

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

R. Knox McMahon, Circuit Court Judge

RECEIVED

AUG 13 2013

S.C. Supreme Court

DONALD E. BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213436

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Does the record support the PCR court's finding that Petitioner was not denied effective assistance of counsel where the only evidence that Petitioner understood the proximate cause element of a felony DUI charge was plea counsel's own, contradictory testimony that the two talked about the element and where Petitioner testified he would not have pled had he understood this element and where, contrary to the PCR court's recollection, no testimony suggested that Petitioner's family members urged him to enter a guilty plea?

STATEMENT

Around 8:40 on the evening of June 19, 2005, Petitioner Donald E. Brown was driving his Jeep on an unlined, rural road in Kershaw County. App. 15, ll. 4-23; App. 51, ll. 11-15; App. 92, ll. 5-13. Just ahead of him, a man was riding bicycles with his young nephew and five year-old son; the man and his nephew crossed over to the edge of the left lane, leaving his son alone on a sixteen-inch high bicycle on the opposite edge. App. 51, l. 11 – App. 52, l. 16; App. 92, ll. 5-13.

Though the speed limit was fifty-five mile per hour, Petitioner was driving around only forty-one to forty-six miles an hour as he approached the pinch point of cyclists from behind. App. 51, l. 6 – App. 52, l. 14; App. 92, ll. 5-13. Petitioner blew his horn at the group, but as he passed, the boy on the right collided with the front of the jeep on the passenger side. App. 52, ll. 8-16; App. 276-278; App. 16, ll. 17-21. No witnesses saw whether Petitioner ran directly over the boy or whether the boy steered in front of Petitioner to catch up with his dad and cousin or was otherwise startled into moving in front of the Jeep.

Tests after the accident showed Petitioner's blood alcohol level was 0.225. App. 17, l. 19 – App. 18, l. 2; App. 29, ll. 14-16. On April 5, 2006, a Kershaw County grand jury indicted Petitioner on one count of felony driving under the influence causing death (DUI). App. 259-260. On April 10, 2006, the Honorable L. Casey Manning heard Petitioner's guilty plea. App. 1. William Tetterton represented Petitioner, and Barney Giese and John Meadors represented the State. *Id.* Judge Manning postponed sentencing until September 19, 2006, when he sentenced Petitioner to thirteen years imprisonment. App. 66, ll. 3-6.

On September 22, 2006, Petitioner filed a motion to reconsider the sentence. App. 68. On April 23, 2007, Petitioner, represented by Tara Shurling, also filed an application for post-conviction relief arguing ineffective assistance of counsel. App. 70-77. The State filed a return on

June 27, 2007. App. 78-83. On August 7, 2008, Petitioner filed a motion to stay the PCR action. App. 84-85. On January 5, 2011, Petitioner appeared before Judge Manning to be heard on the motion to reconsider. App. 88. Tara Shurling again represented Petitioner, and John Meadors and Ron Moak represented the State. *Id.* Judge Manning denied the motion and upheld Petitioner's sentence. App. 102.

On August 14, 2012, The Honorable Knox McMahon heard Petitioner's PCR claims. App. 105. Tara Shurling represented Petitioner, and Roby Corney represented the State. *Id.* At the hearing, Petitioner testified he did not understand the proximate cause element of the felony DUI statute at the time of his plea:

Q: Did you understand at the time of your plea that the State would have to prove beyond a reasonable doubt (a) that you were driving under the influence?

A: Right.

Q: And (b) that your actions were the proximate cause of the wreck that caused the child's death? Did you understand that the State had to prove both of those to convict you?

A: No. I just thought it was just – just that one drinking would have covered the whole thing.

App. 118, ll. 5-13.

Q: — did you understand that the State had to prove that you caused the wreck in addition to proving that you were drunk?

A: I didn't understand that.

Q: If you had understood that, would you have pled guilty or gone to trial?

A: I would have – I would have went to trial.

App. 138, ll. 4-10.

Q: Okay. So you would have gone to trial for that certain 25 that Mr. Tetterton had all but promised you if you went to trial rather than take the 13 on the plea?

A: Well, if I – if I'd have knowed it was 13 years, I wouldn't have. I would have went to trial . . .

