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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**CERTIORARI - PCR- GREENWOOD COUNTY
Court of Common Pleas
Hon. J. Mark Hayes, II, Post-Conviction Relief Judge**

Appellant Case No. 2020-000574

Maunwell Ervin, Jr. No 3566337 Respondent,

vs.

The State Petitioner.

BRIEF OF RESPONDENT

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Statement of Issues on Appeal

I. The PCR court erred in failing to find the PCR application was procedurally barred because it was untimely filed and the discovery of preexisting law does not constitute new facts under S.C. Code § 17-27-45(C). Ervin was aware that he filed a PCR application alleging counsel was ineffective at trial, so the alleged conflict that was not an actual conflict also fails to constitute new facts under § 17-27-45

II. Counsel reasonably ascertained that no double jeopardy violation occurred and the PCR court's finding that counsel was ineffective for failing to raise a double jeopardy violation is controlled by an error of law. Further, no conflict of interest arose from Respondent filing a PCR application against the State alleging counsel was ineffective a the prior trial because counsel still owed a duty of loyalty solely to Applicant for the remaining charges to which the jury was unable to reach a verdict.

Argument

Question I

The PCR court erred in failing to find the PCR application was procedurally barred because it was untimely filed and the discovery of preexisting law does not constitute new facts under S.C. Code § 17-27-45(C). Ervin was aware that he filed a PCR application alleging counsel was ineffective at trial, so the alleged conflict that was not an actual conflict also fails to constitute new facts under § 17-27-45¹

S. C. Code § 17-27-45 requires that the Post Conviction Relief petition be filed “within one year after entry of a judgment of conviction or within one year after sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.” As no appeal was taken in this case, the statute of limitation would normally have begun to run on the date Mr. Ervin entered his guilty plea. The Statute as to Post Conviction Relief Potions has an exception. It provides “(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.”

Mr. Ervin filed his petition within one year of the time he learned of the material facts that would afford him a valid Post Conviction Relief action. He based his Post Conviction Relief Petition upon the failure of plea counsel in this case to assert a valid and complete defense. An

¹ For the ease of the reader in following the issues, Respondent has used the same issues stated by the Petitioner.

analysis of the other pending Post Conviction Relief action is necessary to fully understand the issues in this case. Mr. Ervin was originally indicted for the charges of possession of a firearm while engaged in a drug trafficking offense, possession with intent to distribute marijuana, possession with intent to distribute marijuana within proximity of a school, trafficking crack cocaine, trafficking crack cocaine within proximity of a school and possession of Benzylpiperazine.

The first trial was held in January of 2013. At that trial Mr. Ervin was found not guilty of possession of a firearm while engaged in a violent crime. The Indictment specifies the violent crime as “trafficking in crack cocaine.” App. at 571. The jury was unable to reach a verdict on all the remaining charges. A second trial was held in July of the same year. This trial resulted in Mr. Ervin being convicted of possession of marijuana with intent to distribute, possession of marijuana with intent to distribute within proximity of a school, and possession of Benzylpiperazine. The jury was, again, unable to reach a verdict on the trafficking crack cocaine and proximity charges. Mr. Ervin took an appeal from these convictions, which were affirmed on November 26, 2014. The remittitur was sent on December 12, 2014.

On November 30, 2015, Mr. Ervin filed his first Post Conviction Relief Petition on the charges for which he was convicted by depositing it in the mail of the South Carolina Department of Correction. At the time of his plea in this matter, his first Post Conviction Relief Petition had been pending for more than four months. He had also filed a Motion to have his counsel relieved which was admitted as an exhibit in Post Conviction Relief Petition hearing. His plea counsel, who was also his trial counsel at the two 2013 trials, acknowledged that she had received the Motion to have her relieved as counsel. She further confirmed that the State

was also aware that Mr. Ervin had filed an ineffective assistance of counsel claim against her and a Motion to have her relieved. Notwithstanding these facts, the plea judge was never informed of this conflict and there was no attempt to obtain a waiver from Mr. Ervin. Simply put, from the testimony no one made the plea judge aware of this obvious conflict.

This Court has said, “An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are averse to the defendants.” *State v. Gregory*, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005). In that case, trial counsel representing Mr. Gregory was also representing the assistant solicitor prosecuting the case in his divorce action. The Court said, “In this case, we find Gregory’s attorney had an actual conflict because he placed himself in a ‘situation inherently conducive to divided loyalties’ by simultaneously representing Gregory and the assistant solicitor who was handling his criminal case. Given the actual conflict, Gregory is not required to demonstrate prejudice.” *Id.* at 154, 612 S.E.2d at 451.

In this case, there was divided loyalty. Mr. Ervin had filed an action saying his lawyer was not competent in his prior representation. He was seeking a new trial in that action. He further had filed a Motion requesting his plea counsel be dismissed. This Motion had not been heard. At the time of his plea in this matter the motion had been pending for almost exactly one full year. By not raising any defense and entering the plea, the plea lawyer mooted his first PCR as very little time would be reduced if he were successful in the first PCR. Thus, his plea counsel had an incentive to protect herself and to eliminate any benefit to an ineffective assistant of counsel claim.

