

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

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DONTE JAROD STOKES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-002027

—————
REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI
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KATHRINE H. HUDGINS
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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ISSUES PRESENTED

1. Did the PCR judge err 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?
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?

ARGUMENTS IN REPLY

- 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.**

It appears that a proposed order of dismissal was submitted by Respondent to the successor judge on July 10, 2019, over a year and a half after another judge presided over Petitioner's PCR hearing. (App. p. 96). Although the judge who heard the PCR hearing said she would be happy to accept proposed orders from both sides, it is unclear if proposed orders were submitted by either side to this judge. ((App. p. 85, lines 3-10). It is unclear if the successor judge asked for a proposed order from Petitioner. The successor judge who signed the order of dismissal submitted by Respondent failed to comply with the requirements of Rule 63, SCRCP which 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.

The successor judge failed to certify familiarity with the record and failed to determine that the proceedings could be completed without prejudice to the parties. The order of dismissal reads, "This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary hearing." (App. p. 89). This language in the order of dismissal does not meet the certification requirement of Rule 63, especially when the successor judge did not "listen" to the testimony given or "hear" the arguments presented. There is no specific finding in the order that the proceedings may be completed without prejudice to the parties.

Additionally, the successor judge improperly made credibility findings without hearing the witnesses testify. 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).

Pursuant to 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), interpreting Rule 63, SCRPC, if all parties consent, a successor judge may make findings of fact and conclusions of law based on the trial transcript. 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. Id. "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. at 512, 556 S.E.2d at 705 (Ct. App. 2001), aff'd as modified, 354 S.C. 203, 580 S.E.2d 444 (2003). The successor judge in the present case erred in making credibility determinations. PCR counsel's failure to object to the successor judge signing the order and failing to file a Rule 59(e) motion does not equal the consent required in order for the successor judge to make credibility findings.

Respondent argues, "Further, the successor court did not base its decision on credibility, or lack thereof, of the witnesses." (Return to Petition for Writ of Certiorari p. 11). The order of dismissal, however, makes specific credibility findings. (App. p. 89). The order specifically

finds that Petitioner's "testimony lacked credibility." (App. p. 89). Credibility of the witnesses is particularly important in this case where Petitioner alleges that the no contest plea to murder was not knowingly and voluntarily entered. The judge who heard the PCR testimony had the direct opportunity to observe the witnesses and, based on credibility determinations, may have come to a different conclusion than the successor judge who simply read the record. Rule 63 aims to prevent the situation in the present case where a successor judge makes credibility findings without the consent of the parties. The successor judge in the present case failed to comply with Rule 63, SCRPC. Petitioner is entitled to a new PCR hearing.

As to preservation, PCR counsel's failure to object and file a Rule 59(e) when the successor judge signed the order of dismissal should not prevent this Court from ordering a new PCR hearing in which a judge would have the opportunity to observe the witnesses, determine their credibility and properly rule on the issues of ineffective assistance of counsel. This is especially true given the fact that the successor judge failed to certify familiarity with the record and failed to determine that the proceedings could be completed without prejudice to the parties. If the successor judge had complied with the statute by certifying familiarity with the record and determining if the proceedings could go forward without prejudice, PCR counsel could have lodged a timely objection. The successor judge's failure to comply with the statute is distinguished from a failure to raise an allegation of ineffective assistance of counsel because the failure to comply with the statute deprived Petitioner of a full and fair ruling on his claims of ineffective assistance of counsel. "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d

346, 350 (2008). Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial review. *Id.*” Thompson v. State, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016). Petitioner was deprived of judicial review by a judge who heard the testimony of the witnesses. The successor judge’s non-compliance with the statute by failing to certify familiarity with the record, failing to determine that the proceedings could be completed without prejudice and making credibility determinations violates procedural due process and requires 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 because he did could not admit that he intended to kill the passenger. (App. p. 70, lines 3-5). 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). See Kibler v. State, 267 S.C. 250, 254-55 S.E.2d 199, 201 (1976) (“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.”). In the present case, however, no benefit accrued to Petitioner because the plea judge required an admission of guilt and sentenced Petitioner to thirty-eight (38) years in prison. Plea counsel was deficient in failing to continue and object when the plea judge demanded an admission of guilt in a no contest plea to murder. Plea counsel’s deficient performance rendered the plea involuntary.

In United States v. King, 673 F.3d 274, 281 (4th Cir. 2012), the Fourth Circuit Court of

Appeals wrote:

An Alford plea is “an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest.” United States v. Taylor, 659 F.3d 339, 347 (4th Cir.2011) (citing Alford, 400 U.S. at 37, 91 S.Ct. 160). A trial court may accept an Alford plea when: (1) the defendant “intelligently concludes that his interests require entry of a guilty plea;” and (2) “the record before the judge contains strong evidence of actual guilt.” United States v. Mastrapa, 509 F.3d 652, 659 (4th Cir.2007) (quoting Alford, 400 U.S. at 37, 91 S.Ct. 160) (emphasis omitted).

The plea judge in the present case should not have accepted the no contest plea to murder without first determining that Petitioner intelligently concluded that the plea was in his best interest and that the State had strong evidence of guilt. Plea counsel was deficient in failing to explain what the plea required and failing to object when the plea did not meet the requirements of Alford. Plea counsel’s deficient performance rendered the plea involuntary.

During the PCR hearing Petitioner generally alleged that the plea was involuntary. (App. p. 56, lines 13-14). The PCR judge was aware of the unusual circumstances surrounding the no contest plea to murder and specifically asked plea counsel, “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). The order of dismissal states, “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 allegation that

the no contest plea to murder was not knowingly and voluntarily entered is preserved for appellate review.

In Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001)(internal citation omitted), the South Carolina Supreme Court wrote, “All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.” Petitioner did not understand that one of the consequences of the no contest plea before this particular plea judge was the requirement that Petitioner admit guilt. Plea counsel was ineffective in failing to object when the plea judge required an admission of guilt after accepting the no contest plea to murder. Plea counsel was additionally ineffective in failing to explain what the plea required and failing to object when the plea did not meet the requirements of Alford. There is a reasonable probability that, but for counsel’s errors, Petitioner would not have pled guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

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.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of August, 2021.