 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

J. Derham Cole, Circuit Court Judge

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S.C. Supreme Court

ALEX O. DAVIDSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001855

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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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 where Petitioner did not understand the terms of the plea but where plea counsel ordered him to answer questions during his plea colloquy as if he did understand?

STATEMENT

On March 22, 2012, the Cherokee County Grand Jury indicted Petitioner Alex O. Davidson for distribution of crack cocaine. App. 79-80. On July 27, 2012, Petitioner appeared at a plea hearing before The Honorable Lee S. Alford. Michael Berry represented Petitioner and Kimberly Leskanic represented the State. App. 1. Petitioner was serving probation for a charge of possession with intent to distribute crack cocaine from 2007. App. 11, lines 15-22.

The State alleged that on December 12, 2011, law enforcement used an undercover informant to purchase 0.2 grams of crack cocaine from Petitioner. App. 10, lines 1-10. Pursuant to a negotiated-sentence plea deal, Petitioner pled guilty in exchange for the State's acceptance of a seven-year sentence. App. 4, lines 9-15; App. 6, lines 2-4. After a routine plea colloquy, the trial judge accepted the plea and sentenced Petitioner to seven years' incarceration. App. 4, line 25—App. 11, line 3; App. 17, lines 16-20.

On October 18, 2012, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 20-33. The State filed a return on January 9, 2014. App. 34-39. On April 10, 2014, Petitioner appeared at an evidentiary hearing before The Honorable J. Derham Cole. Leah B. Moody represented Petitioner and Suzanne H. White represented the State. App. 40.

Petitioner testified that prior to the plea hearing, he had a mistrial, which concluded with a hung jury. App. 44, lines 8-14. Afterwards, he decided to plead based on specific advice from plea counsel:

I decided to plea because Mr. Berry told me that I would be charged with first offense distribution and that I would be running concurrent with the probation revocation, which meaning that the charge was—I think it was terminated. At the time I thought terminated mean[t] expunged—expunged.

App. 45, lines 9-14. He later attempted to explain his misunderstanding of the plea further:

See, I'm serving a first offense distribution charge and I'm serving a second offense distribution charge, which means I'm serving one at a time. It's 85 percent. And one at a time is nonviolent, 51 percent. And he never broke that down to me.

App. 47, lines 9-13.

Petitioner claimed that he met with plea counsel once after mistrial, and "all he kept doing was trying to get me to plea. That's all he kept doing, was trying to get me to plea." App. 51, lines 5-8. He also repeatedly testified that plea counsel gave him particular instructions regarding responding to the court during the plea hearing: "[H]e told me that if I get up there and I say anything that's discreditable that the state would take the plea back." Ap. 50, lines 17-19. "He told me that I couldn't say certain things because they would take my plea back. . . . So I'm going off what he told me to say instead of agreeing with what they say." App. 57, lines 17-21. "I couldn't say nothing because he told me that they would take the first offense plea back. They're saying certain things, but I'm telling you what he told me not to say." Ap. 58, lines 8-11.

On July 25, 2014, the PCR court issued its order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 71-78. Specifically, the court concluded that the evidence showed Petitioner's plea was knowing and voluntary because Petitioner "indicated at his plea that he was satisfied with Counsel and that Counsel had fully discussed the charges he faced. . . . [Petitioner] failed to offer any testimony or evidence to support his claim that he did not plead freely and voluntary" App 76-66.

ARGUMENT

The PCR court's finding that no evidence showed Petitioner did not knowingly and voluntarily plead guilty is plainly contravened by the record, and the court erred in concluding Petitioner did not establish ineffective assistance of plea counsel.

The PCR court's finding that no evidence showed Petitioner did not knowingly and voluntarily plead guilty is plainly contravened by the record, and the court erred in concluding Petitioner did not establish ineffective assistance of plea counsel. 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”). 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’s finding that no evidence showed Petitioner did not knowingly and voluntarily plead guilty is plainly contravened by the record. First, Petitioner did not want to plead guilty. He had already consummated his desire to proceed to trial. Petitioner also expressly testified that plea counsel overtly pressured him into making a plea. The PCR court found that Petitioner was satisfied with plea counsel’s recommendation because he stated so at the plea hearing. However, Petitioner also specifically and repeatedly testified that plea counsel compelled him to answer the plea colloquy questions in a complacent fashion. Once plea counsel told Petitioner what he could and could not say, Petitioner “[went] off what he told [him] to say instead of” answering honestly. Therefore, Petitioner made the plea based on the instructions of plea counsel and not in accord with his own volition.

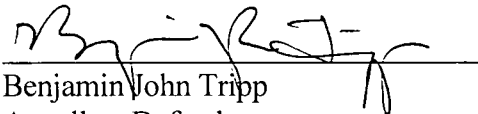
Second, the record shows Petitioner did not plead knowingly insofar as gave very disjointed testimony about his understanding of the terms of the plea. He stated he understood that he would be pleading to a first-offense distribution charge that, also in his understanding,

would be based on some kind of cancellation of his prior distribution charge. He also believed that terms existed affecting whether the charge was violent or non-violent. Plainly, Petitioner did not have a grasp of the terms of his plea, even as late as the PCR hearing. Accordingly, the record does not support the PCR court's finding that Petitioner intelligently pled guilty.

CONCLUSION

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

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of February, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

ALEX O. DAVIDSON,

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STATE OF SOUTH CAROLINA,

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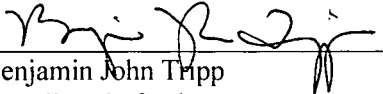
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Alex O. Davidson 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 10, 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 Alex O. Davidson.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of February, 2015

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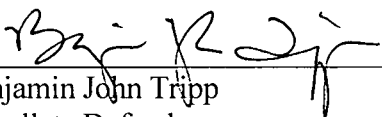
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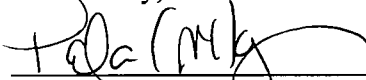
CERTIFICATE OF SERVICE

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Alex O. Davidson, #322478, at Livesay Pre-Release Center, this 12th day of February, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of February, 2015.


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