The due process clause of Article I, §12 of the Constitution of the State South Carolina and the Fourteenth Amendment to the Constitution of the United States of American should

afford relief to Mr. Ervin either independently or in interpreting the South Carolina Post Conviction Relief Statute. The due process issue arose in a unique way in *Steele v. Kehoe*, 724 So. 2d 1192 (Fla. Dist. Ct. App. 1998), approved, 747 So. 2d 931 (Fla. 1999). Mr. Steele sued his attorney in a civil suit for malpractice for failing to file a timely post conviction relief action. His civil suit was dismissed below. In affirming the dismissal of the suit, the Court granted Mr. Steele the right to file an action for post conviction relief. As the Court said, “If a defendant can prove that he was improperly convicted, he should be set free. If he is denied the opportunity to offer such proof because of the malpractice of his lawyer, fundamental due process requires that he have a remedy that will address his future incarceration and not merely compensate him for improperly staying in prison.” *Id.* at 1193-1194. The same principle applies here. Mr. Ervin was not aware of a valid defense because of the conflict of his lawyer and because she did not advise him of the defense even though she was aware of the defense. The conflict in this case is such that no reasonable judge would have taken a plea in this case had the judge known all the facts. The failure to inform the judge of the conflict is the fault of defense counsel and the State. By not raising this defense and entering the plea, the lawyer virtually mooted Mr. Ervin’s first PCR, as very little time would be reduced if he were successful in the first PCR.

The other part of the code section requires that it be information that the applicant could not have learned by the exercise of reasonable diligence. The failure of a non lawyer to know of a valid legal defense, especially an inmate in the Department of Corrections, is not one of the things that he can be expected to learn through reasonable diligence. In fact, his plea counsel, who had been informed of the defense, did not raise it. Mr. Ervin could not be held to a higher standard. In *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2012) this Court held that a

successive PCR should not summarily be dismissed as the applicant showed a valid reason as to why he filed his second petition about four years after his conviction. In that case, the petitioner filed his petition based upon his discovery, some four years later, that one of the jurors on his case had a cousin who was married to the Seventh Circuit Solicitor. He learned this from reading the transcript of the trial of a fellow inmate that had occurred shortly after his trial. The relationship came up during the jury selection of the fellow inmate. Learning of a valid defense to a charge is at least equal to learning of a relationship between a cousin of the juror and the solicitor.

South Carolina has recognized that a structural error requires reversal of a conviction even without prejudice. *State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) (“Essentially, an error is structural if it is the type of error which transcends the criminal process.”)(citations omitted). In this case, the conflict plea counsel had with her client is the equivalent of a structural error. Because of the obvious conflict, Mr. Ervin had the equivalent of no objective counsel to advise him of the valid defense. Failure to provide counsel is a structural error. *Johnson v. United States*, 520 U.S. 461, 468, (1997). S. C. Code § 17-27-20 (A4) provides as a ground for granting a Post Conviction Relief Petition that is not timely filed “That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” When such a basic structural error occurs in a trial or plea, the interest of justice should, and does, require that the issue be addressed. The facts of this case also come under this provision. The Post Conviction Relief judge made a factual finding that the ends of justice require that Mr. Ervin be granted relief. The record adequately supports this factual finding.

The State was fully aware that Mr. Ervin had a clear conflict with his plea counsel. The State took no action to obtain a waiver of this conflict or to bring it to the attention of the plea judge. Mr. Ervin had filed a “Motion for Relief of Counsel” on April 30, 2015. No action had been taken on that motion at the time of the plea. Common sense and fairness would dictate that a lawyer who has an active PCR petition pending against them by their client should not be representing the client unless a waiver is obtained on the record. This was not done in this case. Mr. Ervin has the right to have as his counsel an attorney who is free from a conflict with him. That did not happen in this case. These facts are certainly one of those fact situations where a sentence should be set aside “in the interest of justice.”

As noted previously, S. C. Code § 17-27-45 (C) requires that a Post Conviction Relief Petition be filed within one year of the applicant learning of the facts that would entitle him to post conviction relief. In this case, Mr. Ervin did not learn of the double jeopardy defense until May 26, 2017. At that point Mr. Ervin knew his lawyer did not raise a very meritorious defense of which she had knowledge. This PCR was filed about a month after he acquired this knowledge. In addition, the PCR application is timely filed because the due process clause would require that a plea entered by an attorney with an obvious conflict cannot be permitted to stand. This Court has also recognized that a guilty plea does not waive a double jeopardy defense unless it is specifically placed on the record and waived. *Jivers v. State*, 304 S.C. 556, 406 S.E.2d 154 (1991). *See also, Kelly v. State*, 274 S.C. 613, 615–16, 266 S.E.2d 417, 418 (1980) (“The trial court found defense counsel’s representation competent and a ‘conscious and calculated decision’ to accept the State’s offer and waive appellant’s double jeopardy claim.”)

Question II

Counsel reasonably ascertained that no double jeopardy violation occurred and the PCR court's finding that counsel was ineffective for failing to raise a double jeopardy violation is controlled by an error of law. Further, no conflict of interest arose from Respondent filling a PCR application against the State alleging counsel was ineffective at the prior trial because counsel still owed a duty of loyalty solely to Applicant for the remaining charges to which the jury was unable to reach a verdict.

