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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable Perry H. Gravely, Circuit Court Judge

GERALD AKEEM GADSDEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000153

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

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2.

Whether the PCR court erred in denying Petitioner post-conviction relief where counsel did not move to have Petitioner evaluated for competency, where Petitioner had schizophrenia and bipolar disorder, and had been found not competent to stand trial in connection with another case, since this resulted in Petitioner's entry of a plea that was not knowingly, intelligently, and voluntarily tendered?

STATEMENT

Procedural history

On September 13, 2016, an Anderson County Grand Jury indicted Gerald A. Gadsden, Petitioner, for murder and possession of a weapon during the commission of a violent crime. App. 144 – 145. On January 8, 2020, Petitioner appeared before the Honorable J. Cordell Maddox, Jr. for a plea hearing. Petitioner was represented by Gordon Senerius. Catherine Huey and Stan Overby prosecuted the case. App. 1. Petitioner pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to the lesser offense of voluntary manslaughter with a recommendation of twenty years, to be served concurrently with a life sentence he was serving for a Greenville County case. App. 2, ll. 12-19; App. 11, ll. 5-8. The court accepted the plea and sentenced Petitioner to twenty years, to be served concurrently. During sentencing, the court specified on the record and in writing on the sentence sheet that, "The defendant shall receive all mental health medicine while incarcerated." App. 16, ll. 1-15; App 146.

Petitioner asked counsel to file an appeal. App. 74, ll. 21-23. Counsel filed a defective notice of appeal on January 21, 2020. App. 18 – 21. On January 28, 2020, the Court of Appeals sent counsel a letter asking him to provide a written explanation of an issue that could be reviewed on appeal. App. 22 – 23. On February 10, 2020, counsel filed an amended notice of appeal stating he was unaware of any issues for appeal. App. 24 – 27. On March 18, 2020; June 3, 2020; and on September 2, 2020, the Court of Appeals sent counsel letters directing him to 1) within ten days forward his guilty plea explanation to Petitioner; 2) advise Petitioner he had twenty days to inform the court of any basis for appeal; 3) copy the Court on his letter to Petitioner. App. 28 – 33. Counsel failed to do so, and the appeal was dismissed. App. 34. The remittitur was issued November 9, 2020. App. 35.

On December 10, 2020, Petitioner filed an application for post-conviction relief (PCR). App. 36 – 42. The State made its return on July 26, 2021. App. 46 – 59. On February 21, 2023, Petitioner filed a supplemental PCR application. App. 43 – 45. On March 2, 2023, a hearing was held on the matter before the Honorable Perry H. Gravely. Don Thompson represented Petitioner and Taylor Smith represented the State. App. 60. The State conceded Petitioner was entitled to belated appellate review. App. 103, ll. 3-18. On December 15, 2023, the court issued an order granting belated appellate review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), but denying all other allegations.[1] App. 125 – 143.

Plea hearing

Petitioner's plea hearing was unorthodox. The solicitor stated Petitioner was pleading guilty to voluntary manslaughter with a recommendation of twenty years' imprisonment, to be served concurrently with a life without parole sentence from Greenville County. App. 2, ll. 12-19. The colloquy began and the court heard Petitioner had been diagnosed with schizophrenia and bipolar disorder. The court heard that Petitioner was not taking medication for his conditions. The court asked defense counsel if he thought Petitioner was competent and defense counsel stated that he did. Defense counsel stated that Petitioner had been found not competent in connection with the Greenville County case, but his competency had been restored. App. 3, l. 7 – 4, l. 3.

Petitioner told the plea judge he was not satisfied with counsel because, "I was not in my right mind at the time when the incident occurred . . . I was just released from MUSC mental institution less than, like, 72 hours before the incident happened." App. 6, ll. 1-7. A recess was taken, and Petitioner waived a conflict with the judge, based on the judge's wife working on

[1] In tandem with this petition for writ of certiorari, Petitioner is filing a brief of appellant pursuant to *White v. State*.

Petitioner's Greenville case. App. 6, l. 9 – 8, l. 17. The court asked Petitioner if he was guilty of voluntary manslaughter and Petitioner stated he was *not*, but that he was guilty of involuntary manslaughter. App. 9, ll. 14-17.

