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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Spartanburg County
Honorable G. D. Morgan, Jr., Post-Conviction Relief Judge
Honorable J. Derham Cole, Plea Judge

Appellate Case No. 2022-000939

ANDREW MURPHY, SCDC # 354829,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

I. Trial counsel erred in failing to obtain a mental evaluation for petitioner in order to develop a mental illness defense and proceed with a jury trial in the case, particularly in light of the fact that petitioner received a fifty-year sentence after pleading guilty.

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

I. Whether the PCR Court correctly held that trial counsel did not err by failing to obtain a mental evaluation regarding a potential mental illness defense?

STATEMENT OF THE CASE

Petitioner Andrew Murphy is currently incarcerated within the South Carolina Department of Corrections following his guilty plea and sentence for the murder of Daeshawn Brown and for possession of a weapon during a violent crime. App. at 136.

Petitioner shot the victim on February 18, 2018. App. at 137. The victim was the new boyfriend of Petitioner's ex-girlfriend. Id. Several hours prior to the shooting, Petitioner indicated his intent to harm the victim to his ex-girlfriend. Id. The morning of the shooting, the victim went to the girlfriend's mother's house. Id. He and the girlfriend hung out in the yard. Id. The victim left to go to the store, and the girlfriend went inside. Id. Once inside, the girlfriend heard a gunshot. She looked outside and saw the victim on the ground motionless and Petitioner running away. Id. The victim was killed across the street from the girlfriend's mother's yard. Id.

The girlfriend identified Petitioner in the 911 call her mother made, as well as in a written statement and when talking to responding officers. Id. The shooting was captured on a surveillance video. Id. The victim was seen walking down the street when Petitioner approached the victim. Id. The victim tried to run away, and Petitioner shot him and then took off running. Id. Petitioner was seen shooting the victim with his left hand because he has a deformity of his right. Id.

Petitioner's car was found nearby. Id. It was missing two hubcaps on the passenger side and had Petitioner's keys and work ID. Id. On the surveillance video footage the vehicle did not have hubcaps. Id. at 138. Additional video footage (from another business) showed Petitioner wearing the same outfit as the shooter. Id. Petitioner had possession of his cell phone at the time of the incident, and-at the time of the shooting-his phone was hitting between two towers with a coverage range that included the murder location. Id.

At the plea, Petitioner was represented by Andrew Johnston, Esquire. Assistant Solicitor

Jennifer Jordan of the Seventh Circuit Solicitor's Office prosecuted the case. Id. at 136. On June 3, 2019, Petitioner appeared before the Honorable J. Derham Cole, circuit court judge, and pled guilty as indicted to all offenses without any negotiations or recommendations. Id. At the plea hearing, as a part of the mitigating facts, Petitioner's plea counsel informed the court that he received paperwork from 2000 and 2002 which indicated that Petitioner was exposed to lead as a child and may suffer from a neuropsychological dysfunction. Id. at 25. Petitioner's counsel informed the court that he did not currently have any reason to believe that Petitioner suffered from a neuropsychological dysfunction. Id. Judge Cole sentenced Petitioner to fifty years' imprisonment for murder and five years' for possession of a weapon during a violent crime, sentences running concurrently. Petitioner did not pursue a direct appeal. Id. at 44.

On April 28, 2020, Petitioner filed a PCR application. Id. at 46. Respondent filed a return dated July 1, 2020. Id. at 55. A PCR hearing was convened on April 19, 2022, before Judge G.D. Morgan, Jr. Id. at 69. Petitioner was present at the PCR hearing and was represented by Rodney Richey, Esquire. Id. 70. Assistant Attorney General Chelsea Marto appeared on behalf of the State. Id.

