

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

William P. Keesley, Circuit Court Judge

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APR 18 2013

S.C. SUPREME COURT

JOSE ANTONIO ANZALDO,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2012-213423

APPELLANT'S INITIAL BRIEF FOR WRIT OF CERTIORARI

JOSE ANTONIO ANZALDO
APPELLANT/PETITIONER

Kershaw Correctional Institution
4848 Goldmine Hwy., HC-208
Kershaw, South Carolina 29067

PRO SE PETITIONER

Therefore, Petitioner requests that the Court entertain his petition for Certiorari in this PCR matter.

Respectfully Submitted,

Jose A Anzaldo

Jose Antonio Anzaldo, #334118
Kershaw Correctional Inst., HD-226
4848 Goldmine Highway
Kershaw, SC 29067

This 12 day of APRIL 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SALUDA COUNTY
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

JOSE ANTONIO ANZALDO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2012-213423

PETITIONER'S REPLY TO COUNSEL'S PETITION TO BE RELIEVED AS COUNSEL

Jose Antonio Anzaldo, proceeding pro se, states:

1. He is the Petitioner in this case and is seeking redress in a post-conviction relief case.
2. He has reviewed the records and transcript of Petitioner's post-conviction relief hearing which was held on August 31, 2011. In his opinion seeking certiorari from the order of dismissal is with merit.
3. He has, pursuant to Rule 11 of the Federal Rules of Criminal Procedures, U.S. v. McCarthy, 394 U.S. 459 (1969), briefed two arguable legal issues which arose during the post-conviction relief process.

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ISSUES PRESENTED

Whether the PCR Court erred in finding that Counsel was not ineffective for failing to investigate?

Whether the State Court's failure to sua sponte hold a competency hearing to establish Petitioner's competency to plead guilty violated Petitioner's procedural Due Process rights?

STATEMENT

On April 7, 2009, petitioner appeared before the Honorable L. Casey Manning in Saluda County and pled guilty to criminal sexual conduct with a minor-second degree and criminal sexual conduct with a minor-first degree. A ten (10) year sentence was imposed on each charge. John E. Duncan, Esquire, was plea counsel. (App. p.1-p.14).

Petitioner filed an application for post-conviction relief on February 17, 2010. (App. p.16-p.25). Respondent filed a return dated May 3, 2010. (App. p.26-p.31). An evidentiary hearing was held on August 31, 2011, before the Honorable William P. Keesley. Petitioner was present and represented by Stephen D. Geoly, Esquire. Respondent was represented by Kaelon E. May, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. P.33-P.98).

On November 30, 2011, Judge Keesley issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p.105-p.118).

This petition follows.

ARGUMENT

Petitioner contends that the PCR Court erred in finding that counsel was not ineffective for failing to investigate

In 2008, Petitioner's daughters, minors at the time reported to their mother that Petitioner sexually assaulted them. The victims made the allegation to their mother, who subsequently reported to the police. There was no indication that the victims were taken or seen by a pediatrician. If so there was no indication that such pediatrician discover any evidence of abuse, sexual or otherwise. The victims submitted statements to the police officers as well as was spoken to by DSS officials. They identified their father as the perpetrator. In their statement they identified the circumstances surrounding the incidents.

On or about April 7, 2009, the Petitioner pled guilty of second degree criminal sexual conduct with a minor and first degree criminal sexual conduct with a minor. He was sentenced to concurrent terms of ten years for each criminal sexual conduct charge.

On February 17, 2010, Petitioner filed an application for PCR, alleging that counsel was ineffective in failing to adequately investigate the surrounding circumstances of his case. The PCR court found that Petitioner could not point to any specific matters counsel failed to discover which would have caused him to proceed with a jury trial instead of pleading guilty. The Court found that the Petitioner offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Petitioner. The Applicant did not produce any witnesses or offer any other evidence from which the Court could conclude that the outcome of the case would likely have been different, had the evidence been developed. As a result, the PCR court denied and dismissed the allegation that counsel failed to investigate.

The Petitioner submits that the judge erred in allowing the testimony of counsel over his testimony at the PCR hearing, where the court found counsel's testimony to be more credible is irrelevant because counsel has a duty to investigate regardless of any admissions of guilt by the client.

Counsel's testimony is based solely on speculation as to what the testimony from the victims would be at a trial.

Petitioner argues that counsel asked Petitioner one time if he was guilty and stated that Petitioner did not respond. Counsel took this lack of response as Petitioner not denying his guilt rather, an indication he was not aware of what was being asked by counsel. This was a communication issue, not an acknowledgement of guilt by silence. The transcript (page 13, line 5) of the plea hearing indicates that the Petitioner had questions as to the proceedings and accusations. After being asked by the Court if he understood what the Solicitor had just stated for the facts of the case, the Petitioner asked to speak with his Attorney. The transcript shows a lapse of time that indicates confusion on the part of the Petitioner. Petitioner was more concerned with the threat of receiving 50 years versus 10 years which created tremendous pressure to plead guilty.

