

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 25 2021

S.C. SUPREME COURT

APPEAL FROM CALHOUN COUNTY
Fourteenth Judicial Circuit
The Honorable Edgar W. Dickson, Circuit Court Judge

2017-CP-09-0130

Timothy J. Phillips #260429 ----- Appellant,

-vs-

State of South Carolina, ----- Respondent.

A P P E L L A N T ' S P R O S E B R I E F

Timothy J. Phillips #260439, pro se
Perry Correctional Inst.
430 Oaklawn Road
Pelzer, South Carolina 29669

S T A T E M E N T O F I S S U E S O N A P P E A L

1. THE PCR COURT ERRED BY FINDING THAT PLEA COUNSEL WAS NOT INEFFECTIVE FOR PROVIDING ERRONEOUS AND INCORRECT ADVICE
2. THE PCR COURT ERRED BY FINDING THAT PLEA COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ENSURE THAT APPELLANT UNDERSTOOD HIS RESPONSIBILITIES REGARDING AN APPEAL.
3. THE PCR COURT ERRED BY FINDING THAT PLEA COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO SOLICITOR'S PREJUDICIAL REMARKS REGARDING THE AGREED SENTENCING RECOMENDATION.

S T A T E M E N T O F T H E C A S E

Timothy J. Phillips, the Appellant, was indicted by a Calhoun County Grand Jury for the crime of kidnapping (2016-GS-09-0340) during the November 2016, term of court. Appellant entered a plea of guilty on November 28, 2016, before the Honorable Diane S. Goodstein, and was sentenced to a term of imprisonment for twenty (20) years. At the time of his plea, Appellant was represented by Martin R. Banks, Esquire, and the state was represented by Assistant Solicitor Theodore Lupton, Esquire of the First Circuit Solicitor's office. Appellant is currently confined in the South Carolina Department of Corrections pursuant to an order of commitment from the Calhoun County Clerk of Court.

On the same day of Appellant's guilty plea, his plea counsel filed a notice of appeal. Thereafter, on February 2, 2017, the South Carolina Court of Appeals dismissed the appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, citing Appellant's failure to provide a sufficient explanation for his appeal.

F A C T S A N D A R G U M E N T S F O R R E V I E W

1. Because a criminal defendant waives several constitutional rights by pleading guilty, the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999).

Boykin requires that a defendant be made aware of the nature and crucial elements of the offense, the maximum and any minimum penalty, and the nature of the constitutional rights being waived.

A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. Therefore, a conviction obtained in this manner would be a substantive due process violation open to collateral attack. U.S. v. Marchibroda, 368 U.S. 487.

A plea bargain is a process of give and take, if a criminal defendant is free to accept or reject the plea bargaining agreement without fear "of punishment or retaliation," the plea is voluntary. When determining whether or not a guilty plea is voluntary or involuntary, the court must examine the **totality of circumstances** surrounding the plea and the possibility of any coercion.

Furthermore, a guilty plea is constitutionally flawed if the defendant has an **incomplete understanding of the charge**. "A guilty plea is an admission of all the elements of a formal criminal charge, and it cannot be truly voluntary unless the defendant possesses an **understanding of the law** in relation to the facts." McCarthy v. United States, 394 U.S. 459. (emphasis added); also United States v. Punch, 709 F.2d 889. A court, when evaluating whether a defendant understood the charges against him, may examine the following:

"(1) Whether conversations occurred between the defense counsel and the defendant that related to the charges; (2) whether there was a written guilty plea agreement which the defendant had read; and (3) whether the charges were simple or complex." United States v. Bell, 776 F.2d 965; United States v. Cusenza, 749 F.2d 473.

2. An appeal may be taken by the defendant from a final order of the court denying relief. Orders of Dismissal from PCR actions should be specific and complete on **every issue raised**. McCulloch v. State, 320 S.C. 270, 464 S.E.2d 340. (emphasis added); McCray v. State, 305 S.C. 329, 408 S.E.2d 241; Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127.

After receiving notice of the entry of an order denying post-conviction relief, PCR attorneys should inform an Applicant that they have a right to appeal their PCR, and also have a right to have an attorney assist them with the appeal. Bray v. State, 366 S.C. 137, 620 S.E.2d 743.

In the instant case, Appellant's plea counsel failed to properly file a notice of appeal although the issue of appeal is well settled law, and Appellant was within his rights to have his sentence and conviction appealed to a higher court. The PCR court erred in its

finding regarding this issue, because the Appellant testified during the evidentiary hearing that he had specifically requested to have his case appealed. Appellant's plea counsel was ineffective for failing to perfect a notice of appeal and for failing to inform the Appellant regarding the requirements necessary for a case to be heard on appeal.

3. At Appellant's plea hearing, prior to the imposition of sentencing, the Solicitor repeatedly reminded the court of the state's agreement to a "sentencing cap" not to exceed twenty (20) years. Appellant's counsel was ineffective by failing to counter these prejudicial sentencing comments. Counsel should have recognized the prosecution's efforts to lead the court to a sentence of twenty years, the maximum amount under the negotiated plea arrangement.

The agreement was that Appellant would enter a **negotiated plea agreement for an open sentencing range** from zero to a twenty year maximum. Appellant testified that although he knew he was facing a maximum sentence of twenty years incarceration, his counsel coerced him into this plea agreement by convincing him that the sentence imposed would be an amount **between** zero and twenty years. Counsel provided ineffective assistance by failing to argue for a **mid-range** sentence. Furthermore, counsel's conduct was **unlawfully coercive**, thereby denying his client a **full and complete** understanding of what potential sentence he might receive.

C O N C L U S I O N

WHEREFORE, based on the reasons and arguments presented herein, this Honorable Court should reverse the decision of the PCR court and remand for further proceedings.

Respectfully Submitted,

Timothy J. Phillips 3-22-21
Timothy J. Phillips, pro se