

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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DEC 31 2013

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

S.C. Supreme Court

BRANDON JONES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000605

PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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QUESTION PRESENTED

Whether Petitioner's plea counsel was ineffective for bargaining with the State that certain uninvestigated, prejudicial statements by Petitioner's former cellmate would not be submitted to the court for consideration at sentencing; where the statements were subsequently included in a presentence investigation report and presented to the court; and where plea counsel failed to object to the report or to withdraw Petitioner's plea.

STATEMENT

On December 15, 2004, a Richland County grand jury indicted Petitioner on three counts of first degree criminal sexual conduct with a minor. App. 121-130. On June 27th, 2005, Petitioner appeared at a plea hearing before the Honorable John L. Breeden. App. 1; App. 274, l. 17 – App. 275, l. 3. Deborah Ahrens represented Petitioner and Erin Gaddy represented the State. App. 1. The State alleged that from September through December of 2003, Petitioner engaged in repeated incidents of fondling, oral sex, and masturbation with three minor children. App. 8, ln. 16—App. 9, ln. 3. The plea court found Petitioner’s plea was knowing and voluntary. App. 8, ll. 5-11. Petitioner requested a presentence investigation and report. App. 3, ll. 15-19; App. 20, ll. 18-24. The court delayed sentencing pending a pre-sentencing investigation. App. 20, ll. 22-24.

The pre-sentencing investigation and report were completed by July 25, 2005, but Petitioner had not seen the report when he entered the courtroom for his sentencing hearing on September 15, 2005 before Judge Breeden. App. 54, ll. 10-13; App. 60, ll. 10-19; App. 133. At the hearing, Lauren Mobley represented Petitioner, and Vincent D. Smith represented the State. App. 50, ll. 6-18; App. 133. Counsel objected to the court’s use of the report solely on grounds that it did not include input from Petitioner’s family. App. 56, ll. 11-13; App. 136, l. 18 – App. 137, l. 24. The court overruled the objection, saying that it did not “have to ask for a pre-sentence investigation at all to begin with.” App. 57, ll. 2-13; App. 137, l. 25 – App. 138, l. 10. The court sentenced Petitioner to thirty years concurrent for each charge. App. 152, ll. 22-25.

Petitioner filed an application for post-conviction relief on August 31, 2019, claiming ineffective assistance of counsel. App. 23-28. The State filed a return on April 1, 2010. App. 29-32; App. 100. On February 28, 2011, Petitioner proceeded to a hearing before the Honorable L.

Casey Manning. App. 34. Brian T. Petrano represented the State, and Tommy A. Thomas represented Petitioner. App. 267.

At the PCR hearing, Petitioner testified that during the prosecution of his case, his former cellmate, Elijah Hunter, gave a written statement to the Richland County Sheriff's Office that Petitioner had confessed to sexual misconduct with as many as twenty other victims. App. 45, ln. 3—App. 47, ln. 8. Petitioner adamantly denied the allegation all along, and he testified that he agreed with the State only to plead guilty to the three offenses he was facing in exchange for the State's promise not to submit Hunter's statement to the plea court for consideration at sentencing. App. 48, ln. 8—App. 49, ln. 5; App. 63, ll. 1-25. However, even though counsel knew the terms of the plea bargain and knew that the presentence investigation report featured Hunter's statement, she allowed it to be presented to the sentencing court without objection. App. 63, ll. 1-25.

Petitioner also testified that he had strong convictions about pursuing trial to set his record straight. "This case had a lot of sensationalism. . . . The media had played it up that I had committed several crimes, made a lot of threats and then fled the country." App. 43, ll. 19-25. "I may have done something but all that they're saying I did and all that this guy is saying is going on, the truth has got to come out at trial." App. 46, ll. 6-9. Accordingly, Petitioner sought the presentence investigation specifically for the purpose of setting a record for the plea and sentencing. App. 43, ll. 7-15; App. 44, ll. 12-19. He explained how important seeing the presentence investigation report prior to the plea was: "[B]ecause of all the sensationalism, because of all of the . . . false accusations that wanted to set apart from the truth, I wanted to get a hold of the presentence investigation so that I could separate the chaff from the wheat." App. 51, ll. 12-17; App. 54, ll. 1-8. Petitioner the restated that the omission of Hunter's statements from the report was a necessary condition to his plea:

[I]f I had the chance, I would have certainly objected to it. . . . [O]nce I saw Elijah's statement in there, I said . . . they've broken a plea deal. I told [counsel], that by my understanding that gave me the right to withdraw the plea. And she said, no – she said, it's too late to withdraw the plea. . . . I said, I want to withdraw. I said, we have to go to trial because at least then I'll be sentenced for something that I did rather than something that some people made up.

App. 71, ll. 6-25.

The State called Petitioner's sentencing counsel to testify. She confirmed Petitioner's testimony:

Q: Ma'am, have you been present here throughout the testimony today?

A: Yes, I have.

Q: Can you tell us for the most part, do you just agree with what he said as far as your involvement?

A: I do. I mean, I had very limited involvement with the case but when I was reviewing my file, I did see a note from Ms. Ahrens recounting a discussion between her and the Solicitor Erin Gaddy noting that there would be a serious problem *and the plea wouldn't go through if Elijah Hunter's testimony was allowed during the plea proceedings.*

App. 80, ll. 11-22 (emphasis added).

