

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED

FEB 25 2016

SC SUPREME COURT

SETH A. STEARNS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001681

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

INDEX.....	1
ISSUE PRESENTED.....	2
STATEMENT.....	3
ARGUMENT.....	5
CONCLUSION.....	7
PETITION TO BE RELIEVED AS COUNSEL.....	9

ISSUE PRESENTED

Whether the PCR court erred in ruling that trial counsel's failure to argue material variance was reasonable merely because it presented an alternative theory of defense.

STATEMENT

On December 13, 2005, the South Carolina State Grand Jury indicted Petitioner Seth Aaron Stearns for conspiracy to traffic methamphetamine based on alleged criminal activity between January 1, 2004 and the day of the indictment. App. 857—App. 856. On December 10, 2007, Petitioner's case proceeded to trial in absentia before The Honorable Alexander S. Macaulay and a jury. Matt Kappel represented Petitioner, and Susan O. Porter and Jennifer Evans represented the State. App. 1; App. 27, lines 21—App. 28, line 6.

In her opening statement, Assistant Attorney General Evans said the evidence would show Petitioner, a woman named Amanda Fordham, and three other men successfully conspired to bring into South Carolina from Atlanta large quantities of crystal meth on numerous occasions. App. 42, line 9—App. 61, line 21. After the State presented its evidence, Petitioner's trial counsel made a "usual motion[] . . . for directed verdict . . . viewing the evidence in the light most favorable to the State to support a conviction" App. 609, lines 16-19. The trial judge denied the motion upon finding "sufficient evidence to go forward to the jury." App. 609, line 21—App. 610, line 1.

At the conclusion of trial, the jury found Petitioner guilty, App. 685, line 22—App. 686, line 3, and the trial judge entered a sealed sentence, App. 690, lines 23-25. On March 25, 2008, Petitioner appeared before the trial judge, who unsealed a sentence of thirty years' incarceration and a fine of \$100,000. App. 694; App. 698, lines 7-16.

On February 28, 2011, Petitioner filed an application for post-conviction relief ("PCR") claiming ineffective assistance of counsel. App. 709—App. 715. Petitioner filed an amendment to the application dated May 9, 2011. App. 716—App. 730. The State filed a return on June 28, 2011. App. 731—App. 735. Petitioner filed second and third amendments on April 21, 2014 and December 3, 2014. App. 736—App. 749.

On December 17, 2014, Petitioner appeared at an evidentiary hearing before The Honorable Eugene C. Griffith, Jr. Scarlet B. Moore represented Petitioner and Brian T. Petrano represented the State. App. 750. Trial counsel appeared and was asked why he failed to argue that the evidence that the State adduced at trial materially varied from the allegations in the indictment. He responded, "I don't know I mean, I just don't know. I mean, you know, I was operating in this trial on the evidence that they were presenting." App. 794, line 15—App. 795, line 2. Trial counsel further responded that he could not remember talking about the issue with Petitioner, and he qualified the response by saying, "I think our position was that he was not involved in the conspiracy." App. 796, lines 16-20. When asked if he ever had "any concerns about the time frames that were being presented through the testimony of the witnesses," he stated, "I don't know. . . . I don't recall." App. 798, line 21—App. 799, line 3.

On July 14, 2015, the PCR court filed its order of dismissal ruling Petitioner failed to establish ineffective assistance of counsel. App. 843—App. 856. Specifically, the order stated that counsel articulated a valid reason for failing to argue material variance because it "may have undermined their argument that Applicant was not a part of the conspiracy." App. 852.

ARGUMENT

The PCR court's ruling that trial counsel's failure to argue material variance was reasonable because it was an alternative theory of defense was erroneous.

The PCR court's ruling that trial counsel's failure to argue material variance was reasonable because it was an alternative theory of defense was erroneous. 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 jury or 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))).

"In South Carolina, '[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in

the bill of indictment.’ ” *State v. Gunn*, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (quoting *State v. Cody*, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)). “[W]hile a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts under a different theory than that alleged.” *Bailey v. State*, 392 S.C. 422, 433-34, 709 S.E.2d 671, 677 (2011) (quotations omitted). “A conviction under the latter circumstance violates principles of due process . . . because the State has failed to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant was charged.” *Id.* (quotations omitted).

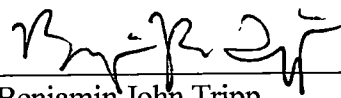
In this case, the PCR court found that trial counsel made a reasoned decision not to argue material variance because it was an alternative theory of defense. The record shows trial counsel summarily made a motion for a directed verdict without arguing specific grounds such as material variance. The record also plainly shows that trial counsel did not make an affirmative decision not to argue material variance, saying that he did not know why he failed to, did not remember discussing the argument with Petitioner, and could only surmise in hindsight that he was focused on a different theory of defense. Regardless, the PCR court’s ruling that the failure was reasonable was erroneous. No potential harm counseled against, in addition to arguing that Petitioner was not involved in the conspiracy at all, showing the jury that the State’s evidence of any conspiracy was based on time frames different from that set forth in the indictment. The jury was entitled to determine that the State did not meet its burden to prove either one or all of the charged elements. Even in its opening statement, the State failed to pin down as an element that Petitioner made an agreement particularized in time to transport methamphetamine. The PCR

court's rationale for trial counsel's ignoring this flaw in the prosecution's case was simply invalid.

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 25th day of February, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
EUGENE C. GRIFFITH, JR., CIRCUIT COURT JUDGE

SETH A. STEARNS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001681

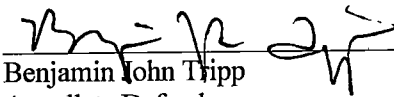
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Seth A. Stearns 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 December 17, 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 Seth A. Stearns.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Eugene C. Griffith, Jr., Circuit Court Judge

SETH A. STEARNS,

PETITIONER,

V.

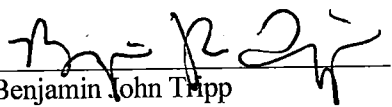
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001681

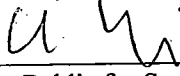
CERTIFICATE OF SERVICE

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 Seth A. Stearns, #327380, at Perry Correctional Institution this 25th day of February, 2016.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of February, 2016.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.