

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

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AUG 16 2013

S.C. Supreme Court

MASON JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213721

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal because there was no voluntary or intelligent waiver of his right to a direct appeal in the case.

II. Trial counsel erred in failing to develop a mental illness defense on petitioner's behalf in the case.

STATEMENT

Petitioner Mason Johnson was convicted of second degree burglary and grand larceny per jury trial held during the May 2010 term of the York County General Sessions Court before Judge Lee S. Alford. Petitioner was sentenced to imprisonment for an aggregate period of fifteen years. App. 1-349. Kenneth D. Snow represented petitioner at trial. Petitioner did not enjoy the benefit of a direct appeal of his convictions and sentences.

On February 14, 2011, petitioner filed a PCR application with the York County Office of the Clerk of Court. App. 353-371. Petitioner's chief complaint was that trial counsel failed to file a proper notice of appeal after he was convicted and sentenced. The respondent filed a return dated August 18, 2011, requesting that a hearing be held in response to petitioner's PCR action. App. 360-365.

On December 27, 2012, petitioner filed an amended PCR application alleging additional allegations of ineffective assistance of trial counsel in the case. App. 356-313.

A PCR hearing was convened on August 15, 2012, at the York County Courthouse before Judge John C. Hayes, III. App. 374-406. Petitioner was present at the hearing and represented by Brad Rawlins.

On August 20, 2012, Judge Hayes issued an order including a finding that petitioner did not waive his right to a direct appeal and granting his request for a belated direct appeal via White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). App. 408-411.

Petitioner appealed Judge Hayes' order. This petition follows.

QUESTION I

The PCR judge ruled properly in granting petitioner's request for a belated direct appeal because there was no voluntary or intelligent waiver of his right to a direct appeal in the case.

During the PCR hearing, trial counsel testified that he filed a notice of appeal in the case, but that there was a problem with the certificate of service in that he did not provide proof of service on the notice of appeal filed under Rule 203, SCACR. See notice of appeal filed June 7, 2010, at Appendix page 351. As a result, the Court of Appeals dismissed petitioner's direct appeal. App. 384, l. 17-p. 385, l. 13. See Appendix page 352 where the Court of Appeals issued an Order of Dismissal "due to the failure to provide the Court with the timely proof of service of the Notice of Appeal, as provided for in Rule 203 of the South Carolina Appellate Court Rules, and as requested by letters from this office dated July 15, 2010, and August 5, 2010."

Petitioner testified during the PCR hearing and explained that he asked for an appeal, but that he received mail indicating that his appeal was "denied." App. 390, l. 20-p. 391, l. 2.

The PCR judge ruled in the order of dismissal that trial counsel failed to comply with Rule 203, SCACR, and that petitioner did not waive his right to a direct appeal as a result, and then granted petitioner's request for a belated direct appeal in the case. App. 409-411.

A defendant is entitled to an appeal where there has been no intelligent or voluntary waiver of the right to appeal made by the defendant. White v. State, supra. Here, petitioner did not waive his desire or right to appeal, but rather it was counsel who erred in failing to file a proper notice of appeal. Compare Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991), where counsel took no action to secure an appeal where the defendant desired an appeal. Here, counsel took no action to secure proof of service on the appeal notice to ensure an appeal for petitioner. The PCR judge ruled properly in granting petitioner's request for a belated direct appeal in the case.

QUESTION II

Trial counsel erred in failing to develop a mental illness defense on petitioner's behalf in the case.

During the PCR hearing, petitioner testified that he spent numerous weeks at Catawba Mental Health Center and was placed on medication (twice a day) for his mental illness also because he was a suicide patient. Petitioner stated that he was housed in a special mental health unit while jailed, and that trial counsel knew about his stints at the mental health center. App. 392, lines 21-25. App. 391, l. 3-25. Petitioner added that he was placed in specialized classes in school with "handicapped kids" during his childhood. App. 392, l. 21-p. 393, l. 7.

