

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

William H. Seals, Jr., Circuit Court Judge

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SEP 17 2014

S.C. Supreme Court

SHALLA MARSHALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000011

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

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

INDEX

INDEX.....1
ISSUE PRESENTED2
STATEMENT3
ARGUMENT4
CONCLUSION6
PETITION TO BE RELIEVED AS COUNSEL.....8

ISSUE PRESENTED

Whether the record supports the PCR court's finding that plea counsel adequately investigated the bias of Petitioner's codefendant stemming from his jealousy and anger towards Petitioner's relationship with a woman where plea counsel testified that he and Petitioner discussed the matter, but where he admitted "that's as far as that went" other than confirming that the woman personally knew the codefendant?

STATEMENT

On March 3, 2011, the Florence County Grand Jury indicted Petitioner Shalla Marshall on two counts of attempted armed robbery; four counts of armed robbery; four counts of criminal conspiracy; two counts of possession of a weapon during the commission of a violent crime; and one count of kidnapping. The charges stemmed from a spree of holdups from August 21, 2010 to August 25, 2010 that Petitioner allegedly committed with two codefendants. App. 5, line 24—App. 9, line 4; App. 63-80.

On August 8, 2011, Petitioner appeared at a plea hearing before The Honorable Michael G. Nettles. Vick Meetze represented Petitioner and John Jepertinger represented the State. App. 1. As part of a negotiated plea, Petitioner pled guilty to two counts of armed robbery and two counts of attempted armed robbery. App. 3, lines 1-11; App. 9, line 8—App. 10, line 1. Judge Nettles handed down concurrent sentences of fifteen years for each charge. App. 16, line 11—App. 17, line 9.

On December 13, 2012, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 19-25. The State filed a return on March 8, 2013. App. 26-30. On October 7, 2013, Petitioner appeared at an evidentiary hearing before The Honorable William H. Seals, Jr. Frank Clayton Swaggard represented Petitioner and Joshua Thomas represented the State. App. 31.

Petitioner testified that impeachment evidence existed showing that his codefendant had a bias to falsely implicate him:

My co-defendant pointed a finger my way saying I was with him and I pointed out that my co-defendant has a vendetta against me. My son's mother—he wanted to get with my son's mother before I even met my son's mother. This guy said it himself on the audio that they asked him. He said, yeah, well, I had—I have a crush on this—on this girl.

App. 41, lines 12-18. On the same topic, plea counsel testified that he was aware of the evidence but did not further investigate it:

We had certainly discussed that. That was certainly something that was going to be part of any questioning that I had of that witness whenever that witness testified as part of any cross examination to sort of try to convince the jury that this person was biased, had an axe to grind, that kind of thing.

As far as investigation that's—that's as far as that went. I mean I had talked to Mr. Marshall's girlfriend. She was also a potential witness in the case and she would have been able to testify certainly that she knew that individual and all that.

App. 52, lines 4-14.

On December 10, 2013, the PCR court issued its order of dismissal concluding Petitioner failed to show ineffective assistance of counsel. App. 55-62. Specifically, the order stated that plea counsel conducted a proper investigation of the codefendant's bias and was prepared to address the issue had Petitioner proceeded to trial. App. 59-60.

ARGUMENT

The record does not support the PCR court's finding that plea counsel adequately investigated the bias of Petitioner's codefendant because plea counsel testified he never investigated the codefendant beyond confirming that the mother of Petitioner's child knew him.

The record does not support the PCR court's finding that plea counsel adequately investigated the bias of Petitioner's codefendant because plea counsel testified he never investigated the codefendant beyond confirming that the mother of Petitioner's child knew him. 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. *Id.* at 687.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes . . . making an independent investigation of the facts and circumstances of the case.” *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). *See also Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (“[A]n attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.’” (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968))). A court must identify an affirmative decision not to investigate further and assess the reasonableness of the decision under the facts and circumstances within counsel’s knowledge:

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.”

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)).

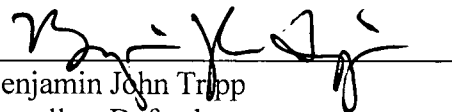
In this case, Petitioner testified that his codefendant falsely implicated him because of jealousy and anger regarding the mother of Petitioner’s child. Plea counsel confirmed that this evidence of bias existed and that he was aware of it prior to Petitioner’s plea, saying that Petitioner “certainly discussed that” with him. Nevertheless, plea counsel expressly testified that he never investigated the codefendant beyond confirming that the mother of Petitioner’s child knew him. His

decision not to investigate further was unreasonable because it did not allow him to determine if the theory of the codefendant's bias could be developed into a complete defense at trial. Indeed, as plea counsel testified—and the order of dismissal stated—the investigation was only adequate to allow plea counsel to cross-examine the codefendant on the matter. Plea counsel reasonably should have considered that the evidence provided a cornerstone for a complete defense rather than merely an impeachment tactic. In this manner, the record does not show that plea counsel made reasonable decision that making further investigation unnecessary, and the order of dismissal is unsupported.

CONCLUSION

For the foregoing reasons, Petitioner respectfully 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 17th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

SHALLA MARSHALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000011

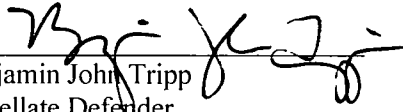
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shalla Marshall 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 7, 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 Shalla Marshall.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of September, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County
William H. Seals, Jr., Circuit Court Judge

SHALLA MARSHALL,

PETITIONER,

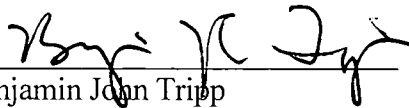
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

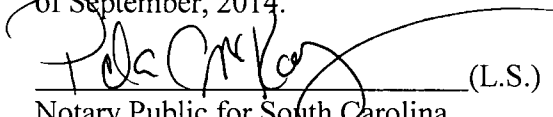
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Shalla Marshall, #327284, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 17th day of September, 2014.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of September, 2014.



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