

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Kristi Lea Harrington, Circuit Court Judge

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SEP 12 2013

S.C. Supreme Court

DUSTIN WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213626

JOHNSON PETITION FOR WRIT OF CERTIORARI

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

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ISSUE PRESENTED

Does the record support the PCR court's conclusion that Petitioner's plea was knowing and voluntary where plea counsel gave Petitioner barely thirty minutes to respond to a plea offer that was made in court on the morning of trial and that would result in years of imprisonment?

STATEMENT

On June 12, 2011, Petitioner appeared at a suppression hearing before the Honorable Roger M. Young, Sr. App. 1; App. 59, ll. 2-8. George B. Bishop, Jr. represented Petitioner, and Ashley B. Cornwell represented the State. App. 7, l. 2; App. 20. A Berkeley County grand jury had indicted him in April of 2011 for trafficking in cocaine base, trafficking in cocaine 10-28 grams, second offense, and possession of marijuana less than one ounce. App. 25. Petitioner argued that the security guards who searched his vehicle outside of a night club on the night of August 26, 2009 were subject to the Fourth Amendment and that he did not consent to their search, but he was unsuccessful on both grounds. App. 59, ll. 9-23. The powdered cocaine, crack cocaine, and marijuana that security and ultimately police officers found would be admissible against him. App. 7, ll. 2-21.

The following morning, Petitioner proceeded to trial. App. 1. Petitioner had a prior record, including possession of marijuana in 2002 and 2005 and possession with intent to distribute cocaine base within proximity of a school in both 2003 and 2004. App. 7, l. 21 – App. 8, l. 4. The State had notified Petitioner it intended to seek punishment of life imprisonment without parole.¹ App. 2, ll. 16-17. Handling pretrial matters just minutes before the jury would be seated, counsel for petitioner decided to request a plea agreement for the State's abandoning life without parole. App. 66, l. 15 – App. 67, l. 13. Agreeing, the State pressed that it would not otherwise agree to a sentence cap. *Id.*

An old jury room sat adjacent to the courtroom, where counsel asked for leave to take Petitioner. App. 61, ll. 10-19. Petitioner's family members joined him inside the old jury room, watching and waiting for his decision. *Id.* “[The] jury’s waiting in a jury room, [and] the trial’s ready to proceed.” App. 61, ll. 20-25. Petitioner was facing a final decision whether to stand up to

¹ See S.C. Code Ann. § 17-25-45.

and challenge the State's case or plea and face years in prison. He had barely thirty minutes to decide. App. 48, ll. 1-13.

After a routine plea colloquy, the PCR court found that Petitioner freely, voluntarily, and intelligently pled guilty. App. 3, l. 2 – App. 6, l. 25. The court sentenced Petitioner to twenty years for each trafficking charge and one year for the marijuana charge to run concurrent. App. 13, ll. 21-23.

On February 20, 2012, Petitioner filed an application for post-conviction relief, claiming ineffective assistance of counsel based on his unknowing and involuntary plea. App. 16-21. The State filed a return on June 4, 2012. App. 25-30. The Honorable Kristi Harrington held a PCR hearing for Petitioner on October 1, 2012. App. 32. Matthew Halverstadt represented Petitioner, and Ashleigh R. Wilson represented the State. App. 33.

At the PCR hearing, Petitioner testified he was under duress when he took the plea offer because his time was so limited:

Q: At the time that you made that decision, why did you make that decision to plead guilty?

A: I made the decision because my lawyer said it was best to me

Q: Okay. And did you feel forced into that?

A: Yes, sir.

Q: How did you feel forced into that?

A: Because I didn't really have no time to really think of what, really. I was going to go to trial until he advised me that I should take the plea. And he called my family in the back to talk about it, and I just – I took the plea.

App. 44, l. 15 – App. 45, l. 2. He also testified that he would have proceeded to trial rather than pleading had he had more time to process the plea offer. Tr. 50, l. 17 – Tr. 51, l. 23.

