

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

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SEP - 4 2013

S.C. Supreme Court

DEMARCO BELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213570

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 7

CONCLUSION 9

PETITION TO BE RELIEVED AS COUNSEL 10

ISSUE PRESENTED

Did plea counsel's failure to request a mental health examination to determine Petitioner's competency to stand trial constitute ineffective assistance of counsel where Petitioner had a history of psychiatric problems, including drug and alcohol abuse, which necessitated treatment for a psychiatric disorder, where his crimes and other acts showed an inability to understand the consequences and impacts of his interactions with others, and where a mental health examiner determined Petitioner had a "very limited" ability to understand abstract concepts?

STATEMENT

“I’ve been in a resource class or a special class or whatever since – ever since elementary, I’d say probably about the second or third grade . . . and growing up, this is all I’ve been in” App. 80, ll. 2-6. Petitioner Demarco Bell also takes antidepressants, has also been diagnosed with anger management problems, and does not always understand the nature or consequences of his actions. App. 88, ll. 5-8; App. 81, ll. 19-21. His account of his deficiencies appears all the more genuine considering the improbable series of crimes for which he was indicted by a Richland County grand jury on March 21 and June 20, 2007:

1. possession of stolen motor vehicle valued over \$1,000 but less than \$5,000;
2. grand larceny over \$5,000;
3. two counts of grand larceny \$1,000 to \$5,000;
4. five counts of kidnapping;
5. three counts of carjacking;
6. three counts of first degree burglary;
7. three counts of attempted armed robbery;
8. armed robbery; and
9. third degree arson.

App. 109-168. The spree lasted about a month and a half beginning on November 5, 2006. App. 6, ll. 5-11. Among other wrongdoings, Petitioner held multiple victims at gunpoint and stole their vehicles, forced multiple other victims at gunpoint to drive him to their ATMs, and broke into multiple houses and stole guns and other valuables. App. 6-13.

Petitioner gave a sworn statement confessing to the majority of the charges. App. 14, ll. 12-13. He asked his appointed counsel, Josh Kendrick, to arrange for a mental health evaluation, but counsel never followed through. App. 74, ll. 3-5; App. 83, ll. 10.

Mr. Kendrick represented Petitioner at a subsequent plea hearing before the Honorable J. Michelle Childs, and Vanessa Shipley represented the State. App. 1. At the hearing, the judge engaged Petitioner in a routine plea colloquy and found a sufficient factual basis for the plea and

that Petitioner was making the plea knowingly and voluntarily. App. 26, ll. 9-17. As a matter of sentence mitigation, plea counsel explained that Petitioner had been prescribed Ritalin and Adderall for hyperactivity and that at the time of the crimes, he also was using cocaine, marijuana, ecstasy and alcohol almost every day, most likely as a means of self-medication. App. 32, ll. 1-8.

The judge sentenced Petitioner to thirty years imprisonment based on concurrent sentences for the charges: thirty years for the kidnapping charges, fifteen for the burglary charges, twenty for the attempted armed robbery and armed robbery charges, twenty for the carjacking charges, ten years for arson, and five years for each of the larceny charges. App. 42, l. 24 – App. 43, l. 19.

On February 23, 2009, Petitioner filed an application for post-conviction relief arguing ineffective assistance of plea counsel based on, inter alia, counsel's failure to request a determination of Petitioner's competency to stand trial. App. 45-50. The State submitted a return on April 29, 2009. App. 51-54. On February 28, 2011, an initial hearing was held before the Honorable L. Cayce Manning. App. 55. Robert L. Brown represented Petitioner and Brian Petrano represented the State. App. 100.

At the hearing plea counsel Kendrick testified that he met with Petitioner several times and Petitioner wanted to plead guilty. App. 62, ll. 12-24. He denied that Petitioner indicated to him a desire to be evaluated for mental health or for ability to understand the proceedings. App. 67, ll. 2-8. The PCR case was continued for Petitioner to undergo an evaluation by the South Carolina Department of Mental Health. App. 100.

At the evaluation, Petitioner had a "sullen affect" and was barely cooperative. The evaluation confirmed treatment for attention-deficit hyperactivity disorder and his poor follow-up treatments in the past. Supp. App. 4. Prior to his arrest, he would drink up to twelve beers a day and smoke up to ten blunts of marijuana a day. *Id.* He was therefore in withdrawal after being

incarcerated. *Id.* His father was also reportedly a drug abuser. Supp. App. 5. Petitioner also stated to the evaluator that he was violent and cruel towards animals, including kicking and shooting dogs and cats. *Id.* He has never been able to hold down “competitive employment.” *Id.*

During a mental status examination, Petitioner could not even recall three objects after five minutes. *Id.* He could not perform a calculation. Supp. App. 6. “His ability to think abstractly was very limited as evidenced by his interpretation of proverbs and similarities.” *Id.*

A second hearing was held on November 16, 2011 in which Petitioner stated that he would not have pled guilty had he been evaluated for competency before the plea hearing. App. 70; App. 79, ll. 17-22. Petitioner testified plea counsel visited him twice: once to introduce himself and again to advise him to take a plea deal of fifteen to thirty years or face trial and the maximum sentences. App. 74, ll. 3-10. At the first meeting, which lasted only about twenty minutes, plea counsel provided discovery materials, and Petitioner asked about having a mental evaluation. App. 74, l. 21 – App. 75, l. 8. The second meeting was three or four months later and lasted about forty-five minutes. App. 75, l. 14 – Tr. 76, l. 15. The two did not talk extensively about the State’s evidence or trial—“He was just saying that it’s best to take the plea.” App. 77, ll. 5-18. Petitioner testified that had he better understood the impact of a mental health evaluation, he would not have pled but would have sought a trial. App. 85, l. 21 – App. 86, 2. Petitioner’s mother appeared and testified that Petitioner had been prescribed Ritalin and Adderall growing up and that he “never understood right and wrong.” App. 95, ll. 18-19; App. 96, ll. 1-4.

