ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 25 2020
S.C. SUPREME COURT

March 25, 2020

The Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Maunwell Ervin v. State of South Carolina
Case No. 2017-24-CP-0754

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

Sincerely,

Brianna L. Schill for BLS
Assistant Attorney General

cc: C. Rauch Wise, Esquire
South Carolina Department of Corrections
The Honorable Chastity Copeland, Clerk of Court, Greenwood County
The Honorable David M. Stumbo, Solicitor, 8th Judicial Circuit
The Honorable J. Mark Hayes, II, Presiding Judge
Victim Advocacy Division

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

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Case No. 2017-CP-24-0754

Maunwell Ervin, ...Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable J. Mark Hayes, II's order granting post-conviction relief, filed September 13, 2018. The State filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which was denied by an Order dated February 14, 2020, and served upon the State on March 3, 2020. Copies of the orders on appeal are attached to this notice.

Respectfully submitted,

ALAN WILSON
Attorney General

BRIANNA L. SCHILL
Assistant Attorney General
S.C. Bar No.: 103380
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

By: s/ Brianna L. Schill
Attorneys for the Petitioner

March 25, 2020

Other Counsel of Record
C. Rauch Wise, Esquire
Law Office of C. Rauch Wise
305 Main Street
Greenwood, SC 29646

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PROOF OF SERVICE

I, Kaitlyn Slice, certify that I have today served the within notice of appeal upon Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

C. Rauch Wise
Law Office of C. Rauch Wise
305 Main Street
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served this 25th day of March, 2020.

KAITLYN S. SLICE
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Legal Assistant

STATE OF SOUTH CAROLINA	)	IN THE COURT O F COMMON PLEAS
COUNTY OF GREENWOOD	)	
Mauwell J. Ervin, Jr. № 3566337	)	
Applicant.	)	2017-CP-24-00754
-vs-	)	Order
State of South Carolina	)	

Mauwell J. Ervin filed this Post Conviction Relief Action on June 27, 2017. The petition is from a guilty plea he entered on April 11, 2016 to a charge of trafficking cocaine base. He was sentenced to 7 years imprisonment to run concurrently with the charges for which he had been previously convicted. This charge arose out of the same facts of the case for which Mr. Ervin filed a Post Conviction Relief petition in action 2015-CP-24-01268. These cases were originally tried in January of 2013. In that trial Mr. Ervin was acquitted of the charge of possession of a firearm while engaged in a drug trafficking offense. The jury was unable to reach a verdict on all other charges, including the charge of trafficking in cocaine base. He was tried again in July of 2013 which resulted in Mr. Ervin being convicted of possession of marijuana with intent to distribute, possession of marijuana with intent to distribute within proximity of a school and possession of Benzylpiperazine. The trafficking charge was not resolved due to the fact that, for the second time, the jury was unable to reach a verdict on that charge. The State has moved to dismiss based upon the fact that the application for Post Conviction Relief was filed more than one year after his guilty plea and sentence.

Statute of Limitations

S. C. Code § 17-27-45 requires that the Post Conviction Relief petition be filed "within one year after entry of a judgment of conviction or within one year after sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." As no appeal was taken in this case, the statute of limitation began to run on the date he entered his guilty plea. The code section has an exception. It provides "(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

Mr. Ervin contends that he filed his petition within one years of the time he learned of the material facts that would afford him a valid Post Conviction Relief action. An analysis of the other pending Post Conviction Relief action is necessary to fully understand the issues in this case. Mr. Ervin was originally indicted for the charges of possession of a firearm while engaged in a drug trafficking offense, possession with intent to distribute marijuana, possession with intent to distribute marijuana within proximity of a school, trafficking crack cocaine, trafficking crack cocaine within proximity of a school and possession of Benzylpiperazine.

The first trial was held in January of 2013. At that trial Mr. Ervin was found not guilty of possession of a firearm while engaged in a drug trafficking offense. The jury was unable to reach a verdict on the remaining charges. A second trial was held in July of the same year. This trial resulted in Mr. Ervin being convicted of possession of marijuana with intent to distribute, possession of marijuana with intent to distribute within proximity of a school, and possession of Benzylpiperazine. The jury was again unable to reach a verdict on the trafficking crack cocaine and proximity charges. Mr. Ervin took an appeal from these convictions, which

were affirmed on November 26, 2014. The remittitur was sent on December 12, 2014. On November 30, 2015, Mr. Ervin filed his first Post Conviction Relief Petition on those charges by depositing it in the mail of the South Carolina Department of Correction. At the time of his plea in this matter, his first Post Conviction Relief Petition had been pending for over four months. He had also filed a Motion to have his counsel relieved which was admitted as an exhibit in this hearing. His plea counsel, who was also his trial counsel at the 2013 trials, acknowledged that she had received the Motion to have her relieved as counsel. She further confirmed that the State was also aware that Mr. Ervin had filed an ineffective assistance of counsel claim against her and a Motion to have her relieved. Notwithstanding these facts, the plea judge was never informed of this conflict and there was no attempt to obtain a waiver from Mr. Ervin. Simply put, from the testimony no one made the plea judge aware of this obvious conflict.

