STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Berkeley County

Honorable Jean H. Toal, Circuit Court Judge

DAVID LEON STEPHENS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001168

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether the PCR court erred in denying Petitioner relief, where the State failed to comply with Petitioner's request under the Interstate Agreement on Detainers Act (IAD), where after Petitioner was transported to South Carolina, the State dismissed the arrest warrant upon which Petitioner sought final disposition, and where the State then indicted him on three different charges before dismissing the arrest warrant, and where plea counsel never moved for dismissal or sought relief on the State's failure to bring Petitioner's case to trial within one hundred and eighty days as required by the IAD?

II. Whether the PCR court erred in granting the State's Motion to Reconsider under Rule 59(e), SCRCP, when the State raised new arguments at the motion hearing, where the State sought to distinguish between different variations of a second degree criminal sexual conduct charge, and where that argument was not made prior to the filing of the motion?

III. Whether the PCR court erred in denying relief, where Petitioner's guilty plea was involuntary following his realization that an IAD violation has occurred and where plea counsel's inaction with regard to the IAD violation rendered his entire plea involuntary?

STATEMENT

Petitioner was indicted by a Berkeley County grand jury in May 2013 for two counts of criminal sexual conduct of a minor in the second degree as well as one count of lewd act. App. 214 – 217. On September 17, 2014, he appeared before the Honorable Kristi Harrington to plead guilty as indicted. App. 1. Anne Williams served as the Assistant Solicitor, and Debra Littlejohn represented Petitioner. Petitioner pleaded guilty subject to a negotiated cap of fifteen years with sentences crafted to run concurrently. App. 4 ll. 2 – 10.

Petitioner pleaded guilty, and Judge Harrington accepted his plea. App. 11 ll. 2 – 11; App. 17 ll. 15 – 21. The lewd act charge was dismissed as part of the agreement. App. 15 ll. 18 – 20. Petitioner was sentenced to fifteen years concurrent on the two criminal sexual conduct charges. App. 24 ll. 9 – 19.

On or about March 11, 2015, Petitioner filed a timely application for post-conviction relief. App. 26 – 32. It contained allegations of ineffective assistance of counsel, including claims that plea counsel did not object or move for compliance with his claim under the Interstate Agreement on Detailers Act (hereinafter "IAD"). The State made its Return on or about March 28, 2016. App. 33 – 37.

An evidentiary hearing was held before the Honorable Jean H. Toal on September 16, 2016. App. 38. Lance Boozer represent Petitioner, and J. Rutledge Johnson and Jonathan Arndt, a third-year law student, appeared on behalf of the State. The PCR court heard testimony from Petitioner and plea counsel.

After taking the matter under advisement, the PCR court granted post-conviction relief by way of a written order filed November 9, 2017. App 94 – 101. The State filed a motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP on or about November 27, 2017.

App. 102 – 111. Counsel for Petitioner filed a Return on or about November 28, 2017. App. 113.

A hearing was held before the Honorable Jean H. Toal on April 4, 2018. App. 115. Lance Boozer again represented Petitioner, and Megan Jameson appeared on behalf of the State. No witnesses were called at the hearing. At the conclusion of the hearing, the PCR court granted reconsideration. App. 157 l. 1 – App. App. 161 l. 14. The criminal sexual conduct charge pertaining to intercourse was dismissed under an IAD violation. Id. The lewd act charge remained dismissed as well. Id. Regarding the digital penetration criminal sexual conduct charge, the PCR court indicated it would survive but questioned the plea's voluntariness. Id.

In accordance with the PCR court's instructions, both parties submitted written filings—the State a proposed order granting reconsideration and amending the prior order granting relief and counsel for Petitioner a response to the proposed order—in April 2018. App. 163 – App. 191. A variation of the former, an Order Granting Respondent's Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e), SCRCP and Amending Prior Order Granting Post Conviction Relief was filed on June 15, 2018.

This appeal follows.

ARGUMENT

I. The PCR court erred in denying Petitioner relief, where the State failed to comply with Petitioner's request under the Interstate Agreement on Detainers Act (IAD), where after Petitioner was transported to South Carolina, the State dismissed the arrest warrant upon which Petitioner sought final disposition, and where the State then indicted him on three different charges before dismissing the arrest warrant, and where plea counsel never moved for dismissal or sought relief on the State's failure to bring Petitioner's case to trial within one hundred and eighty days as required by the IAD.

