RECEIVED
Oct 31 2022
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Robert E. Hood, Circuit Court Judge

DAVID M. DIXON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000295

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Whether the PCR court erred by finding petitioner failed to prove his counsel conducted an inadequate investigation before advising him to plead guilty to ABHAN where the victim was not even injured during the incident, where it was undisputed petitioner was mentally ill, and the record revealed counsel only had several truncated interactions with petitioner while petitioner was attempting to get counsel relieved due to the minimum effort she was expending on his case?

STATEMENT

Petitioner was indicted at the March 13, 2019 term of the Horry County Grand Jury for the offense of attempted murder. App. 99-100. Petitioner appeared on March 10, 2020 before the Honorable Steven John. He was represented by Kia Wilson. Martin Spratlin was the assistant solicitor. App. 1.

Judge John noted that petitioner had a competency to stand trial evaluation done by DMH through the University of South Carolina's Forensic Psychiatry program. Petitioner was found competent. The report stated petitioner had a rational and factual understanding of the charges, and he had the capacity to assist his attorney. Wilson did not challenge those findings but said "he does have some diagnosis. . ." App. 3, l. 23 – 4, l. 10.

The solicitor told the judge that petitioner was pleading guilty "to the lesser-included offense" of ABHAN. App. 3, ll. 5-14. The solicitor explained that on March 13, 2018, petitioner committed ABHAN when he shot at the vehicle the victim was driving on Highway 701 in Conway "at least" seven times. Several bullets apparently hit the car but the victim "was not hit at all." The victim had "no injuries," or "severe trauma" as a result of the shooting. App. 11, l. 8 – 12, l. 19.

During the guilty plea colloquy petitioner said he had not had enough time to talk to defense counsel Wilson. In response to the judge's question about needing more time petitioner said that there was one additional matter that he wished to discuss with Wilson. The plea judge then allowed petitioner to confer with Wilson. Petitioner then said he did not need any more time to converse with her before entering his plea of guilty. App. 9, l. 16 – 10, l. 12.

The PCR record would later reveal that petitioner was very dissatisfied with Wilson's representation. In fact, petitioner contacted Wilson's supervisor to ask that Wilson be removed

from his case, and that he be assigned another defense attorney. Petitioner even told Wilson's staff that she wanted him to go to prison. App. 61, ll. 15-24.

Wilson offered that her meetings with petitioner followed her general practice. She had an initial "meet-and-greet" which was a meeting at the detention center with petitioner before there was any discovery from the state to review. After the discovery was received, Wilson offered that petitioner would have had his opportunity "to tell me his version of events." In his case, my notes reflect that he admitted to the allegations and told me "it was about the relationship" he had been in where his long-time girlfriend -- a seventeen-ear relationship -- suddenly ended their relationship and married the victim.

The following occurred at the PCR hearing with Defense Counsel Wilson:

> Q. Okay. Now, how many times total, if you can tell me, did you meet with him?
>
> A. Meetings in person at the jail?
>
> Q. Yes. I'm sorry; I should have been a little clearer.
>
> A. Well, we would have had other conversations, but at the jail, I see one -- let's see. So we had one on 12/19/2018. We had one on 1/22/2019, one on 3/19/2019. Let's see. Then there was another one on a 5/29/2019. Let's see. Then we spoke by phone, but that's not an actual visit in person. That was in July. Let's see. 10/7/2019 is the next one. And then there's another one, let's see, on 10/15/2019. And then we're moving into 2020. There was a staff visit with him for a video and the disc in his file. That was February of 2020. And, apparently, I saw him around the same time because I have a note in the file about a meeting that, apparently, happened the week prior that was on February 11th.
>
> Q. Okay. And how many is that total?
>
> A. I wasn't keeping count. I was hoping you were as I went through.
>
> Q. Sorry. About seven or eight?
>
> A. I'm not even sure at this point, but yeah, there would have been a few. And that didn't include -- there was another one on 2/26 of

> 2020. And I think that was the last one that I see in the notes prior to the file being closed on March 11, 2020.
>
> Q. Okay. And that would have been the day after he entered this plea; correct? The March 11th?
>
> A. I'd have to look at the sentencing sheet, but that could be correct.

App. 52, l. 11 – 53, l. 15.

During the guilty plea proceeding Defense Counsel Wilson told the judge that the victim was not hit by any of the gunshots, but she added that was "not because my client didn't try." App. 14, l. 18 – 15, l. 9. Wilson said she did not have petitioner's file with her on the day of the plea "because I was planning on this being an arraignment, but I think I'm pretty correct about it as far as [what I am saying]." App. 17, ll. 2-5. Wilson said the victim's current wife had been petitioner's girlfriend for approximately seventeen years before she left him. App. 15, l. 22 – 16, l. 17.

Wilson added that petitioner had been diagnosed with post-traumatic stress disorder, bi-polar disorder, and anxiety. He was taking medications for his mental problems. App. 16, l. 18 – 17, l. 1.

Petitioner told the guilty plea judge that he was truly sorry for his actions but that he was not in his right mind at the time of the incident. Petitioner said he had known the victim for twenty-two years and that he was not in his "right mind at the time. I was trying to transition from the methadone clinic to Shoreline to get on the Suboxone. And so, within that seven days that this was going on -- I take about 700 milligrams a week of the methadone. I stopped -- taking nothing. Mr. Neubauer, the victim, when I talked to him at his house, he said that he -- that I needed some help and he was willing to help me, but things changed as the days went on." App. 18, l. 21 – 19, l. 4.