Secondly, the Petitioner submits counsel's failure to speak with him regularly, failing to address key facts, and failing to investigate potential witnesses to call at trial can all be classified as counsel's failure to investigate.

Counsel has an obligation to conduct a "substantial investigation into each of the plausible lines of defense." Strickland, 466 U.S. at 681, 104 S.Ct. at 2061. "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." Id., 466 U.S. at 686, 104 S.Ct. at 2063. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based on informed strategic choices made by the

defendant and on information supplied by the defendant. In particular, what investigation decision are reasonable depends critically on such information." Ld., 466 U.S. at 691, 104 S.Ct. at 2066.

Strickland spoke directly to counsel's duty to investigate:

Counsel has a duty to make reasonable investigation or to make A reasonable decision that makes particular investigations unnecessary.

At the PCR hearing, counsel testified that he filed a discovery motion, reviewed the discovery materials with the Petitioner, and was able to speak with the two victims and ascertain what their testimony would be at a trial. Counsel testified that Petitioner never indicated that he wanted to go to trial throughout counsel's representation and that had Petitioner informed counsel he wanted to proceed to trial counsel would have prepared Petitioner's case for trial. Counsel testified that obtaining a forensic expert would not have been helpful because the youngest victim did not allege forceful penetration and that after so many months there would be no physical evidence.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1996).

All of the admissions complained of in the victim's statements was in regard to the victim's alleged sexual assault. Counsel failed to review the State's evidence with the Petitioner. If the evidence had been reviewed with the Petitioner, the Petitioner would have had the opportunity to advise Counsel why the victims may have made these accusations and would have given Counsel additional evidence to investigate and potentially exonerate the Petitioner. Petitioner was never given an opportunity to confront the witnesses against him. The victims were also apparently interviewed by DSS in Saluda, but no notes of the interview were provided in any discovery nor were any notes and/or reports requested by or provided to Counsel.

Counsel received discovery consisting of an incident report, statements made by the victims, and Petitioner's criminal record which indicated no prior

record. Counsel testified that Petitioner was alone with the two victims at times even though there were six people living together in the trailer. Counsel apparently never attempted to speak with the additional two people living in the trailer to determine what their testimony would be. It is unclear as to the extent of any conversation with the mother of the victims who was also the wife of the Petitioner, but counsel described the Petitioner's wife as a neutral witness. In the mother's statement, she states that when she asked her daughter if her father had been touching her, the daughter would never answer. Further, the mother stated she asked the victim if she wanted to move to Virginia and the victim replied NO since she has already made plans to move to Mexico with her Dad. Counsel apparently failed to follow up on this information with the victim. Counsel failed to visit the trailer to determine the layout of the living quarters and to further determine the reliability of the victim's testimony. If Counsel had looked into this matter, mitigating circumstances may have been revealed and the Petitioner would not have pled guilty.

In addition, counsel never requested nor received the results of any forensic exams to establish the criminal sexual conduct of which the Petitioner was accused. There is nothing to indicate that in the course of Counsel's interview with the victims that they ever asked about any family related issues that could give rise to these accusations. Counsel never sought any medical or counseling records that may have been used to establish the Petitioner's innocence.

Lastly, Counsel testified that he was able to speak with the two victims and ascertain what their testimony would be at a trial. However, counsel failed to indicate whether the victim's testimony could have been potentially damaging. Counsel attempts to attribute more credibility to the victims's statements than appeared to be. Petitioner submits that the victims's statements were unclear, confusing and dubious in nature. Counsel was therefore rendered "reckless disregard" where counsel acted "with a high degree of awareness of the victims's statements probable falsity," that is when viewing all the evidence, consisting of the incident report, statements

made by the victims, and Petitioner's criminal record, counsel must have entertained serious doubt as to the truth of the victims's statements or had obvious reasons to doubt the accuracy of the information reported." Counsel's testimony is purely speculative. In addition, Counsel should have, at a minimum, properly investigated by interviewing critical witness to determine defenses for the Petitioner. Counsel should have presented evidence of mitigating circumstances that would have allowed for a knowledgeable and informed basis for proceeding to trial or for any voluntary plea or plea negotiations on the Petitioner's behalf.

The Petitioner submits that the PCR judge improperly gave credibility to counsel's testimony at the PCR hearing with regard to what he done as far as investigate the Petitioner's case. As noted in Strickland v. Washington, supra, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statement or actions. In this case, there was a lack of understanding. The testimony by counsel was improperly submitted as counsel failed to act on Petitioner's lack of response in not answering him concerning his guilt.

