

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 27 2014

S.C. Supreme Court

Certiorari to Florence County

William H. Seals, Jr., Circuit Court Judge

DONNELL MCFADDEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002667

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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ATTORNEY FOR PETITIONER
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ISSUE PRESENTED

Does the record support the PCR court's finding that Petitioner received effective assistance of counsel where the State had a videotape of Petitioner conducting an alleged drug transaction; where Petitioner was offered a plea deal of five-years imprisonment for a drug distribution charge; and where trial counsel did not accept the plea offer but led Petitioner to trial where he faced a mandatory sentence of fifteen years upon conviction?

STATEMENT

On October 2, 2008, the Florence County Grand Jury indicted Petitioner Donnell McFadden for distributing crack cocaine. App. 244-245. The State alleged that on April 2, 2008, Petitioner sold crack cocaine to a confidential police informant in Lake City. App. 47, line 25—App. 49, line 20. The State had videotape evidence showing Petitioner committing the offense. App. 170, lines 22-25. Petitioner had two prior convictions for distribution and was facing a mandatory fifteen-year sentence for a third. App. 163, line 22—App. 164, line 8; App. 171, lines 13-16.

Fortunately for Petitioner, the solicitor, John Jepertinger, offered a five-year plea bargain prior to trial. App. 204, lines 8-17. Trial counsel, Scott Floyd, communicated the offer to Petitioner, and Petitioner intended to accept the offer on Friday, April 11, 2009, before his trial was to begin on the following Monday. However, when discussing the matter that Friday, trial counsel told him that the deal “will still have been on the table for that Monday so when I called the automatic voice system that Sunday my name wasn’t on there for Monday, but I still went down the courthouse that Monday to make sure.” App. 211, line 21—App. 212, line 25.

Unfortunately for Petitioner, from his first address to the trial judge, The Honorable Thomas A. Russo, on Monday, April 14, 2009, he was not permitted to make the arranged plea:

DEFENDANT MCFADDEN: Excuse me, can I go ahead and take this plea then and let me go on up. I’ll stop if you’ll go ahead and take the plea.

THE COURT: Scott, you want to go ahead and talk to him outside . . . we weren’t gone start this case –

MR. FLOYD: Your Honor, I’ll take the time to talk to him.

...

MR. FLOYD: Your Honor, could I indulge you one second before we start? Mr. McFadden, apparently has a motion. He wants to relieve me as his attorney is my understanding, okay.

...

DEFENDANT MCFADDEN: Yes, sir, is there anyway possible I can get me a paid attorney and relieve him?

THE COURT: No, sir. What's your reason?

...

DEFENDANT MCFADDEN: Seem like he ain't working with me with the charge.

App. 32, line 18—App. 34, line 6. Accordingly, Petitioner's case proceeded to trial. At the conclusion of the trial on April 15, 2009, the jury found Petitioner guilty, and the trial court imposed a twenty-two year sentence. App. 158, line 20—App. 159, line 2; App. 172, lines 11-21.

On July 10, 2012, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. App. 174-187. On December 19, 2012, the State filed its return. App. 188-192. On October 10, 2013, Petitioner appeared at an evidentiary hearing before The Honorable William H. Seals, Jr. Josh Thomas represented Petitioner and Daryl Corbin represented Petitioner. App. 194.

Petitioner testified that he was willing to accept the plea offer, and on the Friday before trial he discussed the matter with trial counsel, who assured him that the offer would remain open until Monday. App. 208, lines 14-18; App. 212, lines 12-25. Trial counsel also testified and confirmed Petitioner's testimony:

Q: Did Mr. McFadden ever indicate to you that he wanted to take that deal?

A: If I recall, when I—I think I did relay it to him the week prior to the date that the trial was set for. I believe, I recall I thought he was going to accept it, yes. I mean, so I'm sure he told me that he was going to accept it.

Q: And on the day of trial that plea was still on the table?

A: Yes, sir.

Q: And whose decision was it to decline the plea on that day?

A: I assume it was Mr. McFadden's.

App. 228, line 21—App. 229, line 8.

On December 11, 2013, the PCR court issued its order of dismissal, concluding Petitioner failed to show ineffective assistance of counsel. App. 233-242. In particular, the court found that Petitioner “freely and intelligently declined [the plea offer] and decided to take the case to trial.” App. 239.

ARGUMENT

The record does not support the PCR court's finding that Petitioner himself rejected the State's exceptionally favorable plea offer, and trial counsel was therefore ineffective in taking Petitioner's case to trial.

The record does not support the PCR court's finding that Petitioner himself rejected the State's exceptionally favorable plea offer, and trial counsel was therefore ineffective in taking Petitioner's case to 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 right to effective assistance of counsel extends to plea negotiations. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (“This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”). 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"). Counsel's performance can be deficient based on incorrect advice to a defendant deciding whether to accept a plea offer. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) ("As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence [three and a half] times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied." (citations omitted)).

In this case, the record shows that the State made a plea offer favorable to Petitioner. Considering the videotape evidence showing Petitioner making the alleged crack cocaine transaction, proceeding to trial meant a certain mandatory minimum sentence of fifteen years for Petitioner's third distribution offense. When the State offered the five-year deal, the only plausible response was for Petitioner to accept it. Accordingly, Petitioner testified at the PCR hearing that he intended to accept the offer on the Friday before his trial. The only reason he did not was because, in discussing the matter with trial counsel, he was led to believe the offer would remain open until just before trial on Monday. Plea counsel testified at the PCR hearing and expressly confirmed that

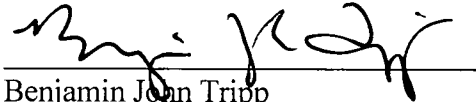
the offer was on the table through Monday and that he was “sure [Petitioner] told [him] that he was going to accept it.” Indeed, the record shows when Petitioner was first allowed to address the trial court, he asked, “[C]an I go ahead and take this plea then and let me go on up. I’ll stop if you’ll go ahead and take the plea.”

The PCR court found that Petitioner freely and intelligently rejected the plea offer himself and chose to proceed to the trial. The only rationale behind the finding was trial counsel’s speculative response to a question about who was responsible for the “decision . . . to decline the plea on that day”: “I assume it was Mr. McFadden’s.” However, Petitioner credibly testified that he wanted to accept the offer, and trial counsel did not contravene the assertion. He merely stated that he “assumed” Petitioner did not want to accept the offer. Accordingly, the PCR court erred in concluding the evidence established that Petitioner freely and intelligently rejected the offer.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Benjamin John Tripp", written over a horizontal line.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE

DONNELL MCFADDEN,

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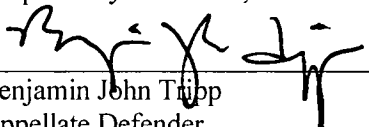
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donnell McFadden 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 10, 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 Donnell McFadden.

Respectfully submitted,



Benjamin John Tipp
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of June, 2014

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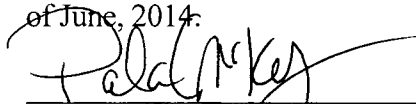
CERTIFICATE OF SERVICE

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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Donnell McFadden, #229635, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 27th day of June, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of June, 2014:


_____(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.