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ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

RECEIVED

MAY 31 2017

SC Court of Appeals

THE STATE,

RESPONDENT,

v.

FAVIAN ALPHONSO HAYES

APPELLANT

APPELLATE CASE NO 2009-129706

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial court abused its discretion in finding Hayes freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court's acceptance of the guilty plea, the trial judge improperly denied Hayes's motion to relieve counsel without conducting an adequate inquiry into Hayes's complaint that counsel had an actual conflict of interest, due to his simultaneous representation of State's witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

STATEMENT OF THE CASE

Indictment, Guilty Plea, and Direct Appeal

In October of 2007, the Sumter County Grand Jury indicted Hayes for possession with intent to distribute (“PWID”) cocaine base and PWID cocaine base within one half mile of a school. In May of 2009, the Sumter County Grand Jury indicted, in an amended indictment, Hayes for armed robbery and criminal conspiracy. R. 72 - 73.

On June 1, 2009, Hayes appeared before the Honorable Howard P. King and pled guilty to one count of armed robbery, conspiracy and the lesser included offense of possession of cocaine base, 2nd offense. David Sullivan (“defense counsel”) represented Hayes at the guilty plea. Assistant Solicitor Catherine Fant represented the State.

After denying Hayes’ motion to relieve defense counsel due to a conflict of interest, Judge King sentenced Hayes to a total sentence of thirty-five years of imprisonment. R. 56, ll. 22 – R. 57, ll. 14. Defense counsel filed a timely Notice of Appeal. However, defense counsel failed to submit an explanation pursuant to Rule 203(d)(1)(B)(iv) showing that there was an issue to be raised on direct appeal of the guilty plea.

PCR Application, Evidentiary Hearing, Order of Dismissal, and Petition for Writ of Certiorari

On September 22, 2009, Hayes filed an application for post-conviction relief. The State filed a return on February 22, 2010. On March 23, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young.

Patrick Killen represented Hayes at the PCR hearing. In a written order signed May 16, 2012, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on May 29, 2012.

Hayes filed a petition for writ of certiorari seeking review of the order of dismissal and was represented on appeal by Appellate Public Defender Katherine Hudgins. The State filed a Return and was represented by Assistant Deputy Attorney General David Spencer.

The Supreme Court transferred the appeal to the South Carolina Court of Appeals. On July 3, 2014, the Court of Appeals denied certiorari. The Remittitur was issued on June 23, 2014.

Federal Habeas Corpus Application and Grant

On September 23, 2014, Hayes filed a petition for writ of *habeas corpus* with the United States District Court, District of South Carolina. The State filed a Return to the Rule to Show Cause issued by the Honorable Thomas E. Rogers, III, United States Magistrate Judge, in response to Hayes' petition. The State then filed a motion for summary judgment on January 28, 2015.

On May 28, 2015, Magistrate Judge Rogers issued his Report and Recommendation that the State's motion for summary judgment be denied unless the State promptly allowed Hayes leave to appeal out of time and provided Hayes with the assistance of counsel and recommended the remainder of the claims be dismissed.

On June 17, 2015, the Honorable Richard Girgel, United States District Judge, entered a conditional order granting writ of *habeas corpus* and directing that the State restore Appellant's direct appeal rights. R. 58 - 59. On September 3, 2015, the South Carolina Supreme Court issued an order that the Court of Appeals recall the remittitur in Hayes' direct appeal and reinstate the appeal. R. 60 - 61:

On September 23, 2015, the Court of Appeals recalled the remittitur. R. 62. On December 2, 2015, Hayes submitted an "Explanation of Appeal Pursuant to Rule 203(d)(1)(B)(iv), SCACR". R. 63 - 70. On June 16, 2016, the Court of Appeals informed Hayes

and the State, via a signed letter from Deputy Clerk V. Claire Allen, that Hayes' appeal was to proceed. R. 71.

This appeal follows.

