

No.

TWELFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA,)

)

)

v.

)

From Cumberland County

)

No. 09-CRS-50579

BRANDON CADY,)

)

DEFENDANT)

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Defendant, Brandon Cady, by and through undersigned counsel, respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the order of the Honorable James Floyd Ammons, Jr., Judge Presiding, Superior Court, Cumberland County, dated July 8, 2015, denying Cady's motion for appropriate relief, and in support of this petition shows the following:

FACTS¹

On May 18, 2009, an Indictment was filed charging Brandon Cady with Statutory Rape and Indecent Liberties With a Minor in violation of North Carolina General Statutes §§ 14-27.7A and 14-202.1 for the incident involving a fourteen (14) year old girl, A.Y., that occurred on December 13, 2008.

Cady met A.Y. and her friend V.M. after he responded to an ad on Craigslist posted by V.M. who was seeking a singing partner for a band. After texting back and forth with V.M., Cady eventually met her in person that the two of them could sing together. Cady was not pleased with her performance after hearing her sing on multiple occasions and the two went their separate ways.

V.M. then got a new phone and did not recognize Cady's phone number so she called Cady using A.Y.'s phone to find out who he was. The three of them began socializing and hung out on multiple occasions. A.Y. would frequently contact Cady throughout the day either through text messages or phone calls. When V.M.'s parents were not home, V.M. and A.Y. would tell Cady to come to V.M.'s house.

A.Y. and Cady became very close over the course of a few weeks and began publically displaying affection for one another. According to A.Y., she thought Cady was twenty-five (25) or twenty-six (26) years of age.

On December 13, 2008, Cady was contacted by V.M. who told him to come over to her house and that A.Y. was also present. When Cady arrived, A.Y. embraced him with a kiss and led

¹ The following facts are set forth upon information and belief, the source of which are conversations with the Defendant, review of court records and medical records, and conversations with others.

him to V.M.'s bedroom. Inside V.M.'s bedroom, A.Y. expressed her desire to have sexual intercourse with Cady and took off her clothes. According to her, the two then engaged in sexual intercourse in V.M.'s bed while V.M. was in the other room. Cady made no threats or demands to A.Y. to coerce her to engage in sexual activity.

The next day, Cady received text messages from A.Y. discussing what happened between them. A.Y. initially expressed no regrets to Cady and even bragged to her friends at school about their relationship. A.Y. and her friends then looked Cady up on the internet and discovered he was actually thirty-six (36) years of age.

A.Y. was extremely upset that Cady was much older than she suspected and expressed this to her friends. One of A.Y.'s friends went home and told her mother about what A.Y. was telling everyone. The friend's mother then contacted A.Y.'s mother and informed her of her daughter's relationship.

On December 16, 2008, A.Y. and her mother reported the incident to the police. A.Y. stated that she engaged in sexual intercourse with Cady and that she was fourteen (14) years old at the time. A.Y. presented for a medical examination where she was tested for sexual transmitted diseases and was given a "morning after pill." However, a rape kit was never performed and A.Y. was not psychologically examined until two months later.

Cady was arrested on February 6, 2009, and charged with Statutory Rape and Indecent Liberties With a Minor in violation of North Carolina General Statutes §§ 14-27.7A and 14-202.1.

Initially, Cady entered a plea of not guilty to the above referenced charges and proceeded to go to trial. Cady retained attorney James MacRae, Esq. (hereinafter “trial counsel”), to represent him at trial, however, he failed to develop a defense strategy.

Cady informed trial counsel that he was active duty in the U.S. Army and had two deployments in Iraq and one in Afghanistan. While in the military, Cady developed Post Traumatic Stress Disorder (PTSD) and also suffered from anxiety, depression, and ADHD, and he informed trial counsel that he was prescribed Adderall, Zoloft, Lorazepam, and Zolpidem to treat those conditions.

Trial counsel never requested his medical records from Veteran’s Affairs which would have supported that Cady suffered from mental disorders that caused him to experience frequent headaches, memory loss or amnesia, anxiety, depression, and trouble sleeping. On February 12, 2009, Cady was evaluated by a medical doctor whom opined that Cady’s psychiatric health was abnormal and he suffered from depression.

