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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

DONTE JAROD STOKES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-002027

AMENDED PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in signing the order of dismissal that made findings of fact, conclusions of law and made findings as to witness credibility when he did not preside over the PCR hearing?

2. Was trial counsel ineffective in failing to properly explain the no contest plea to murder and failing to object when the judge required an admission of guilt, rendering the plea involuntary?

STATEMENT

In November of 2012, the Orangeburg County Grand Jury indicted Petitioner, Donte Jarod Stokes, for murder, indictment #2012-GS-38-1421. (App. pp. 36-37). On July 15, 2013, Petitioner appeared before the Honorable Perry M. Buckner and entered a no contest plea to murder. Jill Ullman represented Petitioner at the plea. Don Sorenson represented the State. The plea was negotiated for a sentencing range between thirty-five (35) and forty (40) years. (App. p. 3, lines 9-10). As a result of the negotiated plea, the State dismissed an attempted murder charge and a possession of a weapon during the commission of a violent crime charge. (App. p. 3, lines 11-15). Judge Buckner sentenced Petitioner to thirty-eight (38) years in prison. (App. p. 38). A timely notice of intent to appeal was filed but later dismissed pursuant to Rule 203(d)(1)(B)(iv), SCACR, for failure to provide a written explanation of what issues could be reviewed on direct appeal.

On June 30, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on April 20, 2017. On December 12, 2017, an evidentiary hearing was held before the Honorable Kristi Harrington. Carl B. Grant represented the Petitioner. Ruston Neely represented the State. At the conclusion of the PCR hearing Judge Harrington stated that she would take the matter under advisement and told the attorneys that she would be happy to accept proposed orders. (App. p. 85, lines 3-10). On July 10-11, 2019, over a year and six months after the PCR evidentiary hearing, a proposed order of dismissal was submitted to the Honorable Edgar W. Dickson, the Chief Administrative Judge for the First Judicial Circuit. (App. p. 96). According to e-mails provided by the State, Judge Dickson was provided with the transcripts from the evidentiary hearing as well as the plea hearing. (App. pp. 96-97). Although Judge Dickson did not hear the PCR hearing, he signed the order of dismissal on July 24, 2019. The

order includes findings of witness credibility. A timely notice of intent to appeal was served on December 9, 2019. This petition for writ of certiorari follows.

ARGUMENTS

1. **The PCR judge erred in signing the order of dismissal that made findings as to witness credibility when he did not preside over the PCR hearing and failed to comply with the requirements of Rule 63, SCRCP.**

The Honorable Kristi Harrington presided over Petitioner's PCR hearing on December 12, 2017. (App. p. 51). Judge Harrington heard testimony from plea counsel, Jillian Denise Ullman, and from Petitioner. (App. pp. 52-85). At the conclusion of the PCR hearing Judge Harrington stated that she would take the matter under advisement and told the attorneys that she would be happy to accept proposed orders. (App. p. 85, lines 3-10). The order of dismissal, however, was not signed by Judge Harrington. The order of dismissal was signed by the Honorable Edgar W. Dickson, the Chief Administrative Judge for the First Judicial Circuit, on July 24, 2019, after Judge Harrington retired on June 30, 2018. (App. p. 95). It is unclear if proposed orders were submitted to Judge Harrington before her retirement, six months after Petitioner's PCR hearing.

The order of dismissal includes a summary of testimony and findings of fact and conclusions of law. (App. pp. 88-94). Importantly, the order additionally makes credibility findings. The order states:

> This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. This Court finds Counsel's testimony was credible and persuasive and Applicant's testimony lacked credibility. Therefore, this Court dismisses Applicant's application for the reasons set out below:

(App. p. 89). Judge Dickson could not have made credibility determinations about witnesses when he did not hear the witnesses testify. Judge Dickson erred in signing the order of dismissal from a PCR hearing presided over by Judge Harrington. Petitioner is entitled to a new PCR

hearing so that the judge, based on what is presented at the hearing, can make findings of fact, conclusions of law and, importantly, determine witness credibility.

