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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Daniel D. Hall, Circuit Court Judge

TAMIKA M. SCOTT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000407

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the lower court erred denying PCR where during sentencing defense counsel failed to present mitigating mental health evidence and instead disclosed damaging facts to the plea court which prejudiced petitioner and resulted in a severe sentence?

STATEMENT

On September 26, 2019, petitioner appeared before the Honorable J. Mark Hayes, II, waived presentment to the grand jury on three charges and pled guilty to strong armed robbery and two counts of shoplifting. App. 1; 9. Petitioner was represented by James Cheek and the state was represented by assistant solicitor, Jennifer Jordan. App. 1. Judge Hayes sentenced petitioner to concurrent terms of fifteen years, suspended upon the service of ten years' imprisonment followed by five years' supervision for strong armed robbery and ten years' imprisonment for each count of shoplifting. App. 18.

Thereafter, petitioner filed an application for PCR on January 21, 2020. App. 21-27. An evidentiary hearing was held on February 8, 2022, before the Honorable Daniel D. Hall. App. 41. Petitioner was represented by Susannah Ross. The state was represented by assistant attorney general, Chelsey Marto and assistant attorney general, William Ray. App. 41.

On March 15, 2022, Judge Hall signed an order denying PCR. App. 79-92. The court found petitioner's guilty plea was freely, voluntarily, knowingly, and intelligently entered based on her responses during the plea hearing and based on defense counsel, James Cheek's, testimony at the evidentiary hearing. App. 87. The court also found that Mr. Cheek was not deficient for failure to present mitigating evidence during sentencing where counsel was unaware of petitioner's mental illness and where counsel "otherwise articulated a valid mitigation strategy." The court found, even if Cheek were deficient, petitioner was not prejudiced as a result where petitioner failed to meet their burden to show that a different sentence would have been imposed.

This petition follows.

ARGUMENT

The PCR court erred finding defense counsel was not ineffective for failure to present mitigating mental health evidence on behalf of petitioner and instead disclosing damaging facts which prejudiced petitioner resulting in her receiving a severe sentence.

Guilty plea hearing

At petitioner's guilty plea hearing the state alleged on multiple occasions petitioner and two other individuals could be seen on surveillance video concealing merchandise in Home Depot and leaving with items not paid for. On one occasion the male that was suspected to be with petitioner pushed an employee of Home Depot while leaving the store. App. 11-12.

Defense counsel, James Cheek, asked the court to consider a suspended sentence following a short period of incarceration. App. 16, ll. 8-10. As mitigation, Mr. Cheek told the court that petitioner had come to realize that most stores have surveillance systems, and should petitioner continue her behavior she understood she would be subject to serious penalties. App. 15, l. 17-16, l. 4.

Mr. Cheek revealed to the plea court that petitioner had charges pending in another state. App. 16, 10-12. In addition, Cheek announced that the other individuals involved in the incident were petitioner's adult children and he told the court that petitioner had been anxious to know if one of her children had reported her to law enforcement forcing him to advise petitioner that she should not confront her children about the incident. Lastly, Cheek declared that he instructed his client, petitioner, that if she said anything regarding the above in court that she would be considered "reprehensible" and not a "good mother." App. 16, l. 24-17, l. 8.

The court asked petitioner about Mr. Cheek's in-court statements, and she apologized explaining that she had stolen things to support her family. App. 17, ll. 19-24.

Evidentiary hearing

Petitioner testified that she was mentally ill, was medicated for kleptomania and post traumatic stress disorder (PTSD), and had undergone inpatient treatment at Patrick B. Harris, Psychiatric Hospital.[1] App. 53, ll. 12-16; 55, ll. 1422. She explained that the medication helped by preventing "the drilling" and "rush" that occur with her impulse to shoplift. App. 53, ll. 12-16. Petitioner disclosed that at the time of the incident she was not taking medication. App. 53, ll. 17-18. Petitioner said that Mr. Cheek did not offer any mitigation to the plea court in regard to her mental health diagnoses. App. 53-54

Petitioner was not shown all her discovery and maintained that she was never aware of any surveillance video and did not view the video prior to pleading guilty. App. 52. She explained that she pled guilty without seeing all her discovery because she had a record of shoplifting and was told by Mr. Cheek, she would receive a probationary sentence. App. 50; 56, ll. 16-21. Petitioner testified had she not been promised a probationary sentence she would have fought the strong-armed robbery charge because she did not physically touch anyone during any of the alleged incidents. App. 51. Additionally, PCR counsel asserted Cheek failed to explain the elements and nature of strong-armed robbery. App. 49.