Cady’s history of mental illnesses and use of psychotropic medications would have supported that Cady suffered from a diminished mental capacity at the time the offense occurred. Had trial counsel listened to Cady, he would have requested the medical records and had Cady evaluated by an expert to determine whether an insanity defense was viable. Additionally, this information, if properly presented to the District Attorney and the sentencing court, would have constituted significant mitigation to justify leniency at sentencing.

Additionally, Cady requested that trial counsel obtain phone records to contradict the State’s allegations that Cady was contacting V.M. and A.Y. via text messages and phone calls

which would have shown multiple incoming phone calls and text message conversations that were initiated by V.M. and A.Y., not Cady.

Instead, trial counsel proceeded to trial unprepared and without a viable defense strategy. He never investigated an insanity defense even though he was presented with supporting facts and failed to obtain evidence that would refute the State's contention that Cady was initiating the contact with V.M. and A.Y.

The case proceeded to trial on March 25, 2014 before a jury. At trial, counsel failed to effectively cross-examine A.Y. Specifically, trial counsel elicited the following damaging testimony: during re-cross examination which served no purpose to the defense:

Q You had two alcoholic beverages that night, one to two?

A Correct.

Q Is that correct?

A Correct.

Q And then two to three minutes after that, you began kissing; is that your testimony?

A Yes.

Q And then two to three minutes after that, you took your clothes off; is that correct?

A It's all around and about.

Q And then you had sex for 45 minutes?

A About, I'm assuming, around.

Q And that was the first time you had ever had sex?

A Correct.

MR. MACRAE: That's all I have.

Immediately afterwards, trial counsel told Cady that he had no choice but to enter a guilty plea instead of proceeding with the trial. This discussion occurred during the testimony of V.M., which trial counsel assigned his co-counsel to conduct the cross-examination while he coerced Cady to enter a guilty plea.

Feeling that he had no choice, especially given that trial counsel did not prepare a defense, Cady withdrew his plea of not guilty and entered a plea of guilty on March 26, 2014 to Attempted Statutory Rape pursuant to a plea agreement. Cady was sentenced that same day to a term of one hundred twenty (120) to one hundred fifty-three (153) months imprisonment.

On March 24, 2015, Cady filed a motion for appropriate relief pursuant to North Carolina General Statutes § 15A-1415(b), which argued: 1) that he was denied his right to effective assistance of counsel due to the fact trial counsel failed to investigate and present a potential defense, which ultimately resulted in him entering a guilty plea rather than proceeding with the trial; and 2) his plea was entered involuntarily, in violation of the United States Constitution and The North Carolina Constitution, because trial counsel refused to continue representing him at trial.

The court then ordered trial counsel to file a response to Cady's allegations in the motion for appropriate relief, which he did so on June 8, 2015. The State was never ordered to file a response to the motion.

Despite the inconsistencies between the allegations contained in the motion for appropriate relief and the response by trial counsel, the court denied Cady's motion for appropriate relief without holding an evidentiary hearing on July 8, 2015.

Reasons Why Writ Should Issue

THE DEFENDANT'S MOTION FOR APPROPRIATE RELIEF WAS ERRONEOUSLY SUMMARILY DENIED WHERE DEFENDANT PRESENTED FACTUAL ISSUES THAT COULD ONLY BE RESOLVED BY HOLDING AN EVIDENTIARY HEARING

Under North Carolina General Statute. § 15A-1420(c):

(1) Any party is entitled to a hearing on questions of law or fact arising from the motion ... unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact....

...

(3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law....

(4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact....

In State v. McHone, the North Carolina Supreme Court stated “an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law”. 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998).

Also, in State v. Hardison, 126 N.C.App. 52, 483 S.E.2d 459 (1997), this Court determined that a hearing was appropriate to determine factually disputed issues such as ineffective assistance of counsel. In Hardison, the defendant argued that there existed a conflict of interest with the counsel representing him during the entry of his guilty plea. The Court determined that the nature of the claim was such that it would not appear on the face of the record but would instead require a hearing.

[t]he ultimate question that must be addressed in determining whether a motion for appropriate relief should be summarily denied is whether the information contained in the record and presented in the defendant's motion for appropriate relief would suffice, if believed, to support an award of relief.

State v. Jackson, 220 N.C. App. 1, 6, 727 S.E.2d 322, 328 (2012).

