RECEIVED
OCT 26 2020
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

THE SUPREME COURT

CERTIORARI TO CLARENDON COUNTY

HONORABLE Kristi F. Curtis, Circuit Court Judge

Roosevelt Sabb, Jr., Petitioner,

VS.

STATE OF SOUTH CAROLINA. Respondent.

Appellate case No. 2019-001990

Written Memorandum to

Johnson Petition for Writ of Certiorari

Date: _____

S/ _____,

ISSUES

1-2 The PCR court erred in denying relief where trial counsel only met with the petitioner on the eve of trial, and where petitioner had no choice but to plead guilty.

3. The PCR court erred in offenging relief when counsel failed to conduct a thorough and independent investigation of the facts of the case solely relying on the integrity and infavorability of the police investigation.

4. The PCR court erred in denying petitioner's claim that counsel failed to proved the state's case with a meaningful adverserial challenge where counsel admittedly did nothing except negatiate a plea.

5. The PCR court in denying relief where PCR counsel failed to file a timely notice of Appeal in denial of relief and after the petitioner requested an Appeal.

6. The PCR court erred in denying relief where PCR counsel failed to file a motion to alter or amend judgment.

7. The PCR court erred in denying relief where the PCR court failed to make the required finding of fact concerning his claims of ineffective assistance of counsel.

8. The PCR court erred in denying relief where counsel gave bad advice about animation and sentence.

9. The PCR court erred in denying the petitioner's claim that the plea is invalid because counsel answered for the petitioner during the plea colloguy, violating Federal Rule 11.

STATEMENT OF THE CASE

On October 9, 2014, petitioner was indicted by a Clarendon county Grand Jury for murder, App. 77-78. On October 3, 2017, he pleaded guilty to voluntary manslaughter before the Honorable George M. McFadden, J. App. 1. Shaun Kent represented petitioner; Christopher Durant appeared on behalf of the state. The plea was negotiated; The proposed sentence was fifteen years. App. 311. 2-20.

The facts according to the assistant solicitor were as follows: On July 5, 2014, petitioner and the decedent got into an argument App. 61. 6-91. 1. The disagreement turned physical. After the decedent went inside and then came back outside, petitioner allegedly hit him with his car. Id. Petitioner pleaded guilty to voluntary manslaughter, and the plea judge accepted his plea. App. 91. 20-101.7. The plea judge sentenced in accordance with the negotiation; petitioner received a fifteen year sentence. App. 11 11. 6-10. Petitioner filed an application for post-conviction relief in March 2018, App. 2018. 13-21. it contained allegations of ineffective assistance of counsel including the claim that counsel failed to "make a reasonable investigation in the applicant's case. App. 20. The state made its return on or about August 6, 2018. App. 22-27.

An evidentiary hearing was held on March 27, 2019, before the Honorable Kristie F. Curtis, App. 28. Timothy Griffith, represented petitioner: Janell Gregory appeared on behalf of the state. Petitioner and plea counsel testified at the hearing At the conclusion of the hearing, the plea judge took the matter under advisement. App. 61 11. 2-3. An order of dismissal was signed on May 7, 2019, App. 63-76. The plea judge denied relief on all of petitioner's cliams, finding that he failed to prove deficiency.

ARGUMENT 1 & 2

The PCR court erred in denying relief where trial counsel only met with the petitioner on the eve of trial and where petitioner had no choice but to plead guilty.

At the PCR hearing counsel admitted that he did not meet with the petitioner during the 34 months before trial while retained nor was there anything of substance discussed on the phone App. 591. 2-25-601. 1-7 when counsel asked the petitioner to come in it was the eve of trial. The counsel showed only one part of discovery, App. 34 1, 11-35 1-18. Because counsel knew 34 months had elasped since he last communicated with the petitioner about the case. Counsel willfully prejudiced the petitioner because a defendant communication with counsel is critical to the Attorney's representation. Ceders v. U.S., 96 S.Ct. 1330.

