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Nov 10 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable G.D. Morgan, Jr., Circuit Court Judge

BRANDON DASHUN ADAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000436

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in denying relief, where trial counsel failed to obtain Petitioner's juvenile competency records and instead substituted his own opinions for Petitioner's competency based on his belief that he could determine Petitioner's intelligence more accurately than the South Carolina Department of Mental Health?

STATEMENT

In June 2015, a Greenville County grand jury indicted Petitioner for armed robbery, possession of a weapon during the commission of a violent crime, murder, and burglary in the first degree. App. 583 – 588. A competency hearing was held on May 15, 2015. App. 441. Petitioner then proceeded to trial before the Honorable R. Knox McMahon and a jury on January 4, 2016. App. 1. Ivan Toney represented Petitioner; Lucas Marchant and W. Ryan Holloway appeared on behalf of the state.

At the conclusion of trial, the jury found Petitioner guilty as indicted. App. 432 ll. 3 – 17. Judge McMahon sentenced Petitioner to forty years' incarceration on the murder charge, thirty years on the burglary offense, five years on the weapons charge, and thirty years on the armed robbery charge. App. 439 ll. 1 – 17. The sentences were crafted to run concurrent. Id.

On November 14, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 451. He alleged ineffective assistance of counsel. App. 458 – 467. The state filed its Return on March 9, 2018. App. 468.

An evidentiary hearing was held before the Honorable G.D. Morgan on November 8, 2021. App. 474. Trial counsel and Petitioner testified at the hearing. At the conclusion, Judge Morgan took the matter under advisement. App. 521 ll. 16 – 18.

A forty-six page Order of Dismissal was signed in March 2022. App. 537. This petition follows.

ARGUMENT

The PCR court erred in denying relief, where trial counsel failed to obtain Petitioner's juvenile competency records and instead substituted his own opinions for Petitioner's competency based on his belief that he could determine Petitioner's intelligence more accurately than the South Carolina Department of Mental Health.

Relevant facts

Wayne Campbell, an employee with the Greenville County Sheriff's Office, interviewed Petitioner twice, on February 11, 2013 and September 18, 2014. App. 37 l. 23 – App. l. 38 l. 17; App. 44 ll. 14 – 18. During the second interview, Petitioner provided details about the situation giving rise to the death of Joseph Crite. App. 46 l. 5 – App. 47 l. 18.

Pretrial, counsel moved to suppress Petitioner's statements based on his inability to read any sort of waiver of his rights. App. 61 ll. 10 – 12; App. 63 l. 18 – App. 64 l. 14. The trial judge found the statements were admissible. App. 67 l. 24 – App. 68 l. 1. In doing so, the trial judge elucidated how intelligence can factor into the totality of the circumstances in a suppression ruling:

> If you have an individual that may have an IQ of 70, 65, or below, I mean that weight may weigh more than if you have an individual that has a higher intellectual level. And, of course, you can have individuals with very high intelligence levels and very low education levels. You know, the education level doesn't measure intellectual ability.

App. 65 ll. 2 – 8.

Campbell would testify at Petitioner's trial regarding the contents of the statements. App. 301.

In 2009, Petitioner was evaluated by the South Carolina Department of Disabilities and Special Needs. App. 524. Contained within that evaluation report was a relevant history,

including Petitioner's mental health history. App. 525. The report contains information, including Petitioner's IQ, that could have been presented at the suppression hearing. Trial counsel did not have these records at trial. App. 498 ll. 17 – 25.

Trial counsel offered the following defense as to why he neglected to obtain Petitioner's mental health records:

> I have, in my opinion, a rough idea of - - *I can eyeball someone and I can tell if they're intelligent. I think I can probably figure out what their IQ is. Maybe ... better than the department of mental health can on occasions.* I'm sure they have - - if someone's cooperative, the department of mental health can do a great job. But if someone is up there malingering and trying to fail the test, which I have no idea that happened, but there's certainly a lot of motivation too, they're not going to be able to make the proper determination, it's just not possible.

App. 507 ll. 5 – 15 (emphasis added). Trial counsel has not received any formal education in IQ testing. App. 504 ll. 17 – 19.