S.C. Code §17-27-80 of the Uniform Post-Conviction Procedure Act provides, "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." The statute requires the PCR judge to make specific findings of fact and conclusions of law. The current Rule 63, SCRCP, outliness the procedure required when a successor judge is needed and provides:

> If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

Judge Dickson, the successor judge in the present case, did not comply with Rule 63. Judge Harrington presided over Petitioner's PCR hearing on December 12, 2017, but did not retire until June 30, 2018, six months after the PCR hearing. It is unclear why Judge Harrington did not sign an order before she retired. When she retired, Rule 63 provides that a successor judge could proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. There is nothing in the record to show that the successor judge certified familiarity with the record and determined the proceedings could be completed without prejudice to the parties.

In Christy v. Christy, 354 S.C. 203, 580 S.E.2d 444 (2003), the South Carolina Supreme Court addressed Rule 63, SCRCP, prior to the 2004 amendment to the rule. The rule at the time of the opinion provided:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules **after a verdict is returned or findings of fact and conclusions of law are filed,** then the resident judge of the circuit or any other judge having jurisdiction in the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(emphasis added). The Court in Christy noted that Rule 63, at the time, applied **after** the judge made findings of fact and conclusions of law. In Christy the judge heard a common law marriage claim but the judge became incapacitated **before** signing an order. The South Carolina Supreme Court affirmed but modified the finding by the Court of Appeals that a new trial was necessary writing:

> Rule 63, SCRCP, by its terms governs those situations where the trial judge becomes incapacitated or dies after the filing of his findings of fact and conclusions of law, but prior to the completion of post-trial acts authorized by the SCRCP. As the Court of Appeals found, other jurisdictions having our version of Rule 63 have derived a 'negative inference' from the language of the rule, and concluded that a new trial is mandated where, as here, the incapacity or death precedes the filing of an order. While we find no error in the Court of Appeals' analysis of the rule, nor in its suggestion that two exceptions adopted by other jurisdictions would be applicable under the appropriate circumstances, we hold that this case is governed not by any negative inference derived from Rule 63, but rather by another principle of state law.

Christy v. Christy, 354 S.C. 203, 206, 580 S.E.2d 444, 446 (2003) (n. 4 and 5 omitted). The South Carolina Supreme Court found that a new trial was necessary, not based upon Rule 63, SCRCP, as the judge had not yet made findings, but based on the principal of law that:

> Until the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may be withdrawn at any time before such delivery." Archer v. Long, 46 S.C. 292, 24 S.E. 83 (1896); *see also e.g.,* Bowman v. Richland Mem. Hosp., 335 S.C. 88, 515 S.E.2d 259 (Ct.App.1999)(citing Archer v. Long); *compare* Rule 58(a), SCRCP ("A judgment is effective only when ... entered on the record"); *see also* Ford v. State Ethics Comm'n, 344 S.C. 642, 545 S.E.2d 821 (2001)("Until written and entered, the trial judge retains discretion to change his mind and amend his oral

ruling").

Christy v. Christy, 354 S.C. 203, 206, 580 S.E.2d 444, 446 (2003).

A new PCR hearing is required in the present case based on both the principal of law relied upon by the Court in Christy as well as the current Rule 63, SCRCP. The current rule now provides that a successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. Pursuant to the rule, the successor judge should, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses. The successor judge in the present case, however, did not comply with the rule.

The two exceptions discussed in the Court of Appeals decision in Christy v. Christy, 347 S.C. 503, 556 S.E.2d 701 (Ct. App. 2001), aff'd as modified, 354 S.C. 203, 580 S.E.2d 444 (2003), are important as applied to the current Rule 63, SCRCP. The Court of Appeals wrote:

> Two exceptions have developed to the general operation of Rule 63. First, if all parties consent, a successor judge may make findings of fact and conclusions of law based on the trial transcript. Second, the successor judge may consider the trial transcript as akin to "supporting affidavits" for summary judgment purposes and render judgment **if no credibility determinations are required**. Emerson Elec. Co. v. Gen. Elec. Co., 846 F.2d 1324, 1326 (11th Cir.1988). **Absent consent of the parties, a successor judge cannot make credibility determinations.** Id.; *see also* Whalen v. Ford Motor Credit Co., 684 F.2d 272, 274 (4th Cir.1982) (finding Rule 63 communicates a positive prohibition on substitution of a judge prior to verdict where all parties have not stipulated their consent).