ARGUMENT

The trial court abused its discretion in finding Hayes freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court's acceptance of the guilty plea, the trial judge improperly denied Hayes's motion to relieve counsel without conducting an adequate inquiry into Hayes's complaint that counsel had an actual conflict of interest, due to his simultaneous representation of State's witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

Relevant Facts

During the plea colloquy, the court questioned the parties on whether Hayes understood that by pleading guilty to only one of the two armed robberies, he was exposing himself to a life sentence should the State decide to try him on the second robbery. R. 11, l. 1 - 13, l. 25. Plea counsel alleged that he had explained this possible outcome to Hayes. R. 14, ll. 15-23. The State averred that Hayes was pleading guilty to this specific armed robbery because the case had been called for trial that morning. R. 13, ll. 9-17. The State then added that it fully intended to try Hayes on the second armed robbery indictment in the coming months. *Id.*; R. 14, ll. 10-14.

Continuing with the plea hearing, the court asked Hayes if he was "pleading guilty of your own free will and accord?" R. 18, ll. 19-20. Hayes responded that he was not and that he was pleading guilty because he believed his attorney's conflicted and ineffectual representation rendered a guilty verdict at trial a foregone conclusion. R. 18, l. 21 - 19, l. 3.

Without receiving an affirmative answer, the trial court continued with the plea colloquy asking Hayes if he was satisfied with his lawyer's representation. R. 19, ll. 4-9. Hayes stated that he was not satisfied and moved to relieve counsel. R. 19, l. 10 - 22, l. 1. Hayes said that plea counsel had a conflict of interest arising from his simultaneous representation of an individual named Stacy Rhodes. *Id.*

Hayes explained that Rhodes had been among of group of people he had been with after the two armed robberies he was accused of committing and that Rhodes was preparing to testify

against him at trial. R. 23, ll. 2-10; R. 26, ll. 13-21. The State confirmed that, following Hayes's arrest, Rhodes was arrested for interfering with police arising from his conduct during the investigation into the robberies. R. 28, ll. 3-6. Hayes' attorney was appointed to represent Rhodes. The State also admitted that Rhodes had offered to testify in Hayes's case and the State was seriously considering having him testify should there be a trial. *Id.* at ll. 6-22.

In fact, the State's recitation of the facts supporting the guilty plea made clear that Rhodes was going to be called as a witness. R. 35, l. 6 - 40, l. 19. The State averred that Hayes' co-defendant, Brandon McFadden, lived near one of the robbed convenience stores and that police first came into contact with McFadden and Hayes on the day of the second robbery. *Id.* Detective Curtis Hodge of the Sumter Police Department spoke with the two as they were leaving McFadden's house only minutes after the robbery. *Id.*

Hodge was suspicious of McFadden and Hayes because they were sweating and in the area of the robbery, but did not detain them. After police reviewed the video surveillance footage, a detective who had arrested McFadden as juvenile identified McFadden as possibly being one of the two robbers. R. 36, ll. 16-25.

On August 2, 2007, two days after the second robbery, Hayes was riding in a friend's car that was pulled over. R. 37, ll. 1 - 22. Police searched Hayes and found a Advil bottle containing a small amount of cocaine base. *Id.* Police also found three hundred eighty-five dollars in cash and a key to a motel room at the Mount Vernon Inn in Sumter. *Id.*

Law enforcement then raided the Mount Vernon Inn room. When police forced open the door, four men attempted to run flee the room, including Stacy Rhodes. R. 37, l. 21 - 40, l. 19. All four were arrested. Rhodes told police that Hayes and McFadden had let the others know about the room. Rhodes also informed police that Hayes and McFadden had recently come into

“an excessive amount of money.” *Id.* Police recovered a gun matching the description of the revolver used in the July 31st robbery in the motel room.

The motel room was rented by Hayes. *Id.* A disposable camera was also seized during the search of the motel room. Hayes was not in any of the pictures, but the four men arrested at the motel room - including Rhodes - all told police that he had been with them. *Id.* When interrogated by police, McFadden admitted to committing the robbery with Hayes. Hayes denied any involvement in the robbery, but stated that he was with McFadden on the night of the robbery. *Id.*

To complicate matters, during a meeting between plea counsel and Rhodes, Rhodes saw incriminating photographs of himself and Hayes. R. 19, l. 10 - 22, l. 22. Apparently, plea counsel had inadvertently brought recently received discovery documents from Hayes’s case to his meeting with Rhodes. *Id.*

Rhodes became upset, took the photographs from plea counsel and refused to return them. *Id.* Hayes stated to the court that when Rhodes returned to pre-trial detention he still possessed some of the documents and was showing them to other inmates. *Id.* Plea counsel disputed this and claimed that he believed all of Hayes’ discovery documents were recovered prior to Rhodes being returned to detention. *Id.*

Plea counsel posited that there was no conflict of interest. *Id.* Hayes continued to argue that there was a conflict of interest and noted that he had unsuccessfully contacted the Chief Circuit Public Defender, the Chief County Public Defender, and the “Lawyer Conduct Board” in an effort to have his concerns with plea counsel addressed. R. 28, l. 16 - 39, l. 20.