Petitioner's defense counsel, James Cheek, testified that his job with the Spartanburg County Public Defender's Office is "to be on standby" "to help the other lawyers move cases" and that he is never assigned a case that is going to trial but instead only works on cases that will result in a guilty plea. App. 63, ll. 13-21; 64, ll. 2-4. He claimed that he explained the elements

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1 Patrick B. Harris, Psychiatric Hospital is a regional acute care inpatient facility of the South Carolina Department of Mental Health serving thirteen counties in upstate South Carolina. They provide "intensive, short-term, psychiatric diagnostic and treatment services on a 24-hour, emergency voluntary and involuntary basis." PATRICK B. HARRIS HOSPITAL, http://www.patrickbharris.com (last visited Sept. 23, 2022); SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH, https://scdmh.net/division-of-inpatient-services/ (last visited Sept. 23, 2022).

of both shoplifting and strong-armed robbery to petitioner before her guilty plea and during her guilty plea. App. 67, ll. 3-12. Cheek acknowledged that he did not provide petitioner with the discovery in her case and explained that "her assigned attorney" would have done that. He went on to say that he reviewed with her the discovery that he had which was limited to what he needed in order to discuss the guilty plea. Cheek admitted that he did not have the surveillance videos from the Home Depot because he was not "technologically savvy" and did not have access to a laptop to take with him when he visited clients. App. 72, l. 21-73, l. 6.

Cheek said that he did go over some photographs with petitioner and he believed that one of the exacerbating things about the photographs of the incident was that it was a "mother with her children in a store stealing." App. 73, ll. 7-11. Cheek did not ever review the surveillance video that allegedly showed the push that led to the charge of strong-armed robbery. App. 73, ll. 12-15.

He denied telling petitioner that she would receive a probationary sentence. App. 66, ll. 4-23. Cheek also denied having any knowledge of petitioner's mental health conditions. App. 67. When asked about his strategy in presenting mitigating evidence at sentencing, Cheek evaded and restated what he told the plea court, that petitioner was concerned about whether someone in her family had shared with police her role in the incident. App. 68, ll. 6-23. Mr. Cheek's testimony was that petitioner was unable to share with the plea court any mitigation or any compelling reason why she had been involved in stealing "thousands of dollars" in goods. App. 68, l. 24-69, l. 2. He also declared that up until her guilty plea petitioner had "raised two adult children and could not share with the court how she had done it other than perhaps through thievery." App. 69, ll. 3-11.

Cheeks went on to say that he thought petitioner had done "a rather good job of

impressing the court that she intended to do better in life," and he believed she had gotten a lenient sentence for Spartanburg County. App. 69, ll. 12-16.

Discussion

The PCR court erred finding defense counsel, James Cheek, was not ineffective for failing to present mitigating mental health evidence during sentencing. That failure was exacerbated when counsel revealed irrelevant and detrimental facts to the plea court, which resulted in petitioner receiving a severe sentence.