Christy v. Christy, 347 S.C. 503, 512, 556 S.E.2d 701, 705 (Ct. App. 2001), aff'd as modified, 354 S.C. 203, 580 S.E.2d 444 (2003) (emphasis added).

The exceptions discussed by the Court of Appeals in the Christy opinion do not apply in the present case. If the judge had certified familiarity with the record and determined that the

proceedings could be completed without prejudice to the parties, as required by the rule, then, with the consent of the parties, the judge could have made findings of fact and conclusions of law based on the transcript of the PCR hearing. There is no evidence that the parties consented to the successor judge making these findings. In addition to findings of fact and conclusions of law, the successor judge in the present case also made credibility findings although the successor judge did not hear the witnesses testify. The order states that, "Counsel's testimony was credible and persuasive and Applicant's testimony lacked credibility." (App. p. 89). As discussed by the Court of Appeal in the Christy case, absent consent of the parties, a successor judge cannot make credibility determinations. There is no evidence in the record that the parties consented to the successor judge making witness credibility determinations.

The successor judge in the present case failed to comply with Rule 63, SCRCP. The successor judge failed to certify familiarity with the record and failed to determine if the proceedings could be completed without prejudice to the parties. The successor judge made credibility determinations without hearing the testimony and without the consent of the parties. Petitioner is entitled to a new PCR hearing.

2. **Trial counsel was ineffective in failing to properly explain the no contest plea to murder and failing to object when the judge required an admission of guilt, rendering the plea involuntary.**

Petitioner pled no contest to murder for a negotiated sentencing range between thirty-five (35) and forty (40) years. (App. p. 3, lines 9-10; p. 7, lines 2-12; p. 11, line 12). Judge Buckner sentenced Petitioner to thirty-eight years in prison. (App. p. 38). Despite the no contest plea, the following took place:

> THE COURT: Are you, in fact, Mr. Stokes, guilty of the offense of murder in Orangeburg County on or about June 21,2012, involving Kathy Mack?
>
> MS. ULLMAN: Your Honor, he's - -

THE COURT: I understand he's pleading Nolo. I'm asking you, are you, in fact, guilty or you are pleading no contest to the offense of murder in Orangeburg County on or about June 21, 2012. As I told you a plea of Nolo has the exact same legal effect as a guilty plea. Do you understand?

MR. STOKES: Yes, sir, Your Honor.

THE COURT: All right. Are you, in fact, guilty of that?

MR. STOKES: Yes, sir, Your Honor.

(App. p. 14, lines 5-18).

During the PCR hearing Petitioner alleged that the plea was involuntary. (App. p. 56, lines 13-14). Plea counsel was asked by the PCR judge, "Do you know why – does Judge Buckner just not take Alford pleas?" (App. p. 69, lines 21-22). Plea counsel answered, "My memory -- and again, Judge Buckner wasn't my resident judge; I didn't go in front of him often. My memory is that he does not like Alford pleas. He did allow the no contest which I was comfortable with because, again, Mr. Stokes' issue was he didn't want to go into court and basically admit to intending to kill the passenger. He wasn't comfortable with that." (App. p. 69, line 23 – p. 70, lines 1-5).

In the order of dismissal the PCR judge wrote, "This Court finds Counsel's advice was well within the range of competence required of defense attorneys. This Court also finds Applicant's plea was voluntarily, intelligently and knowingly made, just as the plea court found. Tr. p. 21. Therefore, this Court denies and dismisses this allegation." (Tr. pp. 92-93). The PCR judge erred.

S.C. Code §17-23-40 provides that, "The defendant in any misdemeanor case in any of the courts of this State may, with the consent of the court, enter a plea of "nolo contendere" thereto and upon so doing such defendant shall be dealt with in like manner as if he had entered a

plea of guilty thereto." In the present case Petitioner pled no contest or nolo contendere to murder, a felony. In Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976), Kibler argued that the Court lacked jurisdiction to convict and sentence upon a plea of nolo contendere as there is no authority in South Carolina for acceptance of such a plea to a felony. The Court in Kibler wrote:

> Section 17-504 of the 1962 South Carolina Code of Laws provides for pleas of Nolo contendere with the consent of the Court in all misdemeanors. Applying the maxim 'expressio unius est exclusio alterius' (expression of one thing is exclusion of another), the lack of any similar provision for felonies may be interpreted as limiting acceptance of Nolo contendere pleas to misdemeanors. Although this Court subscribes to this interpretation, we cannot say that the lower court committed prejudicial error of which the appellant is entitled to complain. There is no statutory prohibition against acceptance of such a plea; until this case, there has been no judicial denial of acceptance of such pleas; and, generally speaking, the federal courts as well as most state jurisdictions accept the Nolo plea in felony cases. See 89 A.L.R.2d 559.