Counsel testifies extensively that he ascertained the victims's testimony and what it "may have" been, but this argument is purely speculative. What we do know is that the mother asked the daughter if her father had been touching her, the daughter would never answer. Further, the mother stated she asked the victim if she wanted to move to Virginia and the victim replied NO since she has already made plans to move to Mexico with her Dad. The Petitioner submits the fact that the daughter was silenced at the question of sexual abuse should have gave rise to counsel to follow up on this information with the victim.

Petitioner strongly submits that counsel's failure to render reasonable representation to investigate the surrounding circumstances of his case prejudiced any chance he had at trial made Petitioner's guilty plea unknowing and unintelligent. Applicant also asserts that counsel coerced him by threat of the potential 50 year sentence. The Petitioner asserts that he has meet his burden of proof in showing that his guilty plea was involuntary. As stated

indicated that he wanted to go to trial throughout counsel's representation and that had Petitioner informed counsel he wanted to proceed to trial, counsel would have prepared Petitioner's case for trial . Counsel also testified that obtaining a forensic expert would not have been helpful because the youngest victim did not allege forceful penetration. All of the admissions complained of in the victims's statements was in regard to the victims's alleged sexual assault. There were several discrepancies in there statements counsel failed to consider, counsel failed to review the State's evidence with the Petitioner. If the evidence had been reviewed with the Petitioner, the Petitioner would have the opportunity to advise counsel why the victims may have made these accusations and would have given counsel additional evidence to investigate and potentially exonerate the Petitioner. The victims were also apparently interviewed by DSS in Saluda, but no notes of the interview were provided in any discovery nor were any notes and/or reports requested by or provided to counsel. The daughter when questioned by the mother as to if her father was touching here refused to answer. Counsel failed to follow up on this information with the victim. Counsel failed to visit the trailer to determine the layout of the living quarters and to further determine the reliability of the victims's testimony. Counsel testified that Petitioner never indicated he wanted to go to trial, However, he also didn't indicate that he wanted to pled guilty, but were following the erroneous advise of his counsel. If counsel had looked into this matter, mitigating circumstances may have been revealed and the Petitioner would not have pled guilty.

Petitioner asserts there was no valid strategic decision that explains counsel's failure to investigate. In *Ex parte Lawley*, 512 So.2d 1370 (Ala. 1987), our Supreme Court articulated the "benchmark" for judging ineffectiveness claims, as set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

" Under the standards enunciated in *Strickland v. Washington*, [supra], and adopted by this court in *Ex parte Baldwin*, 456 So.2d 129 (Ala. 1984), a two prong test must be met before a claim of ineffective assistance of counsel is proven. A convicted Defendant, in order to secure a reversal of his

conviction, must show: (1) That counsel's performance was deficient, which requires a showing that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) That the deficient performance prejudiced Defendant which requires a showing that a different outcome of the trial probably would have resulted but for counsel's allegedly ineffective performance. Strickland, supra, 466 U.S. at 687, 104 S.Ct. at 2064.

Petitioner argues that he has met the first prong of the test, Petitioner showed that counsel's representation fell below an objective standard of reasonableness, where counsel's performance was not reasonable considering the circumstances. When reviewing a case for sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Petitioner argues that the evidence cannot support a conviction for the charges. Specifically, Petitioner argue that "[t]here was no evidence in the discovery material that could have possibly been proven beyond a reasonable doubt that Petitioner committed the acts. However, there is tainted evidence.

Petitioner also states that he has met the second prong of the test in that, he has showed that there is a reasonable probability that, but for counsel's unprofessional errors, he would not have plead guilty, and instead went to trial. The evidence in Petitioner's discovery package and Petitioner's lack of response when questioned about his guilt showed a communication gap. No medical, psychiatric notes, or any notes from DSS. These instances should give rise to a reasonable probability sufficient to undermine confidence in the outcome.

Petitioner also argues that he was prejudice by counsel unprofessional errors. Where the Fourteenth Amendment prohibits the deprivation of liberty or property without due process of law. A due process claim is cognizable only if there is a recognized liberty or property interest at stake. Board of Regents v. Roth, 408 U.S. 564,69 (1972).

The Sixth Amendment to the U.S. Constitution guarantees that criminal defendants are entitled to the assistance of counsel in presenting their defense. "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. "Kimmelman v. Morrison, 477 U.S. 365,374 (1986). Further, the U.S. Supreme Court has recognized that "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970)(emphasis added).

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,

Jose A Anzaldo

Jose Antonio Anzaldo, #334118

Pro Se Appellant

This 12 day of APRIL, 2013.

ARGUMENT

The State Court's failure to sua sponte hold a competency hearing to establish petitioner's competency to plead guilty violated petitioner's procedural due process rights.