On February 14, 2010, the PCR court issued its order concluding that Petitioner failed to prove ineffective assistance of counsel. App. 100-108. The court stated that evidence showed Petitioner was competent to stand trial:

The mental evaluation conducted at the request of the Applicant revealed opinions indicating that he is criminally responsible and is

capable of conforming. Similarly, the forensic evaluation revealed that the Applicant has not been found to be mentally retarded; and he is competent to stand trial.

App. 106. Finding trial counsel to be more credible than Petitioner, the court concluded plea counsel was not deficient, and Petitioner failed to prove he was prejudiced by plea counsel's performance. App. 106.

ARGUMENT

BECAUSE CONSIDERABLE EVIDENCE DEMONSTRATED PETITIONER'S INABILITY TO RATIONALLY UNDERSTAND HIS CRIMES AND THE PROCEEDINGS AGAINST HIM, THE PCR COURT INCORRECTLY FOUND THAT PLEA COUNSEL WAS NOT DEFICIENT FOR FAILING TO HAVE PETITIONER MENTALLY EVALUATED BEFORE HE PLED GUILTY.

Because considerable evidence demonstrated Petitioner's inability to rationally understand his crimes and the proceedings against him, the PCR court incorrectly found that plea counsel was not deficient for failing to have Petitioner mentally evaluated before he pled guilty. 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 (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 second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant 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, 118, 386 S.E.2d 624, 625 (1989).

An individual's constitutional right to due process of law as provided in the Fourteenth Amendment to the United States Constitution prohibits the conviction of an incompetent defendant. *Medina v. California*, 505 U.S. 437, (1992); *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). Therefore, states must provide procedures adequate to protect this right. *Pate*, 383 U.S. at 378. South Carolina law provides that whenever a judge "has reason to believe that a person on trial before him, charged with the commission of a criminal act ... is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or

assistant in his own defense as a result of lack of mental capacity,” the judge shall order an examination of the individual by the Department of Mental Health. S.C. Code Ann. § 44-23-410.

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).

Here, Petitioner’s plea counsel was deficient for failing to request a mental evaluation based on the indicators of Petitioner’s irrationality. First, the very nature of his crimes strongly suggested Petitioner could not rationally understand right from wrong. Within a month and half, Petitioner committed a string of violent and destructive crimes without exhibiting any remorse and without attempting to disown responsibility, even readily confessing to his crimes. He repeatedly threatened the lives of others at gunpoint and kidnapped and interacted with them for extended periods of time, showing he did understand the emotional stresses felt by his victims. And his repeated carjackings appeared to serve no rational purpose as there was no suggestion he was keeping or selling the vehicles he stole. Secondly, plea counsel was aware of Petitioner’s history of psychiatric difficulties, including his extensive drug and alcohol abuse and his need for psychoactive prescriptions and other treatment.

Plea counsel’s failure to request a competency also prejudiced Petitioner because evidence existed showing he could not have rationally understood the criminal proceedings against him. In addition to the serious indications of mental problems in the crimes themselves and his history of

drug and alcohol abuse and psychiatric treatment, Petitioner's mental health evaluation revealed his inability to understand the proceedings he was facing. He could barely cooperate with his examiner. He reported that he had never been able to hold down a job, showing his inability to understand and follows rules and procedures. Indeed, the examiner specifically noted his "very limited" ability to think abstractly and understand abstract concepts. He could not perform calculations or commit objects to memory. His abuse towards animals further established his failure to rationally understand the capabilities of others to feel emotional and physical pain. Accordingly, rationally understanding the abstract concepts involved in a criminal prosecution was well beyond his mental reach.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
L. CASEY MANNING, CIRCUIT COURT JUDGE

DEMARCO BELL,

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APPELLATE CASE NO. 2012-213570

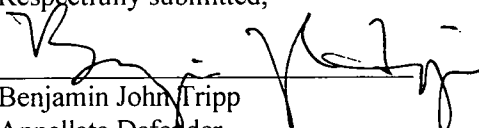
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demarco Bell states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on February 28, 2011. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Demarco Bell.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of August, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
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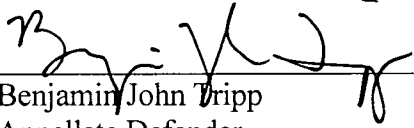
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STATE OF SOUTH CAROLINA,

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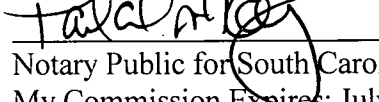
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix and a copy of the supplemental appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Demarco Bell, #328067, at Lee Correctional Institution, 990 Wisacky Hwy. Bishopville, SC 29010, this 30th day of August, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of August, 2013.


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