenced petitioner to fifteen years imprisonment. App. 19 l. 5 – p. 36, l. 8.

Note that petitioner refused to sign a written waiver in the conflict issue and was sentenced for contempt of court. App. 68, l. 2 – p. 69, l. 12.

During the PCR hearing held in the case, trial counsel testified that while reviewing the discovery he saw Karen Viamazar's name on a search warrant document and joined in with

² Defense counsel: Trafficking contains an element of conspiracy.
Court: The law with regards to one who is charged with trafficking also contains the element of conspiracy but he is charged under the trafficking statute based on the alleged conspiracy...the jury [will] determine whether or not he conspired with somebody else. App. 16, line 21; App. 17, l. 1 – 6.

petitioner's pro se motion requesting that he be relieved in the case due to the conflict. App. 64, l. 13 – p. 65, l. 7; p. 70, l. 22-25. Counsel stated that the plea judge hinted that there was no conflict in chambers, but when they returned to the courtroom the judge relieved him as counsel in petitioner's case after finding that a conflict was apparent, but that later on after that ruling petitioner asked him to remain on the case as his attorney. App 66, l. 22 – p. 68, l. 1; p. 80, l. 22 – p. 82, l. 12. Counsel stated that he had represented Viamazar and that her charges were pending simultaneously during the time period that petitioner's charges were pending also. App. 69, l. 24 -p. 70, l. 7.

Counsel recalled that the solicitor stated that the charge on which petitioner was pleading to had “no involvement with Viamozar,” but counsel testified that this case was “a trafficking scheme” case and hence a conflict existed. App. 71, lines 13 -24.

Counsel added the following:

The only two references I have regarding Karen Viamazar was one, she was left a copy of a search warrant, a return of a search warrant, which meant that she had to be at the house where the search warrant was executed...so if there's a contact....there's a connection there....App. 72, lines 5 -10.

Petitioner testified during the PCR hearing and explained in effect that counsel's dual representation posed a conflict because counsel represented him and Viamazar, who was his “co-defendant.” App. 82 l. 8 – p. 83, l. 15. Petitioner stated Viamazar was arrested at the location where he had stopped living when the search warrant was executed. App. 84, lines 2-20.

Petitioner stated that he waived the conflict claim because he thought he could get “45 years” in the case. App. 86, l. 1-10. Petitioner stated that “[he] didn't want to [plead guilty], but [he] kind of felt forced to because who wants to get a sentence of 45 years,” and that he “became afraid” after the judge told him that that “he would get [him] another lawyer, but after 5 pm [he]

couldn't negotiate any more," i.e., the fifteen year plea deal would have expired. App. 87, lines 2 – 8; App. 89, lines 10-13. Petitioner added that another lawyer "would have negotiated [his] case better." App. 88, l. 9-13.

The PCR judge ruled that there was "no evidence [that petitioner's] plea was not entered freely, knowingly, and voluntarily." App. 4. The PCR judge also ruled on the conflict of interest issue as follows:

At the PCR hearing, [petitioner] alleged he was prejudiced at his guilty plea by a conflict of interest existing because his attorney also represented his codefendant. This allegation is without merit. Testimony elicited at the PCR hearing from both [petitioner] and plea counsel indicated that counsel did not in fact represent [petitioner's] codefendant because the charge at issue to which [petitioner] pled guilty, did not involve the person in question. Additionally, [petitioner] was not charged with any type of conspiracy. In fact, the alleged codefendant had nothing to do with the charge to which [petitioner] pled guilty. Plea counsel testified that prior to [petitioner's] plea the solicitor made sure that none of [petitioner's] charges involved the alleged codefendant. An applicant alleging his conviction was due to a conflict of interest from counsel's representation bears the burden of showing that a potential conflict actually materialized into a realized conflict adversely affecting counsel's performance. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Here, [petitioner] has not shown how said conflict might have affected counsel's performance. As such, this allegation is without merit. As applicant has shown no ineffectiveness, he can show no prejudice. App. 5 – 6.

At the plea proceeding, petitioner's plea terms and waiver were stated as follows:

Ms. Elder: Your Honor, it's my understanding that Mr. Hernandez or Medoza has decided to waive any conflict of interest with his attorney at this time, plead guilty to trafficking twenty-eight to a hundred grams which is a lesser included offense of what he's indicted for. The State had negotiated a fifteen-year sentence. App. 19, lines 14-19.

