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STATE OF SOUTH CAROLINA

MAR 23 2015

IN THE SUPREME COURT

S.C. Supreme Court

Certiorari to Lexington County

William P. Keesley, Circuit Court Judge

JASON BONEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001794

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the evidence in the record supports the PCR court's conclusion that Petitioner knowingly and voluntarily pled guilty where Petitioner did not know on the day of his plea that he was appearing at a plea hearing; where plea counsel only met with Petitioner for fifteen to twenty minutes prior to the plea; and where Petitioner took five times his normal dosage of medication before the plea based on his extreme anxiety.

STATEMENT

On October 1, 2012, the Lexington County Grand Jury indicted Petitioner Jason Cooke Boney for second-degree criminal sexual conduct with a minor. App. 146-147. On January 22, 2013, Petitioner appeared at a plea hearing before The Honorable Clifton Newman. Sally J. Henry represented Petitioner and Kate Whetstone Usry represented the State. App. 1.

The State alleged that Petitioner had maintained a sexual relationship with his and his girlfriend's babysitter from the time she was thirteen to fifteen years old. During this time, Petitioner was around twenty-seven years old. App. 3, line 23—App. 6, line 1. Petitioner pled guilty, and the plea judge sentenced him to ten years' incarceration. App. 7, lines 13-16; App. 21, lines 23-25.

On April 30, 2013, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 24-40. The State filed a return on March 14, 2013. App. 41-47. On April 14, 2014, Petitioner appeared at an evidentiary hearing before The Honorable William P. Keesley. Anna R. Good represented Petitioner and Walt Whitmire represented the State. App. 48.

Petitioner testified that he had only met with plea counsel once prior to the plea hearing. Moreover, on the day of the plea hearing, he believed he was only attending court for a roll call, and he was not aware he would be attending a plea hearing. App. 54, line 2—App. 56, line 7. Petitioner also testified that he suffered from anxiety and was supposed to be taking one prescribed pill of Prozac each day. However, on the morning of the plea hearing, he took two pills, plus three more after learning he was not merely in court for a roll call. App. 61, lines 6-20; App. 64, lines 2-6. He confirmed that the plea judge did not ask him whether he was on any medication that morning.

App. 65, lines 14-22. Plea counsel also appeared and testified that their second meeting prior to the plea lasted only fifteen to twenty minutes. App. 103, lines 18-21.

On August 5, 2014, the PCR court filed an order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 131-145. Specifically, the court concluded Petitioner's plea was knowing and voluntary because Petitioner did not mention his use of Prozac during the plea, did not adduce an expert to testify about the effects of Prozac, did not demonstrate alarming conduct during the plea, and because the "reason he came to court is not determinative of whether his guilty plea was entered" knowingly or voluntarily. App. 142-143.

ARGUMENT

THE EVIDENCE IN THE RECORD DOES NOT SUPPORT THE PCR COURT'S CONCLUSION THAT PETITIONER KNOWINGLY AND VOLUNTARILY PLED GUILTY.

The evidence in the record does not support the PCR court's conclusion that Petitioner knowingly and voluntarily pled guilty. 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 dismissal of Petitioner claim was based on a series of flawed findings of fact from the record. First and foremost, plea counsel was deficient for giving Petitioner sufficient notice of a decision whether to enter a plea. Petitioner had only met with plea counsel once prior to the day of the plea hearing. His meeting with plea counsel that day lasted only fifteen to twenty minutes, and Petitioner was not aware that he would be making decision of whether to enter a plea because he thought he was merely appearing for roll call. Patently, whether Petitioner's

plea was voluntary depended on the amount of time he had to weigh the advantages and disadvantages of the plea, and insufficient time to do so caused duress making his decision involuntary. Thus, the PCR court's statement that the reason Petitioner went to court was not determinative of whether his guilty plea was entered voluntarily was misguided.

Petitioner's use of Prozac also showed his plea was not voluntary. Already prone to anxiety, the short notice of the plea hearing and feeling of unpreparedness caused him so much more anxiety that he took five pills, four more than usual. Thus, while Petitioner did not adduce an expert to testify to the effects of Prozac, the PCR court failed to see compelling evidence that Petitioner's mental state was highly infirm based on his unusually high anxiety, and his plea was more likely the product of duress and stress rather than a knowing and voluntary state of mind.

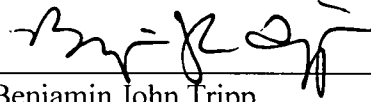
Importantly, the record plainly showed that the plea judge never asked Petitioner about whether he was on any medication during the plea hearing. The PCR court's reliance on Petitioner's failure to raise the matter sua sponte as showing it did not affect his thinking was nonsensical because such a rationale would mean a plea judge's inquiry about medication would never support a material consideration for determining the validity of a plea.

Thus, the plea court's assessment of the evidence was faulty, and the record shows plea counsel's failure to provide Petitioner with sufficient notice and preparation for the plea hearing made his plea unknowing and involuntary.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Jason Cooke Boney'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 23rd day of March, 2015.

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CERTIORARI TO LEXINGTON COUNTY
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

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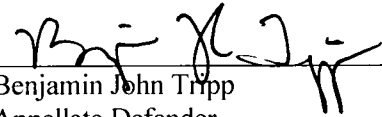
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Boney 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 14, 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 Jason Boney.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of March, 2015

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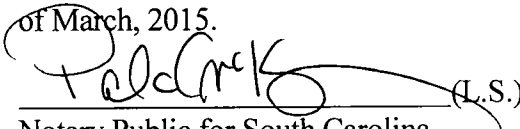
CERTIFICATE OF SERVICE

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, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jason Boney, #354029, at Allendale Correctional Institution this 23rd day of March, 2015.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of March, 2015.


(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.