PCR counsel argued this issue at the PCR hearing as follows:

PCR Counsel: [Petitioner] also inform[ed] me that [defense counsel] was aware of a mental defect and that he had been in special education classes and that he had went (sic) to Catawba Mental Health and this potential defense was never raised. App. 380, lines 14-23.

PCR Counsel: [Petitioner]...told [defense counsel] that he had some concerns about...being competent for trial, [and] the fact that he had been in special education classes, and that he was under some type of medication that he had received from Catawba Mental Health...[and that defense counsel] knew of those things [but]...did not [accordingly] on that by alleging that potential defense. App. p. 381, l. 16-p. 382, l. 4.

Trial counsel testified at the PCR hearing and explained that petitioner's competency was not a question in his mind and that there was nothing about petitioner that pointed to evidence that he needed a mental evaluation in the case. App. 403, l. 2-12.

The PCR judge ruled that the competency issue raised by petitioner was not a viable issue. App. 405, lines 6-8.

As a rule, counsel has a duty to conduct adequate and appropriate investigations in a case. Strickland v. Washington, 466 U.S. 668 (1984). Also, with respect to cases where mental issues

abound, counsel has a duty to investigate, prepare, and present evidence of mental illness on behalf of the defense. See Wiggins v. Smith, 539 U.S. 510 (2003), where trial counsel was found ineffective in failing to expand the investigation into the defendant's background with enough sufficiency to learn of the defendant's diminished mental capacity and childhood abuse, rape, and molestation in order to show his impaired mental and psychological state. Compare Rompilla v. Beard, 545 U.S. 374 (2005), where the Court held that trial counsel erred in failing to investigate into the defendant's prior conviction file in order to uncover his mental health issues for presentation at sentencing.

Our state courts have ruled similarly in cases where counsel were found ineffective in failing to develop mental illness defenses. For example in Von Dohlen v. State, 360 S.C. 598, 601 S.E.2d 738 (2005), the Court found that counsel was ineffective in failing to provide the psychiatrist who testified at trial with all the defendant's extensive medical records and information so that the defendant's true mental diagnosis of major episodes of depression with severe symptoms of anxiety and psychosis could have been presented during the penalty phase. Moreover, in Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2005), the Court reversed because trial counsel pursued a guilty but mentally ill verdict, but omitted his expert's qualifications and failed to provide the jury with any insight into petitioner's mental illness. Furthermore, in Nance v. Ozmint, 367 S.C. 547, 557 S.E.2d 883 (2006), the Court found that trial counsel erred in failing to investigate into and present evidence of the defendant's mitigating social history documents outlining his troubled childhood and mental illness. Additionally, in Council v. State, 380 S.C.159, 670 S.E.2d 356 (2009), trial counsel was found ineffective in failing to investigate into and present mitigating evidence of petitioner's mental illness at the time of the crime from his background records, and medical records, hospital records, and information from his childhood. Finally, in Rosemond v.

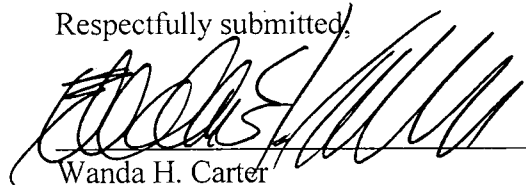
Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), the Court held that trial counsel's error in failing to present evidence of the defendant's mental illness was deficient and that such deficient performance was prejudicial to the case.

In the case at bar, counsel violated petitioner's Sixth Amendment right to effective assistance of counsel by failing to develop a mental illness defense in the case. See Hill v. Lockhart, 484 U.S. 52 (1985). Petitioner was prejudiced by counsel's deficient legal representation in this regard because but for the error, petitioner might have exercised his option for a jury trial in his case.

CONCLUSION

Based on the foregoing arguments, petitioner requests that the Court grant the petition and allow full briefing on the issues.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of August, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mason Johnson, #229175, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of August, 2013.



Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of August, 2013.



Emily M. (L.S.)

Notary Public for South Carolina

My Commission Expires: November 16, 2022.