

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

Frank R. Addy, Circuit Court Judge

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S.C. Supreme Court

STEVEN WHITT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001486

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in finding Petitioner knowingly and voluntarily pled guilty to distributing crack cocaine to an undercover agent where Petitioner testified that he was never found with the State's marked twenty dollar bill on his person and where plea counsel did not investigate the evidence or advise Petitioner as to the impact of the missing evidence on his chances for a verdict of not guilty at trial?

STATEMENT

On February 12, 2010, the Edgefield County Grand Jury indicted Petitioner Steven Whitt on one count of distribution of crack cocaine. App. 78-79. On February 22, 2011, Appellant appeared at a plea hearing before The Honorable R. Knox McMahon. W. Greg Seigler represented Petitioner and H. Franklin Young represented the State. App. 1. Petitioner agreed to plead guilty a second offense of distribution of crack cocaine in exchange for the State's recommendation of a seven-year sentence. App. 3, ll. 4-12.

At the hearing the State alleged that on October 15, 2009, Petitioner sold .39 grams of crack cocaine to an undercover operative of Edgefield County law enforcement for \$20 in documented funds. App. 12, ll. 2-11. The plea court accepted the plea, finding a substantial factual basis supported the plea and Petitioner made the plea knowingly and voluntarily. App. 13, ll. 14-20. The plea court sentenced Petitioner to seven years imprisonment. App. 16, ln. 24—App. 17, ln. 4.

On July 25, 2011, Petitioner filed an application for post-conviction relief. App. 19-40. The State filed a return on February 25, 2012. App. 41-47; App. 69. On April 15, 2013, Petitioner attended a hearing before The Honorable Frank R. Addy, Jr. Dorothy H. Hagg represented Petitioner and J. Walt Whitmire represented the State. App. 48.

Petitioner claimed that he was denied effective assistance of counsel insofar as plea counsel failed to adequately investigate his case. He specifically testified that when police officers apprehended him after the alleged drug buy, he did not have a marked twenty dollar bill on his person as the police alleged; all he was carrying was \$1.37. He stated that plea counsel never investigated this inconsistency. App. 52, ln. 13—App. 53, ln. 3. Plea counsel also testified, and when asked about the evidence against Petitioner, he merely stated that “it was a standard case,” and

he discussed with Petitioner the “potential conviction” and the “tremendous amount of time” to which he would be exposed. App. 60, ll. 8-15.

On June 25, 2013, the PCR court issued an order dismissing Petitioner’s claim. App. 69-76. The order stated that Petitioner was arrested “pursuant to a valid and standard controlled buy,” and Petitioner failed to adduce “evidence from which the court could conclude that the outcome of the case would likely have been different had that evidence [of the missing money] been developed.” App. 73.

ARGUMENT

The PCR court erred in finding Petitioner knowingly and voluntarily pled guilty because the evidence in the record establishes that his plea counsel failed to investigate the State’s evidence and advise Petitioner about his chances of success at trial.

The PCR court erred in finding Petitioner knowingly and voluntarily pled guilty because the evidence in the record establishes that his plea counsel failed to investigate the State’s evidence and advise Petitioner about his chances of success at trial. 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.”).

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 PCR court erred in finding that Petitioner’s plea counsel adequately investigated the State’s evidence and advised Petitioner about his chances of success at trial. The most important piece of evidence for the State should have been the marked twenty dollar bill that its undercover agent allegedly used in the purchase. Petitioner testified that when police officers apprehended him after the alleged drug buy, he did not have the marked twenty dollar bill on him. Without that evidence, the State almost certainly could not have convicted Petitioner. Nevertheless, plea counsel never investigated records of the marked bill or its whereabouts. Plea counsel’s testimony showed that he looked no further into the State’s evidence than concluding the case was “standard,” after which he determined Petitioner’s conviction at trial was a foregone conclusion and only warned him of the “tremendous amount of time” that he could be sentenced to. Thus, plea counsel failed to fully investigate and advise Petitioner about the State’s potential lack of evidence and his chances for exoneration at trial.

Additionally, the State neither adduced evidence nor attempted to elicit from Petitioner testimony suggesting he would have opted to plead even had he been adequately advised of the impeachment evidence. As stated above, without evidence showing Petitioner received the marked twenty dollar bill, the State almost certainly could not have convicted him in front of a jury, and Petitioner prudently would have opted to exonerate himself at trial. Accordingly, the PCR court erred in finding that trial counsel’s deficient performance did not prejudice Petitioner.

CONCLUSION

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

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of February, 2014.

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CERTIORARI TO EDGEFIELD COUNTY
FRANK R. ADDY, CIRCUIT COURT JUDGE

STEVEN WHITT,

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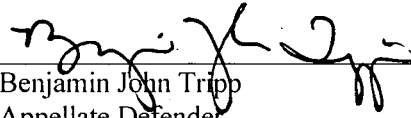
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Steven Whitt 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 April 15, 2013. 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 Steven Whitt.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of February, 2014

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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 John Walt Whitmire, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Steven Whitt #255456, Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, , this 7th day of February, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of February, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.