On February 14, 2012, the PCR court issued its order dismissing Petitioner's claims. App. 100-110. The court found sentencing counsel was not ineffective because the sentencing court based the harsh sentence on Petitioner's "attempt to flee to Ecuador." Further, counsel was not deficient because she objected to the report during sentencing. Additionally, the PCR court found "no credible evidence to support the notion that the 'deal' was to hide something from the plea court. Such a 'deal' is not conducive to the nature of a guilty plea proceeding." App. 107.

By notice dated March 9, 2012, PCR counsel moved the PCR court to reconsider. App. 111-112. The State filed a return on January 24, 2009. App. 113-114. Petitioner filed a supplement to the motion to reconsider dated January 22, 2013, arguing that the court's ruling was contrary to the evidence of sentencing counsel's testimony affirming the agreement. App. 116-117. On March 11, 2013, the PCR issued its order denying the motion to reconsider. 119-120

ARGUMENT

Counsel was ineffective because she plea-bargained for terms the Petitioner was not entitled to secure and because she failed to object to the contents of the presentence investigation report or to withdraw Petitioner's guilty plea after the court received the report.

Counsel was ineffective because she plea-bargained for terms the Petitioner was not entitled to secure and because she failed to object to the contents of the presentence investigation report or to withdraw Petitioner's guilty plea after the court received the report. 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.

In the context of a guilty plea, 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”).

In *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988), this Court held that a defendant’s counsel was ineffective for failing to object or withdraw his guilty plea once the solicitor reneged on a deal not to oppose probation. *Id.* at 54-55, 374 S.E.2d at 685. The plea counsel negotiated with an assistant solicitor on the day of the plea for the State to neither recommend nor oppose probation. *Id.* at 53, 374 S.E.2d at 684. At the hearing, a different assistant solicitor represented the State and vigorously opposed probation on the grounds that the defendant was too old. *Id.* Counsel never requested to withdraw the plea or inform the judge that the State changed its position. *Id.* This Court stated that the defendant had originally insisted with vehemence on pursuing a jury trial, and he only agreed to plea when he believed the State would neither oppose nor recommend probation. *Id.* at 54-55, 374 S.E. 2d at 684-85.

In this case, both Petitioner and counsel testified at the PCR hearing that counsel bargained with the State for Hunter’s statements not to be submitted to the court for consideration at sentencing. However, the statements were subsequently included in the presentencing report, which was presented to the court. If the court was always entitled to be made aware of Hunter’s statements, counsel unreasonably bargained to prevent the court from seeing them. Alternatively, if Hunter’s statements were so unreliable or speculative that the parties could have properly agreed to disregard them, then like in *Jordan v. State*, counsel acted unreasonably in failing to object to the report, qualify its contents to the court, or withdraw Petitioner’s plea.

Also like in *Jordan v. State*, the record shows that Petitioner’s original convictions in setting his record straight at trial and his agreement to a plea based on the condition that Hunter’s statements not be presented to the sentencing court signified a reasonable probability that absent

counsel's deficiency, he would have insisted on going to trial. Petitioner testified that media reports distorted his actions, and he sought a prehearing investigation specifically purpose of setting an accurate record for the plea and sentencing. Petitioner always denied the uninvestigated allegations of Hunter's statements, and sometime later, he only agreed to plea based on the allegations underlying the three charges against him and a promise that Hunter's statements would not be published. Counsel then testified and confirmed that Petitioner told his previous attorney that he would not plead if Hunter's statements were presented during the proceedings. Therefore, had counsel raised and addressed the issue with the sentencing judge, a reasonable probability existed that Petitioner would have withdrawn the plea and sought trial.

The PCR court's order concluded counsel was not ineffective for three reasons. First, it found the sentencing court based the harsh sentence on Petitioner's "attempt to flee to Ecuador." This analysis was erroneous because effectiveness in this case turns on whether counsel was unreasonable in failing to object or withdraw the guilty plea and whether Petitioner therefore suffered prejudice by being denied his right to seek trial. Whether Petitioner would have received a lighter sentence is not a part of the legal test for effectiveness in a plea case such as this one.

Second, the order concluded counsel was not ineffective because she did in fact object to the report at the sentencing hearing. However, counsel objected on grounds that the presentence report was incomplete and did not include the input from Petitioner's family. Thus, counsel did not object that the report contained information that the State promised to be excluded, which was unreasonable and below the necessary standard.

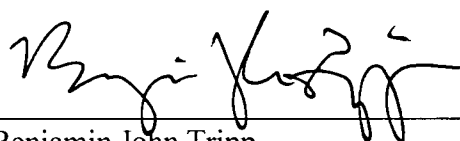
Finally, the PCR court stated it found "no credible evidence to support the notion that the 'deal' was to hide something from the plea court. Such a 'deal' is not conducive to the nature of a guilty plea proceeding." In other words, the court found no relevant evidence in the record that

Petitioner and the State agreed that the State would not present to the court Hunter's uninvestigated allegations. However, Petitioner testified at the PCR hearing that counsel led him to believe that the State agreed not to submit Hunter's statements to the court for consideration at sentencing, and counsel confirmed that Petitioner had that understanding based on communications from his previous attorney. Accordingly, based on counsel's communications with Petitioner and counsel's conduct at the plea hearing, counsel was deficient in assisting Petitioner in knowingly and voluntarily waiving his right to trial, and the conclusion to the contrary in the court's order was erroneous.

CONCLUSION

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

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

BRANDON JONES,

PETITIONER,

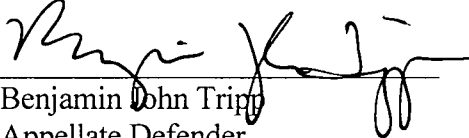
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of December, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31st day
of December, 2013.


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