Another recess was taken. The judge suggested the plea hearing proceed pursuant to *North Carolina v. Alford*. The judge and the solicitor discussed on the record, in front of Petitioner, whether Petitioner could plead guilty to involuntary manslaughter. Another recess was taken for the solicitors to discuss involuntary manslaughter. App. 9, l. 21 – 11, l. 17. Court reconvened, and the judge stated, "what we have decided to do is have him plead under North Carolina versus Alford; is that correct?" Counsel answered that it was, and counsel stated that Petitioner understood what that means. Petitioner agreed with the judge that he would most likely be found guilty at trial. (After the court broke for the solicitors to discuss involuntary versus voluntary manslaughter, and then reconvened, no one ever stated on the record that Petitioner was pleading to voluntary manslaughter, rather than involuntary manslaughter.) App. 11, l. 18 – 12, l. 15.

Petitioner's prior finding of incompetency on the Greenville case was discussed. The court asked counsel if he believed Petitioner "may have lapsed back into incompetency," and counsel stated, "I do not." The court then asked Petitioner what medications he was taking. App. 14, ll. 1-24. Petitioner stated, "At this point in time I was taken off my medicine. But my doctor was supposed to put me back on my medicine this month, my mental health consult actually last month, but or me to be placed back on my medicine." App. 14, l. 25 – 15, l. 4.

Petitioner told the court he took Depakote and Haldol, but was not receiving them currently. Counsel confirmed that Petitioner had been taking Depakote and he listed a number of other medications. The court stated it would order as part of the sentence that Petitioner "shall

receive all mental health medicine while you're incarcerated." The court accepted the plea, stating that Petitioner "apparently seems to understand what's going on[,]" and sentenced Petitioner. App. 15, l. 5 – 16, l. 17.

PCR Hearing

Petitioner alleged that ineffective assistance of counsel caused him to enter a plea that was not knowing, voluntary, and intelligent, based on counsel's failure to move that Petitioner be evaluated for competency to stand trial. App. 64, ll. 9-14; App. 107, ll. 17-23. Petitioner testified he had been hospitalized in mental institutions seven times, beginning when he was thirteen years old. Petitioner stated when he went to court in Anderson, he had bipolar disorder and schizophrenia, and was supposed to take Haldol and Depakote, antipsychotics, but went without them for a couple of months before court. Petitioner explained he was sentenced on the Greenville case three years before he entered his plea in this case. App. 67, l. 4 – 72, l. 8. However, PCR counsel stated based on a prior conversation with Petitioner, he believed the Greenville conviction and this plea were only several days apart. App. 79, ll. ll. 5-12. The State subsequently conceded Petitioner's Greenville County conviction was June 9, 2016. App. 99, ll. 6-12. (Petitioner therefore had over three years to decompensate after he was restored to competency in the Greenville case.)

Plea counsel claimed he did not have Petitioner evaluated because Petitioner seemed to understand what plea counsel told him, and was taking medication. Plea counsel did not have questions about Petitioner's competency. App. 82, l. 25 – 83, l. 11. Plea counsel claimed Petitioner understood he was pleading to voluntary manslaughter. App. 85, ll. 2-20.

Plea counsel was unable to answer whether he sent the proper letters to Petitioner regarding the notice of appeal. He stated it was standard practice for a paralegal to do so, but his

file was probably destroyed because the case was thirteen years old. However, the PCR judge pointed out this plea was only three years old. App. 25, l. 23 – 87, l. 23. The State stipulated that the prior Attorney General who handled this case had an email stating plea counsel told her he found a letter from the Court of Appeals "under some paperwork on [his] desk and forgot to send it to" Petitioner. App. 88, l. 5 – 89, l. 21.

The State asked to leave the record open to search for plea counsel's file. PCR counsel did not object, and the judge left the record open. App. 108, l. 13 – 109, l. 13. The State subsequently submitted two exhibits, which were letters from plea counsel's file that purported to be from Petitioner. App. 113 – 124. However, Petitioner's signature on the sentence sheet looked nothing like the signatures on the two letters. And the signatures on the two letters looked nothing alike. It is doubtful these letters were authored by Petitioner and not another inmate on his behalf. *See* App. 114; 115; 146.

In its order granting belated appellate review and denying all other allegations, the PCR court stated it found Petitioner's plea was freely and voluntarily given. App. 131. The order cited to the beginning of the plea hearing for its finding that petitioner "knew he was pleading to voluntary manslaughter with a recommendation of twenty years[.]" App. 131. The order addressed Petitioner's claim counsel was ineffective for failing to request Petitioner be evaluated for competency. App. 132. The order stated that besides Petitioner's testimony, he "did not provide any additional testimony or evidence to show he was incompetent at the time of his plea." App. 133. The order referenced plea counsel's testimony that Petitioner appeared competent to him. App. 133 – 134.

