

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County

Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 2020-UP-101 (S.C. Ct. App. Filed April 8, 2020)

ERICK HERNANDEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001142

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' opinion issued in this case on April 8, 2020, a petition for rehearing was filed on April 23, 2020, which was denied by the South Carolina Court of Appeals on May 22, 2020.

QUESTION PRESENTED

Did the Court of Appeals err in holding that petitioner's plea was not involuntarily given per its finding that no actual conflict of interest existed when counsel admitted that a conflict of interest existed based on his dual representation of petitioner and petitioner's co-defendant in a drug conspiracy ring, and where the plea judge removed counsel from the case after granting the conflict of interest motions filed by both counsel and petitioner outlining how the conflict of interest existed in the case?

STATEMENT OF THE CASE

Petitioner Erick V. Hernandez, aka, Pedro Mendoza, pled guilty to trafficking in cocaine (third offense) between 28 to 100 grams¹ during the October 2012 term of the Horry County General Sessions Court before Judge Edward B. Cottingham and was sentenced to imprisonment for a period of fifteen years. App. 1-36. Fran Humphries represented petitioner during the plea proceeding and Assistant Solicitor Donna Elder appeared on behalf of the state. Petitioner did not appeal his conviction and sentence.

On June 11, 2013, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 38 – 44. The respondent filed a return dated October 24, 2013, requesting that a hearing be held in response to petitioner’s PCR action. App. 45 – 48.

A PCR hearing was convened on November 13, 2015, at the Horry County Courthouse before Judge Thomas A. Russo. Petitioner was present at the PCR hearing and represented by Tristan M. Schaffer, and Assistant Attorney General J. Croom Hunter appeared on behalf of the state. App. 50 – 98. On April 13, 2016, Judge Russo signed an Order of Dismissal denying petitioner’s allegations of ineffective assistance of counsel in the case. App. 105 – 111.

Petitioner appealed Judge Russo’s Order of Dismissal and filed a petition for writ of certiorari on March 1, 2017, with the South Carolina Court of Appeals, which was granted on December 12, 2018. On April 8, 2020, the South Carolina Court of Appeals affirmed petitioner’s conviction and sentence. See Hernandez v. State, Unpublished Opinion No. 2020-UP-101 (filed April 8, 2020). ROA 1-3. On April 23, 2020, petitioner filed a petition for rehearing in the case. ROA 4-9. On May 22, 2020, the South Carolina Court of Appeals. denied the rehearing petition. ROA 10. This petition requesting review of the Court of Appeals’ decision follows.

¹ Petitioner pled to the lesser cocaine charge of trafficking in 28-100 grams of cocaine, but was indicted for cocaine trafficking in 200 grams or more. App. 19, lines 16 – 19.

ARGUMENT

The Court of Appeals erred in holding that petitioner's plea was not involuntary given per its finding that no actual conflict of interest existed when counsel admitted that a conflict existed based on his dual representation of petitioner and petitioner's co-defendant in a drug conspiracy ring, and where the plea judge removed counsel from the case after granting the conflict of interest motions filed by both counsel and petitioner outlining how the conflict of interest existed in the case.

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, 1. 16; App. 19, 1.22-p. 20, 1.4. 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, 1.20.

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, 1. 25 – p. 30, 1. 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, 1. 16 - p. 31, 1. 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 petition.

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.²

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 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.

² 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.

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).

CONCLUSION

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

Respectfully Submitted,

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

ATTORNEY FOR PETITIONER

This 22nd day of June, 2020.