

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Apr 23 2020
SC Court of Appeals

ERICK HERNANDEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001142

Appeal from Horry County

Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 2020-UP-101

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for petitioner would petition for rehearing per this Court's holding in this appeal that no actual conflict of interest existed in connection with petitioner's ineffective assistance of counsel claim because this Court might have overlooked the fact that the plea judge apparently found the existence of an actual conflict and granted both conflict of counsel motions presented by petitioner and petitioner's trial counsel. In support of this petition, the undersigned counsel would submit the following points.

Petitioner was indicted on trafficking in cocaine charges. Also, one Viamazar was also indicted on the same drug charges because both petitioner and Viamazar were both accused of

being players a coordinated drug conspiracy along with alleged players Vargas and Diaz as well. Counsel stated he represented both petitioner and Viamazar and that both of them had drug charges pending at the same time. They were in effect co-defendants. App. 3, 1.10-p. 5, l. 16; App. 19, 1.22-p. 20, l.4. App. 74, lines 1-2. Note that Viamazar was arrested at the location where petitioner previously resided. Both petitioner and trial counsel filed conflict motions, after which time the plea judge ruled there was a conflict and granted the conflict motion and petition to relieve trial counsel. App. 9, 1.10-p.10, l.20.

Contrary to this Court's holding, there was an actual conflict that existed in this case. Here, a confidential informant wired by DEA and the Horry County Police Department had cocaine delivered to him (informant) by a co-defendant named Vargas, who received the drugs from petitioner. Herman Diaz, who was the "top tier of this drug conspiracy," had already been indicted and sentenced in the case. App. 28, l. 25 – p. 30, l. 21. Note that both co-defendants Vargas and Diaz agreed to testify against petitioner in the event petitioner opted for a trial by jury in his case. App. 30, l. 16 - p. 31, l. 8. Therefore, the inference was that Viamazar, who was represented by petitioner's counsel also, would most likely have testified against petitioner as well if a trial had been held on petitioner's behalf. Since counsel represented petitioner and Viamazar, then the conflict of counsel that existed in the case became clearly obvious. Compare Thomas v. State, *supra*, where a husband and wife were represented by the same attorney on drug charges after the state's offer was that the charges against one spouse would be dismissed if the other spouse pled guilty to all of the charges. The Thomas Court held that a conflict was evident in counsel's dual representation of the married couple. Compare also Edgemon v. State, *supra*, where counsel advised Edgemon's codefendant to plead guilty and testify against Edgemon prior to Edgemon's plea. The Court found that there was a conflict of

interest with counsel's representation of the codefendant. In the instant case, note counsel's silence when asked about the details of his representation of Viazamar, whose charges were pending simultaneously while petitioner's charges were pending in the same case. App. 69, l. 24 – p. 70, l. 12. Finally, note that petitioner refused to sign a written waiver of the conflict of counsel claim and was sentenced to six months imprisonment for contempt of court due to said refusal to do so. App. 68, l. 12 – p. 69, l. 12. The charges were inextricably linked for both defendants, which established that the conflict adversely affected trial counsel's representation of petitioner.

The plea judge responded to the conflict issue by stating that "I've determined...that there is a conflict," and that "[I am] "appointing a public defender" on the same date (of the plea proceeded) and that he would set the trial date for 60 days later. The motion to relieve counsel was granted. App. 9, l. 10- p.10, l. 20. The solicitor's response was that the state's "theory in the case [was that it was] a conspiracy to traffic" case and that the plea offer expired on the date of the plea proceeding. App. 8, lines 16-20; App. 12, l. 24-25. Note the court's address to petitioner regarding the matter of the conspiracy.¹

Counsel recalled that the solicitor stated that the charge on which petitioner was pleading to had "no involvement with Viamazar," but counsel testified that this case was "a trafficking scheme" case and hence a conflict existed. App. 71, lines 13 -24. Counsel's comment follows:

The only two references I have regarding Karen Viamazar was one, she was left a copy of a search warrant, a return of a search warrant, which meant that she had to be at the house where the

¹ Defense counsel: Trafficking contains an element of conspiracy. Court: The law with regards to one who is charged with trafficking also contains the element of conspiracy but he is charged under the trafficking statute based on the alleged conspiracy...the jury [will] determine whether or not he conspired with somebody else. App. 16, line 21; App. 17, l. 1 – 6.

search warrant was executed...so if there's a contact....there's a connection there....App. 72, lines 5 -10.