The court rejected Hayes’s efforts to have plea counsel relieved:

Well, this is not the time. The time to tell me right now is whether you're willing to advise me that you're satisfied with his

representation of these, charges for armed robbery and this charges, and we're talking about the [first robbery] at this time and the charge of the drugs and if you're not, I can tell you this as far as his representation is concerned. ***He's representing you on these charges and he's also representing you on the [second robbery].*** You do not get your choice of public defenders. . . .

So, if you wish to withdraw your plea because you're not happy with Mr. Sullivan on this, don't think that's going to get you a new lawyer, because it's not. You don't have your choice of lawyers when it comes time to try the case. ***I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer.*** Is that, that's your call if you don't want to plead guilty, fine. I'm sure the State is ready to go forward. ***They got the other charges that they are going to call I think shortly and you can go to trial on this charge, this armed robbery, that is the [first] armed robbery, or you can go to trial and go to trial on the drug charges, you can go to trial on both of those and I have not accepted your plea yet and if you are not comfortable pleading guilty to these charges with Mr. Sullivan as your lawyer, now is the time to tell me and he'll stand you aside and Ms. Fant can call the case to trial and it can go before a jury. It's your call, which way you want to go?***

R. 30, l. 16 - 32, l. 14 (*emphasis added*). Hayes responded that, faced with those options, he would “go with the plea.” *Id.* The court reiterated that if Hayes wished to withdraw his plea, plea counsel would remain his lawyer and the trial would begin immediately. R. 32, l. 24 - 33, l. 3.

The court then accepted Hayes’s plea and sentenced him to 25 years for armed robbery, 5 years concurrent for conspiracy and 5 years concurrent for possession. A timely notice of intent to appeal was filed. The appeal, however, was dismissed because, pursuant to Rule 203(d)(1)(B), an explanation was not provided showing that there was an issue to be raised in the direct appeal of the guilty plea.

Discussion

Appellant raised defense counsel's conflict of interest with the plea court prior to court accepting Appellant's guilty plea. However, the court flatly refused to appoint Appellant a new, conflict free attorney or to delay Appellant's trial. "You don't have your choice of lawyers when it comes time to try the case. I will let you withdraw your plea if you want to go to trial, but Mr. Sullivan's going to be your lawyer." R. 30, l. 16 - 32, l. 14

Once Appellant objected to being represented by defense counsel and established that defense counsel had an active of conflict interest due to his representation of Rhodes, the trial court should have allowed him to withdraw his guilty plea and ordered the appointment of conflict free counsel. The court's failure to do so constitutes reversible error.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527 (1975); accord *Gideon v. Wainwright*, 372 U.S. 335, 339-40, 83 S.Ct. 792 (1963). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657, 664 (1984).

Inherent in the right to counsel is the right to conflict-free counsel. While an indigent defendant is not entitled to counsel of his choice, the state and federal constitutions guarantees of equal protection of the laws means that an indigent defendant is entitled to conflict-free representation. U.S. Const. Amend. XIV; S.C. Const. Art. I, § 3 and § 19.

Our Supreme Court has held that "[a]n actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's" interests. *Duncan v. State*, 281

S.C. 435, 315 S.E.2d 809 (1984) (holding that the interests of other client and defendant are sufficiently adverse if it is shown the attorney owes duty to the defendant to take some action that could be detrimental to his other client); *see also Edgemon v. State*, 318 S.C. 3, 455 S.E.2d 500 (1995) (finding actual conflict of interest where counsel convinced solicitor petitioner's co-defendants were less culpable).

