

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

RECEIVED

MAY 06 2019

CALVIN TERRELL WILLIAMS,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001839

PETITION FOR WRIT OF CERTIORARI

TAYLOR D GILLIAM
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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where two prior federal crimes were used against Petitioner to sentence him to life imprisonment without the possibility of parole, where the state served notice that it was seeking life without the possibility of parole, where those two crimes did not qualify as predicate offenses, and where trial counsel failed to object to the sentence of life without the possibility of parole?

STATEMENT

A Spartanburg County grand jury indicted Petitioner on the charges of bank robbery and accessory before the fact to bank robbery in May 2016. App. 549 – 550. He proceeded to trial before the Honorable Roger L. Couch and a jury on June 6, 2016. App. 1. Barry Barnette served as the solicitor, and Matthew Shealy represented Petitioner.

After a three-day trial, the jury found Petitioner guilty of bank robbery. App. 355 l. 24 – App. 356 l. 3. The state had served a notice of life sentence pursuant to S.C. Code Ann. § 17-25-45(a), and Judge Couch sentenced Petitioner to life. App. 356 l. 17 – App. 359 l. 13; App. 368 ll. 11 – 16. Petitioner’s sentence was affirmed. State v. Williams, Op. No. 2017-UP-395 (S.C. Ct. App. filed October 18, 2017).

Petitioner filed a timely application for post-conviction relief on January 8, 2018. App. 370 – App. 399. It contained allegations of ineffective assistance of counsel, including the claim that trial counsel was ineffective for failing to object to the notice of life without parole. App. 377. The state made its Return on or about April 18, 2018. Ap. 401 – 407.

An evidentiary hearing took place before the Honorable Grace Knie on June 18, 2018. App. 408. Susannah Ross represented Petitioner, and Megan Jameson and Jordan Cox appeared on behalf of the state. Petitioner, Petitioner’s son, trial counsel, and the solicitor testified at the hearing. The PCR court took the matter under advisement and requested post-hearing memoranda. App. 506 l. 7 – App. 507 l. 10. Both parties submitted memoranda. App. 509 – 525.

Judge Knie signed an Order of Dismissal closely resembling the state’s memorandum which was filed on August 7, 2018. She found that trial counsel “cannot be deemed constitutionally ineffective for failing to challenge his sentence” because Petitioner “was

properly noticed, served, and sentenced to life without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45.” App. 533. ,

Counsel for Petitioner filed a Motion to Alter or Amend the Judgment on August 17, 2018. App. 538 – 539. The state filed a Return to the Motion on or about September 21, 2018. App. 540 – App. 544. An Order Denying Applicant’s Motion to Alter or Amend the Judgment closely resembling the state’s Return was filed on September 29, 2018. App. 545.

This Petition follows.

ARGUMENT

The PCR court erred in denying relief, where two prior federal crimes were used against Petitioner to sentence him to life imprisonment without the possibility of parole, where the state served notice that it was seeking life without the possibility of parole, where those two crimes did not qualify as predicate offenses, and where trial counsel failed to object to the sentence of life without the possibility of parole.

Relevant facts

After the jury's verdict was read, the trial court recognized defense counsel as sentencing began. App. 356 ll. 20 – 22. In response, counsel simply stated: "Your Honor, we have nothing to say." Id. Regarding two prior bank robberies which the solicitor suggested qualified as most serious offenses, defense counsel articulated: " I don't think we can argue that .. he was not convicted of those two prior armed bank robberies. This would be - - these are serious offenses. We have no legal basis for objection to that." App. 359 ll. 10 – 13. As noted, Petitioner was sentenced to life without the possibility of parole.

The facts giving rise to Petitioner's arrest as alleged by the state at trial are as follows: Petitioner's sixteen year old son, Shyquone Williams (hereinafter "Shyquone"), went into a BB&T bank in Spartanburg, South Carolina on January 22, 2015. He handed the teller a handwritten note that read:

This is an armed robbery. This is an armed bank robbery. I demand \$40,000 in large bills with no bands around the money. No dye packs. No bait money. No tracking devices. I want all the money placed in my book bag. No silent alarms. If you obey me nobody will get hurt.

App. 166 l. 13 – 171, l. 4. Because there was no book bag, the teller put approximately two thousand dollars in envelopes, along with a dye back, and gave it to Shyquone. App. 173, l. 18 –

175, l. 9. The defense's theory of the case was that Shyquone acted alone in robbing the bank and lied to Petitioner about his need to go to the bank to pick up money from someone that day. App. 162, l. 1 – 163, l. 22.