Trial counsel was retained to represent Petitioner. App. 480 ll. 16 – 23. He testified at the PCR hearing that he had plenty of time to prepare for trial. Id. Petitioner had an IEP in school,[1] and he received social security benefits for a leaning disability. App. 482 ll. 2 – 14; App. 484 ll. 19 – 24.

Trial counsel was unsurprised to learn Petitioner's IQ is 68. App. 486 ll. 11 – 20. Remarkably, however, trial counsel testified that the records of Petitioner's competency evaluation would not have aided him at trial. App. 488 ll. 6 – 17. In a startling admission, trial counsel further acknowledged that he **would not have brought Petitioner's low IQ to the trial judge's attention**. App. 517 l. 25 – App. 518 l. 4.

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[1] IEP stands for Individualized Education Program. https://www.scjustice.org/brochure/individualized-education-program/ (last accessed November 7, 2022).

Discussion

When alleging ineffective assistance of counsel, a PCR applicant must satisfy the two-prong Strickland test. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the applicant must establish plea counsel's performance was deficient. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Second, generally the applicant must demonstrate plea counsel's "deficient performance prejudiced the [applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

The test for determining competency to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." State v. Weik, 356 S.C. 76, 81, 687 S.E.2d 683, 685 (2002) (citing Dusky v. United States, 362 U.S. 402 (1960)); State v. Bell, 293 S.C. 391, 395-396, 360 S.E.2d 706, 708 (1987). Competency to stand trial relates to the time the defendant is before the court for trial, not the time of the alleged offense. Monahan v. State, 365 S.C. 130, 616 S.E.2d 422 (2005). "Factors to be considered in determining whether further inquiry into a defendant's fitness to stand trial is warranted include evidence of his or her irrational behavior, his or her demeanor at trial, and any prior medical opinion on his or her competence to stand trial." State v. Burgess, 356 S.C. 572, 575, 590 S.E.2d 42, 44 (Ct. App. 2003)(citing State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981)). "In some circumstances, the presence of just one of these factors may justify a trial court's ordering a further inquiry into a defendant's competency to undergo trial." Id.

A waiver of a constitutional right requires a showing on the record that the defendant made the waiver knowingly and intelligently. State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988), modified, State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

This Court found plea counsel provided ineffective assistance by failing to request a competency hearing to determine the defendant's fitness to stand trial where the defendant presented evidence at his post-conviction relief (PCR) hearing that he was learning disabled, suffered a major head injury from a near-fatal car accident a year before the crimes, and as a result of the accident had severe frontal lobe brain damage. The defendant's expert at the PCR hearing testified that the defendant was incompetent and could not assist in his defense. The Court concluded the defendant "clearly established by a preponderance of the evidence" that he was incompetent at the time he entered his guilty plea. Matthews v. State, 358 S.C. 456, 459-460, 596 S.E.2d 49, 50-51 (2004).

The South Carolina Court of Appeals held a trial judge erred in failing to order a competency evaluation for a criminal defendant. State v. Buchanan, 302 S.C. 83, 85-86, 394 S.E.2d 1, 2 (Ct. App. 1990). According to the Court, when Buchanan's case was called for trial, "Buchanan's behavior was strange." Id. at 84, 394 S.E.2d at 1. At the request of the solicitor, the judge issued an order for an evaluation of Appellant's "mental capacity to stand trial" and criminal responsibility. Id. The next day, Buchanan met briefly with a psychiatrist, who testified the encounter was not long enough to enable the doctor to render an opinion on competency. Id. The following day, Buchanan was tried in his absence and without counsel. Id. He was convicted and sentenced. Id. After sentencing, the judge issued a second order to determine "mental capacity to stand trial." Id. The Court held the trial judge abused his

discretion by failing to comply with the statute because the trial judge had reason to believe that a competency examination was necessary. Id. at 86, 394 S.E.2d at 2.