Petitioner alleged that his plea counsel failed to adequately investigate his mental competency and therefore did not provide effective assistance of counsel. Id. at 74. In support of this, Petitioner testified and offered into evidence the 2000 and 2002 psychological reports. Id. at 127-135. At the PCR hearing, Petitioner's plea counsel testified that he had both the 2000 and 2002 reports at the time of the plea. Id. at 100-101. Additionally, he testified that Petitioner appeared to be intelligent and articulate. Id. at 106. Further, he stated that there was nothing to indicate that Petitioner suffered from any hallucinations, delusions, or psychosis. Id. As a result, Petitioner's plea counsel testified that while Petitioner may have suffered from some psychological

issues, he did not think they rose to the level of a defense, and therefore, he did not seek additional mental evaluations. Id.

On June 29, 2022, Judge Morgan signed an Order of Dismissal denying Petitioner's allegations of ineffective assistance of counsel. Id. at 136.

Petitioner appealed Judge Morgan's Order of Dismissal.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR Court correctly held that trial counsel did not err by failing to obtain a mental evaluation regarding a potential mental illness defense.

The PCR Court correctly ruled that Petitioner did not demonstrate that his plea counsel's investigation into his mental competency was inadequate. Therefore, the PCR Court correctly denied Petitioner relief.

When alleging ineffective assistance of counsel, a PCR applicant must satisfy the two-prong Strickland test. See Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the applicant must establish plea counsel's performance was deficient. Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 844 (2017) (citing Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011)). Second, 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.'" Id. (citing Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989)). When a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong Strickland analysis still applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice. Id. at 21, 795 S.E.2d at 845. Thus, when establishing Strickland prejudice in the context of plea counsel's failure to request a mental competency evaluation, "the [applicant] need only show a 'reasonable probability' that he was . . . incompetent at the time of the plea." Id. (quoting Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)); see also Matthews v. State, 358 S.C. 456, 458–60, 596 S.E.2d 49, 50–51 (2004) (expanding the reasonable probability standard as the burden for proving both the deficiency of counsel and the prejudice prongs). Importantly though, Strickland does not require counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case. Van Dohlen v. State, 360 S.C. 598, 607,

602 S.E.2d 738, 743 (2004). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. State, 539 U.S. 510 at 521-522 (2003).

When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018) (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)).

In this case, the PCR Court found that Petitioner's counsel was effective, and probative evidence exists in the record to support that finding. Thus, the Court should deny certiorari.

Petitioner asserts that Mr. Johnston did not adequately investigate his competency at the time of the plea. App. at 74-75. Specifically, Petitioner claims that the impact of his childhood exposure to lead was not adequately investigated. Id. However, Mr. Johnston met with Petitioner and reviewed Petitioner's medical records prior to the plea. Id. at 101. Afterwards, Mr. Johnston determined that, based on his extensive experience in criminal defense, a mental competency evaluation was not necessary in this case. Id. Such a determination is well within the discretion afforded to plea counsel. See Wiggins at 521-522. When explaining his determination, Mr. Johnston stated that he did not seek a mental evaluation of Petitioner prior to the plea based on his interactions with Petitioner. App. at 101, line 2. Specifically, Mr. Johnston said that Petitioner was "an intelligent individual, articulate, and . . . there was never any presentation of anything to me that indicated he would have suffered from something like hallucinations or delusions or psychosis." App. at 106, lines 2-6. Mr. Johnston testified that, had he seen any of those symptoms, he would have sought a mental competency evaluation. App. at 106, lines 6-8. Mr. Johnston also

testified that he was aware of the lead poisoning prior to the plea, App. at 100, lines 5-10, that he had seen the psychodiagnostics evaluation of Petitioner dated January 18, 2000, App. at 100, line 1-4, and that he had a copy of the 2002 clinical summary in his file, App. at 100, line 11-14. In fact, at the plea, Mr. Johnston offered Petitioner's lead poisoning as a mitigating factor. App. at 25, lines 1-9. The totality of Mr. Johnston's testimony establishes that he fulfilled the duty laid out in Wiggins. See Wiggins, 539 U.S. at 521-522 ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.")