After his initial arrest, Shyquone repeatedly denied that his father had any involvement in the bank robbery. App. 198, ll. 11-16; App. 199, l. 23 – 201, l. 12. However, he eventually told the police that the robbery was Petitioner's idea, that Petitioner told him how to write the demand note, and that Petitioner procured their ride to the bank. App. 188, l. 17 – 195, l. 16; App. 198, ll. 17-25. Shyquone admitted that he walked from the van where Petitioner and the driver were waiting and robbed the bank. On his way back to the van, the red dye pack in the money exploded. App. 195, l. 17 – 196, l. 3. When he got to the van, Petitioner asked Shyquone whether he "had it" and Shyquone responded "no, he wasn't there." App. 196, ll. 4-7. The driver dropped them off near Quail Pointe apartments, where they were later apprehended by police. Shyquone claimed that Williams threw Shyquone's stained clothing into the bushes and gave him an orange hoodie to wear. App. 196, l. 20 – 198, l. 10.

At trial, the state sought to introduce some documents related to Petitioner's federal pleas under Rule 404(b), SCRE. App. 101 l. 3 – App. 102 l. 3; App. 133 ll. 5 – 10. Prior to opening statements, the state elicited testimony from James Lannamann regarding two prior alleged bank robberies which supposedly involved Petitioner. App. 47 – 84. Dean Cook, a sentencing guidelines specialist at the Federal Probation Office, also testified *in camera* regarding the prior pleas. App. 102 – 121. The presentencing report was entered as Court's Exhibit 5 over an objection that the records did not qualify as public record or report under SCRE 803(8). App. 103 l. 22 – App. 105 l. 24.

The presentencing report contained the pretrial services adjustment section, the offense conduct, and the charges and convictions. App. 110 ll. 1 – 5. Regarding the admissibility of the prior plea information at trial, trial counsel argued:

[I]t doesn't set out what my client allegedly did or didn't do. We have an indictment. That is what my client pled guilty to. That doesn't set out sufficient facts. We don't know what my client claims he did or did not do. I don't believe that there's any competent evidence.

App. 126 ll. 5 – 10. The solicitor, in turn, noted that “Judge Herlong released it. I mean this is information he released by the judge himself. So, to me, there's no question, question we've met the clear and convincing part of it.” App. 127 ll. 13 – 17. The trial judge expressed concern about one of the former offenses “since it's not described in detail in the document,” and indicated that he would “be listening to hear the similarities that might exist between these events” during the state's case-in-chief. App. 140 ll. 1 – 13.

Interestingly, Judge Herlong recalled the federal documents on the third day of Petitioner's trial. App. 291 – 293. Dean Cook, who testified pre-trial, was ordered “not to testify or say anything in Court.” Id. The solicitor moved to withdraw Court's Exhibit 5 “per Court Order by the Federal Court.” Id. The solicitor indicated that the decision “came from Washington.” App. 293 ll. 6 – 7.

Trial counsel never discussed S.C. Code Ann. § 17-25-45 with Petitioner nor showed him a copy of the statute. App. 417 ll. 8 – 11. Petitioner admitted to pleading guilty to two federal bank robbery charges. App. 430 ll. 7 – 12. He served “a little over ten years in federal prison for those sentences.” Id. Petitioner was served with the state's notice to seek life without parole based on those convictions while he was in the county jail, without access to legal resources. App. 430 ll. 17 – 23.

Trial counsel testified that he was appointed to represent Petitioner. App. 452 ll. 20 – 23. Regarding the life without parole (LWOP) notice, trial counsel confirmed that Petitioner was served. App. 457 ll. 3 – 10. He indicated that the two federal armed bank robberies which Petitioner pleaded guilty to served as the qualifying offenses. Id. When asked what research he performed, trial counsel testified that he looked at the statute and then looked at the elements of the indictments. App. 457 ll. 11 – 22. He claimed that the elements of the federal indictments were that there was a taking of money from the person of another while armed with a deadly weapon which he equated to armed robbery in South Carolina. Id.

On cross-examination, trial counsel agreed that the federal indictments used the language “dangerous weapon and device” versus “deadly weapon” in S.C. Code Ann. § 16-11-330. App. 470 l. 21 – App. 472 l. 19. Counsel admitted that he never required the state to put up a witness during sentencing or challenged the life without parole notice. App. 473 ll. 13 – 23. Counsel eventually agreed that he should have forced the state to produce a witness regarding the prior offenses. App. 477 l. 2 – App. 478 l. 7. He remarked that he should have objected to the state making the indictments a court’s exhibit. App. 478 l. 16 – App. 479 l. 7. Further, he did not bring up the discrepancy in elements. App. 473 l. 24 – App. 474 l. 7.