Wilson put on the record that she advised petitioner this was a violent offense as well as a "serious strike and what that means." App. 19, ll. 20-23. Judge John then sentenced petitioner to ten years' imprisonment. App. 20, l. 21 – 21, l. 6.

Petitioner filed an application for post-conviction relief on June 2, 2020. App. 24-31. Petitioner alleged that he was ineffectively represented. App. 26.

To this application the state filed a return and motion for a more definite statement on September 30, 2020. App. 32-42. An evidentiary hearing was convened on October 28, 2021, before the Honorable Robert Hood. Carla Grabert-Lowenstein represented petitioner and William Ray was the assistant attorney general. App. 43.

Wilson maintained during the PCR hearing that there had been "a big push" for drug court or mental health court in petitioner's case but the solicitor adamantly opposed those alternatives. App. 64, l. 20 – 65, l. 17. Wilson opined this case was "relatively cut and dried," and that she did not have a "whole lot" to work with. "And sometimes it's like that." App. 69, ll. 14-21.

The solicitor, Martin Spratlin, testified at the PCR hearing that he did not recall seeing anything unusual or troubling in the report of petitioner's competency evaluation. He also did not recall having any problem with the victim's cooperation despite the close personal relationships involved in this case. App. 79, l. 23 – 82, l. 23.

An order of dismissal was filed on May 9, 2022. App. 87-89. This order stated that counsel testified at the evidentiary hearing that she met with petitioner approximately eight times and spoke with him over the phone. App. 96. The PCR court found that petitioner failed to prove counsel's investigation or preparation was deficient. App. 97. The PCR court also found petitioner failed to prove counsel was deficient regarding the handling of the competency report or petitioner's mental health problems. App. 92-93.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243, SCACR.

ARGUMENT

The PCR court erred by finding petitioner failed to prove his counsel conducted an inadequate investigation before advising him to plead guilty to ABHAN where the victim was not even injured during the incident, where it was undisputed petitioner was mentally ill, and the record revealed counsel only had several truncated interactions with petitioner while petitioner was attempting to get counsel relieved due to the minimum effort she was expending on his case.

"Assault and battery of a 'high and aggravated nature' is an unlawful act of *violent injury* to the person of another, accompanied by circumstances of aggravation, such as the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, the great disparity between the ages and physical conditions of the parties, a difference in sexes, indecent liberties, or familiarities with the female, the purposeful infliction of shame and disgrace, resistance of lawful authority, and others." State v. Jones, 133 S.C. 167, 181, 130 S.E.2d 747, 751 (S.C. 1925). (emphasis added). In this case there was no "violent injury" at all to the victim. In fact, there was no injury to the victim as the solicitor told the judge during the guilty plea proceeding.

The record in this case shows that defense counsel did a minimal investigation at best. She met with petitioner several times in the county detention center but did not have a specific memory of what petitioner told her. She only knew that petitioner was very dissatisfied with her representation and he asked "her boss" to assign another attorney to his case. Petitioner asserted that if there had been an investigation into his mental illness, his mental health problems, or the facts of the shooting itself, that he would not have pled guilty to ABHAN.

A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigations. Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986). Counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007), *citing*

Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), affd, 828 F.2d 670 (11th Cir. 1987). In Ard v. Catoe, this Court found that counsel's investigation and failure to challenge the gunshot residue evidence was unreasonable and clearly deficient. Accordingly, this Court found defense counsel was inefficient and granted petitioner Ard a new trial.

This is a strange case where petitioner pled guilty to ABHAN where there was no injury to the victim, much less a "violent injury" to the victim. Petitioner essentially said that he was "not in his right mind" at the time he fired the shots in this case, and that he essentially did not formulate the requisite intent to commit the crime. Regardless, the victim did not suffer any injuries.

Indeed, the facts of this case reveal that the crime was either assault with intent to kill since there was no battery or injury involved in this case or the crime could have been attempted murder if petitioner had the intent to kill the victim. See State v. Mims, 286 S.C. 553, 335, S.E.2d 237 (1985) (assault with intent to kill does not involve a battery). State v. King, 442 S.C. 47, 810 S.E.2d 18 (2017) (attempted murder requires proof that the defendant had a specific intent to kill).

In this case defense counsel was deficient in failing to undertake a sufficient reasonable investigation into the specific crime that fit the facts of this case. Petitioner was prejudiced because he received a ten-year prison sentence for ABHAN where the victim suffered no injury as a result of the incident.

CONCLUSION

By reason of the forgoing argument, a writ of certiorari should be granted to allow full briefing on this issue.

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 31st day of October, 2022.

RECEIVED

Oct 31 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Honorable Robert E. Hood, Circuit Court Judge

DAVID M. DIXON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000295

PETITION TO BE RELIEVED AS COUNSEL

Counsel for David M. Dixon states:

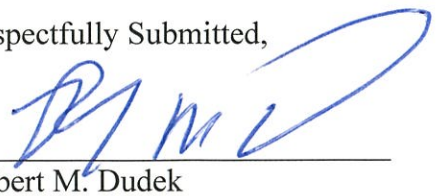
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Robert Hood, which was held on October 28, 2021, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for David M. Dixon.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of October, 2022.

RECEIVED

Oct 31 2022

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 31st day of October, 2022.