Our Supreme Court has said, "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants." *State v. Gregory*, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). In that case, trial counsel representing Mr. Gregory was also representing the assistant solicitor prosecuting the case in his divorce action. The Court said, "In this case, we find Gregory's attorney had an actual conflict because he placed himself in a 'situation inherently conducive to divided loyalties' by simultaneously representing Gregory and the assistant solicitor who was handling his criminal case. Given the actual conflict, Gregory is not required to demonstrate prejudice." *Id.* at 154, 612 S.E.2d at 451. In this case, there was divided loyalty. Mr. Ervin had filed an action saying his lawyer was not competent in his prior representation. He was seeking a new trial in that action. He further had filed a Motion requesting his plea counsel be dismissed. This Motion had not been heard. By not

raising any defense and entering the plea, the lawyer virtually mooted his first PCR as very little time would be reduced if he were successful in the first PCR.

The due process clause of Article I, §12 of the Constitution of the State South Carolina and the Fourteenth Amendment to the Constitution of the United States of American should afford relief to Mr. Ervin either independently or in interpreting the South Carolina Post Conviction Relief Statute. The due process issue arose in a unique way in *Steele v. Kehoe*, 724 So. 2d 1192 (Fla. Dist. Ct. App. 1998), approved, 747 So. 2d 931 (Fla. 1999). Mr. Steele sued his attorney in a civil suit for malpractice for failing to file a timely post conviction relief action. His civil suit was dismissed below. In affirming the dismissal of the suit, the Court granted Mr. Steele the right to file an action for post conviction relief. As the Court said, "If a defendant can prove that he was improperly convicted, he should be set free. If he is denied the opportunity to offer such proof because of the malpractice of his lawyer, fundamental due process requires that he have a remedy that will address his future incarceration and not merely compensate him for improperly staying in prison." *Id.* at 1193-1194. The same principle applies here. Mr. Ervin was not aware of a valid defense because of the conflict of his lawyer and because she did not advise him of the defense even though she was aware of the defense. The conflict in this case is such that no reasonable judge would have taken a plea in this case had the judge known all the facts. The fault or failure to inform the judge lies with defense counsel and the State. By not raising this defense and entering the plea, the lawyer virtually mooted Mr. Ervin's first PCR, as very little time would be reduced if he were successful in the first PCR.

The other part of the code section requires that it be information that the applicant could not have learned by the exercise of reasonable diligence. The failure of a non-lawyer to know of a valid legal defense, especially an inmate in the Department of Corrections, is not one of the

things that he can be expected to learn through reasonable diligence. In fact, his plea counsel, who had been informed of the defense, did not raise it. Mr. Ervin could not be held to a higher standard. In *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2012) the South Carolina Supreme Court held that a successive PCR should not summarily be dismissed as the applicant showed a valid reason as to why he filed his second petition about four years after his conviction. In that case, he filed based upon his discovery, some four years later, that one of the jurors on his case had a cousin who was married to the Seventh Circuit Solicitor. He learned this from reading the transcript of the trial of a fellow inmate that had occurred shortly after his trial. The relationship came up during the jury selection of the fellow inmate. Learning of a valid defense to a charge is at least equal to learning of a relationship between a cousin of the juror and the solicitor.

South Carolina has recognized that a structural error requires reversal even without prejudice. *State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) ("Essentially, an error is structural if it is the type of error which transcends the criminal process.")(citations omitted). In this case, the conflict plea counsel had with her client is the equivalent of a structural error. Because of the obvious conflict, Mr. Ervin had the equivalent of no objective counsel to advise him of the valid defense. Failure to provide counsel is a structural error. *Johnson v. United States*, 520 U.S. 461, 468, (1997). S. C. Code § 17-27-20 (4) provides as a ground for granting a Post Conviction Relief Petition that is not timely filed "That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." When such a basic structural error occurs in a trial or plea, the interest of justice should, and does, require that the issue be addressed. The facts of this case also come under this provision.

The State was fully aware that Mr. Ervin had a clear conflict with his plea counsel. The State took no action to obtain a waiver of this conflict or to bring it to the attention of the plea judge. Mr. Ervin had filed a "Motion for Relief of Counsel" on April 30, 2015, a couple of weeks short of a full year before his plea. No action had been taken on that motion at the time of the plea. Common sense and fairness would dictate that a lawyer who has an active PCR petition pending against them by their client should not be representing the client unless a waiver is obtained on the record. This was not done in this case. Mr. Ervin has the right to have as his counsel an attorney who is free from a conflict with him. That did not happen in this case. These facts are certainly one of those fact situations where a sentence should be set aside "in the interest of justice."

As noted previously, S. C. Code § 17-27-45 (C) requires that a Post Conviction Relief Petition be filed within one year of the applicant learning of the facts that would entitled him to post conviction relief. In this case the fact that Mr. Ervin did not learn of the double jeopardy defense until May 26, 2017. At that point Mr. Ervin knew his lawyer did not raise a very meritorious defense of which she had knowledge. This PCR was filed about a month after he acquired this knowledge. In addition, the PCR application is timely filed because the due process clause would require that a plea entered by an attorney with an obvious conflict cannot be permitted to stand. The Court finds that the PCR in this case was timely filed.

