

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

S.C. Supreme Court

SOLOMON SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000254

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was the PCR court's finding that plea counsel was not required to advise Petitioner about an appeal supported by the evidence when Petitioner understood the longest sentence he could receive for attempted armed robbery was five years although the statutory maximum was twenty years and when the judge sentenced him to ten years imprisonment?

STATEMENT OF ISSUE ON APPEAL

Did Petitioner knowingly and voluntarily plead guilty to attempted armed robbery where he believed that he could receive no more than five years imprisonment although the statutory maximum was twenty years?

STATEMENT

On July 14, 2011, Petitioner was indicted by the Richland County Grand Jury on one count of Attempted Armed Robbery. App. 77. The State alleged that on October 29, 2011, Petitioner and a codefendant jumped a victim around the 1900 block of Greene Street in Columbia. App. 7, ll. 2-20; App. 77. Petitioner and the codefendant allegedly tackled, restrained, and struck the victim while attempting to empty his pockets, and the codefendant allegedly pulled out a pistol in the course of the robbery and struck the victim with it. App. 7, ll. 2-20.

On July 20, 2011, Petitioner stood in front of the Honorable Deandrea G. Benjamin in a plea hearing to take his medicine. App. 1. Tynika A. Claxton represented Petitioner, and Richard C.R. Cathcart represented the State. *Id.* Petitioner believed the greatest sentence of jail time he could face was five years. App. 47, l. 20 – App. 48, l. 2. During the plea colloquy, Petitioner offered an apology for his mistakes:

Your Honor, I just want to take the time to – I understand the victim is not here, but I do want to apologize to the victim. I feel very bad about what happened. My heart goes out to him. And I just I pray for the victim plenty of nights at the county jail, praying that what happened didn't affect his life, you know, and that he can make it each and every day without going in fear, Your Honor.

App. 17, l. 25 – App. 18, ll. 8. To Petitioner's surprise, the trial court sentenced him to imprisonment for ten years. App. 19, l. 23 – App. 20, l. 3.

On June 11, 2012, Petitioner filed a claim for post-conviction relief, arguing that he was denied effective assistance of trial counsel because plea counsel did not appeal the plea. App. 26-31; App. 67. On July 12, 2011, the State filed a return to the claim. App. 33-39. On December 7, 2012, a hearing was held before the Honorable J. Ernest Kinard, Jr. App. 40. William Jordan represented Petitioner, and Robert Corney represented the State. *Id.*

At the hearing, Petitioner testified that plea counsel never gave him copies of discovery to keep, never interviewed his codefendant, and advised him to plead guilty. App. 46, l. 13 – App. 47, l. 19. Petitioner also testified that plea counsel explicitly told him he would not receive a sentence of over five years. App. 47, l. 20 – App. 48, l. 2. In fact, he had no idea he could face twenty years in prison. App. 48, ll. 3-6. After he was sentenced to ten years, Petitioner testified he asked plea counsel to appeal, and she agreed she would. App. 48, ll. 20-24.

Plea counsel also testified at the hearing. She admitted she never gave Petitioner copies of discovery materials for him to keep. App. 55, ll. 14-23. She stated she informed Petitioner of the potential sentences, and he never asked for an appeal. App. 53, l. 22 – App. 54, l. 2; App. 59, ll. 1-8. She also admitted she never interviewed the codefendant or the police officers. App. 56, 21-25; App. 61, ll. 1-4.

On January 7, 2013, the PCR court issued an order of dismissal finding that Petitioner was not denied effective assistance of counsel. Tr. 67-76. The court stated that Petitioner never requested that plea counsel file an appeal and that she had no reason to believe he would want to appeal. App. 75.

ARGUMENT

The PCR court's finding that plea counsel was not required to advise Petitioner about an appeal was not supported because Petitioner was laboring under a plain, severe misapprehension about the potential sentence he could face.

The PCR court's finding that plea counsel was not required to advise Petitioner about an appeal was not supported because Petitioner was laboring under a plain, severe misapprehension about the potential sentence he could face. 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)). “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.* Following a guilty plea, a defendant must be advised about the right to appeal when extraordinary circumstances exist, such as when the defendant inquires about an appeal. *Weathers v. State*, 319 S.C. 59, 691, 459 S.E.2d 838, 839 (1995).


In this case, extraordinary circumstances existed because Petitioner had a plain misapprehension about the sentence he could face. Petitioner testified that he understood that at most he could face five years in prison. However, the statutory maximum Petitioner could actually face was twenty years. Because the statutory maximum was four times the amount of time he

thought he could face, this misapprehension was also severe. Moreover, Petitioner ended up receiving a sentence of twice the amount of time he thought he could be sentenced to. The severe discrepancy between the punishment Petitioner thought he would receive and the punishment he actually received presents an extraordinary circumstance justifying plea counsel's need to advise Petitioner about the possibility of an appeal of his plea. Accordingly, the PCR court's finding that plea counsel was not required to specifically discuss an appeal with Petitioner was not supported by the record.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Solomon Smith'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.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

SOLOMON SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-000254

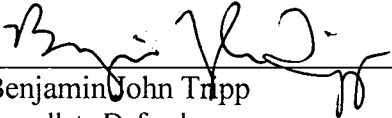
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Solomon Smith states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on December 7, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Solomon Smith.

Respectfully submitted,



A handwritten signature in black ink, appearing to read "Benjamin John Tripp", is written over a horizontal line.

Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of August, 2013

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Certiorari to Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

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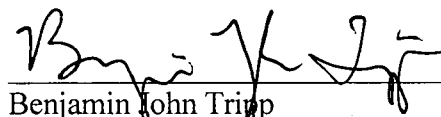
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

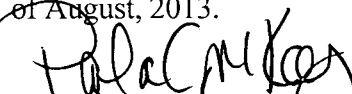
I certify that true copies of the Johnson petition for writ of certiorari and appendix have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Solomon Smith, #346955, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29335-9308, 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.