In the

Supreme Court of Virginia

At Richmond

Record No. 141487

ELDESA C. SMITH,

Appellant,

– v. –

TAMMY BROWN,
WARDEN, Virginia Department of Corrections,

Appellee.

OPENING BRIEF OF APPELLANT

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I. MATERIAL PROCEEDINGS IN THE LOWER COURTS

A. Danville Circuit Court

The Petitioner, Eldesa C. Smith ("Smith") filed a *pro se* petition for a writ of habeas corpus in the Danville Circuit Court. After reviewing the pleadings, and without an evidentiary hearing, the trial court denied Smith's petition. Smith, still acting *pro se*, filed a Notice of Appeal and Petition for Appeal.

II. ASSIGNMENTS OF ERROR

> The trial court erred by summarily dismissing Eldesa C. Smith's Pro Se Habeas Corpus Petition when the claims, if true, would entitle her to relief and reversal of conviction. (Final Order- App. 91)

III. STATEMENT OF FACTS

Ms. Smith appeared for arraignment and plea on July 13, 2011. Her trial counsel elected to waive reading of the indictment, App. 19, and Ms. Smith entered pleas of guilty. App. 20. Ms. Smith acknowledged she understood the charges and had enough time to consult with her attorney. App. 22. After acknowledging she decided for herself to plead guilty, her attorney addressed the court and advised that concert of action and accessory before the fact were difficult concepts for lay people to understand, but that Ms. Smith understood what the law was, and that her

“behavior puts her in the chain of distribution.” App. 23. Ms. Smith acknowledged that she was pleading guilty because she was in fact guilty. App. 23. The trial court suggested a recess after asking if Ms. Smith if she understood she was waiving her right to defend herself, App. 24, and her attorney stated that Ms. Smith had “been shedding a lot of tears.” App. 25. Ms. Smith asked the trial court if she was going to lose her driver’s license, and her attorney stated “it could.” App. 26. Ms. Smith acknowledged being satisfied with the services of her attorney, reviewing the guilty plea form and reviewing the plea agreement. App. 27.

The Commonwealth’s Attorney then summarized the facts of the case. The decedent died of an MDMA overdose. App. 30. The day before her death, the decedent contacted Ms. Smith to help her get MDMA. Tr. 30-31. Ms. Smith contacted the dealer and was present for the deal. App. 31. After the deal, the decedent went to Applebee’s, then to her residence, where she consumed the pills. App. 31. Ms. Smith’s role was minor. App. 32. The trial court accepted the plea of guilty. App. 36.

When asked if she had any statement to make, Ms. Smith stated “. . . there was other things that occurred that night to her which, I mean, I don’t

. . . I guess I don't have the right to bring that up." App. 42. Ms. Smith was sentenced in accordance with the terms of the plea agreement.

On July 10, 2013, Ms. Smith timely filed her petition for appeal. Ms. Smith stated in her petition that her attorney had failed to research the *res gestae* rule, and if he had, "there [was] a reasonable probability that he would not have advised Petitioner to accept a plea bargain." App. 74. Ms. Smith alleged that she had been advised of the wrong charge and that she was advised her murder charge would be reduced to manslaughter. App. 75. Ms. Smith alleged that she was prejudiced by this incorrect advise, as she would not have accepted the agreement if it had not called for a reduction of the charge. App. 75. Ms. Smith alleged that counsel's "failure to render adequate advice and effective assistance of counsel, deprive petitioner of her constitutional rights, in which led her to accept a plea bargain." App. 75.

In support of her argument, Ms. Smith attached as an exhibit a letter from counsel dated just eight (8) days before the plea hearing. App. 80-81.The letter purported to summarize conversations between counsel and Ms. Smith, render opinions about the law, and give legal advice on how

best to proceed. App. 80-81. Ms. Smith also submitted as an exhibit a portion of the police report. App. 85-86.