The denial of this opportunity is a constitutional error requiring erversal.
Counsel agreed with the petitioner's claim that they did not meet during the 34 months It's not zero, but he is actually close to accurate App. 43 1-3 this shows counsel was ineffective and prejudiced the petitioner because adequate consultation is an essential element of competent representation of a criminal defendant, Coles v. Peyton, 389 F. 2d 224 225. While the amount of consultation should be sufficient to determine all legally relevant information known to the defendant. Not only did counsel's action prejudice the petitioner. He also denied the petitioner of his due process and equal protection of those rights. During the delay of those 34 months the record shows counsel did nothing to prepare his client for trial, and he did nothing in preparing some type of strategy or defense for trial. By counsel's inaction and conduct.

Reasonable minds would say counsel was relying on his client to plead guilty, instead of counsel representing his client as an advocate in preparing a defense for trial. Strickland, necessaryly created a flexible standard to judge counsel's conduct. So an unlimited number of ways exist for counsel to potentially render deficient performance. Failure to object to trial court error is a common claim. Another common claim is that counsel did not investigate some critical evidence or defense when preparing for trial. Strickland, also assigns additional duties to counsel as "assistant to the defendant" which is to advocate the defendant's cause and more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution". Id. at 688. these additional duties tend to be critical in the context of a guilty plea. See Berry v. State, 675 S.E. 2d 425 (S.C. 2009). The sixth amendment guaratees the right to effective assistance of counsel in criminal prosecutions. See, Yarborough v. Gentry, 540 U.S. 1, 5 (2003)(per curiam); see also, PadILLA V. Ky., 599 U.S. 356, 364 (2010)(6th amendment right to counsel is the right to effective counsel); McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970) (same).

The right to effective assistance applies to both retained and appointed counsel. See Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980). And Strickland v. Washington, 466 U.S. 668, 688 (1984); and U.S. v. Cronic, 466 U.S. at 659.

ARGUMENT 3

The PCR court erred in denying relief when counsel failed to conduct a thorough and independant investigation of the facts of the case solely relying on the integrity and infavorability of the police investigation. At the PCR hearing the petitioner raised that counsel did not conduct a thorough and independent investigation of the facts and circumtaances of the case as mandated by the American Bar Association. Counsel affirmed the petitioner's claim by stating that his investigation only

consisted of talking to the police investigators and have his friend look at the police animation. he also went to the scene with the police. App. 48, 17-20 counsel did not state what he didindependent of looking at the police discovery counsel has a duty to make a reasonable investigation or to reasonable decisions that make particular investigation unnecessarily. In any ineffectiveness case a particular decisions not to investigate must be directy assesed of reasonableness in all circumstances applying a heavy meansure of deference to counsel judgment (Strickland) when counsel was asked did he let the petitioner speak to an investigator he replied I don't think I did, Tim and he's (petitioner) probably accurate about that and probably looking back I probably should have let him. App. 151, 11-25. Here counsel was deficient because he should have hired or discussed hiring an expert to more thoroughly challenge the state's scientific evidence Reeves v. State, 782 S.E. 2d 747. Furthermore counsel's failure to independent investigate can not be justified under Strickland's performance prong by his faith in the integrity and infavorbility of the police investigation Elmore v. Ozmint, 661 F. 3d 783. The supreme court has recognize that without pre trial consultation with the defendant trial counsel cannot fulfill his duty to investigate. Mitchell v. Mason, 325 F. 3d 732.

ARGUMENT 4

The PCR court erred in denying petitioner's claim that counsel was ineffective for failing to provide the states case with a meaningful adverserial challenge.

Trial counsel was ineffective for failing to object to the insufficient indictment, forcing the petitioner to plead to the indictment, instead of preparing a defense for trial because the state failed to meet the burden of proof on each and every element petitioner was prejudice by counsel's error. Thus, trial counsel was ineffective for failing to object to the state's failure in meeting the burden of proof where the state failed to prove willfully, feloniously, intentionally, and malice in the indictment.

By counsel forcing the petitioner to plead guilty does not cure counsel's error when there is evidence that the petitioner was innocent when there is ample evidence to support the incident was an accident. In order to establish a claim of ineffective assistance of counsel petitioner must prove that (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced petitioner's case. U.S.C.A. const. Amend. 6.

