

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Post-Conviction Relief

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2017-002180

RECEIVED
MAR 31 2020
SC Court of Appeals

Demario Cunningham #296848,..... Appellant,

vs.

State of South Carolina,Respondent.

PETITION FOR REHEARING

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STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. The Applicant was indicted at the May 2015 term of the York County Grand Jury for trafficking cocaine (2015-GS-46-1542) and Possession of a weapon during the commission of a violent crime (2015-GS-46-1542A). Applicant was represented by Mindy Lipinski, Esq. On January 12, 2016, Applicant pled guilty as indicted. Pursuant to a recommendation, The Honorable John C. Hayes, III, sentenced Applicant to imprisonment for eight (8) years for trafficking cocaine and five (5) years for Possession of a weapon during the commission of a Violent Crime.

The conviction was not appealed.

STATEMENT OF THE FACTS

This matter came before the Court pursuant to an Application for Post- Conviction Relief filed on June 23, 2016. The State filed their Return dated November 9, 2016. An evidentiary hearing was convened on April 18, 2017. The Court issued it's order of dismissal on June 27, 2017. This Order was filed on July 3, 2017 and received by counsel for Petitioner on July 10, 2017. A Notice of Motion and Motion to Alter or Amend the Judgement was filed on July 19, 2017. An Order Denying Plaintiff's Motion to Alter or Amend the Judgment was filed on September 18, 2017.

A timely Notice of Intent to Appeal was filed on October 23, 2017. A Petition for Writ of Certiorari and Appendix was filed on March 28, 2018. A Return to Petition for Writ of Certiorari was filed on July 23, 2018. On March 24, 2020 an Order denying Certiorari was filed.

The Applicant testified that he was represented by Ms. Mindy Lipinski. That he was initially offered a plea offer of seven (7) years trafficking, first offense and five (5) years for possession of a weapon. The Applicant, however, testified that he always wanted to take this case to trial and that he turned down the original plea offer. (App. p. 137, line 1-17)

The Applicant testified that he did not know why he was placed under arrest and that law enforcement officers took him to his Mother's home and searched the house where they eventually found drugs. (App. p. 139, line 10-22) He testified that he had concern about the chain of custody of the drugs. That the description of the drugs changed. The arrest warrant indicated one bag of drugs, but SLED's report showed that there were two bags. The Applicant testified that he brought this to the attention of his Defense Attorney, but there was not a pre-trial motion made to suppress. The Applicant stated that this issue was presented at sentencing as a minor clerical issue. (App. p. 118, lines 1-25) but that he believed that this compromised the chain of custody of this evidence. In addition, he went on his own to discuss this matter with the South Carolina Law Enforcement Division. (App. p. 140, line 10-25, p. 141, lines 1-25, p. 142, lines 1-22)

Applicant also testified that he had issues with the search warrant, because it was based on a prior drug charge that was dismissed prior to his plea. He felt that the charges that he pled to were based on the search warrant on this Distribution charge that was dismissed.

The Applicant also was concerned about counsel's inability to view the buy video, from the distribution charge. That eventually lead to his arrest. The Solicitors office refused Counsel's request because of the fact that the charges had been dismissed. (App. p. 145, lines 2-25, p. 146, lines 1-16)

The Applicant testified that the State contended that he had given three (3) oral statements. Two in the home and one at the booking office. None of the statements were recorded, nor was there a written statement.

The Applicant testified that his guilty plea was not freely and voluntarily given, nor was it knowingly and intelligently entered into. (App. p. 146, lines 17-21) That the Applicant was in special education classes while he attended public school and he had mental health issues. In fact, he had been evaluated regarding competency to stand trial (App. p. 6, lines 16-24). The Court did however, find him competent for trial. (App. p. 11, lines 6-9)

The Applicant also testified regarding other pre-trial issues. One being that there were no African Americans in the Jury Pool. That argument was made that this was a violation of the 14th Amendment and that it gave the appearance of impropriety. (App. p. 16, lines 15-20) And this motion was eventually denied by the Court. (App. p. 20)

ARGUMENT

Pursuant to Rule 221, SCACR, Petitioner respectfully petitions this Court for rehearing and for rehearing *en banc*. In doing so, Petitioner would respectfully request that the panel and entire Court review the Petition for Writ of Certiorari and the entirety of the arguments contained therein. Petitioner would further request that the panel and the entire Court review the record contained in the previously filed Appendices.

By way of the Petition, the following arguments were raised:


- 1. Did the Lower Court err in not granting Post Conviction Relief on the basis that the State refused to provide Rule 5 and Brady Motion evidence of a dismissed charge?**
- 2. Did the Lower court err in not granting Post-conviction Relief on the failure of Counsel to object to the change or manipulation of drug evidence?**

3. Did the Lower Court err in not granting the Appellant a belated Appeal pursuant to White v. State?

Petitioner would respectfully draw the Court's attention to the arguments as set forth in Petitioner's Petition for Writ of Certiorari. The Petitioner would further request that this Court allow these issues to be further addressed by granting Certiorari.

CONCLUSION

In consideration of the arguments contained in the Petition and the above stated points of emphasis, Petitioner respectfully requests that the Court conduct a full review of the previously submitted Petition for Writ of Certiorari and Appendix. Petitioner would further urge this Court to reverse the Order filed on March 24, 2020 and allow Petitioner to brief the arguments.


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March 31, 2020

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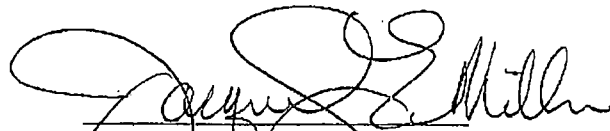
vs.

State of South Carolina,Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant,
hereby certify that I emailed a copy of the Petition for Rehearing, to the Attorney General's
Office, at:

Megan Harrigan Jameson, Esq.
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March 31, 2020

Jackie Miller

From: Jackie Miller
Sent: Tuesday, March 31, 2020 3:31 PM
To: Megan Jameson
Subject: FW: Cunningham v. State
Attachments: petitionforrehearing.pdf

Hey Megan:

We are filing this today (by fax).

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