Without benefit of a hearing, the trial court entered an order summarily dismissing Ms. Smith's petition. App. 97-99. The trial court found that Ms. Smith did not demonstrate she was misadvised about the consequences of her plea. App. 98. The trial court found the counsel was "not required to predict a change in the law that would affect his assessment of the strength of a possible defense to one of petitioner's charges." App. 98. The trial court found that Ms. Smith failed to plead or demonstrate prejudice. App. 98.

Ms. Smith timely noted her appeal.

IV. ARGUMENT

A. Standard of Review

Because entitlement to habeas relief is a mixed question of law and fact, the habeas court's findings and conclusions are not binding upon this Court, but are subject to review to determine whether the court correctly applied the law to the facts. Curo v. Becker, 254 Va. 486, 489, 493 S.E.2d 368, 369 (1997). When the habeas court has dismissed the petition based upon a review of the pleadings without an evidentiary hearing, this

Honorable Court reviews the decision to dismiss the petition de novo. See Dominquez v. Pruett 287 Va. 434,440, 756 S.E.2d 911, 914 (2014).

B. Argument

Smith submits that she received ineffective assistance of counsel which resulted in her acceptance of a plea agreement, and but for this ineffective assistance, the outcome of her trial would have been different. "Erroneous advice during the plea negotiation process . . . constitutes unreasonable professional assistance." Brannon v. United States, 48 Fed. Appx. 51 (4th Cir. 2002); see also Paters v. United States, 159 F.3d, 1047-48 (7th Cir. 1998). Smith avers that the record considered by the trial court demonstrated that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance actually prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Lovitt v. Warden, 266 Va. 216, 249, 585 S.E.2d 801, 820 (2003). Smith acknowledges it was her burden to show that there was a reasonable probability that, but for counsel's alleged errors, she would have pleaded not guilty and would have insisted instead on going to trial. Hill v. Lockhart, 474 U.S.52, 59 (1984). In order to obtain relief, Smith

was required to convince the trial court that a decision to reject a plea agreement would have been rational under the circumstances.

Smith asserts that the trial court made three erroneous rulings in its order dismissing the petition for a writ of habeas corpus. First, the trial court erred by finding that Smith failed to demonstrate she was misadvised about the consequences of her plea. The trial court held that "the colloquy . . . demonstrates conclusively that petitioner's pleas were knowingly and voluntarily entered." App. 98. However, this finding ignores the evidence discussed below, specifically the letter of counsel to Ms. Smith dated July 5, 2011, which was attached to Smith's petition. As discussed further below, the trial court erred by finding that there was some change in the law that trial counsel would have been required to predict. There was not. Finally, Smith submits that the trial court's finding that Smith failed to allege of demonstrate prejudice is plainly wrong and without evidence to support it. As detailed above, Smith clearly alleged the ways in which she was prejudiced.

As it pertains to the performance prong of Strickland, Smith relies primarily on the letter her counsel sent her dated July 5, 2011. Counsel begins the letter of July 5, 2011, by stating that he will recap the recent discussions between counsel and Smith. The letter states that Smith is

charged with “murder under Virginia Code Section 18.2-32.” As is obvious from the record, Smith was charged with felony murder in violation of Virginia Code Section 18.2-33, a crime with significantly different elements than murder under Virginia Code Section 18.2-32. Smith clearly alleged in her petition for a writ of habeas corpus that she was unclear on the nature of the charges based upon her discussions with her trial counsel.

In counsel’s letter dated July 5, 2011, he stated “[f]or you to be successful in reducing the drug charge to a lesser offense of accommodation, you bear the burden of convincing the jury that you participated in the sale for a purpose that did not include, among other things, the use of the drug.” App. at 80. This statement is not a correct statement of the law. An accommodation defense is a defense that pertains only to the penalty imposed on one found guilty of drug distribution. See Code § 18.2-248(D); Stillwell v. Commonwealth, 219 Va. 214, 223, 247 S.E.2d 360, 365 (1978) (an accommodation defense "is relevant to the determination of the proper degree of punishment, but only after guilt has been established"); Barlow v. Commonwealth, 26 Va. App. 421, 430, 494 S.E.2d 901, 905 (1998) (the code section "provides for mitigation of punishment where one convicted of possession with intent to distribute is found not be a dealer in drugs, but one 'motivated by a desire

to accommodate a friend without any intent to profit or to induce or to encourage the use of drugs'" (quoting Stillwell, 219 Va. at 219-20, 247 S.E.2d at 364)).

