

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable Paul M. Burch, Circuit Court Judge

DAVID ANTONIO KUCINSKI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000891

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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Trial counsel erred in failing to move for the withdrawal of petitioner’s guilty pleas based on his actual innocence claim, which was the remedy upheld on a similar claim in Rolen v. State,¹ because petitioner pled guilty despite his innocence after having been being coerced to do so in response to various threats made against him and his family.3

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¹ 384 S.C. 409, 683 S.E.2d 471 (2009).

ISSUE PRESENTED

Trial counsel erred in failing to move for the withdrawal of petitioner's guilty pleas based on his actual innocence claim, which was the remedy upheld on a similar claim in Rolen v. State,² because petitioner pled guilty despite his innocence after having been being coerced to do so in response to various threats made against him and his family.

² 384 S.C. 409, 683 S.E.2d 471 (2009).

STATEMENT

Petitioner David Antonio Kucinski entered an Alford³ pleas to murder, armed robbery, and possession of a weapon during the commission of a violent crime at the August 2017 term of the Lancaster County General Sessions Court before Judge Daniel D. Hall. Petitioner was sentenced to imprisonment for an aggregate thirty-year term. App. 1-32. Mark Grier represented petitioner at the plea proceeding, and Assistant Solicitor Lisa Collins appeared on behalf of the state. Petitioner appealed, but the Court of Appeals dismissed the appeal on December 28, 2017.

On May 8, 2018, petitioner filed a PCR application with the Lancaster County Office of the Clerk of Court. App. 34-42. The respondent filed a return dated November 29, 2018, requesting that a hearing be held in the case. App. 43-51. A hearing was convened on January 23, 2019, at the Lancaster County Courthouse before Judge Paul M. Burch. Petitioner was present at the hearing and represented by Donae Minor, and Assistant Attorney General Samuel Key appeared on behalf of the state. App. 53-80.

On May 13, 2019, Judge Burch issued an Order of Dismissal therein denying petitioner's allegations of ineffective assistance of counsel in the case. App. 82-91. Petitioner appealed. This petition follows.

³ North Carolina v. Alford, 400 U.S. 25 (1970).

ARGUMENT

Trial counsel erred in failing to move for the withdrawal of petitioner's pleas based on his actual innocence claim, which was the remedy upheld on a similar claim in Rolon v. State,¹ because petitioner pled guilty despite his innocence after having been being coerced to do so in response to various threats made against him and his family.

The facts of the case were presented to the trial judge at the guilty plea proceeding. Apparently, this case involved a drug deal that went sour. Petitioner and co-defendants Nachon Hayden, Chris Glass, and Tony Maynard met up with Randy Tran, and during their transaction. Randy Tran was fatally shot. The state alleged that petitioner shot Tran and confiscated the marijuana. According to the state's case, Chris Glass and Tony Maynard stayed in the vehicle during the transaction, and Hayden was outside the vehicle with petitioner when petitioner allegedly shot Tran and fled. App. 12, l. 12 – p. 17, l. 24.

During the PCR hearing, petitioner testified in effect that counsel erred in failing to schedule a post-trial motion within ten days after his plea per his request in order for him to withdraw his guilty pleas. Petitioner stated that he was threatened by the real perpetrators and that his family members, (including his wife), were also threatened by them. Petitioner added that he was innocent, but pled guilty because of the threats. He claimed that he was forced to plead guilty as charged. Petitioner testified that he asked counsel about the withdrawal motion and stated that counsel knew all about the threats against him and his family. App. 56, l.11-15; App. 57, l.3-p. 25, l.25.

Trial counsel testified at the hearing and explained that petitioner wrote a letter to him about withdrawing the pleas. Counsel admitted that petitioner had told him about the threats. App. 70, l.20-p. 72, l.8; App. 73, lines 10-11; App. 76, l.24-p. 77, l.1.

The PCR judge ruled that petitioner waived the innocence allegation via his pleas in the case. App. 87-88.

There was unequivocal proof in the record via counsel's PCR admission and petitioner's PCR testimony that petitioner was innocent, but pled guilty after being threatened by other individuals involved with and/or connected to the drug enterprise. Petitioner stated that he was innocent with respect to the charges and wanted to withdraw his pleas.

A trial court can reject a guilty plea if the defendant protests his innocence. State v. Paris, 354 S.C. 1, 578 S.E.2d 751 (2003). The withdrawal of a guilty plea is not absolutely precluded or conditional upon whether the plea has already been accepted by the trial judge, but rather the withdrawal of a guilty plea rests within the sound discretion of the trial judge. State v. Riddle, 278 S.C. 148, 292 S.E.2d 793 (1982); State v. Lee, 274 S.C. 372, 264S.E.2d 418 (1980). The permission of the withdrawal of a guilty must be given if the defendant has credibly asserted his legal innocence. United State v. Sparks, 67 F.3d 1145 (4th Cir. 1995). Here, petitioner credibly asserted his innocence. A plea received despite a defendant's protests of innocence cannot be considered voluntarily given. See Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009), where counsel was found ineffective in failing to move to withdraw appellant's guilty plea where the plea was accepted despite "appellant's protestation of his innocence." Likewise, petitioner's guilty pleas were involuntarily given because he too claimed his innocence on the charges. In addition, 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).

Counsel erred in failing to move for the withdrawal of petitioner's guilty pleas at the plea proceeding or in a post-trial motion after the plea proceeding on the ground that petitioner

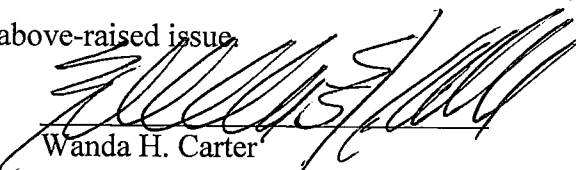
declared his innocence. Petitioner had a right to have the withdrawal matter raised in the form of a post-trial motion under Rule 29 SCRCrimP that would have allowed an airing for such a request. Rule 29, SCRCrimP follows:

Except for motions for new trials on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence. In cases involving appeals from convictions in magistrate's or municipal court, post-trial motions shall be made within ten (10) days after receipt of written notice of entry of the order of judgement disposing of the appeal. The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial or hearing was held. The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument.

Counsel's failure to move for the withdrawal of petitioner's pleas due to actual innocence and based on coercion via threats constituted deficient legal representation in violation of the Sixth Amendment; and but for the omission, a reasonable probability exists that petitioner would have had a different outcome in the case. See Hill v. Lockhart, 474 U.S. 52 (1985).

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition and allow full briefing on the above-raised issue.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of January, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Lancaster County

Honorable Paul M. Burch, Circuit Court Judge

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DAVID ANTONIO KUCINSKI,

PETITIONER

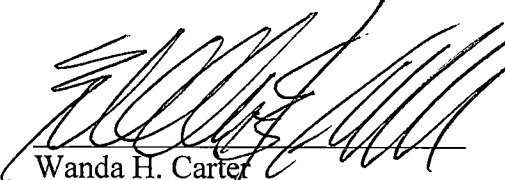
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

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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 Samuel Key, 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 David Antonio Kucinski, #373636, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of January, 2020.


Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 6th day of January, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.