A deficient performance by counsel is prejudicial when there is a reasonable probability that, but for counsel's errors the outcome of the trial would have been different. U.S.C.A. const. Amend. 6. Petitioner's claim arises out of the due process clauses of the fifth and fourteenth Amendments, which protect an accused against conviction unless the state supplies proof beyond a reasonable doubt of each element necessary to constitute the crime with which the accused is charged. See S.C. const. Article 1. sec. 3. "In re Winship" 90 S.Ct. 1068 (1970). This principle prohibits the use of enidentiary presuptions that have the effect of relieving the state of its burden of proof beyond a reasonable doubt as to every essential element of the crime. Sandstrom v. Montana, 99 S.Ct. 2450 (1979). See Estelle v. McGuire, 112 S.Ct. 471 (1991); Francis v. Franklin, 105 S.Ct. 1965 (9185); Todd v. State, 585 S.E. 2d 305 (S.C. 2003);

Middleton v. McNeil, 124 S.Ct. 1830 (2004); and Arnold v. State, Plath v. State, 420 S.E. 2d 834 (S.C. 1992) (hereinafter Arnold v. Plath).

ARGUMENT 5

The PCR court in denying relief where PCR counsel failed to file a timely notice of Appeal in denial of relief and after the Applicant/Petitioner, requested for Appeal dated May 2019.

By July 2019 the petitioner did receive a copy of the Appeal that counsel had supposed to have filed from the denial of his PCR Application, so Applicant had his family call the clerk of court Clarendon county and the supreme court and was told that no Appeal was filed. As the record will support counsel had abandon the petitioner, counsel refused to file a notice of Appeal from the deinal of post-conviction relief, and counsel also refused to file a Rule 59(e), S.C.R.C.P., motion to alter and Amend the judgment. When petitioner found out that counsel had abandon him and did not file these remedies, the petitioner immediately filed another post-conviction Application to bring this matter to the attention of the courts. When counsel found out that the petitioner had filed another PCR Application exposing counsel of his abandonment of his client, and counsel's refusal in filing the Rule 56(e), motion and motion for Appeal, counsel then, in December 2020, decided to file a Appeal on behalf of the petitioner. The petitioner's Appellate counsel "Taylor D. Gilliam, was aware of this matter but also decided in denying the petitioner the right to Appeal. Therefore, the petitioner requests the court to take"Judicial notice" of this matter.

In Johnson v. State, 480 S.E. 2d 733 (S.C. 1997); trial counsel found ineffective for failing to timely notify defendant of right to Appeal so direct Appeal issues were reviewed on the merits in PCR Appeal. A final decision entered under the PCR Act is reviewable by the South Carolina supreme court upon a petitionfor writ of certiorari by either party. S.C. App. Ct. R. 243(a), the Appeal from denial of PCR relief counsel must serve a notice of Appeal on opposing counsel within thirty (30) days after receipt of written notice of entry of the order denying relief, see S.C. App. Ct. R. 243(b), S.C. App. Ct. R. 203 (b)(1).

ARGUMENT 6

The PCR court erred in denying relief where PCR counsel failed to file a Rule 59(e) S.C.P.C.P. motion to alter or Amend the judgment.

PCR counsel rendered deficiient performance, where not only was counsel ineffective for failing to file a timely notice of Appeal, and failing to file a timely Rule 59(e), motion to alter or Amend the judgment.

A Rule 59(e), motion must be served within ten (10) days of receiving written notice of the entry of the order denying post-conviction relief, S.C.R.Civ. P. 59(e), if a timely Rule 59(e) motion to alter or Amend the judgment also tolls the time for filing a notice of intent to Appeal. S.C.R.Civ.P.59(e). Our state supreme court has expressed the need for counsel in failing to file a 59(e) and has reversed. In the instant case the court denied the petitioner relief without making findings of fact and conclusions of Law pursuant to 17-27-80.

In McCray v. State, 408 S.E. 2d 241 (S.C. 1991); in McCray v. State, counsel was found ineffective for failing to file a timely Ruel 59(e) motion to alter or Amend the judgment.

ARUMENT 7

The PCR court erred in denying relief where the PCR court failed to make the required findings of fact concerning his claims of ineffective of counsel.