Petitioner points to several cases in support of his claim; however, the cases cited by Petitioner are distinguishable from this case. First, Petitioner points to Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017). In Ramirez, the applicant underwent two mental evaluations. The first evaluator noted that "[the applicant] exhibited certain speech difficulties, had difficulty reading the words 'solicitor,' 'evaluation,' and 'competency,' and struggled to remember the name of his attorney." Id. at 17, 795 S.E.2d at 843. Additionally, the applicant "despite acknowledging the serious nature of the charges against him, [] believed he was only facing 'up to a few years in [DJJ]." Id. Regardless, the evaluator concluded the applicant had "sufficient factual and rational understanding of the charges against him," and was therefore competent to stand trial. Id. In reaching this conclusion, the first evaluator did not review any collateral sources, nor did he perform any psychological testing or consider a psychological diagnosis. Id. The second evaluator "concluded [the applicant] had poor judgment and an impaired ability to regulate his impulses" and "was highly malleable, easily confused, and suffering limitations across the entire range of cognitive function, resulting in severely limited language and reading comprehension skills." Id. at 18, 795 S.E.2d at 843. Additionally, the second evaluator found the applicant had a general IQ

level between thirty-one and forty-four and was functioning at the intellectual level of a four to seven year old child. Id. The second evaluator diagnosed the applicant with an adjustment disorder with mixed disturbance of emotions and conduct, severe mental retardation, and a Global Assessment of Functioning score of thirty-five out of one hundred. The second evaluator rendered no opinion as to the applicant's competency to stand trial. Id. Ultimately, the applicant pled guilty but mentally ill to all the charges. Id. at 19, 795 S.E.2d at 843. At the plea, both of the evaluations were submitted into evidence, but there was no request for a further competency evaluation. Id. at 19, 795 S.E.2d at 843-844. The circuit judge accepted the applicant's plea but noted his "IQ level [was] as low as any [the judge had] ever seen." Id. at 19, 795 S.E.2d at 844. At the PCR hearing, plea counsel testified that the applicant was very naïve and questioned whether the applicant fully understood what was going on. Id. Plea counsel further admitted he should have moved to have the applicant's competency reevaluated after comparing the evaluations, and he gave no explanation for his failure to do so. Id. In light of these facts, the South Carolina Supreme Court found that "[p]lea counsel was clearly on notice, not only from the [second evaluation], but from his own interactions with [the applicant], that [the applicant] 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." Id. at 22-23, 795 S.E.2d at 845-846. The Court observed, "[the second evaluation] and plea counsel's testimony at the PCR hearing clearly established a reasonable, if not strong, likelihood that the applicant was incompetent to plead guilty." Id. at 23, 795 S.E.2d at 846. As a result, the Court held that the failure to pursue additional mental evaluations constituted ineffective assistance of counsel and vacated the plea. Id.

Petitioner's case is not analogous to Ramirez. In Ramirez there were observable signs that the applicant was incompetent. For example, the applicant could not read certain words, struggled

to remember the name of his attorney, "was highly malleable, easily confused, and suffering limitations across the entire range of cognitive function, resulting in severely limited language and reading comprehension skills." Id. at 17-18, 795 S.E.2d at 843. In this case, Mr. Johnston testified in this case that Petitioner was "an intelligent individual" and "articulate." App. at 106, lines 1-3. Additionally, the medical records available to Mr. Johnston did not indicate the same level of impairment as those in Ramirez. In Ramirez, plea counsel had contemporary medical documentation indicating that the applicant had a general IQ level between thirty-one and forty-four and was functioning at the intellectual level of a four to seven year old child. Ramirez at 18, 795 S.E.2d at 843. The applicant's IQ was so low that the circuit judge remarked his "IQ level [was] as low as any [the judge had] ever seen." Id. at 19, 795 S.E.2d at 844. Furthermore, the second evaluation diagnosed the applicant with an adjustment disorder with mixed disturbance of emotions and conduct and severe mental retardation. Id. at 18, 795 S.E.2d at 843. In contrast, at the time of the plea, Mr. Johnston had only been provided with two medical records which were over fifteen years old. App. at 99-100 and 127-135. These records did list various deficiencies for Petitioner, but they were accompanied by statements that suggest the deficiencies could be remedied or otherwise managed with proper treatment and they provided no indication that Petitioner suffered from the deficiencies at the time of the crime or the plea. See App. at 127-135. Finally, in Ramirez, plea counsel admitted that he should have moved to have the applicant's competency reevaluated after comparing the evaluations. Ramirez at 18, 795 S.E.2d at 844. Mr. Johnston, on the other hand, testified at the PCR hearing that he did not believe there was any reason for additional evaluations because any deficiencies were unlikely to rise to the level of a defense. App. at 106, lines 9-12.