A detailer was placed on Petitioner while he was in Pennsylvania on or about February 16, 2011. App. 18 ll. 5 – 11. He made a request for a speedy trial in April 2013. App. 45 ll. 13 – 18. He arrived in South Carolina on September 18, 2013. App. 19 ll. 3 – 12. Plea counsel was appointed in October 2013. App. 44 l. 15 – App. 45 l. 5. The two met approximately five times prior to his plea. App. 47 ll. 9 – 23. Petitioner spoke mostly of the IAD issue in his case during those meetings. Id. Counsel's response was always that she would check with someone because she had never had a case involving the IAD before. App. 47 l. 24 – App. 48 l. 15. Petitioner noted that had counsel should have moved, pursuant to the IAD, for dismissal of his charges. App. 49 l. 23 – App. 50 l. 6.

Petitioner requested, under the IAD, that he be tried within 180 days. App. 13 ll. 13 – 21. Upon review of the arrest warrant, the State became aware that the dates were wrong. App. 13 l. 22 – App. 14 l. 8. The warrant which was the subject of the IAD detailer was *nolle prossed*, and the assistant solicitor "directly indicted three counts of CSC second with a minor." Id.

The IAD is an interstate compact by which the States, the District of Columbia, and the federal government have established uniform procedures for the transfer of prisoners serving sentences in one state to another state for the disposition of pending charges. State v. Tucker, 376 S.C. 412, 656 S.E.2d 403 (Ct. App. 2008). Under the Interstate Agreement on Detainers Act (IAD):

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment ... he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court ... written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment.

S.C. Code Ann. 17-11-10.

This Court has recognized that failure to comply with the Act mandates dismissal of the charges with prejudice. State v. Patterson, 273 S.C. 361, 256 S.E.2d 417 (1979), State v. Holbrook, 274 S.C. 4, 260 S.E.2d 181 (1979).

At Petitioner's guilty plea, the State noted Petitioner's request that he be tried within 180 days. App. 13 ll. 13 – 21. After a brief cross-examination by the State during the evidentiary hearing in this matter, Petitioner was asked by the PCR court to explain in his own words, the violation of the IAD. His answer was instructive:

> [Plea counsel] didn't try to pursue for me the 180 days, where it said - - in the interstate agreement, if I recall correctly, it said you have 180 days to have this person in court; otherwise, they will be remanded back to the custody of the following state with the charges dismissed, and I kept pushing that issue and none of it seemed to have mattered.

App. 54 l. 1 – App. 55 l. 8. Petitioner repeated that he did not believe plea counsel pursued this issue on his behalf. Id.

Plea counsel testified at the evidentiary hearing that Petitioner brought the IAD matter to her attention fairly early on in her representation. App. 56 l. 22 – App. 58 l. 20. Petitioner "wanted [plea counsel] to pursue the IAD" issue following the State's failure to comply with the Act's requirements. App. 63 ll. 2 – 14. Counsel admitted that she had never had an IAD case before. Id. Counsel was convinced, however, that there was no violation based on her belief that Petitioner's complaint under the statute had not been delivered to the Clerk of Court in Berkeley County. Id.

As a result of this belief, Counsel never complied with Petitioner's request by filing a motion to dismiss the charges, because she believed that although Petitioner had "filled out some of the stuff he needed to fill out... some of it wasn't done." App. 59 ll. 11 – 22. Counsel testified that she characterized Petitioner's request pursuant to the IAD as "null and void as not being properly made." App. 62 ll. 11 – 15. However, counsel did not recall having a conversation with Petitioner indicating such. App. 62 l. 16 – App. 63 l. 1.

On cross-examination, counsel conceded that the State did not dispute the validity of Petitioner's request pursuant to the IAD at his guilty plea. App. 65 ll. 1 – 8. Again, counsel admitted that she "did not pursue any sort of motion to have either the charge dismissed or for [Petitioner] to be taken back to Pennsylvania because the case had not been called for trial within that particular time frame as required by the agreement." App. 65 l. 21 – App. 66 l. 1.

Counsel admitted that had the IAD request been properly filed, pursuant a motion to get the charge dismissed is something that would have benefitted Petitioner. App. 66 ll. 5 – 17. Had she pursued that course of action, she acknowledged the possibility that Petitioner's charge could have been dismissed. App. 68 ll. 18 – 21.

As was the case with Petitioner, the PCR court questioned plea counsel. App. 67. The PCR court examined the process behind requesting relief under the IAD. App. 67 l. 10 – App. 77 l. 3. During this line of questioning, counsel agreed that it was Petitioner's responsibility to file with the warden in Pennsylvania a petition for relief. Id. Counsel also agreed that it was the duty of the person who has custody of the detainee to properly forward it to the clerk of court. Id. The PCR court and plea counsel discussed four forms which were made Court's Exhibit 1. App. 84 – 93.