In *Hill v. Lockhart*, the United States Supreme Court explained, that the two-part *Strickland v. Washington*[2] test applies to challenges to guilty pleas based on ineffective assistance of counsel. 474 U.S. 52, 57 (1985). "A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency." *Stalk v. State*, 383 S.C. 559, 560–61, 681 S.E.2d 592, 593 (2009). "Plea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." *Id.*

Here, the PCR court erred in finding that counsel was not deficient, for failure to present mitigating evidence of petitioner's mental illness, because he "articulated a valid mitigation strategy" where counsel testified that he told petitioner to tell the court she understood she could not keep stealing and she wanted to change her life for better. Mr. Cheek's testimony regarding his advice to petitioner about how to behave during the plea was not the articulation of a valid mitigation strategy, it was the bare minimum conversation any attorney should have with a client before they appear in court. Mr. Cheek's testimony at the evidentiary hearing was that *petitioner*

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2 466 U.S. 668 (1984).

failed to tell the court any facts in mitigation. His testimony demonstrated that Mr. Cheek effectively abdicated his role as petitioner's counsel and chose instead to let her put forth mitigation evidence to the plea court. *See Strickland v. Washington*, 466 U.S. 688, 688-89 (1984) (stating "[c]ounsel's function is to assist the defendant").

Additionally, it was clear, from testimony of both petitioner and defense counsel during the evidentiary hearing, that Mr. Cheek spent very little time with petitioner. It appears from his testimony that he worked as a liaison between the assigned attorney and incarcerated client and only worked on cases that would end in a guilty plea. Cheek admitted he failed to review all the discovery in petitioner's case and only reviewed certain evidence with petitioner when they met. Testimony, of both petitioner and Mr. Cheek, indicated limited and perfunctory meetings between petitioner and Cheek at the county jail where the two had general conversation regarding the charges against petitioner and guilty plea.

It was unreasonable for defense counsel to fail to see for himself and review with petitioner all the discovery in her case. *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) (stating the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances). Had Cheek reviewed all the discovery in petitioner's case and adequately met with her in preparation for her guilty plea he would have learned of her serious mental health diagnoses and learned that she had spent time at an inpatient treatment facility. It was unreasonable for counsel to present nothing and instead rely on his client to be able to articulate to the court evidence in mitigation. Evidence regarding petitioner's mental health was essential information for the plea court, where she had several prior convictions for shoplifting, and it would have been instructive for sentencing and/or other rehabilitative court ordered opportunities for petitioner.

In cases where allegations of ineffective assistance challenges in the context of a guilty plea, the prejudice inquiry will be similar to the inquiry when reviewing ineffective-assistance challenges to convictions obtained through a trial. *Stalk v. State*, 383 S.C. 559, 561–62, 681 S.E.2d 592, 594 (2009).

"Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.*; *See, e.g., Evans v. Meyer*, 742 F.2d 371, 375 (C.A.7, 1984) ("It is inconceivable to us ... that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received").

The PCR court erred finding that, even if defense counsel was deficient, petitioner was not prejudiced because petitioner did not show a different sentence would have been imposed had counsel presented mitigation evidence at sentencing. Not only did Mr. Cheek fail to present any mitigation, but he instead chose to make harmful admissions about petitioner which undoubtedly prejudiced the plea court against her. *See Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) (stating "[c]ounsel's function is to assist the defendant, and hence **counsel owes the client a duty of loyalty**, a duty to avoid conflicts of interest").

Mr. Cheek revealed to the plea court that petitioner had other pending charges. Not only did counsel disclose, to the plea court, that the other individuals involved were petitioner's adult children, a fact which counsel remarked on disdainfully at the evidentiary hearing,[3] counsel also

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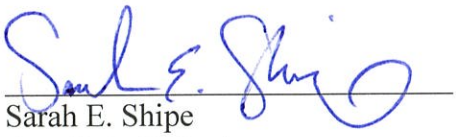
[3] During the evidentiary hearing counsel stated, "up to that point, [petitioner had] raised two adult children and could not share with the court how she had done it other than perhaps through thievery." App. 63, ll. 9-11.

disclosed to the plea court an irrelevant, but extremely damaging, conversation between he and petitioner regarding her interest in whether one of her children had spoken with law enforcement regarding her involvement in the alleged incidents. All of these adverse admissions by petitioner's own attorney, Mr. Cheek, prejudiced the plea court against petitioner and caused her to receive a severe sentence.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.



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This 6th day of October, 2022.