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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to York County

J. Ernest Kinard, Jr., Circuit Court Judge

JOHN T. ROBINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002250

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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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 his counsel did not challenge or discuss with Petitioner the validity of the traffic stop for a U-turn during which a police officer found drugs even though no street signs or other conditions made the U-turn illegal?

STATEMENT

On November 15, 2012, the York County Grand Jury indicted Petitioner John Thomas Robinson for possession with intent to distribute crack cocaine. App. 64-65. On May 8, 2013, Petitioner appeared at a plea hearing before The Honorable Paul Burch. Mark McKinnon represented Petitioner and Misti Shelton represented the State. App. 1.

The State alleged that on August 24, 2012, officers with the York County Multijurisdictional Drug Enforcement Unit responded to an anonymous tip that Petitioner was selling crack cocaine out of his car in an area in Rock Hill. After surveilling Petitioner but failing to observe any criminal activity, officers stopped Petitioner as he was driving in his car, searched the car, and found inside a pill bottle containing a small amount of crack cocaine. App. 9, line 9—App. 10, line 16. In exchange for a plea of no contest, the State requested a negotiated sentence of ten years suspended upon the service of eighteen months of probation. App. 4, lines 1-6; App. 5, lines 5-11; App. 7, lines 10-11. Judge Burch accepted the plea and so sentenced Petitioner. App. 10, lines 24-25.

On November 15, 2013, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 13-19. The State filed a return on May 21, 2014. App. 20-24. On August 5, 2014, Petitioner appeared at an evidentiary hearing before The Honorable J. Ernest Kinard. Leah B. Moody represented Petitioner and J. Rutledge Johnson represented the State. App. 25.

Petitioner testified that the traffic stop was unlawful:

> I don't believe that the U-turn was illegal because there's no signs out there posted not to make a U-turn. The weather was clear. I did not interrupt any oncoming traffic or following traffic. The officer stopped me and they asked for a driver's license and registration. I had those valid documents.

App. 30, line 25—App. 31, line 5. He explained that he attended a preliminary hearing on the charge, but counsel never argued that the traffic stop was pretextual. App. 32, lines 1-4. He also stated that he discussed the issue with counsel, but counsel simply told him, "[T]he best result in this particular case would be for us to plead to the terms that were resulting." App. 32, lines 15-22. He was not aware of any discussion between counsel and the solicitor about the issue. App. 34, lines 10-18. He believed that counsel was advising Petitioner based on his own set of concerns about the case:

> I really think that my attorney wanted to ensure that I did not be [sic] imprisoned by way of a guilty plea to a large imprisonment term and as—and because of that I think he set sold [sic] on the plea rather than let's go to trial just in case something went wrong he kept telling me . . . .

App. 38, lines 8-13. On September 3, 2014, the PCR judge issued an order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 57-63.

ARGUMENT

The record does not support the conclusion that Petitioner failed to establish ineffective assistance of counsel because plea counsel's failure to challenge the lawfulness of the traffic stop made Petitioner's plea unknowing and involuntary.

The record does not support the conclusion that Petitioner failed to establish ineffective assistance of counsel because plea counsel's failure to challenge the lawfulness of the traffic stop made Petitioner's plea unknowing and involuntary. 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"). Of course, representation is deficient and unreasonable when counsel fails to advise a defendant on a material evidentiary issue:

> [W]e recognize that a defendant, for a host of legitimate reasons, may plead guilty to an offense for which a valid legal challenge may exist. . . . The difference . . . between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea. Here, counsel never informed [the defendant] of the potential challenge to the use of the drug paraphernalia conviction for enhancement.

Berry at 635, 675 S.E.2d at 427 (citations omitted). *See also Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (S.C. 1991) (counsel ineffective for failing to inform defendant prior to guilty plea that he may have made statements involuntarily, in which case they would be inadmissible); *Segura v. State*, 749 N.E.2d 496, 502 (Ind. 2001) (addressing "prejudice from an error or omission of counsel that has the effect of overlooking or impairing a defense"). 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, plea counsel failed to challenge the lawfulness of the traffic stop in the preliminary hearing. The record shows the issue of the validity of the stop spawned a material evidentiary issue: whether the crack cocaine found in the car was admissible at trial. The officers stopped Petitioner's car based only on an anonymous tip and an alleged illegal U-turn. However, Petitioner averred that no signs or other conditions made the turn illegal.

Not only did counsel fail to challenge the validity of the stop, but he also never discussed the issue with Petitioner. Instead, he merely told Petitioner that a guilty plea was in the best interest of the two *jointly*. The Constitution required that counsel advise Petitioner about his case in such a manner that he could make a fully informed decision as to whether to plead guilty. Thus, Petitioner needed full knowledge of the material evidence in his case in order to knowingly evaluate his options and decide whether to accept the plea bargain in accord with his own principals and interests. When his counsel withheld advisement and impressed him upon that pleading was the "best result," Petitioner in effect adopted his counsel's values and interests and was denied the opportunity to pursue his own—the principle of fighting on the merits of his case.

While counsel may have had honorable intentions in avoiding a jury finding of guilt, the decision of whether to plead or fight for the case at trial was not his to make.

CONCLUSION

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

Respectfully submitted,

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2015.

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IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for John T. Robinson states:

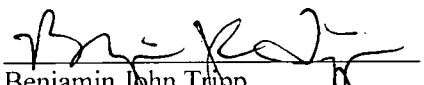
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 5, 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 John T. Robinson.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender
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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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and John T. Robinson, this 7th day of April, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of April, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.