The Double Jeopardy Defense

In this case, under the rule established in *Yeager v. United States*, 557 U.S. 110 (2009), Mr. Ervin has a complete defense to the drug trafficking charge. His plea counsel at the hearing acknowledged that she had received an email from Charles Grose, a lawyer in Greenwood who had followed the case. This email was sent after her mistrial informing her that she had a

substantial argument under the double jeopardy rule established in *Yeager*. She admitted receiving the email. She did not file a motion to dismiss on double jeopardy grounds prior to her client entering a plea. She did not discuss this issue with Mr. Ervin.

In *Yeager*, the defendant went to trial on several counts as did Mr. Ervin in this case. The jury acquitted Mr. Yeager on one count and was unable to reach a verdict on the remaining counts, just as happened in the January trial of Mr. Ervin. The Supreme Court stated the issue as follows: "The question presented in this case is whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. We hold that it does not." *Id.* at 112. Under the *Yeager* analysis, the charges upon which the jury was unable to reach a verdict are treated as "nonevents." As a nonevent, the counts upon which the jury hung are of no consideration in determining the issue preclusion aspect of the Double Jeopardy clause. As the Supreme Court said "To ascribe meaning to a hung jury count would presume an ability to identify which factor was at play in the jury room. But that is not is not reasoned analysis; it is guesswork." *Id.* at 2368.

In this case, the jury acquitted on the charge of possession of a firearm while engaged in a drug trafficking offense. The firearm, just as were the drugs, was found in the house rented by Mr. Ervin. One of the elements involved in the firearms charge was that Mr. Ervin possessed the crack cocaine which was of sufficient amount to make him guilty of trafficking in crack cocaine. As the jury by its verdict found Mr. Ervin not guilty of the firearm charge, that would include being found not guilty of the trafficking in crack cocaine. Thus, the State is precluded from trying Mr. Ervin again for the trafficking charge and related proximity charge. The

possession of marijuana with intent to distribute and the proximity charge were not elements of the firearm charge and therefore are not impacted by the acquittal of the firearm charge.

A simpler way of looking at this analysis is to imagine a trial in which the State elected to try a defendant on the sole count of possession of a firearm while engaged in a drug trafficking offense. If the jury acquits the defendant in that case, the issue preclusion aspect of the Double Jeopardy clause would prevent the State from then conducting a second trial on the drug trafficking charge. Treating the hung counts as a nonevent, as the Supreme Court requires, the analysis is the same regardless of whether the firearm count is tried by itself or as part of the a multiple count charge.

Had counsel raised the Double Jeopardy issue at trial in a motion to dismiss, the trial court would have been required to grant the motion and dismiss the charges. Because of this analysis, trial counsel was ineffective in failing to raise the double jeopardy issue and Mr. Ervin was prejudiced.

REMEDY

Mr. Ervin is entitled to a new trial. This Court, however, has found that trial counsel was ineffective in failing raise the double jeopardy defense established in *Yeager*. Mr. Ervin was prejudiced because no reasonable judge could have denied the motion under the facts of this case. As the defense not raised is meritorious as a matter of law, no purpose is served by simply granting a new trial. The drug trafficking charges against Mr. Yeager should be dismissed.

THEREFORE, it is hereby Ordered, Adjudged and Decreed that the drug trafficking charges against Mauwell J. Ervin, Jr. are hereby dismissed as a violation of the Double Jeopardy

clause of the Fifth Amendment to the Constitution of the United Sates of American and Article I, § 12 of the Constitution of the State of South Carolina.

IT IS SO ORDERED

August July 27, 2018

J. Mark Hayes, II
Presiding Judge
8th Judicial Circuit

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT O F COMMON PLEAS
COUNTY OF GREENWOOD	)	
Mauwell J. Ervin, Jr. № 3566337	)	
	)	
Applicant.	)	2017-CP-24-00754
	)	
-vs-	)	Order
	)	
State of South Carolina	)	

The State of South Carolina filed a Rule 59 Motion requesting this Court to alter or amend the previous order issued in this matter. A hearing was held on Ocotber 1, 2019. The Court reviewed the motion filed by the State and listened to argument of both counsel.

This Court notes that in regards to the order issued in this matter, the case of *Yeager v. United States,* 557 U.S. 110 (2009) has, once again, been reviewed. This Court declines to alter its prior order. The analysis offered by the State in its motions for when a defendant has been acquitted of one charge but the jury fails to reach a verdict on another charge that shares the same elements as the one acquitted appears to be the same analysis offered by the government in *Yeager.* This analysis was rejected by the Supreme Court in *Yeager.* Calling the offense something other than possession of a weapon during the commission of a violent crime does not alter the analysis.

The Court respectfully declines to modify the previous order in respect to the issues raised in the Rule 59 Motion.

IT IS SO ORDERED

~~December __, 2019~~
February 14, 2020

J. Mark Hayes, II
Presiding Judge
8th Judicial Circuit