At the evidentiary hearing, the solicitor reiterated Judge Herlong recalled the federal bank robbery documents:

I contacted the U.S. Attorney’s Office. They gave me the information concerning the offenses. At first we had the FBI agent testify that actually worked the cases that then - - we needed additional information, according to Judge Couch.

I contacted Dean Cook, which is one of the probation officers at that time. He’s now an attorney here in our circuit. At that time, he was a, a probation agent for them.

... I was getting ready - - went out for lunch, and I got a phone call from Mr. Cook saying you cannot use any of the documents. Judge Herlong has ruled that

he is gonna take the documents back. I've never had this situation happen in my career, and hopefully it will never happen again.

So I had to go down and I let Mr. Shealy know. We went back in chambers, and told him that I had to make a motion to withdraw all those items, and they had to be returned back to Mr. Cook, and they had to be returned back to the U.S., to the U.S. Courts, which we did, and obviously, none of that was mentioned in front of the jury. It was in pretrial motions.

App. 484 l. 18 – App. 485 l. 22. The solicitor confirmed that the prior plea documents were removed from the record. App. 496 ll. 4 – 8.

In the United States Code, the bank robbery offense for which Petitioner was indicted reads as follows:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

...

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C.A. § 2113.

As correctly pointed out by defense counsel, this is not the equivalent of armed robbery under S.C. Code Ann. § 16-11-330. App. 498 l. 20 – App. 499 l. 16.

Discussion

Upon conviction of a serious offense, a person must be sentenced to LWOP if the person has two or more prior convictions for a serious offense. S.C. Code Ann. § 17-25-45(B). When a prior conviction is for an offense not found in § 17-25-45, trial judges can look to the elements of the prior offense to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement. See State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003); State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000).

Near the end of the evidentiary hearing, trial counsel concluded, repeatedly, that he should have objected to the state's attempt to have Petitioner sentenced to life in prison without parole:

Well, my objection would [have] been they can't prove it. I mean, I think [PCR counsel is] right. I ... probably could [have] argued well, they need to prove that - - just like whatever - - a shoplifting case, a person is convicted of shoplifting third or subsequent, they have to prove those other two convictions. Now, that's very easy to do. Again, I think that Mr. Barnette would have been able to prove that, but, at a life without parole case, I probably should have made them prove it.

App. 479 l. 21 – App. 480 l. 8.

In order to prove counsel was ineffective, a PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104

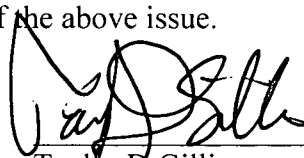
S.Ct. 2052, 80 L.Ed.2d 674 (1984); Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

Trial counsel was ineffective for failing to object to the state's use of the prior offenses, especially where the documents had been recalled by the federal court. Based upon a comparison of the applicable statutes, the federal crime of bank robbery does not require a deadly weapon like South Carolina's armed robbery charge. Therefore, the two federal convictions cannot serve as the predicate offenses upon which a sentence of life without the possibility of parole is based.

As noted above, trial judges can look to the elements of the prior offense to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement. Because trial counsel acquiesced and failed to object, the trial judge was not required to analyze the elements. Had counsel objected, the scrutiny offered by PCR counsel at the evidentiary hearing could have been explored by the circuit court. This issue could then have been raised on direct appeal. However, because trial counsel failed to offer an objection or advance an argument against the LWOP notice, Petitioner was sentenced to life without parole, the deficient prior offenses notwithstanding. Trial counsel repeatedly objected to the admission of the federal plea materials when the argument was regarding prior bad acts, but he failed to object when the discussion shifted to sentencing. As admitted by trial counsel at the evidentiary hearing, he should have objected. Because he failed to do so, Petitioner was sentenced to life without the possibility of parole based on federal charges which do not qualify as most serious offenses.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and order further briefing of the above issue.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of May, 2019.

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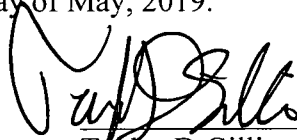
V.

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 Johnny Ellis James, Jr., 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 Calvin Terrell Williams, #218862, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of May, 2019.



Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 6th day of May, 2019.

Country Powers (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.