STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

R. Markley Dennis, Jr., Circuit Court Judge

JOHN G. KIMBLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213572

AMENDED JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in holding trial counsel adequately advised Petitioner of his right to a direct appeal where all of the testimony at the PCR hearing showed undeniably that either trial counsel did not discuss an appeal with Petitioner or if they did, trial counsel refused to file an appeal?

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in trying Petitioner in his absence on charges of armed robbery, first degree burglary, and possession of a weapon during the commission of a violent crime when he had previously reported for numerous roll calls and when he was out of custody on a bond of $150,000 secured by his family's property?

II. Did the trial court err in denying Petitioner's motion for a directed verdict on the charge of first degree burglary and holding the state adduced evidence sufficient to find Petitioner guilty beyond a reasonable doubt when the State did not produce the resident of the home allegedly broken into to testify that Petitioner did not have consent to enter the home?

STATEMENT

On April 13, 2010, a Greenville County grand jury indicted Petitioner John Kimble on one count of first-degree burglary, two counts of armed robbery, and one count of possession of a weapon during the commission of a crime. App. 318-328. On June 8 and 9, 2010, Petitioner's case was heard before the Honorable Edward W. Miller and a jury. App. 1.[1] Petitioner was represented by Chase Harbin, and the State was represented by Christy Sustakovitch and Lauren Price. *Id.*

The State alleged that on May 30, 2008, Petitioner approached Omar Arcos who was standing outside of the trailer of his friend, Juan Garcia. App. 62, ll. 1-6. Petitioner allegedly held Mr. Arcos at gunpoint, demanded his money, walked him into the trailer, and robbed Mr. Garcia. App. 62, ll. 10-14.

After the State presented its case, trial counsel moved for a directed verdict on the jury charge: "[T]here's been no evidence from the proprietor, the owner of the dwelling, the person that actually lives in the dwelling, that Mr. Kimble did not have permission to go into the dwelling." App. 201, ll. 10-21. In fact, not only was Mr. Garcia not called at the trial, but also the State did not elicit from any other witness that Petitioner did anything other than walk unimpeded into Mr. Garcia's open front door. Mr. Arcos did not testify to any more than "going inside" the house:

> Q: So what happens? He tells you to walk towards the trailer. Does he have the gun pointed at your head, your back where is it? Do you recall?
>
> A: Still with the pistol to my head.
>
> Q: Do you go inside the trailer at this point?
>
> A: Yes.
>
> Q: When you get inside the trailer, what happened?

[1] Petitioner was not present in the courthouse that day, and the court tried the case in his absence. App. 6-7.

A: When we got inside, he threw me against the refrigerator . . . .

App. 92, ll. 12-21. Similarly, when the State called one of Petitioner's alleged accomplices, it did nothing to clarify what the witness saw when Petitioner was allegedly "forcing the other guy into the trailer." App. 125, ll. 12-16. The most detailed description of Petitioner's alleged entry into the trailer came from Judy Rogers, another alleged accomplice whom the State called.

> Q: So you pull up and you see a man outside that you didn't know. Go ahead.
>
> A: And once I got out of the car, I approached him and I asked . . . if he wanted to trade sex for money. He said no. . . .
>
> I went and knocked on the door. Juan was inside. He said come in. Well, I discussed the situation with him. I asked him if he wanted to, you know, do business, which trading sex for money, and he said yes. Well, we go to shut the door. And as I go and we shut the door, buster and [Petitioner] had got out of the car and [Petitioner] had the gentleman that was standing outside . . . on the ground with a gun to his back. . . .
>
> . . .
>
> Q: Did you have any idea that that was going to happen when you came over that day?
>
> A: No, ma'am. No, ma'am.
>
> Q: Go ahead.
>
> A: I – as we seen them outside, well, Juan, he, they come into the house. They seen us and we seen them. They forced Juan into the house.
>
> Q: I'm sorry. They forced the man that was outside?
>
> A: Yes, ma'am. Excuse me. I'm nervous. But Omar outside, they forced him in the house with the gun and then Buster had Omar up against the wall with a knife. . . .

App. 142, ll. 15 – App. 144, ll. 2.

Nevertheless, the judge held sufficient evidence existed to prove the charge and denied the motion. App. 202, ll. 9-12. The defense then rested. App. 203, ll. 12-20. The jury returned a verdict of guilty on all four charges, and Judge Miller sentenced Petitioner under seal to concurrent terms of thirty years for first-degree burglary, thirty years for both counts of armed robbery, and five years for possession of a weapon during commission of a crime. App. 264, ll. 12-25; App. 267, ll. 20-22; App. 290, ll. 15-22.

On January 3, 2011, Petitioner filed an application for post-conviction relief in the Greenville County Court of Common Pleas, arguing that Petitioner was denied effective assistance of trial counsel. App. 310. Petitioner filed Amendments to Post Conviction Relief Applications dated Jun 2, 2011. App. 311. Petitioner claimed, inter alia, that his trial counsel did not advise him of or preserve his rights, did not properly consult with him, and did not appeal his case. App. 311-12. The State submitted a return on April 12, 2011. App. 310. On October 30, 2012, a hearing was held before the Honorable R. Markley Dennis. App. 289.