67 S.C. at 254, 227 S.E.2d at 201. While the Court in Kibler found no statutory prohibition against acceptance of a plea of nolo contendere to a felony offense the Court noted, "However, as the benefits of a Nolo contendere plea as opposed to a guilty plea accrue primarily to the accused, this Court feels that the proper procedure for our lower courts to follow is to refrain from accepting pleas of Nolo contendere in felony cases until such are authorized by our legislature." 267 S.C. at 254–55, 227 S.E.2d at 201.

In the present case Petitioner does not challenge the court's jurisdiction to accept a plea of no contest or nolo contendere to a felony. Instead, Petitioner alleges that the plea was rendered involuntary by the fact that counsel failed to properly explain the no contest plea and failed to object when the judge required an admission of guilt. The Court in Kibler explained:

> A plea of Nolo contendere literally interpreted means 'I do not with to contend.' For all practical purposes it is a plea of guilty in so far as the consequences in the particular case in which it is pled. 'Like a plea of guilty (it) leaves open for review only the sufficiency of the indictment and waives all defenses other than that the

> indictment charges no offense.' State v. Stokes, 274 N.C. 408, 163 S.E.2d 770 (1968). (Of course, like a guilty plea, it is subject to attack on the issue of the plea being made knowingly and voluntarily).

267 S.C. at 254, 227 S.E.2d at 201. As noted by plea counsel, Petitioner entered a no contest plea because, "[H]e didn't want to go into court and basically admit to intending to kill the passenger. He wasn't comfortable with that." (App. p. 70, lines 3-5). The judge, however, required an admission of guilt. Plea counsel was ineffective in failing to object when the trial judge required an admission of guilt after Petitioner entered a no contest plea to murder. The failure to object to the judge requiring an admission of guilt rendered the no contest plea involuntary.

The no contest plea to murder, a felony, should have been entered pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). In Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999), the South Carolina Supreme Court noted that, "The United States Supreme Court held in Alford that an accused may consent voluntarily, knowingly, and understandingly to the imposition of a prison sentence although unwilling to admit culpability, or even if the guilty plea contains a protestation of innocence, when the accused intelligently concludes that his interests require a guilty plea and the evidence strongly supports his guilt of the offense charged." Gaines at fn. 1. The same should be required in a no contest plea to a felony. Counsel in the present case was ineffective in failing to explain that the plea required Petitioner's intelligent conclusion that the plea was in his best interest and that the State's evidence was strong. The judge failed to question Petitioner about the strength of the State's evidence or whether the no contest plea was in his best interest.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001), the South Carolina Supreme Court wrote:

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial.[5] Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994). Thus, an applicant must show both error and prejudice to win relief in a PCR proceeding. Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999).

A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea

is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

Counsel was ineffective in failing to object when the plea judge required an admission of guilt after accepting the no contest plea to murder. Petitioner did not wish to admit guilt and the failure to object to the judge requiring an admission of guilt renders the no contest plea involuntary. Additionally, counsel was ineffective in failing to properly explain the no contest plea. There is a reasonable probability that if counsel had explained that the no contest plea required Petitioner to intelligently conclude that the plea was in his best interest and that the State's evidence strongly supported guilt, Petitioner would have withdrawn the plea and demanded a jury trial. The no contest plea was rendered involuntary by counsel's failure to properly explain the no contest plea. The plea colloquy fails to establish that Petitioner knowingly and intelligently entered the no contest plea when the judge failed to ask Petitioner about the strength of the State's evidence and failed to ask Petitioner whether he believed the no contest plea was in his best interest.

CONCLUSION

Based on the argument presented in issue one, this Court should remand the case for a new PCR hearing. Based on the argument presented in issue two, this Court should reverse Petitioner's conviction and remand for a new trial.

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ATTORNEY FOR PETITIONER

This 17th day of March, 2021.