THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY

Honorable L. Casey Manning, Circuit Court Judge

State of South Carolina.....Respondent,

vs.

Julius Powell,.....Appellant.

INITIAL BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. WHETHER THE LOWER COURT ERRED IN ACCEPTING APPELLANT'S GUILTY PLEA SINCE THE PLEA WAS NOT KNOWINGLY AND VOLUNTARILY ENTERED BY THE APPELLANT

STATEMENT OF THE CASE

During the April 2007 term of the Lexington County Grand Jury, the Appellant was indicted for Burglary, First Degree (2007-GS-32-1126), Kidnapping (2007-GS-32-1127) and Armed Robbery (2007-GS-32-1128). App. p. 215. On May 24, 2007, the Appellant entered a guilty plea to Burglary, Second Degree, Kidnapping and Armed Robbery in front of the Honorable L. Casey Manning. App. p. 1. The Appellant was represented by Lowell Bernstein, Esquire. The Honorable L. Casey Manning sentenced the Appellant to concurrent terms of fifteen (15) years for Burglary, Second Degree, eighteen (18) years for Kidnapping and eighteen (18) years for Armed Robbery. The Appellant did not appeal his plea or sentence.

The Appellant filed an Application for Post Conviction Relief in Lexington County on December 4, 2007. App. p. 37. The State submitted a Return on or about May 1, 2008. App. p. 50. The Appellant, through appointed counsel, submitted an Amendment to Application for Post Conviction Relief on January 20, 2010. App. pp. 47-8. By way of this Amendment, the Appellant added the following specific allegations to his original allegation of "ineffective assistance of counsel" and "guilty pleas were not knowing, voluntary and intelligent" and specifically requested a belated direct appeal:

1. Ineffective assistance of trial counsel and involuntary guilty plea, specifically but not limited to the following grounds:

    a. Failure to properly prepare and investigate the case.

        i. Counsel failed to thoroughly review the discovery with the Applicant prior to his plea.

        ii. Counsel failed to meet with the Applicant and properly prepare for trial and/or plea.

        iii. Counsel failed to conduct an independent investigation or speak with any witnesses.

iv. Counsel failed to utilize the investigative work conducted by Lee Connelly and obtain additional funding for her to complete her investigation.

v. Counsel failed to look into the Applicant's alibi defense or speak with his alibi witness.

vi. After informing the Applicant that his co-defendant's would testify against him, counsel failed to prepare for potential impeachment of the Applicant's co-defendants

b. Failure to provide effective assistance of counsel during the plea phase.

i. Counsel advised the Applicant that he could plead no contest but the plea was a straight up guilty plea.

ii. Counsel did not properly prepare himself or the Applicant for mitigation.

2. The Applicant is also alleging that counsel failed to file a direct appeal as was requested by the Applicant. Therefore, the Applicant is requesting a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

An evidentiary hearing into the matter was held on February 5, 2010 at the Lexington County Courthouse in front of the Honorable R. Lawton McIntosh. App. p. 55. The Appellant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The Respondent was represented by A. West Lee, Assistant Attorney General.

At the beginning of the hearing, PCR counsel called Lee T. Connelly, Private Investigator, to the stand. The Appellant testified on his own behalf and PCR counsel admitted eleven exhibits. Lowell Bernstein, Esquire, also testified during the evidentiary hearing. The PCR court also had before it a copy of the Application, the Respondent's Return, the Appellant's Amendment, the records of the Lexington County Clerk of Court concerning the subject conviction, and the Petitioner's records from the South Carolina Department of Corrections.

At the conclusion of the evidentiary hearing, the Honorable R. Lawton McIntosh requested that PCR counsel submit a proposed Order Denying Post Conviction Relief and

Granting White v. State Appeal. On March 3, 2010, the Honorable R. Lawton McIntosh signed the Order, which was filed on March 5, 2010. The Appellant, through appointed counsel, filed a timely Notice of Appeal, and the Petitioner's appeal was transferred to the Office of Appellate Defense. On or about July 20, 2010, Robert M. Pachak, Appellate Defender, submit an Initial Anders Brief of Appellant Pursuant to White v. State, a Petition for Writ of Certiorari, and an Appendix.

On October 14, 2010, undersigned counsel submitted a Motion for Substitution of Counsel, Substitution of Brief of Appellant, and Substitution of Petition for Writ of Certiorari. On October 28, 2010, this Court issued an Order granting the Appellant's Motion for Substitution, from which this Brief follows.

ARGUMENT

I. The Lower Court Erred in Accepting the Appellant's Guilty Plea Since the Plea Was Not Knowingly and Voluntarily Entered by the Appellant.

The Appellant submits that that lower court erred in accepting his guilty plea since it was not knowingly and voluntarily entered. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. See Id.

In order for a defendant to knowingly and voluntarily plead guilty, he must have a full understanding of the consequences of the plea. Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991) (citing State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980)). To ensure the defendant understands the consequences of his guilty plea, the trial judge usually questions the defendant about the facts surrounding the crime and punishment that could be imposed. Dover, 304 S.C. at 434-435, 405 S.E.2d at 392. Although the trial court is not required to direct defendant's attention to each right and obtain a separate waiver, the record should indicate the defendant was fully aware of the consequences of the guilty plea. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); See, e.g., Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (Finding guilty plea not involuntary where the colloquy demonstrated the trial judge asked

defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge.).

Here, the Appellant submits that the record from his plea clearly establishes that his plea was not voluntarily and knowingly entered into. From the very start of the lower court's questions, the Appellant provided a basis for the court to determine that his plea should not be accepted. When asked if he had been treated for drugs and alcohol, the Appellant explained that he had been treated for alcohol six months prior to incident at issue. App. p. 5-6. In response, the court asked if he successfully completed the program, to which the Appellant responded as follows: "Yes, I did. And I was – my wife and I we was making arrangements for me to go back and I relapse ---." App. p. 6, lines 9-11. Without receiving a complete response from the Appellant, the court continued on with his questioning. App. p. 6.

When plea counsel was given an opportunity to address the court, he explained that the Appellant did not agree with the facts that were presented by the State. App. pp. 29-30. During plea counsel's presentation, the court interpreted with the following comment:

> You know, I'm not saying that everything he's totally responsible for. That's why you considering pleading Alford or nolo or something like that but basically that's why the word substantial was used in these situations, it's substantial.

App. p. 30, lines 3-7. Based upon the court's and plea counsel's statements, it is clear that the Appellant was not in agreement with the facts put forth by the State and had even requested to enter a plea that would not require an admission of guilt.

At the conclusion of the hearing, the Appellant acknowledged that he understood that his co-defendant had implicated him, but he explained that he wanted a trial. App. p. 32, lines 16-21. He further explained that he considered the high conviction rate in Lexington County and felt it was best to plead guilty. App. p. 32, lines 20-23.

Upon review of the record of the Appellant's plea, it is clear that the Appellant admitted that he had an alcohol problem, but the lower court did not fully explore the issue with the Appellant. Furthermore, it is clear from the record that the court was aware that the Appellant wanted to enter an Alford or nolo plea, but the court chose to accept the Appellant's guilty plea and ignore the clear signs that the Appellant was not knowingly and voluntarily admitting guilt. Therefore, the Appellant urges this Court to set aside his guilty plea and allow him to follow his intention, which was conveyed to the lower court, and proceed to trial.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that his plea and convictions be vacated and he be granted a new trial.

Respectfully submitted,

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February 21, 2011