The order cited to Respondent's Exhibits #1 and #2, letters ostensibly written by Petitioner, which discussed the need for a psychological evaluation. App. 134 – 135. The order

stated the PCR court found plea counsel's testimony to be credible that Petitioner appeared to be competent at the plea. App. 135. The order stated Petitioner failed to overcome the presumption he was competent at the time of the plea. Therefore, the court found no deficiency in the failure to request a competency evaluation. App. 136.

Finally, the order stated the PCR court found Petitioner was entitled to belated appellate review pursuant to *White v. State*. App. 138. The order cited to Petitioner's testimony that he requested counsel initiate an appeal, and counsel's testimony he did not remember sending Petitioner the guilty plea explanation. The order also cited to the State's concession that Petitioner was entitled to belated appellate review. App. 137 – 138.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974), where Petitioner asked counsel to appeal, where counsel's amended notice of appeal stated counsel was unaware of any issues to be reviewed, and where counsel failed to act in response to three letters from the Court of Appeals directing counsel to forward the letters to Petitioner so that Petitioner could respond in writing with any arguable basis regarding preserved issues for appeal, since counsel's failure resulted in dismissal of the appeal, and since the State agreed Petitioner was entitled to a belated direct appeal.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). *See Webb v. State*, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984) (same).

"Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal." *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (citing *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Wilson v. State*, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967)." *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480 (1992).

However, "[a]bsent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea, and the bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief."

Rolen v. State, 384 S.C. 409, 415, 683 S.E.2d 471, 474–75 (2009) (citing *Weathers v. State*, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)). "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Jones v. State*, 382 S.C. 589, 596, 677 S.E.2d 20, 23 (2009), *overruled on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (quoting *Roe v. Flores–Ortega*, 528 U.S. 470, 480 (2000)). "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. at 477. *Accord Kinard v. State*, 418 S.C. 478, 481, 795 S.E.2d 15, 16 (2016).

Petitioner asked counsel to file an appeal. App. 74, ll. 21-23. The Court of Appeals sent counsel several letters directing him to forward his guilty plea explanation to Petitioner within ten days and advise Petitioner he had twenty days to inform the court of any basis for appeal. Counsel did not, and the appeal was dismissed. App. 22 – 34. The State conceded Petitioner was entitled to belated appellate review. App. 103, ll. 3-18. The State conceded plea counsel spoke with the prior Attorney General and he told her the Court's letter had gotten buried underneath paperwork on his desk. App. 88, l. 5 – 89, l. 21. This evidence supports the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to *White v. State*. The PCR court correctly granted Petitioner belated appellate review. *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626; *Webb v. State*, 281 S.C. at 238, 314 S.E.2d at 839.

2.

The PCR court erred in denying Petitioner post-conviction relief where counsel did not move to have Petitioner evaluated for competency, where Petitioner had schizophrenia and bipolar disorder, and had been found not competent to stand trial in connection with another case, since this resulted in Petitioner's entry of a plea that was not knowingly, intelligently, and voluntarily tendered.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Gilchrist v. State*, 350 S.C. 221, 226, 565 S.E.2d 281, 284 (2002) (citing *Strickland*, 466 U.S. at 687). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.*

The decision to plead guilty must be a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). "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." *Garren v. State*, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018) (cleaned up); *see Jeter v. State*, 308 S.C. 230, 234, 417 S.E.2d 594, 596 (1992) (same).

"The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.'" *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968); U.S. CONST. amend. XIV. "Due process prohibits the conviction of a person who is

mentally incompetent." *Jeter v. State*, 308 S.C. at 232, 417 S.E.2d at 595; *see State v. Colden*, 372 S.C. 428, 440, 641 S.E.2d 912, 919 (Ct. App. 2007) (same). "[A] person whose mental condition is such that he lacks the capacity to understand the nature and objects of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This right cannot be waived by a guilty plea. *Jeter v. State*, 308 S.C. at 232, 417 S.E.2d at 595–96 (citing *Pate v. Robinson*, 383 U.S. 375 (1966)).

"The conviction of an accused person who is legally incompetent violates due process, and state procedures must be adequate to protect this right." *State v. Bellardino*, 429 S.C. 563, 567–68, 841 S.E.2d 621, 623 (2020) (citing *Pate v. Robinson*, 383 U.S. at 378). A state court's failure to invoke statutory procedures that exist to protect an accused's "right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope v. Missouri*, 420 U.S. at 172. "In order to protect the legal process and preserve the integrity of the trial, a trial judge has the authority to order a psychiatric evaluation of the defendant when his or her competency may be in question." *State v. Locklair*, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000). S.C. Code Ann. § 44-23-410 provides:

> Whenever a judge of the circuit court or family court has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:
>
> (1) order examination of the person by two examiners designated by the Department of Mental Health . . .