App. 144, ll. 19-23.

Plea counsel said that “he and [Petitioner] went over that [element] many times,” and Petitioner understood “after several different explanations.” App. 176, l. 24 – App. 177, l. 4. However, he later retreated, saying the two did not discuss the proximate cause element:

So at that time, Mr. Brown and I concluded that there definitely was a collision between his red Jeep and the bicycle and there was never – there was never any question about the red Jeep coming into contact with the bicycle. There was never any – there was never any discussion or concern by Mr. Brown that the bicycle was traveling with the flow of traffic in the proper lane of traffic.

App. 186, ll. 17-23. Plea counsel ultimately provided an unconvincing summary of his advisement and Petitioner's stance regarding the element:

The little boy is on the side of the road by himself. Daddy was on the left-hand side. Donald Brown was driving under the influence. That's a given. Then a horn blew. We don't know what happened after that so we have to rely on experts and the accident reconstructionists. He understood that and that's when I explained it to him several different times and gave him the opportunity to let a jury decide proximate causation and I chose not – he chose not to do that.

App. 215, ll. 10-18.

Plea counsel also talked about Petitioner's family members' involvement in the case:

Q: It's pretty fair to say his family was pretty involved in this whole process?

A: Well, I would say his wife was definitely involved in it. She stood behind him. She was a little bit ashamed of what he did, embarrassed about it. She was friends or knew the family of the [victim]. . . .

[Petitioner's brother] Gary was involved in it up to a point when after a while he got a little disappointed with the way things were going and what it looked like Donald had done and sort of got out of it, but he wasn't involved . . . too much in the negotiations or with Mr. Brown about whether or not he should plead guilty or not or whatever.

His wife was primarily the person that was there with me. I think his mother might have been there whenever we went over all the testimony, all the evidence. . . .

App. 180, ll. 7-24.

[T]he third video was the Datamaster video in the Datamaster room. Each one of those videos I showed the family members in my office before we decided to make a plea. I wanted them to understand and look at those videos to see [his] conduct . . . after he was arrested to help me decide whether or not the State could prove whether or not he was under the influence of alcohol.

As I showed the video to the family members . . . prior to deciding whether to plea or not plea, the wife hung her head and the young son I think was there and he – he hung his head, too, and they all after that agreed that [Petitioner] was definitely under the influence of alcohol.

App. 184, ll. 10-23.

On October 18, 2012, the PCR court issued its order finding that Petitioner failed to prove ineffective assistance of counsel. App. 243-258. The court stated that plea counsel's testimony "clearly refute[d] any allegation that Applicant was not sufficiently informed of the requirement or meaning of 'proximate cause' as it relates to the Felony DUI charge" App. 250-51. The court also found Petitioner failed to prove prejudice because both "considerable" evidence existed in the record supporting a guilty finding and "according to [plea] counsel's testimony, [Petitioner's] family members urged him to enter a guilty plea." App. 251-52.

ARGUMENT

The record does not support the PCR court's findings that plea counsel adequately informed Petitioner about the element of proximate cause or that Petitioner would not have been reasonably likely to try his case.

The record does not support the PCR court's findings that plea counsel adequately informed Petitioner about the element of proximate cause or that Petitioner would not have been reasonably likely to try his case. 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. The two-part test adopted in *Strickland* "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *see generally Brady v. United States*, 397 U.S. 742, 758 (1970) ("Guilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results.").

Specifically, by showing that "counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty," a defendant sufficiently undermines the required voluntary and intelligent character of a plea. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); *accord State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (holding record must reflect that defendant freely and intelligently waived constitutional trial rights and had full understanding of the consequences of the plea); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding the difference "between a valid guilty plea and an invalid guilty plea lies in the

knowing and voluntary nature of the plea”). Of course, representation is deficient and unreasonable when counsel fails to advise or incorrectly advises a defendant on a material evidentiary issue:

[W]e recognize that a defendant, for a host of legitimate reasons, may plead guilty to an offense for which a valid legal challenge may exist. . . . The difference . . . between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea. Here, counsel never informed [the defendant] of the potential challenge to the use of the drug paraphernalia conviction for enhancement.