Smith's case presents a clear case of distribution as an accommodation. This fact was acknowledged by the Commonwealth's Attorney in the summary of the evidence: "it's clear that Ms. Smith's role in this is minor compared to that of Mr. Woodard and that she accommodated the sale." App. 32. Despite this concession from the Commonwealth, trial counsel advises Ms. Smith in the letter that "it will be difficult for you to convince the jury" that she was only guilty of an accommodation. App. 80. The undisputed evidence was that Ms. Smith did nothing other than attempt to assist a friend obtain drugs. There was no evidence she profited in any way or had any intent to encourage the use of drugs, as required by the statute. While the charge was ultimately reduced via the plea agreement accepted, this misstatement of the law and erroneous advice should factor into this Court's determination of whether counsel's performance fell below that required. It must be considered in the context of all advice given to Smith by her trial counsel. It is also important to note that trial counsel advised Ms. Smith that this defense would not likely prevail, which is contrary to the law.

This Honorable Court has observed that the accommodation defense applies when the unlawful distribution was made "not by a dealer in drugs, a pusher or one who was normally engaged in the drug traffic, but by an individual citizen who was motivated by a desire to accommodate a friend." Stillwell v. Commonwealth, 219 Va. 214, 219, 247 S.E.2d 360, 364 (1978). This description is Eldesa Smith. She received a call from a friend who was interested in getting MDMA and she introduced that friend to a dealer. There was no evidence, or even suggestion, that she engaged "in the drug traffic." She did an unfortunate favor for a friend. For her attorney to suggest to her that she could not prevail at trial on accommodation defense constituted ineffective assistance of counsel. While counsel for Smith will concede there are no certainties in criminal defense, trial counsel's advice that she would not likely prevail was erroneous. The trial court had a copy of this letter; its contents are not at all in dispute. Trial counsel's statement regarding "use of the drug" was incorrect.

Counsel also told Smith in this letter that "Mr. Woodard . . . has a horrible criminal record and was on probation for selling MDMA when this crime occurred." App. at 80. This statement was clearly an effort by counsel to encourage Smith to accept the plea agreement. Counsel incorrectly states that Mr. Woodard's "horrible criminal record" would be

admissible at trial. Similarly, the fact that Mr. Woodard was on probation for selling MDMA would not be admissible. In the event that Mr. Woodard was charged with a second or subsequent offense, this fact would appear to require counsel to file a motion to sever trials; the evidence of a prior conviction by a co-defendant would be inadmissible in Smith's trial. While there appears to have been some hearing relative to a motion for joinder, the record provided to undersigned counsel does not contain a motion objecting to joinder on this important point. Instead, counsel states that Smith should plead guilty, and uses these two facts to support his position; however, neither of these facts should have factored into whether Smith should accept a plea agreement.

The letter goes on to state that Smith's charge would be reduced to manslaughter from murder. The record fails to indicate why there was some change in the agreement prior to the hearing of July 13, 2011. Smith very clearly alleges in her petition for a writ of habeas corpus that the promise of this reduction was a significant factor in her decision to accept the plea agreement.

Despite the detail of this letter, trial counsel failed to address the potential defense to the felony murder charge. As has been clear for nearly four decades, ". . . the felony murder statute applies where the initial felony

and the homicide were parts of one continuous transaction, and were closely related in point of time, place and causal connection. . . ." Heacock v. Commonwealth, 228 Va. 397, 405, 323 S.E.2d 90, __ (1984)(quoting Haskell et al. v. Commonwealth, 218 Va. 1033, 1041, 243 S.E.2d 477, 482 (1978). There appeared to be no real dispute in the record about the facts of this case. Smith assisted the decedent in purchasing drugs by arranging a meeting. She readily admitted this to law enforcement. The record the trial court had to consider consisted of the transcripts of the proceedings, the petition and Smith's exhibits, which included this letter from counsel.