"By statute [S.C. Code Ann. § 44-23-410], the question of whether a defendant is fit to stand trial depends upon whether the defendant, because of a lack of mental capacity, cannot 'understand the proceedings' or 'assist in his or her own defense.'" *State v. Burgess*, 356 S.C. 572, 575, 590

S.E.2d 42, 44 (Ct. App. 2003) (cleaned up). "Thus if the judge believes the person may be unfit to stand trial, a competency evaluation is mandatory." *Colden*, 372 S.C. at 441, 641 S.E.2d at 919; *see State v. Bellardino*, 429 S.C. at 568, 841 S.E.2d at 624 (same). Factors to be considered in determining whether further inquiry into a defendant's fitness to stand trial was warranted are: (1) evidence of irrational behavior; (2) demeanor at trial; and (3) prior medical opinion regarding ability to stand trial. In some instances, the presence of just one of the factors may justify further inquiry requiring a mental evaluation. *State v. Colden*, 372 S.C. at 441, 641 S.E.2d at 920 (citing *State v. Burgess, supra*).

In *State v. Singleton*, 322 S.C. 480, 472 S.E.2d 640 (Ct. App. 1996), the defense requested a continuance at a probation revocation hearing. Singleton was receiving mental health treatment, he had audio and visual hallucinations, and his mother stated she believed his odd and violent behavior stemmed from a childhood poisoning incident. The court denied the motion and revoked probation, yet the judge stated: "I urge treatment for Singleton's mental condition while he's incarcerated and for drugs, and that he go through the Alcohol Treatment Unit before he is released." *State v. Singleton*, 322 S.C. at 482, 472 S.E.2d at 641 (cleaned up). The Court of Appeals addressed whether the trial court abused its discretion and deprived Singleton of due process when it revoked his probation without first ordering that he undergo a mental evaluation pursuant to S.C. Code Ann. § 44-23-410. The Court of Appeals concluded that

> Singleton's counsel's report to the court that he suffers from symptoms suggestive of schizophrenia and was under psychiatric care at the time of the hearing, along with his mother's testimony regarding the seriousness and duration of his mental problems and **the statement of the trial judge at the conclusion of the hearing indicating he believes Singleton needs additional treatment for his mental condition reflect that the trial judge had reason to believe that a competency examination was necessary.**

State v. Singleton, 322 S.C. at 483, 472 S.E.2d at 642 (emphasis added).

In this case, Petitioner denied he was guilty of voluntary manslaughter. Counsel knew Petitioner suffered from schizophrenia and bipolar disorder. Petitioner was released from a mental hospital several days before committing the crime. Counsel knew Petitioner had been prescribed medications used to treat severe mental illness, including Depakote. Counsel heard Petitioner say he was supposed to be receiving these medications to treat his mental illness, but had been taken off of them, and had not yet been put back on them. Counsel knew that in connection with his Greenville County charges, Petitioner had been found not competent to stand trial but had subsequently been restored to competency. Although Petitioner had been restored to competency, he was restored *several years before* this plea. As in *Singleton*, the judge recognized Petitioner needed mental health treatment: the court ordered that Petitioner "shall receive all mental health medicine while incarcerated." App. 2, l. 4 – 16, l. 16. These things should have tipped counsel off to move for a competency evaluation. *Burgess*, 356 S.C. at 575–76, 590 S.E.2d at 44; *Colden*, 372 S.C. at 442, 641 S.E.2d at 920; *State v. Singleton*, 322 S.C. at 483, 472 S.E.2d at 642. Petitioner met his burden of proof as to deficient performance. *Strickland*, 466 U.S. at 687.

Petitioner has also shown prejudice: a reasonable probability that he was incompetent at the time of the plea. He suffered from two severe mental illnesses: bipolar disorder and schizophrenia. As he told the plea judge, he was not receiving his needed medications. He had been hospitalized in mental institutions since the age of thirteen. His competency restoration in the Greenville case took place more than three years prior to this plea. *Garren v. State*, 423 S.C. at 12, 813 S.E.2d at 710; *Jeter v. State*, 308 S.C. at 234, 417 S.E.2d at 596.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari to allow full briefing on Issue 2, and consider Petitioner's belated direct appeal.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of July, 2024.