Petitioner also relies on Van Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). In Van Dohlen, a psychiatrist testified that, at the time of the murder, the applicant suffered from "adjustment reaction with mixed features of emotions and conduct, as well as pathological intoxication from the abuse of alcohol and Valium,"[1] but the psychiatrist further testified that the applicant did not have a chronic mental illness and did not dispute the solicitor's assertion that adjustment reaction disorder was "pretty small potatoes" in the spectrum of mental illnesses. Id. at 604, 602 S.E.2d at 741. However, at the PCR hearing, the psychiatrist testified that if he had been provided with additional medical and psychiatric records that existed and were available before the trial, he would have diagnosed the applicant as suffering at the time of the murder from "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features, plus alcohol and Valium abuse." Id. at 604-605, 602 S.E.2d at 741. All the medical records necessary to make these additional diagnoses were potentially available to Petitioner's attorneys and expert witnesses before his trial. Id. The Supreme Court found that the absence of crucial medical records and related information which existed at the time of the applicant's trial prevented the psychiatrist from conveying an accurate diagnosis and explanation of Petitioner's mental condition to the sentencing jury. Id. at 608, 602 S.E.2d at 743. Therefore, while the attorneys exerted some effort, according to the testimony of the psychiatrist at the PCR hearing, it was insufficient. Id.

Again, the actions of trial counsel in Van Dohlen are distinguishable from this case. Unlike Van Dohlen, Petitioner has not provided any medical documentation that indicates that at the time of the murder he was suffering from a mental impairment. Neither has he shown that documentation indicating he was suffering from an impairment at the time of the crime was

[1] According to the Court in Van Dohlen "[a]djustment reaction is a disorder in which a person's expression of grief exceeds what is normally expected. It is generally easily treatable and lasts no longer than three months." 360 S.C. at 604, 602 S.E.2d at 741.

available to his counsel. In Van Dohlen, trial counsel had access to medical records which conclusively demonstrated that the applicant had substantial mental impairments (beyond those discovered by the psychiatrist) at the time of the crime. Id. at 608, 602 S.E.2d at 743. In this case, Petitioner has offered two documents from 2000 and 2002. App. at 127-135. These documents indicate Petitioner had mental impairments fifteen years prior to the murder, but do not provide evidence regarding his impairment at the time of the crime or the plea. Id. Additionally, Petitioner's documents include treatment plans and comments which indicate the impacts can be reduced with appropriate treatment. Id. Therefore, the Court's holding in Van Dohlen does not entitle Petitioner to relief.

The actions of Mr. Johnston fall within the discretion provided to plea counsel. See Van Dohlen ("Strickland does not require counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case . . . .") There is evidence in the record to support the PCR Court's finding that Petitioner's counsel was aware of Petitioner's childhood lead exposure and the medical records documenting its effects at the time of the plea and that, in light of his interactions with Petitioner and those records, Mr. Johnston determined, based on his years of experience in criminal defense, that further mental competency evaluations were not necessary. Thus, the PCR Court correctly held that Petitioner has not presented evidence that he was incompetent to plead guilty and Mr. Johnston's decision to forgo further evaluation was a reasonable exercise of his professional discretion. Therefore, the post-conviction relief court properly denied relief and this Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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