

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County
Edgar W. Dickson, Circuit Court Judge

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S.C. Supreme Court

DAMETRIOSE MOSS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001132

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the record supports the PCR court's conclusion that trial counsel was reasonable in failing to move to vacate Petitioner's two convictions for discharging a firearm into a dwelling when the jury found the State did not prove beyond a reasonable doubt that Petitioner ever possessed a firearm.

STATEMENT

In September of 2011, the Oconee County Grand Jury indicted Petitioner Dametriose Moss on counts of murder, attempted murder, possession of a weapon during the commission of a violent crime, and two counts of discharging a firearm into a dwelling. App. 501; App. 508—App. 510. On July 23, 2012, Petitioner proceeded to trial before The Honorable R. Lawton McIntosh and a jury. Scott Robinson represented Petitioner and Blair Stoudemire represented the State. App. 1.

The State alleged that on May 18, 2011, Petitioner used a handgun to shoot two men at trailer park between Seneca and Clemson. One of the men died from his injuries. App. 111, line 11—App. 112, line 10. At the conclusion of the trial, the jury found Petitioner not guilty of murder, the lesser-included offense of voluntary manslaughter, and attempted murder, but the jury found him guilty on both counts of discharging a firearm into a dwelling. App. 446, line 20—App. 447, line 17. Judge McIntosh sentenced him to ten years' incarceration for one charge and five years' consecutive suspended to five years with probation for the second. App. 456, lines 2-8.

On March 14, 2013, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of trial counsel. App. 458—App. 465. The State file a return on July 2, 2014. App. 466—App. 471. On July 28, 2014, Petitioner appeared at an evidentiary hearing before The Honorable Edgar W. Dickson. Hugh Welborn represented Petitioner and John W. Whitmire represented the State. App. 472.

Petitioner testified and explained his understanding that the jury's finding him guilty of shooting into a dwelling but not guilty of possession of a firearm was illogical, and trial counsel was therefore deficient in failing to move to vacate his convictions. App. 487, line 13—App. 488, line 2. At the close of the hearing, the State argued that South Carolina law precluded relief for inconsistent verdicts. App. 496, line 25—App. 497, line 6. On May 19, 2015, the PCR judge

issued an order of dismissal concluding Petitioner failed to show ineffective assistance of trial counsel. App. 501—App. 507. Specifically, the order stated trial counsel was not deficient for failing to move to vacate the convictions because the Supreme Court of South Carolina abolished the rule against inconsistent verdicts in *State v. Alexander*, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991). App. 506.

ARGUMENT

Trial counsel should have moved to vacate the convictions based on inconsistent verdicts, and the PCR court's conclusion that he was reasonable in failing to do so was unsupported.

Trial counsel should have moved to vacate the convictions based on inconsistent verdicts, and the PCR court's conclusion that he was reasonable in failing to do so was unsupported. 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. *Id.* at 687.

In determining whether a criminal defense counsel adequately argued an issue to the trial judge, a court must identify an affirmative decision by counsel concerning what points to argue and assess the reasonableness of the decision under the facts and circumstances within counsel's knowledge: "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). *Cf. Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984))).

"An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge." *Thomasko v. Poole*, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2002). "Under the

law of the case doctrine, ‘a party is precluded from re-litigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.’” *Sloan Const. Co. v. Southco Grassing, Inc.*, 395 S. C. 164, 169-70, 717 S.E.2d 603, 606 (2011) (quoting *Judy v. Martin*, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009)). “‘The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case.’” *Id.* (quoting *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957)). A party may argue against precedent in a brief of appellant. Rule 217, SCACR.

South Carolina Code section 16-23-440 makes it a felony “to discharge or cause to be discharged unlawfully firearms at or into a dwelling house, other building, structure, or enclosure regularly occupied by persons.” South Carolina Code 16-23-490 (A) provides, “If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime . . . , he must be imprisoned five years, in addition to the punishment provided for the principal crime.” “Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, . . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970).

In this case, the record shows trial counsel should have moved to vacate the convictions based on inconsistent verdicts. Due process required the State to prove beyond a reasonable doubt all of the elements of the discharging a firearm charge in order to sustain a conviction. In order to prove all the elements of discharging a firearm charge, the State logically had to prove that Petitioner possessed a firearm. The State failed to meet this burden insofar as the jury found

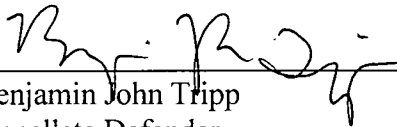
Petitioner not guilty on the charge of possession of a firearm during the commission of a violent crime. Accordingly, the convictions for discharging a firearm could not stand, and trial counsel should have moved the trial court to vacate them.

The PCR court concluded trial counsel was not deficient because of a prior state court decision in *State v. Alexander*. This conclusion was unsupported because the record shows trial counsel never made an affirmative, identifiable decision not to move to vacate the conviction. Moreover, such a decision would have been unreasonable. Even if the trial court was bound by *Alexander*, Petitioner was entitled to appeal and argue against the precedent in the appellate courts. However, by failing to raise the issue and obtain a ruling, trial counsel precluded Petitioner from doing so. Nothing in the record shows trial counsel reasonably weighed discarding this potential avenue for relief against any conceivable cost in making the motion to vacate.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of November, 2015.

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EDGAR W. DICKSON, CIRCUIT COURT JUDGE

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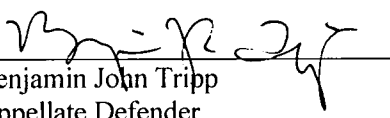
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dametriose Moss 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 July 28, 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 Dametriose Moss.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of November, 2015

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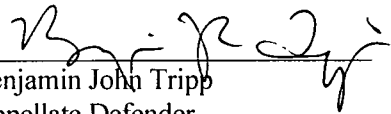
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CERTIFICATE OF SERVICE

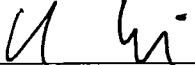
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Patrick Schmeckpeper, Esquire and Dametriose Moss, #326883, at Ridgeland Correctional Institution this 18th day of November, 2015.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of November, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.