At the hearing, Petitioner testified that trial counsel spoke perfunctorily with him about an appeal:

> Q: Did you have an opportunity to talk to your lawyer after you were sentenced?
>
> A: [H]e related to me that I had been tried in my absence and that I could face up to 30 years for each crime. So I told him I said, well, I want to appeal the case and he said, appeal what? I said appeal the sentence and appeal the whole case and he said there's nothing to appeal so I'm not going to appeal it.
>
> At the time, him being my lawyer, he let me know there's nothing to appeal that I have no issues. I didn't know it was up to the court to decide whether or not I got merit or not. . . .
>
> Q: So you actually discussed the issue of appeal with your lawyer?
>
> A: I actually told him I wanted to appeal.

App. 296, ll. 2-20. Thereafter, trial counsel testified could not specifically recall whether the two spoke about an appeal:

> Q: [D]id you talk to him about an appeal?
>
> A: I don't recollect that we did have a conversation about an appeal. The only think I remember is the conversation downstairs letting him know that the judge had already sentenced him and he just needed to find out what the sentence was at that time.
>
> Q: You don't know if his recollection of the conversation was correct or not?
>
> A: Well, I can tell you this that I've never had somebody ask me to file an appeal and me just say no, I'm not going to do it, so whatever did happen if I told him he had a right to an appeal or I didn't, I certainly not refuse to file an appeal but I can't tell the specifics.

App. 300, ll. 8-22.

On November 29, 2012, the PCR court issued its order finding that Petitioner failed to prove ineffective assistance of counsel. App. 315. Finding trial counsel to be more credible than Petitioner, the court concluded either Applicant did not ask about an appeal or he did but did not request trial counsel file one:

> Trial counsel testified he did not recall whether or not he had a conversation with Applicant about an appeal, but he would have filed a notice of appeal if he had been asked to do so. Trial counsel further testified he has never had a client ask him to file an appeal and he refuse to do so.

App. 315. The PCR court also found that Petitioner failed to prove he was prejudiced by trial counsel's performance. App. 315-16.

ARGUMENT

STANDARD OF REVIEW

"This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Lomax v. State,* 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

DISCUSSION

The PCR court erred in holding trial counsel adequately apprised Petitioner of his right to a direct appeal because trial counsel could not confirm that he spoke with Petitioner about the option to appeal but only believed he would have appealed if Petitioner had asked.

The PCR court erred in holding trial counsel adequately apprised Petitioner of his right to a direct appeal because trial counsel could not confirm that he spoke with Petitioner about the option to appeal but only believed he would have appealed if Petitioner had asked. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland,* 466 U.S. at 687.

"'To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.'" *Clark v. State*, 396 S.C. 164, 168, 719 S.E.2d 708, 710 (Ct. App. 2011) (quoting *Simuel v. State*, 390 S.C. 267, 269, 701 S.E.2d 738, 739 (2010)). "'*Following a trial*, counsel is required to make certain the defendant is made fully aware of the right to appeal.'" *Id.* (quoting *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008)). "Absent an intelligent

waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 . . . (1967)." *Id.*

In this case, the PCR court committed a legal error in holding that adequately advised Petitioner of his right to counsel. Trial counsel was required to affirmatively communicate to Petitioner his right to a direct appeal. Based on the testimony of Petitioner and trial counsel, either the two did not discuss an appeal or they did but trial counsel refused to file one and therefore did not follow the *Anders* procedure. The PCR court found that trial counsel could not confirm he advised Petitioner of his right to appeal and concluded that trial counsel did not ignore any request by Petitioner to file an appeal. This performance was inadequate as a matter of law because Petitioner was entitled to be fully advised of his right to appeal, which includes advisement that if counsel did not consider any issues appealable, an *Anders* brief would be filed on his behalf and Petitioner himself could submit a written memorandum in appealing.

Importantly, trial counsel's failure to adequately advise Petitioner of his right to appeal caused prejudice. The trial court denied Petitioner's motion for a directed verdict finding that the evidence was sufficient to support the burglary charge. However, the trial court erred because the State adduced no evidence that Petitioner entered Mr. Garcia's trailer without his consent. "First degree burglary requires the entry of a dwelling without consent with the intent to commit a crime therein, as well as the existence of an aggravating circumstance." *State v. Cross*, 323 S.C.41, 44, 448 S.E.2d 569, 569 (Ct. App. 1994) (citing S.C. Code Ann. § 16-11-311 (Supp. 1993)). "Due process requires the State to prove every element of a criminal offense beyond a reasonable doubt." *Dervin v. State*, 386 S.C. 164, 168, 687 S.E.2d 712, 714 (2009).

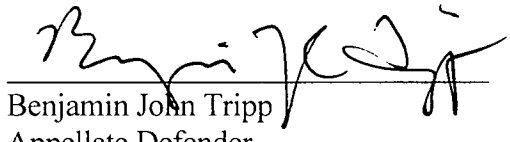
At the criminal trial in this case, the State did not produce Mr. Garcia or any other witness to testify that Petitioner did not have permission to enter into the trailer. Thus, even if

Petitioner did force Mr. Arcos through the door at gunpoint, Mr. Garcia was not present to testify that he saw a gun or otherwise was forced to let Petitioner into the trailer, and the State could not have proven the element beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner John Kimble's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of August, 2013.

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CERTIFICATE OF SERVICE

I certify that true copies of the motion to amend the Johnson petition for writ of certiorari and the amended Johnson petition for writ of certiorari have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and John G. Kimble, #284110, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 2nd day of August, 2013.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day of August, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.