In Ramirez v. State, this Court held plea counsel's failure to request an additional competency evaluation prior to the guilty plea amounted to deficient performance and Ramirez was prejudiced. 419 S.C. 14, 795 S.E.2d 841 (2017). The plea judge noted Ramirez's "IQ level [was] as low as any [the judge had] ever seen." Id. at 19, 795 S.E.2d at 841. Unlike the matter *sub judice*, plea counsel testified favorably for Ramirez at the PCR evidentiary hearing. Plea counsel questioned whether Ramirez "fully understood what was going on prior to and at the plea hearing." Id. Plea counsel further admitted "he should have moved to have Ramirez's competency reevaluated" after comparing two of the reports he had procured. Id.

The Court of Appeals held plea counsel was deficient, relying on one of the reports and plea counsel's "own awareness of Ramirez's communicative and intellectual limitations." Id. at 22, 795 S.E.2d at 845. This Court affirmed the deficiency determination:

> Plea counsel was clearly on notice, noy only from the Gedo report, but from his own interactions with Ramirez, that Ramirez suffered from severe mental retardation, was functioning at the level of a four-to-seven-year-old, and had difficulty in comprehending the legal proceedings. Accordingly, we affirm the court of appeals' holding that Ramirez's plea counsel was deficient in not requesting an additional competency evaluation.

Id. at 22-23, 795 S.E.2d at 845-46. This Court concluded that the Court of Appeals erred in affirming the PCR court's finding of no prejudice, noting there existed a strong likelihood that Ramirez was incompetent to plead guilty. Id. at 23, 795 S.E.2d at 846.

Counsel in the matter at bar could have utilized the evaluation performed in 2009.[2] App. 524. When asked if it would have been important for a judge to consider the fact that Petitioner could not read a simple sentence, trial counsel contended:

> That is not true. I will tell you right now, he had his discovery, he had his copy. He went over it. I would point out different things. And he would, actually, flip over, you know, 200 pages later on and say, what about this and what about this. Not only can he read a simple sentence, Mr. Adams is able to look through hundreds of pages of exhibits, most of which - - a lot of which, in his case, were not correlated, bring them out at the right time. I'm going to tell you right now, if he's not as smart as anyone in this room or, you know, I think he's close to it. He's highly intelligent.

App. 489 ll. 14 – 25.

PCR counsel rebutted this claim by asking trial counsel to review a portion of the trial transcript wherein trial counsel alleged Petitioner could not read as part of his argument in favor of suppression:

> Now, he's ... gone to the tenth grade. So, presumedly, he's had a ninth grade education. And he could barely read, which is often a way of saying they can't read. But, at the very least, reading is a prerequisite to understanding a waiver of your rights. These rights while they're not - - they don't require formal training to understand rights, they do require the ability to read. And, in this case, he said he ... could barely read.

App. 61 ll. 13 – 21. It is unclear whether trial counsel was being honest at trial or at the PCR hearing. Unsatisfied with his own testimony, trial counsel then accused Petitioner of perjuring himself. App. 515 ll. 10 – 13.

Notably, the state elected not to cross-examine Petitioner. App. 512. Petitioner testified that he did not understand the conversations with counsel and told him as much. App. 509 ll. 1 – 9. Petitioner also told counsel he could not read. App. 509 ll. 15 – 17.

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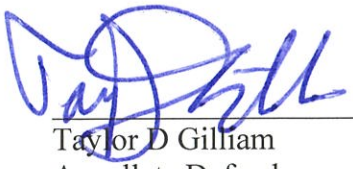
2 Based on counsel's testimony at the PCR hearing, he appeared to believe Petitioner began malingering in 2003, when Petitioner was ten years old. App. 501, ll. 6 – 15.

Trial counsel was aware of his client's difficulties. While representing Petitioner—prior to the PCR—counsel was an advocate for his client. He should have, however, further pursued the juvenile records. The trial judge remarked how a lower IQ could have weighed in favor of suppression of Petitioner's statements to law enforcement. Had counsel obtained the records and successfully argued for suppression, the outcome at trial would have been different. This Court should reverse the PCR court and remand for a new trial.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse and remand for a new trial.



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This 10th day of November, 2022.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brandon Dashun Adams states:

1. He is 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 G.D. Morgan, Jr., which was held on November 8, 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 Brandon Dashun Adams.

Respectfully Submitted,

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of November, 2022.

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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."

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This 10th day of November, 2022.