Trial counsel had 34 months to ask for the experts to properly conduct a meaningful investigation to prepare the petitioner's defense for trial. In addition to the situation when a court fails to address one or more PCR issues, a Rule 59(e) motion may also be used when the order contained an erroneous finding of fact, or a misapplication of the Law like what was applied to applicant/petitioner's case. Our supreme court has held and clearly stated that past practice would not continue, stating that its past practice was a "unique" situation in which the court attempted to remind circuit court judges and parties that (1) apecific findings of fact and conclusions of Law were required: and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for Appellate review. See Marlar, 653 S.E. 2d at 267. Therefore, petitioner's case should be returned to the lower court.

ARGUMENT 8

The PCR court erred in denying claim of wrong bad advice on use of animation and length of sentence.

At the PCR hearing the petitioner raised that counsel erroneously told him that if he plead to a fifteen years sentence he could be released in as little as ten years. This was a error because the minimum amount of time to be served is twelve years nine months. Counsel did not dispute this fact replying he could be right and if so, I was just wrong and I informed him incorrectly. App. 51, 15-18. In order for a defendant to knowingly and voluntarily plead guilty he must have full understanding of the consequences of the plea. Dover v. State, 405 S.E. 2d 391. Confusion over time to be seved attacks the knowing portion of the plea.

The petitioner also raised the issue that counsel told him the animation invented by the state would be shown repeatedly should he go to trial. Once in prison the petitioner learned that animations are normally not allowed. Counsel disputed this claim stating that he did'nt think the animation would be allowed. Here counsel was ineffective for not thinking. Because the only way he could fully inform the petitioner was to make a pre trial challenge.

Considering that pre trial motions such as a motion in limine is sought to aide counsel in formulating a trial strategy. The decisions regarding whether to file such a motion is clearly part of the process of establishing trial strategy. Jones v. Stotts, 59 F. 3d 177. Counsel's not thinking does not fully inform the petitioner with all available information needed to make a knowing and voluntary plea.

ARUMENT 9

The PCR court erred in denying the petitioner's claim that the plea is invalid because counsel answered for the petitioner during the plea colloquy, violating Rule 11.

At the PCR hearing the petitioner raised that during the plea colloquy, when the court asked him to admit the necessary mens Rea the petitioner refused so counsel answer for him completing the colloquy. App. 9, 23-25.

The petitioner declares that the validity of his plea agreement is a "contested factual issue."

At the plea hearing the petitioner did not utter a single word concerning the charged offense or alleged conduct. The court determined the petitioner's guilt based upon coached yes or no answers. The petitioner hereby avers that his guilt or innocence was never a issue or concern. He simply followed counsel's instruction to the best of his ability to mitigate the sentence. Than when asked to admit the necessary mens Rea the petitioner refused so the court allowed counsel to answer for him.

Federal Rule 11 requires the court to address the defendant personally. By personally interrogating the defendant not only is this better to ascertain the plea's voluntariness, but will also develope a more complete record. McCarthy v. U.S., 895 S.Ct. 1166.

Here the record shows that the petitioner asked counsel several questions and was coached during the colloquy. The court seeing this made no inquiry to insure any questions or misunderstandings were cured.

This plea is plainly invalid because the court allowed counsel to violate the petitioner's protected autonomy right by allowing counsel to usurp control of on issue within the petitioner's sole perogative. This violation of a defendant's 6th Amendment secured autonomy has been ranked a stractual error and is not harmless. McCoy v. Louisiana, 138 S.Ct. 1500.

The plea is also invalid because the court communicated with the Attorney rather than the client. U.S. v. Pena, 314 F. 3d 1152. The plea is also invalid because consent to a guilty plea cannot be referred from silence 89 S. Ct. 1709.

Mr. Roosevelt Sabb, Jr., #374107
Broad River Correctional Institution
Marion Unit A - 185
4460 Broad River Rd.
Columbia, SC 29210

Date: 10-21-20

The Supreme court of South Carolina
Daniel E. Shearouse, Clerk of court
Post Office Box 11330
Columbia, SC 29221

Enclosed please find the original copy of writ of certiorari, for filing with the South Carolina supreme court. After you have filed the writ of certiorari with the clerk of court office. Please return the clocked stamped copy to me with date stamped thereof at the above address.

Sincerely,

S/ Roosevelt Sabb,

Roosevelt Sabb, Jr., #374107