STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Daniel D. Hall, Circuit Court Judge

JAMES DANIEL MAYBERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000772

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the record support the PCR court's conclusion that Petitioner failed to show his plea was involuntarily based on plea counsel's deficient advice where plea counsel originally informed him of a plea offer with a recommended sentence of fourteen to sixteen years and told him to think about it but did not tell him that it expired and where the offer did expire, forcing Petitioner to accept a plea with a longer recommended sentence?

STATEMENT

On November 20, 2012, the Greenville County Grand Jury indicted Petitioner James Daniel Mayberry for two counts of attempted armed robbery, three counts of carjacking, one count of attempted murder, one count of possessing a firearm during a violent crime, one count of pointing or presenting a firearm, and one count of armed robbery. App. 121—App. 124. On August 15, 2013, Petitioner proceeded to a plea hearing before The Honorable Brian M. Gibbons. Brian Johnson represented Petitioner and Allen Fretwell represented the State. App. 1. The State alleged that on or prior to January 28, 2012, Petitioner and his brother stole their father's vehicle in Anderson County and drove to Greenville County. There, they attempted to hold up the driver of a vehicle in a residential area and fired a gun at the car as it drove away. The two then attempted to hold up another vehicle, which also drove away. Finally, the two forced the occupants out of a third vehicle and drove it away. App. 9, line 11—App. 12, line 19. Petitioner pled guilty, App. 9, lines 2-3, and the plea judge sentenced him to consecutive terms of thirty years' incarceration suspended to twenty years for the armed robbery charge; twenty years for the attempted murder charge; ten years each for the attempted armed robbery charges; and ten years each for two of the charges of carjacking. He imposed a consecutive sentence of ten years for the third carjacking charge. App. 21, line 15—App. 22, line 3.

On July 8, 2014, Petitioner filed an application for post-conviction relief ("PCR") claiming ineffective assistance of counsel. App. 24—App. 46. The State filed a return on October 30, 2014. App. 47—App. 51. On February 19, 2015, Petitioner appeared at an evidentiary hearing before The Honorable Dan D. Hall. R. Mills Ariail, Jr. represented Petitioner and Karen C. Ratigan represented the State. App. 52.

Petitioner testified he was first jailed on January 29, 2012, and he wrote a letter asking to see plea counsel in person for the first time on July 26, 2012. App. 59, line 16—App. 60, line 15. Over a year later, on July 21, 2013, the two still had not met, and Petitioner wrote plea counsel's supervisor, the chief public defender of the county, to state Petitioner would contact the bar organization if plea counsel did not communicate with him. App. 61, lines 11-19; App. 74, lines 15—App. 75, line 7. Petitioner said that at some later time, plea counsel brought him a plea offer for a recommended sentence of fourteen to sixteen years. However, plea counsel "didn't really tell [him] anything" about the terms even though Petitioner asked for his opinion. App. 62, line 14—App. 63, line 3. Instead, plea counsel said that "he felt like he could get that going to trial." He then told Petitioner "to think about it." App. 63, lines 7-9; App. 77, lines 13-17. Plea counsel never showed him a written version of the offer or informed him of an expiration for the offer. When Petitioner later told plea counsel to accept the plea, plea counsel told him it was "off the table." App. 63, lines 11-18.

Plea counsel testified that he advised Petitioner to take the fourteen to sixteen year offer. However, when asked whether Petitioner took any advice about the offer, he said Petitioner told him to accept it in July of 2013, but the solicitor then denied the offer. App. 89, lines 4-8; App. 90, lines 1-4.

On March 2, 2015, the PCR court issued its order of dismissal. App. 112—App. 120. Specifically, the court concluded Petitioner did not show his plea was involuntary because he participated in the plea colloquy and because plea counsel "had numerous meetings with the Applicant." App. 117.

ARGUMENT

The evidence in the record does not support the PCR court's conclusion that Petitioner voluntarily pled guilty because the PCR testimony shows plea counsel failed to adequately advise him about a more favorable plea that had already expired once Petitioner decided to plead guilty.

The evidence in the record does not support the PCR court's conclusion that Petitioner voluntarily pled guilty because the PCR testimony shows plea counsel failed to adequately advise him about a more favorable plea that had already expired once Petitioner decided to plead 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 deficient 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 its order of dismissal, the PCR court stated Petitioner did not show his plea was involuntary because he participated in the plea colloquy and because plea counsel had numerous meetings with Petitioner. As stated above, the facts that the plea judge marshaled Petitioner through a routine plea colloquy and that Petitioner complied at the behest of plea counsel is not dispositive of whether his plea was voluntary. Further, the record cannot support the finding that plea counsel had adequate meetings with Petitioner. Petitioner testified he had no contact with plea counsel for six months after he was in jail. After writing plea counsel a letter, the two ostensibly had very little communication and had still not met in person by July 21, 2013. Petitioner testified that when the two did communicate about the fourteen to sixteen year plea offer, plea counsel merely relayed the offer and never discussed or showed him the terms in detail or talked about whether Petitioner

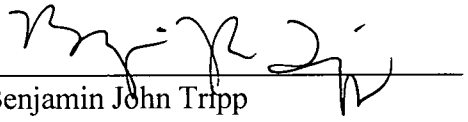
should take it. Nothing in plea counsel's testimony contradicts Petitioner or otherwise shows plea counsel fully advised Petitioner about the fourteen to sixteen year offer in their communications.

The record shows Petitioner's plea was involuntary because plea counsel denied him a meaningful opportunity to accept the first offer for a recommended sentence of fourteen to sixteen years. Plea counsel did not adequately communicate with Petitioner or advise him about the expiration of the offer or otherwise review the details. While plea counsel testified he thought Petitioner should have taken the offer, he did not testify that he conveyed the thought to Petitioner. Instead, he merely told Petitioner "to think about it." The record shows Petitioner took time to think about the plea and did not understand it could expire because he tried to accept the plea after it did actually expire. Based on the record and testimony at the PCR hearing, Petitioner ultimately pled guilty under terms mandating a longer sentence because of plea counsel's deficient advice, and he did not do so voluntarily.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner James Daniel Mayberry'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 November, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
DANIEL D. HALL, CIRCUIT COURT JUDGE

JAMES DANIEL MAYBERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000772

PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Daniel Mayberry states:

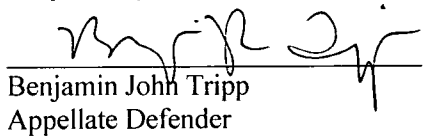
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 19, 2015. 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 James Daniel Mayberry.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of November, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Daniel D. Hall, Circuit Court Judge

JAMES DANIEL MAYBERRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000772

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 Karen Ratigan, Esquire and James Daniel Mayberry, #356631, at Perry Correctional Institution this 12th day of November, 2015.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

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

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.