ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

BOBBY M. SHAW,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding that plea counsel provided effective assistance of counsel where plea counsel failed to request a competency hearing to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea where Petitioner had suffered a seizure the morning of the plea and was taking medication for seizures at the time of the plea?

STATEMENT

Indictment

On June 9, 2011, Petitioner Bobby M. Shaw was indicted by the Florence County Grand Jury for (1) murder; and (2) possession of a weapon during the commission of a violent crime. App. 93-94.

Guilty Plea and Sentence

On June 13, 2011, Petitioner appeared before the Honorable Michael G. Nettles where he pled guilty to voluntary manslaughter. App. 1-21. Petition was represented by Scott Floyd, and the State was represented by Assistant Solicitor E.L. Clements, III. App. 1.

The State presented its version of the facts. App. 5 – 8. The incident happened in August 2010 at the home of Petitioner's mother where Petitioner shot and killed his brother, Robert Leon Shaw, III. App. 5, l. 24 – 6, l. 5. According to the State, the brothers were in a heated argument before Petitioner shot the brother. App. 6, ll. 5-11.

Petitioner testified at the plea hearing that the brothers were arguing about who could stay at their mother's house that night. App. 9, ll. 14-25. Petitioner testified that he did not mean to kill his brother, that he only meant to warn him to back off. His brother had grabbed him and snatched a button off the Petitioner's shirt. App. 9, l. 24 – 10, l. 1. Petitioner said his brother was charging at him and when Petitioner pulled the gun out of his pocket, the gun just went off and hit his brother in the chest. App. 10, ll. 8-16.

Petitioner also advised the plea judge that he was on medication for seizures and that he in fact had had a seizure the morning of the plea hearing. App. 4, l. 20 – 5, l. 9; 9, ll. 13-14.

The plea judge asked plea counsel about whether he felt Petitioner understood what was going on at the plea hearing in light of Petitioner's seizure earlier in the day and Petitioner's use of

seizure medicines, and plea counsel responded that Petitioner "seemed responsive and seem[ed] to answer my questions just fine." App. 11, ll. 8-20.

The plea judge found that based upon Petitioner's testimony, he found that Petitioner was entering "this plea freely and voluntarily, knowingly and intelligently with the consent of competent counsel with whom [Petitioner says he's] satisfied." App. 16, ll. 20-24. The plea judge sentenced Petitioner to twenty years for the lesser included offense of voluntary manslaughter. App. 21, ll. 5-9.

Petitioner did not file a direct appeal of his guilty plea.

PCR Application and Evidentiary Hearing

On February 8, 2012, Petitioner filed his application requesting post-conviction relief (PCR). App. 23-29. The State filed its return on April 11, 2012. App. 30-34.

An evidentiary hearing was held before the Honorable Thomas A. Russo on October 17, 2012. App. 36 – 84. Petitioner was represented by Kevin Barth, and the State was represented by Assistant Attorney General Tyson Andrew Johnson, Sr. App. 36. Petitioner and trial counsel testified at the evidentiary hearing. App. 41 – 77.

Petitioner testified that the day of the hearing he was taking a medication called Dilantin for his seizures. App. 43, ll. 3 – 8; 44, l. 22 – 45, l. 2. Petitioner had a medical condition where he had reoccurring seizures every month or two months. App. 42, ll. 10-25. Petitioner testified that the seizure medication does not "take him out of the picture," but nevertheless he still does not really understand what is happening. App. 51, ll. 16-24. Petitioner testified:

> I'm listening to what I'm saying, but I'm not a hundred percent of what I'm understanding. I'm listening, trying to catch up with what's going on here and holding, but as far as fully understanding, no.

App. 51, l. 24 – 52, l. 3.

The day of the plea hearing, Petitioner had a seizure around 4:00 a.m. in the morning. App. 53, l. 16 – 54, l. 2. Petitioner said when he has a seizure, it takes him "a minute or so" to come out of the "state of the seizure. Like everything is crazy and you have to sit there and let it come back to you . . . ." App. 54, ll. 3-5. Petitioner testified he was still a little bit out of it and a little confused at the plea hearing. App. 54, ll. 7-23. He had informed his plea counsel that he had had a seizure that morning and explained to his plea counsel the effects of the seizure medication. App. 56, ll. 17-22.

After the plea hearing and after he had been taken back to the jail, Petitioner said his mind cleared up and he started thinking more about the plea and he wrote a letter to the judge to see if he could get the sentence reduced. App. 54, l. 21 – 55, l. 3.

Petitioner affirmed that he would not have pled guilty if he had understood what he was doing on the day of his plea and he would have asked for a trial. App. 52, ll. 4-8. If he had not been confused on the day of the plea, he would have asked for a trial. App. 56, ll. 13-16.

Mr. Floyd, Petitioner's plea counsel, agreed that if Petitioner was having trouble understanding because of the medication and did not understand what he was doing, then he should not have pled guilty if he did not understand. App. 77, ll. 3-6.

Judge Russo found that from his review of the plea hearing transcript and Petitioner's testimony at the PCR hearing that Petitioner was aware of what he was doing at the time he entered the plea. App. 82, l. 21 – 83, l. 5.