Since courts typically will not proceed with a guilty plea when the defendant makes an objection, almost all of South Carolina's case law addressing when defense counsel's conflict of interest requires reversal arise out post-conviction relief actions. However, the logic sustaining these decisions applies with equal force to direct appeals when a timely objection has been lodged.

For example, in *Thomas v. State*, the Supreme Court held that an actual conflict of interest arose when the solicitor offered to dismiss the charges against one spouse if the other spouse pled guilty to possessing the entire amount of cocaine. 346 S.C. 140, 551 S.E.2d 254 (2001). When that offer was extended, Thomas and her husband were represented by the same attorney.

Unlike Appellant, the spouses had previously waived any conflict of interest arising from their joint representation. However, the Court held that, "at the moment the solicitor made the plea offer, Thomas' and her husband's interests became adverse to one another and counsel should have advised them accordingly." *Id.* at 144, 551 S.E.2d at 265.

Here, Appellant's defense counsel had an active conflict of interest. Stacey Rhodes, who defense counsel also represented, was going to testify for the State against Appellant. R. 37, l. 21 - 40, l. 19. Rhodes' interests were directly adverse to Appellant's interests. The State anticipated that Rhodes was going to testify that Appellant and McFadden had arranged for the motel room where Rhodes was arrested and that both men had "an excessive amount of money" in the days after the robbery. *Id.*

While defense counsel stated that his representation of Rhodes had concluded with Rhodes' guilty plea, the conflict of interest remained. The State made clear that it believed Rhodes may lie on the witness stand. *Id.* Thus, during Appellant's trial, defense counsel might have had to advise Rhodes on his Fifth Amendment right to remain silent and on the consequences of perjury in his capacity as Rhodes' attorney; while then having to cross-examine Rhodes when acting as Appellant's attorney.

Unlike in *Thomas*, far from waiving the conflict of interest, Appellant objected to it and sought relief from the trial court. R. 17, l. 9 - 30, l. 15. A non-indigent defendant could avoid the problem Appellant faced by simply exercising his right to counsel of his choice. *Cf. State v. Sanders*, 341 S.C. 386, 390, 534 S.E.2d 696, 697-698 (2000) (defendant's right to counsel of his choosing is protected by the Sixth Amendment and courts "must balance the defendant's right to his own freely chosen counsel against the need to maintain the highest ethical standards of professional responsibility.").

Instead, by virtue of his indigence, Appellant was faced with a Hobson's choice between immediately proceeding to trial represented by an attorney with an active conflict of interest or pleading guilty while represented by an attorney with an active conflict of interest. *Ex Parte Lexington County*, 314 S.C. 220, 228, 442 S.E.2d 589, 594 (1994) (holding that *ex parte* hearings on expert funding for indigent capital defendants should be closed to the public) (internal citations omitted)(*emphasis added*); *see also Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465 (1985) (holding that a state violates equal protection by creating arbitrary classifications among similarly-situated persons).

Appellant's situation represents a total breakdown of the adversarial system bordering on the absurd. *State v. Boykin*, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996); *see also United States v.*

Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984) (“[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”).*

Even after pleading guilty, Appellant still faced charges arising out of a second burglary. R. 12, l. 14 - 16, l. 6. The State intended to seek life without parole for the second burglary. *Id.* Presumably, had the State tried Appellant for the second burglary, Appellant would have faced the possibility of life imprisonment represented by a defense counsel, who owed a duty to Appellant to take some action that could be detrimental to State’s witness, Stacey Rhodes. *Duncan*, 281 S.C. 435, 315 S.E.2d 809.

Under these circumstances, Appellant’s guilty plea could not have been voluntarily and freely entered into. Accordingly, the trial court committed an abuse of discretion in refusing to allow Appellant to withdraw from the guilty plea. The court should have allowed Appellant to withdraw and have new, conflict-free counsel appointed to represent him.

CONCLUSION

By reason for the foregoing arguments, Appellant Favian Hayes respectfully requests this Court vacate his guilty plea and remand his case for a new trial.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line. The signature is somewhat stylized and loops back to the right.

John H. Strom
Appellate Defender

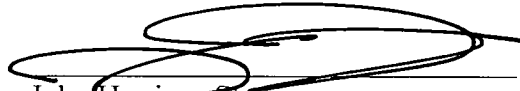
ATTORNEY FOR APPELLANT

This 31st day of May 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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