In addition to the letter, a careful examination of the plea colloquy demonstrates that Smith's plea cannot be said to be voluntarily made. The record is clear that Smith was crying and visibly upset; the trial court offered to take a break at one point during the proceedings. App. 24. Trial counsel interjected during the colloquy more than once, most significantly to state Smith understood what the law was regarding felony murder. App. 23. This assertion is belied by the letter, which purported to summarize all of their recent discussions, but makes no mention of the felony murder doctrine whatsoever. The statement by counsel during the colloquy is directly contradicted by counsel's own letter. Again, counsel's own letter makes no mention of felony murder under Virginia Code Section 18.2-33,

and erroneously discusses Virginia Code 18.2-32 and mentions Smith being an accessory before the fact. The repeated references to "accessory before the fact," both in counsel's letter and during the plea colloquy, seem to suggest a lack of understanding of the felony murder doctrine. As detailed above, the initial felony and the homicide must be part of one continuous transaction—- closely related in point of time, place and causal connection. In this case, the distribution of drugs which Smith accommodated occurred in a Wal-Mart parking lot. The decedent left the Wal-Mart parking lot and eventually went to dinner at Applebee's. She later went to her residence and ultimately consumed the MDMA pills. This evidence plainly fails to demonstrate one continuous transaction. There are breaks in both time and place. The trial court's finding that trial counsel was not required to predict a change in the law ignores the fact that the felony murder doctrine existed at common law and the res gestae rule was adopted by this Honorable Court nearly four (4) decades ago. As this Honorable Court explained in Commonwealth v. Montague, 260 Va. 697, 702, 536 S.E.2d 910 (2000), "the required elements of the rule, *i.e.,* time, place, and causal connection, are stated in the conjunctive. Therefore, all three elements must be established for the felony-murder statute to apply." In Montague, this Honorable Court held that the accidental killing was not

related in time to the theft, as eleven hours had elapsed, and further that the place requirement had not been proven, as the larceny and the homicide happened in different parts of the City. Id.

Similarly, the distribution in this case occurred sometime around 7:00 p.m. at the Wal-Mart parking lot. After going to dinner, the decedent went to the residence. Sometime between two and half and three hours later, the decedent ingested MDMA. As the Court of Appeals found in the co-defendant's case, Woodard v. Commonwealth, 61 Va. App. 567, 739 S.E.2d 220 (2013), the Commonwealth failed to prove the necessary elements of time and place.

Counsel's letter, which purports to "recap[] [their] recent discussions and the effort to resolve this case," fails to address this defense. In fact, counsel goes to great length to convince Smith to accept a deal whereby the murder charge would be reduced to manslaughter. Trial counsel explains that "your version of the events and circumstances of this case will be difficult for a jury to believe and they could be offended by such a story." App. 81. His statements at the plea colloquy make it clear counsel believed there was no defense to this charge.

The trial court had the transcripts and the letter to consider. As argued above, the finding that counsel was not required to predict a

change in the law was erroneous. Additionally, the pleadings and evidence provided by Smith clearly demonstrated that she was prejudiced by the erroneous advice to accept the plea agreement. In light of the foregoing, rejection of the plea agreement would have been rational had she been given sound legal advice. Smith has met her burden of demonstrating both ineffective assistance and prejudice. Accordingly, Smith respectfully requests that this Honorable Court reverse her convictions and remand these matters to the trial court for further proceedings should the Commonwealth be so advised.

V. CONCLUSION

Based on the foregoing, Smith respectfully requests that this Honorable Court reverse her convictions and remand these matters to the trial court for further proceedings, should the Commonwealth be so advised.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the following:

1. On November 5, 2015, the Opening Brief and Appendix were filed electronically via the VACES system with the Supreme Court of Virginia. This same date, ten copies of the Opening Brief and three copies of the Appendix were hand delivered to the clerk's office.

2. A copy of the Brief and Appendix were sent via email to all counsel of record, at the email addresses below:

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3. Counsel for the appellant does not waive oral argument.

4. Counsel for the appellant is court appointed.

/s/ Gregory R. Sheldon