Petitioner's plea counsel also testified, confirming that after the plea, Petitioner was irresolute:

I walked back to the bullpen, and again reiterated to Mr. Williams that he could even appeal this process of the plea, but that in my opinion, would serve no purpose. And I explained to him, more likely than not, when he gets wherever he's going, he will file a PCR; and just let me know what he needs when he gets wherever he is, and I'll send him whatever records I have.

App. 63, ll. 13-20.

On November 9, 2012, the PCR issued an order dismissing Petitioner's claim finding Petitioner voluntarily and intelligently pled guilty. App. 78; App. 80.

ARGUMENT

The record does not establish that plea counsel adequately handled the guilty plea because Petitioner barely had thirty minutes to respond to a plea offer that was made in court on the morning of trial and that would resulted in years of imprisonment.

The record does not establish that plea counsel adequately handled the guilty plea because Petitioner barely had thirty minutes to respond to a plea offer that was made in court on the morning of trial and that could have resulted in years of imprisonment. 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”). Deficient performance by plea counsel can therefore 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 determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

In this case, the record establishes that plea counsel deficiently handled the State's plea offer resulting in Petitioner making the plea under duress. Plea counsel was handling pretrial matters just minutes before seating the jury when he asked for a bargain from the State. By waiting until the last hour, the State was able to leverage a plea without conceding a sentence cap. Thus, plea counsel's deficient dealing resulted in a more fateful deal for Petitioner to consider in extremely limited

circumstances as well as less favorable terms from the State.

The angst and tension in the old jury room that morning must have settled in like a smothering haze. Petitioner's family members and the waiting jury walled him in, depriving him of a meaningful opportunity for introspection or reflection. The trial was ready to proceed. Thirty minutes was all plea counsel gave Petitioner, and it was not enough time to think—even in hindsight Petitioner could identify a rational thought process: "I didn't really have no time to really think of what, really. I was going to go to trial until he advised me that I should take the plea. And he called my family in the back to talk about it, and I just – I took the plea."

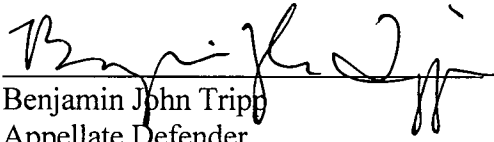
Indeed, plea counsel himself testified to Petitioner's irresoluteness during the plea itself. He testified that he freely anticipated Petitioner's dissatisfaction with his handling of the situation and, after the formal plea, addressed it with him straight away, advising him about appeals and PCR claims. Plea counsel knew the plea was not acceptable: "I explained to him, more likely than not, when he gets wherever he's going, he will file a PCR; and just let me know what he needs when he gets wherever he is, and I'll send him whatever records I have."

Petitioner also testified that he would have proceeded to trial rather than pleading had he had more time to process the plea offer. Accordingly, his plea counsel's deficient handling of the plea deal put him under duress, undermining the knowing and voluntary nature of the plea.

CONCLUSION

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

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of September, 2013.

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IN THE SUPREME COURT

CERTIORARI TO BERKELEY COUNTY
KRISTI LEA HARRINGTON, CIRCUIT COURT JUDGE

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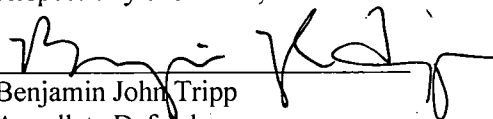
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dustin Williams 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 October 1, 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 Dustin Williams.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of September, 2013

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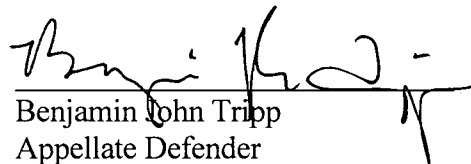
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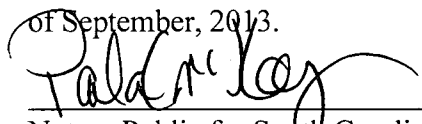
CERTIFICATE OF SERVICE

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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Dustin Williams, #296021, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of September, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of September, 2013.


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