The PCR court noted that it was rather unfair for the State to *nolle prosequi* the warrant which was the subject of the interstate detainer and then directly indict three charges. App. 75 ll. 1 – 25.

Petitioner did what he was required to do throughout these proceedings. He complied with the IAD and was unable to force the warden to serve the Berkeley County Clerk. As argued by PCR counsel:

> Mr. Stephens followed all of the steps necessary to get him down here to South Carolina to deal with this charge, and, in doing so, that kind of triggers some benefits for him because the State then has to abide by certain rules and timelines. I think in this situation Mr. Stephen's position is he should have been given the opportunity to pursue the - - to try and get the charge dismissed by his lawyer for failing to follow the time line of 180 days, and [plea counsel] admitted that if everything were done properly, and it appears form what we've seen that's been marked as Court's Exhibit No. 1, everything was done properly by Mr. Stephens. Everyone was on notice he was down here, and that's why he was here, was pursuant to the agreement.
>
> She felt that it would have been prudent to probably make that motion to at least try and get the charges dismissed. It's a rare opportunity in a criminal case to have some sort of procedural bar where it just knocks the case … out of the court system but certainly they could come back and indict later on, but I certainly think he deserves that opportunity to make that argument, and we don't know what the solicitor's office would have done had the charge been dismissed pursuant to a motion by [plea counsel], but I think she should have made that motion because without the motion, he remained here in South Carolina.

> While he's in South Carolina, she said it was unfair, but they *nolle prossed* it and served him with three more charges that he then had to deal with, so that is the basis of his argument and why he feels he's entitled to post-conviction relief.

App. 78 l. 5 – App. 79 l. 11. He was unable to force plea counsel to file a motion for a speedy trial. Thus, a plain violation of the requirements of the IAD was established. A defendant need not show prejudice before a trial court can dismiss an indictment where the State has violated a prisoner's rights under Article III of IAD. State v. Johnson, 278 S.C. 668, 669, 301 S.E.2d 138, 139 (S.C. 1983).

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient, and 2) he was prejudiced by counsel's deficient performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As seen by the State's later concession that the IAD was violated, plea counsel was deficient in failing to recognize this fact and move to prevent re-indictment by the State. The prejudice in Petitioner's case manifested itself in the additional charges which could have been avoided had Petitioner received a final disposition on the charge as provided by the IAD. He would have had grounds to exclude potentially damaging testimony on anything that the State sought to further indict him for.

The IAD provides for expeditious delivery of the prisoner to the receiving State for trial prior to the termination of his sentence in the sending State, and it seeks to minimize the consequent interruption of the prisoner's ongoing prison term. The purpose of the act is to foster the expeditious disposition of charges outstanding against prisoners so as to eliminate the uncertainties which accompany the filing of detainers. State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1977). The goal of promoting prisoner rehabilitation programs is achieved by requiring the receiving state to dispose of the case within 180 days. State v. Patterson, 273 S.C. 361, 363, 256

S.E.2d 417, 418 (1979). In this case, Petitioner made a request for final disposition of his charge, that both the Pennsylvania correctional institution in Somerset and the solicitor in Berkeley County were aware of this request, and that Petitioner was not tried within 180 days. The IAD was applicable, and both Article III(a) and Article IV(c) were violated when Petitioner's charge was not brought before the court for final disposition within the required time frame.

The PCR court, at a later motions hearing, questioned whether there would be a problem of double jeopardy after the State conceded that the arrest warrant should have been dismissed. App. 126 ll. 13 – 23.

Both the United States Constitution and the South Carolina Constitution protect against double jeopardy. The United States Constitution, which is applicable to South Carolina through the Fourteenth Amendment, provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb...." U.S. Const. Amend. V. The South Carolina Constitution states: "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty...." S.C. Const. Art. I, § 12. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 664-65 (1969) (overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)); accord Schiro v. Farley, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994); Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984); United States. v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); United States v. Wilson, 420 U.S. 332, 95 S.Ct.

1013, 43 L.Ed.2d 232 (1975); Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999); McMullin v. South Carolina Dep't of Revenue & Taxation, 321 S.C. 475, 478, 469 S.E.2d 600, 602 (1996); State v. Owens, 309 S.C. 402, 405, 424 S.E.2d 473, 475 (1992); see also In re Matthews, 345 S.C. 638, 648, 550 S.E.2d 311, 316 (2001) ("The Double Jeopardy Clause protects against multiple punishments for the same offense."). Had the arrest warrant been dismissed with prejudice, Petitioner could have argued against future indictments on the same charge.