In this case, under the rule established in *Yeager v. United States*, 557 U.S. 110 (2009), Mr. Ervin has a complete defense to the drug trafficking charge. His plea counsel at the hearing acknowledged that she had received an email from Charles Grose, a lawyer in Greenwood, who had followed the case. App. at 506. This email was sent shortly after the first trial informing her that she had a substantial argument under the double jeopardy rule established in *Yeager*. She admitted receiving the email. She did not file a motion to dismiss on double jeopardy grounds prior to the second trial or prior to her client entering a plea. She did not recall discussing this issue with Mr. Ervin. App. at 462, ll 12 - 15.

The State has asserted several theories as to how Mr. Ervin could be found not guilty of the possession of a firearm charge while engaged in a violent crime and still not have been acquitted on the trafficking of crack cocaine charge. This approach was specifically rejected by the United States Supreme Court in *Yeager*. The Court said, "Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." *Id.* at 122. In concluding, the Court said, "[T]he fact that a jury hangs is evidence of nothing - other than, of course, that it has

failed to decide anything. By relying on hung counts to question the basis of the jury's verdict, the Government violates the very assumption of rationality it invokes for support." *Id.* at 125.

In *Yeager*, the defendant went to trial on several counts as did Mr. Ervin in this case. The jury acquitted Mr. Yeager on one count and was unable to reach a verdict on the remaining counts, just as happened in the January trial of Mr. Ervin. The Supreme Court stated the issue as follows: "The question presented in this case is whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. We hold that it does not." *Id.* at 112. Under the *Yeager* analysis, the charges upon which the jury was unable to reach a verdict are treated as "nonevents." As a nonevent, the counts upon which the jury hung are of no consideration in determining the issue preclusion aspect of the Double Jeopardy clause. As the Supreme Court said "To ascribe meaning to a hung jury count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork." *Id.* at 2368.

In this case, the State, in the indictment, made the trafficking in crack cocaine an element of the gun charge. App. at 571. The jury acquitted Mr. Ervin on the charge of possession of a firearm while engaged in a drug trafficking offense. App. at 572. The firearm, just as the drugs, was found in the house rented by Mr. Ervin. As the jury, by its verdict, found Mr. Ervin not guilty of the firearm charge, that would include being found not guilty of the trafficking in crack cocaine. Thus, the State is precluded from trying Mr. Ervin again for the trafficking charge and related proximity charge. The possession of marijuana with intent to distribute and the proximity charges were not elements of the firearm charge and therefore are not impacted by the acquittal

of the firearm charge.

A simpler way of looking at this analysis is to imagine a trial in which the State elected to try a defendant on the sole count of possession of a firearm while engaged in a drug trafficking offense. If the jury acquits the defendant in that case, the issue preclusion aspect of the Double Jeopardy clause would prevent the State from conducting a second trial on the drug trafficking charge. Treating the hung counts as a nonevent, as the Supreme Court requires, the analysis is the same regardless of whether the firearm count is tried by itself or as part of multiple charges when the other charges result in a hung jury.

Had counsel raised the Double Jeopardy issue at trial in a motion to dismiss, the trial court would have been required to grant the motion and dismiss the charges. Because of this analysis, trial counsel was ineffective in failing to raise the double jeopardy issue and Mr. Ervin was prejudiced. The lower court properly found plea counsel was ineffective in failing to raise this issue before the plea.

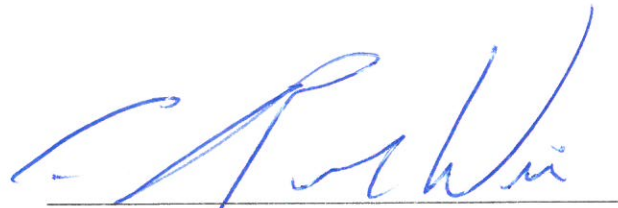
State v. Henley, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019) is of no assistance to the state. An acquittal on the larceny charge did not involve the burglary. Larceny did not include a burglary as an element of the crime. Had the opposite occurred, an acquittal on the burglary and a hung jury on the larceny, *Yeager* would have precluded a second trial. An acquittal on burglary would also have been an acquittal on any stealing or intent to steal. Here, trafficking in cocaine was made an element of the crime by the statute as it required that a violent crime be committed. As noted above, the State, in the indictment, specifically named the violent crime as “trafficking cocaine.” App. 571.

Mr. Ervin is entitled to a new trial. This Court should agree with the lower court and find that trial counsel was ineffective in failing to raise the double jeopardy defense established in *Yeager*. Mr. Ervin was prejudiced in this case because no reasonable judge could have denied the double jeopardy motion under the facts of this case. As the defense not raised is meritorious as a matter of law, no purpose is served by simply granting a new trial. The drug trafficking charges against Mr. Yeager should be dismissed with prejudice.

Conclusion

For the foregoing reasons this Court should affirm the decision of the Post Conviction Relief judge.

December 28, 2021



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