Order of Dismissal

On October 29, 2012, Judge Russo ruled in his Order of Dismissal that Petitioner failed to prove plea counsel provided ineffective assistance of counsel and denied Petitioner's PCR relief. App. 86-90. More specifically, the PCR court ruled:

> Counsel testified that he met with Applicant in person for a length of time before his plea, and that Applicant appeared to be coherent and to understand what counsel was telling him. Counsel indicated that Applicant asked questions and seemed to understand the answers given by counsel.
>
> Regarding Applicant's claim that his medication prevented him from understanding the nature of his plea, I find Applicant not credible. Applicant was mentally sharp enough to understand the plea he was entering, and even to disagree with the finer points of the allegations made by the solicitor during the colloquy. Applicant asked counsel to meet with him in the interruption of the plea to address these issues.

App. 89.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective assistance of counsel because plea counsel failed to request a competency hearing to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea where Petitioner had suffered a seizure the morning of the plea and was taking medication for seizures at the time of the plea.

Petitioner testified at the evidentiary hearing that he had suffered a seizure the morning of his plea hearing and that he was taking medication for his reoccurring seizures at the time of the plea. App. 42, ll. 10-25; 43, ll. 3 – 8; 44, l. 22 – 45, l. 2; 53, l. 16 – 54, l. 2. He explained that he was still out of it and a little confused at the plea hearing and that his medication further caused him to not fully understand what was happening to him. App. 51, l. 16 - 52, l. 3; 54, ll. 7-23. Petitioner said that he had explained this to his plea counsel on the day of the plea hearing. App. 56, ll. 17-22. Therefore, plea counsel provided ineffective assistance of counsel for failing to request a competency hearing to determine Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea.

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, 104 S. Ct. 2052, 80 L.Ed.2d 674 (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. Strickland, 466 U.S. at 687. The two-part test adopted in Strickland also "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). However, "[p]lea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." Stalk v. State, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

"In order to find that petitioner's [plea] counsel was ineffective for refusing to request a Blair hearing[1] on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings." Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50–51 (2004). To show "prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, 'the [Petitioner] need only show a reasonable probability that he was either insane at the time [the crime was committed] or incompetent at the time of the plea.' " Matthews, 358 S.C. at 459, 596 S.E.2d at 50 (alterations by court) (quoting Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)).

Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. Jeter, 308 S.C. at 232, 417 S.E.2d at 595. To prevail in a PCR action, the petitioner must prove by a preponderance of the evidence he was incompetent when he entered his guilty plea. Matthews, 358 S.C. at 458– 59, 596 S.E. 2d at 51; see also Rule 71.1(e), SCRCP. Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal. Jeter, 308 S.C. at 232, 417 S.E.2d at 596.

Furthermore, "[t]he test of competency to enter a plea is the same as required to stand trial." Id. "The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." Id.

Deficient Performance

In this case, plea counsel should have fully investigated whether Petitioner was competent to plead guilty because plea counsel knew that Petitioner had suffered a seizure the

[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

morning of the plea hearing and was on medication for the seizures. App. 56, ll. 17-22; Cf. Lee v. State, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (2011) (finding "[p]lea counsel could not be deficient if she had no indication of [Petitioner's] mental status").

Petitioner testified that after having the seizure the morning of the plea hearing, he was still out of it and a little confused at the plea hearing and that his medication further caused him to not fully understand what was happening to him. App. 51, l. 16 - 52, l. 3; 54, ll. 7-23.

For example, Petitioner vehemently maintained at the plea hearing that he did not intend to shoot his brother, that he was only pulling the gun out of his pocket to warn his brother to stop attacking him, and that the gun accidently fired, hitting his brother in the chest. App. 9, l. 11 -10, l. 21. Despite his potentially successful defenses of accident and self-defense, Petitioner nevertheless went ahead and pled guilty to voluntary manslaughter shortly after suffering a seizure and while under the influence of his seizure medication. Petitioner's waiver of defenses that may have exonerated him shows that he may have misunderstood the consequences of his plea.

Based on the testimony presented at the plea and PCR hearings, "Petitioner clearly established by a preponderance of the evidence that he was incompetent at the time he entered his guilty plea. Consequently, petitioner's [plea] counsel was deficient for failing to request a Blair hearing so that the court could examine petitioner's fitness to stand trial." App. 403 – 405; Matthews, 358 S.C. at 460, 596 S.E.2d at 51; see generally Pate v. Robinson, 383 U.S. 375, 384, 86 S. Ct. 836 (1966) (finding when evidence of a defendant's mental deficiencies raise doubt as to his competence, due process requires the judge to order a competency hearing).

Prejudice

As to prejudice, plea counsel failed to fully explore and investigate Petitioner's temporary incompetence because he maintained that Petitioner "appeared to be coherent" and was not

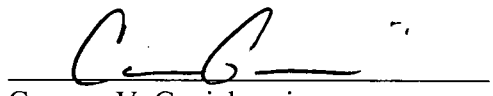
"slurring his words" or "unsteady on his feet or anything like that." App. 73, ll, 11-16. Notably, Petitioner testified that had he not still been suffering from the effects of his earlier seizure that day or been having side effects from his seizure medication, he would not have pled guilty to voluntary manslaughter. App. 52, ll. 4-8; 56, ll. 13-16.

"[Plea] counsel's failure to request a Blair hearing prejudiced petitioner under the Jeter standard because there was, at minimum, a 'reasonable probability' that petitioner was incompetent at the time of his guilty plea." Matthews, 358 S.C. at 460, 596 S.E.2d at 51. Therefore, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 86-90.

CONCLUSION

Based on the foregoing argument, Petitioner Bobby E. Shaw's petition for writ of certiorari should be granted with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of June, 2013.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bobby M. Shaw states:

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

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 17, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She 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 her as counsel for Bobby M. Shaw.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of June, 2013.

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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 Tyson Andrew Johnson, Sr., Esquire this 5th day of June, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day of June, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.