Similar to North Carolina General Statute. § 15A-1420(c), 28 U.S.C. § 2255(b) sets forth the procedure for determining a motion to set aside the judgment or sentence in federal cases:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

In Machibroda v. United States, the United States Supreme Court that the District Court committed error when it made findings of fact without notice and without holding an evidentiary hearing on the defendants motion pursuant to 28 U.S.C. § 2255(b). 368 U.S. 487 (1962). The United States Supreme Court took note of the fact that the allegations made by Machibroda concerned off-the-record discussions, none of which could possibly have been conclusively refuted by the record, the files, or the court's own recollection of events. The Court specifically rejected the Government's position that a hearing would have been futile because there were no other witnesses to the alleged conversations other than the defendant and the Assistant United States Attorney. In rejecting this argument, the Court noted the rule that "[n]ot by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." Machibroda at 514, quoting Walker v. Johnston, 312 U.S., 275, 287 (1941).

When a defendant has appealed unsuccessfully or waived his right to appeal, the post-conviction relief route is his next option to protect his rights. For the post-conviction relief defendant, this is supposed to be a new hope. His lawyer has uncovered some newly-discovered evidence, or evidence of misconduct on the part of the prosecution. Most frequently, claims of ineffective assistance of counsel are made at the post-conviction relief level. The defendant

alleges that his attorney failed to call a critical witness, failed to investigate his defense, failed to communicate a plea offer to him, failed to review the evidence, the facts, and prepare a defense strategy, or present mitigating evidence for sentencing. Often times, the defendant will submit not only his own affidavit, but additional affidavits, records, or other evidence in support of a meritorious claim of ineffectiveness.

In response, the government will submit an affidavit of the defendant's now-estranged attorney, which almost always is the diametrical opposite of what the defendant's affidavits say. Now there are two competing narratives: one that says yes you did, and one that says no I didn't. The motion for post-conviction relief has now turned into a swearing contest.

Now what has become the normal course of events, the trial court will refuse to hold an evidentiary hearing, and will instead credit one 8 ½ x 11 piece of paper over another. The winner in this contest is almost invariably the former attorney. The decision denying the motion which has taken many hours to prepare, and in which lie the defendant's last hope at freedom, will simply recite the facts contained in the lawyer's piece of paper. Again, whatever issues that have been so carefully briefed will be simply glossed over, leaving the defendant and his post-conviction lawyer to shake their heads in disappointment and say "nobody ever even read this motion."

Due Process of Law requires at a bare minimum, notice and a hearing. "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded." Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (internal citations omitted) (emphasis added).

In this case, Cady's motion for appropriate relief asserted that trial counsel urged him to plead guilty after his poor performance during the cross-examination of A.Y., and even threatened to abandon Cady if he refused to plead guilty due to trial counsel's lack of a defense strategy. Cady also alleged that trial counsel told him that if he were to proceed with the trial, he would be found guilty. Trial counsel was ordered to file a response to Cady's motion in which he denied threatening to abandon Cady at trial and never pressured Cady to plead guilty.

Cady's assertions, if believed, support that he received ineffective assistance of counsel at trial and his guilty plea was made involuntarily under the circumstances alleged. Thus, pursuant to North Carolina General Statute. § 15A-1420(c), and under the reasoning of the North Carolina Supreme Court in McHone and this Court in Jackson and Hardison, as well as the reasoning of the United States Supreme Court in Machibroda, the trial court could not have summarily denied Cady's motion for appropriate relief. See McHone, 348 N.C. at 258; see also Jackson, 220 N.C. App. at 6; Machibroda 368 U.S at 514.

Attachments

Attached to this petition for consideration by the Court are certified copies of the order sought to be reviewed, petitioner's motion for appropriate relief and trial counsel's response.

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the Superior Court Cumberland County to permit review of the order above specified, upon issues stated as follows: whether the trial court was required to hold an evidentiary hearing to determine factual issues raised in a motion for appropriate relief; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this __ day of August 2015.

/s/Patrick Michael Megaro
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VERIFICATION

The undersigned attorney for petitioner, after being duly sworn, says:

The material allegations of the petition are true to my personal knowledge.

Patrick Michael Megaro, Esq.

_____ County, Florida
Sworn to (or affirmed) and subscribed before me
by [name of principal].
Date: _____

[Notary's Printed or Typed Name], Notary Public
My Commission expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. First Class Mail this 24th day of August, 2015 to:

Office of the District Attorney
Cumberland County
117 Dick Street, # 427
Fayetteville, NC 28301

Patrick Michael Megaro, Esq.