Petitioner testified during the PCR hearing and explained in effect that counsel's dual representation posed a conflict because counsel represented him and Viamazar, who was his "co-defendant." App. 82 l. 8 – p. 83, l. 15. Petitioner stated Viamazar was arrested at the location where he had stopped living when the search warrant was executed. App. 84, lines 2-20. Petitioner stated that he waived the conflict claim because he thought he could get "45 years" in the case. App. 86, l. 1-10. Petitioner stated that "[he] didn't want to [plead guilty], but [he] kind of felt forced to because who wants to get a sentence of 45 years," and that he "became afraid" after the judge told him that that "he would get [him] another lawyer, but after 5 pm [he] couldn't negotiate any more," i.e., the fifteen year plea deal would have expired. App. 87, lines 2 – 8; App. 89, lines 10-13. Petitioner added that another lawyer "would have negotiated [his] case better." App. 88, l. 9-13. Regarding the Court's holding that the waiver of the conflict was voluntary and the plea was voluntarily given, please note the coercion involved in the case. Lastly, note that petitioner refused to sign a written waiver of the conflict of counsel claim and was sentenced to six months imprisonment for contempt of court due to said refusal to do so. App. 68, l. 12 – p. 69, l. 12.

The question to be answered in resolving 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). Even though a guilty plea may not be held invalid if the defendant was motivated to plead in order to receive a lesser penalty; nonetheless, the long standing test for determining the validity of a guilty plea is whether the plea is a voluntary plea among the alternate courses of action open to the defendant because some circumstances indeed

present intrinsically coercive situations. Gustine v. State, 325 S.C. 123, 480 S.E.2d 444 (1997), citing to Hill v. Lockhart, 474 U.S. 52 (1985) and Brady v. United States, 397 U.S. 742 (1970). Therefore, “the better approach is to determine on a case-by-case basis whether a defendant knowingly and voluntarily enter[ed] a plea of guilty.” See Gustine v. State, *supra*.

In the case at bar, petitioner felt pressured to waive a conflict of counsel issue, which held merit and remained alive, and he refused to sign in writing that he waived the conflict issue, in order to gain the benefit of a favorable plea bargain by pleading guilty to a selected drug charge constituted circumstances that rendered his guilty plea coerced and involuntarily given. Per these circumstances in the instant case, petitioner did not plead guilty voluntarily within the meaning of Boykin v. Alabama, 395 U.S. 268 (1964). Additionally, counsel’s conflicted representation constituted deficient representation that violated petitioner’s right to effective assistance of legal counsel in a criminal case as guaranteed under the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 484 U.S. 52 (1985).

WHEREFORE, based on the foregoing points, counsel for petitioner would request a rehearing on the conflict issue raised above contained this Court’s opinion in this appeal.

Respectfully Submitted,

sWanda H. Carter
WANDA H. CARTER
Deputy Chief Appellate Defender

This 23rd day of April, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Johnny E. James, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 23rd day of April, 2020; and Erick Hernandez, #352808, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 23rd day of April, 2020.

sWanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2020

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Assistant Attorney General
Rembert Dennis Building
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Columbia, SC 29201

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SC Court of Appeals

Re: Erick Hernandez v. State of South Carolina,

Dear Mr. James:

Enclosed are two copies of the Petition for Rehearing in the above-entitled case, which I have e-filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

WHC/SL

Enclosure



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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2020

Mr. Erick Hernandez, #352808
Turbeville Correctional Institution
PO Box 252
Turbeville, SC 29162

Re: Your appeal

Dear Mr. Hernandez:

Enclosed is a copy of the Petition for Rehearing that I filed today on your behalf in the South Carolina Court of Appeals. Feel free to contact me if you have any questions.

Please contact me if you have any questions.

Sincerely,

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

WHC/SL

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