

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County

DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED

JAN 24 2014

S.C. Supreme Court

JOHN DRAYTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000963

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding Petitioner voluntarily pled guilty where plea counsel repeatedly told Petitioner he should accept the plea deal but never discussed Petitioner's interests in taking a chance at trial and where counsel communicated his advice by statements that Petitioner found intimidating?

STATEMENT

On November 10, 2009, the Orangeburg County Grand Jury indicted Petitioner John B. Drayton on one count of entering a bank with intent to steal. App. 75. On February 4, 2010, Appellant attended a plea hearing before the Honorable James C. Williams, Jr. Douglas Mellard represented Petitioner and Tommy Scott represented the State. App. 1. The State alleged that on June 25, 2009, Petitioner drove four passengers to a bank in Holly Hill, which the passengers entered and robbed. App. 9, ln. 24—App. 12, ln. 21. The plea court engaged Petitioner in a routine plea colloquy. App. 6, ln. 2—App. 9, ln. 16. Petitioner pled guilty to accessory before the fact of entering a bank with intent to steal in exchange for a negotiated sentence of fifteen years. App. 5, ll. 6-16. The plea court accepted the plea, finding a substantial factual basis supported the plea and Petitioner pled knowingly and voluntarily. App. 9, ll. 17-23. The plea court sentenced Petitioner to fifteen years imprisonment. App. 13, ll. 16-21.

On May 5, 2010, Petitioner filed an application for post-conviction relief. App. 15-21. On January 27, 2011, the State filed a return. App. 25-29. On February 2, 2012, Petitioner filed an amended application. App. 22-24.

On May 24, 2012, Petitioner proceeded to a hearing in front of The Honorable DeAndra G. Benjamin. Charlie Brooks represented Petitioner and Sally Elliot represented the State. App. 30. Petitioner alleged plea counsel was ineffective because his “main objective and focus was on getting a guilty plea,” and he intimidated Petitioner, for example by stating that “he didn’t care if Jesus Christ came in the courtroom to represent him that [he] was going to get life.” App. 36, ln. 22—App. 37, ln. 2. Petitioner explained he genuinely wanted to take his chances with a trial rather than taking a fifteen-year sentence:

Q: Okay. So you pled guilty because it was to your benefit to avoid the chance of a life sentence?

A: To be honest with you . . . I would rather gamble with my chances on going to trial.

Q: Now?

A: No, before then, too.

App. 45, ll. 19-25. From Petitioner’s position, it felt like “Mr. Mellard threatened me I felt as though Mr. Mellard intimidated me into my plea.” App. 44, ll. 1-3.

Plea counsel also testified about the measures he took to convince Petitioner of the danger of trial: “I explained to him in person. I explained it to him in a letter. I tried to make it clear, so that there would be no question if he decided to go to trial what the ramifications would be.” App. 51, ll. 15-18. He could not deny making the statement to Petitioner that was particularly intimidating. App. 52, ln. 22—App. 53, ln. 3.

On July 30, 2012, the PCR court issued an order dismissing Petitioner’s claim. App. 67-74. The court found that Petitioner knowingly and voluntarily entered the plea based on plea counsel’s proper advice as to the potential sentencing consequences depending on the manner in which Petitioner elected to resolve the charge. App. 72.

ARGUMENT

The PCR court erred in finding Petitioner voluntarily pled guilty because the evidence in the record establishes that plea counsel imposed his own values on Petitioner in convincing him to avoid trial and a possible life sentence.

The PCR court erred in finding Petitioner voluntarily pled guilty because the evidence in the record establishes that plea counsel imposed his own values on Petitioner in convincing him to avoid trial and a possible life sentence. 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 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 testimony presented at the PCR hearing shows that plea counsel convinced Petitioner to plea by imposing his own values on him. The testimony of both Petitioner and plea counsel focused on the counsel’s evaluation of the risk of receiving a life sentence in going to trial. While giving such advice was necessary to adequate representation, it was not sufficient. Plea counsel ostensibly never discussed Petitioner’s interests in fighting on the merits of the case and taking his chance at exoneration. Instead, plea counsel immediately resorted to dramatic admonishments, even referring to Jesus Christ being unable to save Petitioner. Plea counsel confirmed in his testimony that the message he wanted to repeatedly stamp into Petitioner’s mind was that he should plea. The Constitution required that Petitioner be advised about his case in such a manner that he could make a fully voluntary decision as to whether to plead guilty in accord with his own principals and interests. However, Petitioner in effect was forced to adopt

plea counsel's values and interests and was denied the opportunity to pursue his own. While plea counsel may have had honorable intentions in avoiding a life sentence and resolving this case in Petitioner's best interest, the decision of whether to plead or fight for his case at trial was not counsel's to make.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
DEANDREA G. BENJAMIN, CIRCUIT COURT JUDGE

JOHN DRAYTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000963

PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Drayton 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 May 24, 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 John Drayton.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of January, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
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JOHN DRAYTON,

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CERTIFICATE OF SERVICE

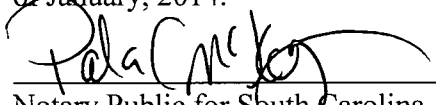
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and John Drayton, #137499, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472 this 24th day of January, 2014.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of January, 2014.

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