Berry at 635, 675 S.E.2d at 427 (citations omitted). *See also Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (S.C. 1991) (counsel ineffective for failing to inform defendant prior to guilty plea that he may have made statements involuntarily, in which case they would be inadmissible); *Segura v. State*, 749 N.E.2d 496, 502 (Ind. 2001) (addressing “prejudice from an error or omission of counsel that has the effect of overlooking or impairing a defense”). It follows that incorrect or omitted advice may deprive a defendant of his Constitutional right “to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

In this case, the record does not support the PCR court’s finding that Petitioner’s plea counsel adequately advised him about the element of proximate cause for a felony DUI charge. “A felony driving under the influence charge requires proof of three elements: (1) the actor drives a vehicle while under the influence of alcohol or drugs; (2) the actor does an act forbidden by law or neglects a duty imposed by law; and (3) the act or neglect proximately causes great bodily harm or death to another person.” *State v. Dantonio*, 376 S.C. 594, 604, 658 S.E.2d 337, 342 (Ct. App. 2008). Petitioner twice expressly and unequivocally testified that he did not understand the proximate cause element. While plea counsel at first stated he and Petitioner discussed the element more than once, he later contradicted himself and admitted that Mr. Brown

never mentioned or raised the issue of proximate cause. He also gave no testimony of specific signs or statements from Petitioner during the course of the representation suggesting that Petitioner properly understood the element. Plea counsel's testimony reveals that he merely assumed that Petitioner understood the issue rather than specifically and thoroughly advising him about it. Indeed, plea counsel's testimony betrayed his motivation to decide the proper course of action rather than letting Petitioner choose for himself: "I chose not – he chose not to" look into it any further.

The Constitution required that Petitioner be advised about his case in such a manner that he could make a fully informed decision as to whether to plead guilty. Thus, Petitioner needed full knowledge of the elements in his case in order to knowingly evaluate his options and decide whether to accept the plea bargain in accord with his own principals and interests. However, the evidence in the record shows counsel denied him this information.

Secondly, the record does not support the PCR court's finding of no reasonable probability that, but for plea counsel's deficiency, Petitioner would not have pled guilty. Petitioner directly testified that he would have sought a trial had he understood the proximate cause element of the charge. The PCR court found that according to plea counsel's testimony, Petitioner's family members urged him to enter a guilty plea. However, plea counsel never gave any such testimony. He stated that Petitioner's wife was "definitely involved," that she "stood behind him," and that she was "a little bit ashamed." Additionally, he stated Petitioner's brother was only involved until he became "disappointed with the way things were going and what it looked like Donald had done," and in particular he was not involved "too much in the negotiations or with Mr. Brown about whether or not he should plead guilty or not or whatever." With regard to Petitioner's mother, plea counsel stated he thought she "might have been there whenever we went over all the testimony." Finally, plea counsel stated that, right before the plea hearing, he showed

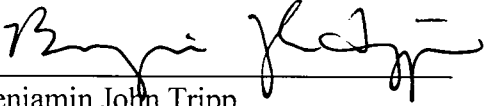
the family members videos of Petitioner around the time of the accident. However, he specifically said the only purpose was to help him decide whether or not the State could prove whether or not Petitioner was under the influence of alcohol.

None of these statements supports the finding that Petitioner's family members urged him in any sense to plead guilty. The PCR completely confabulated that conclusion. Accordingly, the record does not support the PCR court's finding that trial counsel's deficient performance did not prejudice Petitioner.

CONCLUSION

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

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO KERSHAW COUNTY
R. KNOX MCMAHON, CIRCUIT COURT JUDGE

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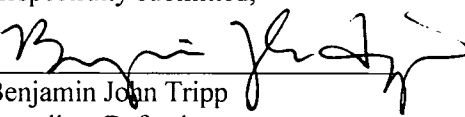
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald E. Brown 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 August 14, 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 Donald E. Brown.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of August, 2013

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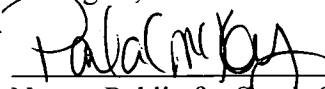
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Donald E. Brown, #317616, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 13th day of August, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of August, 2013.


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