The fundamental difference between the State's decision to dismiss the charge then re-indict Petitioner and what would have transpired had plea counsel provided effective assistance counsel is that in the latter scenario, the dismissal would have been with prejudice. The State could not have re-indicted Petitioner on a charge dismissed with prejudice. This distinction serves not only as the deficient performance but also as the prejudice in Petitioner's case.

II. The PCR court erred in granting the State's Motion to Reconsider under Rule 59(e), SCRCP, when the State raised new arguments at the motion hearing, where the State sought to distinguish between different variations of a second degree criminal sexual conduct charge, and where that argument was not made prior to the filing of the motion.

The State filed a ten-page Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e), SCRCP. App. 102. For the first time, the State attempted to distinguish between digital and penile penetration, arguing that the original warrant under which Petitioner made his IAD request only contained an allegation of penile penetration. Id. The Arrest Warrant, M-333205, was never discussed with any specificity prior to the State's filing of its 59(e) motion, only generally referenced as "this warrant" and "the outstanding warrant" by the assistant solicitor. App. 4 ll.

11 – 20; App. 12 ll. 2 – 4. The warrant was not made an exhibit at either Petitioner's guilty plea or evidentiary hearing.

The State argued in its motion that "Applicant did not properly comply with IAD provisions" yet at the hearing on the 59(e) motion, conceded that a violation had occurred. App. 107; App. 118 l. 23 – App. 119 l. 10.

The State sought to distinguish between the original warrant giving rise to the detainer request and the three subsequent indictments, but they were a product of the original warrant. Had the IAD been complied with and the original warrant dismissed, Petitioner may not have been tried on the subsequent charges. As noted by the State in its Rule 59(e) Motion, Arrest Warrant M-333205 was for genital penetration. App. 103. With that charge dismissed, the fact that the minor was allegedly impregnated by Petitioner might not have been admissible in a subsequent trial for digital penetration.

> [I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21–22, 602 S.E.2d 772, 778–79 (2004) (internal citations omitted). There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity. Id.

South Carolina rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when it believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the

party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In Petitioner's case, the argument offered by the State was newly introduced and did not originate in the State's Return, testimony elicited at the evidentiary hearing, or argument by counsel.

A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. E.g., C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct.App.1990).

As argued by PCR counsel, the State "should be foreclosed from doing that." App. 152 l. 9 – App. 153 l. 3. The PCR court agreed that neither party mentioned this argument, nor did the court inquire about it. App. 154 ll. 2 – 19.

III. The PCR court erred in denying relief, where Petitioner's guilty plea was involuntary following his realization that an IAD violation has occurred and where plea counsel's inaction with regard to the IAD violation rendered his entire plea involuntary.

Petitioner indicated that he pleaded guilty for the following reasons:

> Once I was in jail, sitting down here, because I knew my constitutional rights were violated, and I could see that I was just getting railroaded anyway, so that was one of the main issues.
>
> Another one, … [plea counsel] had came to tell me the solicitor said, Don't take the plea. We're going to put to put everything back to back, make it consecutive, and, basically she'd be going for the max on each sentence. So I was like, 15 years is a lot better than 70, so - -

App. 50 ll. 11 – 22. Petitioner reiterated that plea counsel had not filed the proper motion to have the charge dismissed pursuant to a violation of the IAD. App. 50 l. 23 – App. 51 l. 1.

"[A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. Boykin v. Alabama, 395 U.S. 238, 242–43, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969). Before a defendant may plead guilty, it must be established that the defendant is competent and that the defendant's decision to plead guilty is a knowing and voluntary one. Sims v. State, 313 S.C. 420, 423–24, 438 S.E.2d 253, 254–55 (1993) (citing Godinez v. Moran, 509 U.S. 389, 398–401, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993)). "That the plea be voluntary is not only a requirement of due process, but a premise of the defendant's meaningful participation in the plea process." United States v. Savinon-Acosta, 232 F.3d 265, 268 (1st Cir. 2000) (citing McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)).

The State conceded that a violation under the IAD occurred, so Petitioner was correct in concluding that his rights had been violated. It was only after pursuing relief under the post-conviction relief process that this was finalized, however. At the time of his plea, he knew that to be the case but it had not yet been proven following plea counsel's inaction. His court-appointed attorney had not filed the motion he requested. He had no choice but to plead guilty, especially following the threat of maxing him out under consecutive sentences.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant his petition for writ of certiorari and allow further briefing on this matter, reverse and dismiss the charge against him.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of February, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Jean H. Toal, Circuit Court Judge

DAVID LEON STEPHENS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on David Leon Stephens, #361522, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 19th day of February, 2019.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 19th day of February, 2019.

ATTORNEY FOR PETITIONER

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027