In order to establish a violation of the Sixth Amendment right to effective assistance of counsel due to a conflict of interest arising from multiple representations, a defendant must show an actual conflict of interest that adversely affected his attorney's performance; and an actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the case of the defendant. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998), citing to Cuyler v. Sullivan, 446 U.S. 335 (1980); and Duncan v. State, 281 S.C. 435 315 S.E.2d 809 (1984); Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995); Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). Furthermore, the Sixth Amendment right to counsel requires that a single attorney representing multiple defendants must include representation that is free from conflicting or competing interest for each of the co-defendants. Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990). Moreover, once a client establishes an actual conflict affected adversely counsel's representation, there is no need to prove prejudice to obtain PCR relief because prejudice will be presumed. State v. Sterling, 377 S.C. 475, 661 S.E.2d 99 (2008), quoting Strickland v. Washington, 466 U.S. 668 (1984). Additionally, any waiver of a conflict of interest claim must not only be voluntary, but it must be done knowingly and intelligently, i.e. with the knowledge of the intentional relinquishment of the right to conflict free representation. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Hoffman v. Leeke, supra. Also, whether there has been a valid waiver depends on the facts of each particular case. Hoffman, 903 F.2d at 288.

In the case at bar, trial counsel represented petitioner and Viamazar, both of whom were charged as participants in the same drug conspiracy ring. Petitioner filed a motion regarding the conflict and later waived the conflict and accepted counsel's representation under coercion and duress in order to obtain the lesser charge and lesser sentence. Thus, petitioner's waiver of the conflict based on the facts and circumstances of the case clearly proved petitioner's pleas could

not have been deemed voluntary in nature. Furthermore, the argument by the solicitor that the charge petitioner pled to was not connected to any of the charges against Viamazar cannot stand because the case and facts surely bled over boundary lines and blended into each others' cases. App. 71, lines 13 – 22. The house where the search warrant was executed was said to have belonged to petitioner and Viamazar was there at that time. App. 72, lines 4 – 20.

Here, a confidential informant wired by DEA and the Horry County Police Department had cocaine delivered to him (informant) by a co-defendant named Vargas, who received the drugs from petitioner. Herman Diaz, who was the “top tier of this drug conspiracy,” had already been indicted and sentenced in the case. App. 28, l. 25 – p. 30, l. 21. Note that both co-defendants Vargas and Diaz agreed to testify against petitioner in the event petitioner opted for a trial by jury in his case. App. 30, l. 16 - p. 31, l. 8. Therefore, the inference was that Viamazar, who was represented by petitioner’s counsel also, would most likely have testified against petitioner as well if a trial had been held on petitioner’s behalf. Since counsel represented petitioner and Viamazar, then the conflict of counsel that existed in the case became clearly obvious. Compare Thomas v. State, supra, where a husband and wife were represented by the same attorney on drug charges after the state’s offer was that the charges against one spouse would be dismissed if the other spouse pled guilty to all of the charges. The Thomas Court held that a conflict was evident in counsel’s dual representation of the married couple. Compare also Edgemon v. State, supra, where counsel advised Edgemon’s codefendant to plead guilty and testify against Edgemon prior to Edgemon’s plea. The Court found that there was a conflict of interest with counsel’s representation of the codefendant. In the instant case, note counsel’s silence when asked about the details of his representation of Viazamar, whose charges were pending simultaneously while petitioner’s charges were pending in the same case. App. 69, l. 24

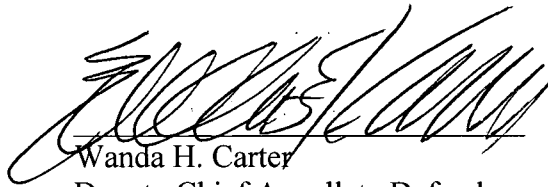
– p. 70, l. 12. Finally, note that petitioner refused to sign a written waiver of the conflict of counsel claim and was sentenced to six months imprisonment for contempt of court due to said refusal to do so. App. 68, l. 12 – p. 69, l. 12.

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 felt pressured to waive a conflict of counsel issue, which held merit and remained alive, and he refused to sign in writing that he waived the conflict issue, in order to gain the benefit of a favorable plea bargain by pleading guilty to a selected drug charge constituted circumstances that rendered his guilty plea coerced and involuntarily given. Per these circumstances in the instant case, petitioner did not plead guilty voluntarily within the meaning of Boykin v. Alabama, 395 U.S. 268 (1964). Additionally, counsel's conflicted representation constituted deficient representation that violated petitioner's right to effective assistance of legal counsel in a criminal case as guaranteed under the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court reverse his conviction and sentence in the case and remand for a new proceeding.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Horry County

Honorable Thomas A. Russo, Circuit Court Judge

ERICK HERNANDEZ,

PETITIONER

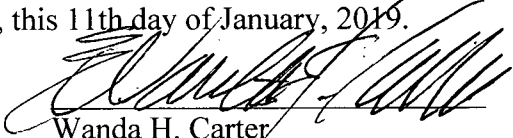
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STATE OF SOUTH CAROLINA,

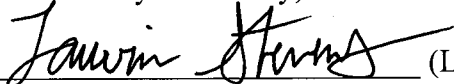
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Erick Hernandez, #352808, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 11th day of January, 2019.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of January, 2019.

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

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SC Court of Appeals