The test for determining competence to stand trial or plead guilty is whether the defendant "has sufficient present ability to consult with [his] or her lawyer with a reasonable degree of rational understanding" and whether the defendant "has a rational as well as factual understanding of the proceedings against [him] or her." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960)(per curiam). A trial court must conduct, sua sponte, a competency hearing when the information known to the trial court at the time of the trial or plea hearing is sufficient to raise a bona fide doubt regarding the defendant's competence. *Pate v. Robinson*, 383 U.S. 375, 385, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966); *McNair v. Dugger*, 866 F.2d 399, 401 (11th Cir.), cert. denied, -U.S.-, 110 S.Ct. 109, 107 L.Ed.2d 71 (1989). Courts focus on three factors in determining whether the trial court violated the defendant's procedural due process rights by failing to hold sua sponte a competency hearing: (1) evidence of the defendant's irrational behavior; (2) the defendant's demeanor at trial or plea hearing; and (3) prior medical opinion regarding the defendant's competence to stand trial. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975). Such an analysis focuses on what the trial court did in light of what it knew at the time of the trial or plea hearing. *Reese v. Wainwright*, 600 F.2d 1085, 1091 (5th Cir.) cert. denied, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979).

In this case, we can focus on two factors to be considered in determining whether the trial court and PCR court should have considered and have held a competency hearing weigh in favor of the petitioner. First, the PCR court possessed significant information regarding petitioner's irrational behavior.

Counsel testified that when asking petitioner if he was guilty, petitioner did not answer the question (App. p.108, lines 11,12), and when the trial court asked petitioner if he understood all of the things that the Solicitor just told him, thereupon petitioner asked to speak with his attorney (App. p.13, lines 2-8).

Not only did the trial court possess evidence of petitioner's irrational behavior, but the court also possessed uncontroverted testimony which concluded that petitioner suffered a understanding of what was going on and being said. By counsel's own testimony and petitioner showing markedly bizarre and inappropriate behavior, that his understanding was generally poor, that he was unable to understand the legality of the proceeding, and that he was evidently following the erroneous instructions advised by counsel. The Court as well as the PCR court knew or should have known and concluded that petitioner was not aware of the nature and consequences of the alleged acts lodged against him and was not capable of distinguishing what was being asked of him and making an informed decision. Petitioner also concludes that he could not intelligently aid his plea counsel in his own defense. Together, the two instances strongly indicated that petitioner was incompetent to plead guilty.

Petitioner's demeanor at the plea hearing, as well as, at the PCR hearing while perhaps not sufficient in itself to raise a bona fide doubt regarding his competence to plead guilty, See, *Thompson v. Wainwright*, 787 F.2d 1447, 1458 (11th Cir. 1986)(defendant's one correct response to a question from the judge did not indicate incompetence), at least supports the doubt raised by counsel's testimony and by petitioner's prior irrational behavior. In response to the judge's question of whether there was anything that petitioner did not understand about his case, petitioner asked to speak with his attorney. This statement, coming directly from the petitioner, could have served only to further alert the trial court that petitioner's understanding and mental competency was in serious doubt.

APPLICABLE LAW

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Butler*, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

The petitioner submits that counsel was ineffective for failing to hold a competency hearing is with merit. Petitioner asserts that counsel was ineffective for holding a competency hearing. Counsel testified that when asked one time if petitioner was guilty, he did not answer. The court asked him a similar question and petitioner asked to consult with his attorney. Here, counsel asked petitioner one time if he was guilty and stated that petitioner did not respond. Counsel took this lack of response as petitioner not denying his guilt rather than an indication he was not aware of what was being asked by counsel. This was a communication issue, not an acknowledgment of guilt by silence. The transcript (page 13, line 5) of the plea hearing indicates that the petitioner had questions as to the proceedings and accusations. After being asked by the Court if he understood what the Solicitor had just stated for the facts of the case, the petitioner asked to speak with his attorney. The transcript shows a lapse of time that indicates

confusion on the part of the Petitioner. Petitioner was more concerned with the threat of receiving 50 years versus 10 years which created tremendous pressure to plead guilty.

Counsel failed to review the State's evidence with the Petitioner. If the evidence had been reviewed with petitioner, petitioner would have had a more informed understand of the proceeding as well as the accusations against him. Petitioner would have decided to forego a jury trial had he have an understanding of the proceeding and accusations.

CONCLUSION

Based on the foregoing, this Petitioner asks this Court to reverse the decision of the PCR court and remand his case.

Respectfully submitted,

Jose A Anzaldo

Jose Antonio Anzaldo

Pro Se Appellant

This 12 day of APRIL, 2013.

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Therefore, Petitioner requests that the Court entertain his petition for Certiorari in this PCR matter.

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