 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
George C. James, Jr., Circuit Court Judge

RECEIVED

OCT 27 2014

S.C. Supreme Court

KEVIN L. HOLT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000953

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Does the record support the PCR court's finding that Petitioner did not establish ineffective assistance of plea counsel where Petitioner testified without contradiction that he pled guilty to possession of drugs in his car because based on his conversations with plea counsel, his girlfriend would not be liable and where after Petitioner pled guilty, his girlfriend was called to plea and sentenced to seven years' incarceration?

STATEMENT

On July 29, 2010, the Horry County Grand Jury indicted Petitioner Kevin L. Holt for trafficking cocaine 110 grams or more but less than 200 grams. App. 112. On November 1, 2010, Petitioner appeared at a plea hearing before The Honorable Steven H. John. Stuart M. Axelrod represented Petitioner and J. Scott Hucks represented the State. App. 1. At the hearing the State alleged that on February 4, 2010, officers from the Myrtle Beach Police Department surveilled Petitioner driving on local highways and stopped him for having a broken tag light. Through a computer check, officers discovered Petitioner had an outstanding bench warrant, and they arrested him. During a subsequent search, Petitioner's passenger, and codefendant, was found to have a quantity of cocaine on her person. App. 9, line 18—App. 10, line 20. Petitioner pled to the lesser-included offense of possession of 28 to 100 grams in exchange for a negotiated sentence of twelve years' incarceration. App. 4, line 10-17; App. 12, line 24—App. 13, line 25. Judge John accepted Petitioner's plea and sentenced him to twelve years' incarceration. App. 12, lines 11-25; App. 15, lines 1-8.

On October 25, 2011, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 19-25. The State filed a return on November 23, 2011. App. 32-35. Petitioner filed an amended application on December 27, 2012 and a second amended application on May 2, 2013. App. 26-31. On March 17, 2014, Petitioner appeared at an evidentiary hearing before The Honorable George C. James. Kristy Goldberg represented Petitioner and Joshua L. Thomas represented the State. App. 36.

Petitioner testified that his understanding based on conversations with plea counsel was that in pleading guilty, he would be taking complete responsibility for possession of the drugs, and his codefendant, also his girlfriend, would not be liable. App. 43, lines 15-21; App. 46, lines 9-16;

App. 47, lines 11-12. He specified that police officers came to him and said, “if you make a confession, we’ll let her go.” App. 82, lines 18-20. He stated that after he pled guilty, the plea court interrupted the hearing to let his girlfriend plead guilty, upon which the court sentenced her to seven years’ incarceration. Petitioner was then called back to receive his sentence. App. 46, line 9—App. 47, line 16; App. 60, line 17—App. 61, line 4; App. 84, lines 1-12. Petitioner did not understand why both he and his girlfriend received sentences. App. 47, lines 17-23. Petitioner testified that had he known that his girlfriend would be sentenced to incarceration, he would not have pled guilty but would have proceeded to trial. App. 59, lines 19-24.

Plea counsel also appeared. When asked if he remembered ever attempting to incorporate Petitioner’s girlfriend’s disposition into Petitioner’s plea, he had no testimony to offer: “I don’t remember. I just don’t remember.” App. 79, lines 3-14. However, plea counsel did recall that Petitioner expressed an interest in not wanting his girlfriend to be made liable. App. 79, line 17—App. 80, line 2.

On April 15, 2014, the PCR court issued an order of dismissal concluding Petitioner failed to establish ineffective assistance of plea counsel. App. 97-108. Specifically, the order stated Petitioner did not present credible evidence that plea counsel inadequately advised him about the liability of Petitioner’s girlfriend. Further, Petitioner did not present evidence of prejudice because “[Petitioner] was in the courtroom while the co-defendant pled.” App. 104.

ARGUMENT

The uncontroverted evidence in the record shows plea counsel did not adequately inform Petitioner about his girlfriend's criminal liability, and Petitioner therefore did not plead knowingly.

The uncontroverted evidence in the record shows plea counsel did not adequately inform Petitioner about his girlfriend's criminal liability, and Petitioner therefore did not plead knowingly. 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, the uncontroverted evidence in the record shows plea counsel did not adequately inform Petitioner about his girlfriend's criminal liability. Petitioner's girlfriend was sentenced to seven years' incarceration for possession of the cocaine. However, as Petitioner testified at the PCR hearing, based on conversations with plea counsel, he understood that in pleading guilty, he would be taking sole responsibility for possession of the drugs. Further, he specified that police officers came to him and said, "if you make a confession, we'll let her go."

No evidence controverted Petitioner's account. When plea counsel was asked if he remembered ever attempting to incorporate Petitioner's girlfriend's disposition into Petitioner's plea, he had no testimony to offer: "I don't remember. I just don't remember." Indeed, plea counsel then recall that Petitioner expressed an interest in not wanting his girlfriend to made liable. Thus, like in *Jordan v. State*, counsel was ineffective for leading Petitioner to actually enter a plea under circumstances different from those that plea counsel advised him would apply.

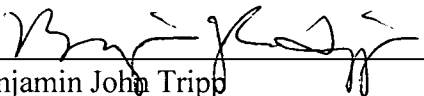
Further, the PCR court's order of dismissal was unsupported in the conclusion that Petitioner did not present evidence of prejudice because "[Petitioner] was in the courtroom while the co-defendant pled." The record plainly shows that Petitioner pled guilty before his hearing was interrupted and his girlfriend was called to plea. Further, Petitioner specifically testified at the PCR

hearing that had he known that his girlfriend would be sentenced to incarceration, he would not have pled guilty but would have proceeded to trial.

CONCLUSION

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

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of October, 2014.

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CERTIORARI TO Horry COUNTY
GEORGE C. JAMES, JR., CIRCUIT COURT JUDGE

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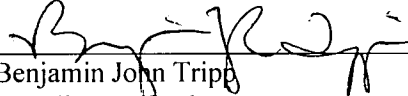
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kevin L. Holt 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 March 17, 2014. 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 Kevin L. Holt.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of October, 2014

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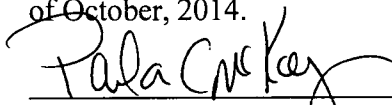
CERTIFICATE OF SERVICE

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 and Kevin L. Holt, #343450, at Evans Correctional Institution this 27th day of October, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of October, 2014.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022