STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
OCT 28 2013
S.C. Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No.: 2012-213721

Mason Johnson.....Petitioner,

v.

State of South Carolina.....Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
SC Bar # 78871

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTIONS PRESENTED

I. Whether the PCR court was correct in ruling that Petitioner was entitled to a belated review of direct appeal issues through PCR as trial counsel failed to properly perfect an appeal after Petitioner requested one?

II. Whether the issue of trial counsel's failure to develop a mental illness defense in this case is preserved for appellate review; in the alternative, whether trial counsel was ineffective for failing to develop a mental illness defense in this case?

STATEMENT OF THE CASE

The Appellant is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's order of commitment. The Appellant was indicted at the February 2010 term of the York County Grand Jury for grand larceny (2010-GS-46-0950) and burglary, second degree (2010-GS-46-0949). Appellant was represented by Kenneth Snow, Esquire. The State took the case to trial. On May 26, 2010, the Appellant was convicted of both charges. The Honorable Lee S. Alford sentenced the Appellant to concurrent terms of fifteen (15) years imprisonment for burglary and five (5) years imprisonment for grand larceny.

A timely notice of Appeal was filed on the Appellant's behalf. However, the South Carolina Court of Appeals dismissed the appeal for failure to timely provide the Court with proof of service of the Notice of Appeal. The Remittitur was issued on September 24, 2010.

The Appellant filed an Application for Post-Conviction relief on February 14, 2011. The State filed its return on or about August 18, 2011. An evidentiary hearing was convened on August 15, 2012 at the York County Courthouse. The Appellant was represented by Bradford A. Rawlinson, Esquire. The State was represented by J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General. The Honorable John C. Hayes, III, granted Appellant this belated appeal in an order dated August 20, 2012 and filed August 22, 2012.

ARGUMENT

I. The PCR court was correct in ruling that Petitioner was entitled to a belated review of direct appeal issues pursuant to White v. State.

Petitioner's trial counsel admitted that he failed to file an appeal from the denial of the first PCR application, even though Petitioner timely requested that he file an appeal. Respondent agrees that Petitioner should be allowed to petition this Court for belated review of direct appeal issues, since he did not knowingly and voluntarily waive his right to an appeal.

II. The issue of Trial counsel's failure to present a mental illness defense is not preserved. Nonetheless, Trial counsel was not ineffective for not developing a mental illness defense at trial when Petitioner assisted in his own defense, never told trial counsel he had mental health issues and has had much prior experience with the judicial system.

Petitioner claims trial counsel was ineffective for not developing a mental illness defense in this case.

"To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal." State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974).

While Petitioner testified concerning his mental health history during the PCR hearing, the PCR court did not rule upon the issue as no documentation was provided to substantiate Petitioner's claim. Further, no motion to alter or amend pursuant to Rule 59(e), SCRCP was filed to preserve this issue for appeal. Therefore, this Court should not review this issue as it was not ruled upon below nor preserved for appellate review.

Notwithstanding, Petitioner's argument is without merit.

At the PCR hearing, Petitioner testified he spent numerous weeks at Catawba Mental Health Center and was placed on medication because he was, as he claimed, a suicide patient. (App. p. 391 line 3- 21). However, no documentation was offered at the hearing to substantiate this claim. Further, no professional mental evaluation was offered to show Petitioner was mentally incompetent during his trial.

Trial counsel testified he did not recall Petitioner discussing any issues concerning Petitioner's ability to understand the proceedings. (App. p. 385 line 25). Specifically, trial counsel stated, "I don't recall any issues of [Petitioner] understanding what I was saying. I can tell you that my recollection he was very, very lively, very engaged in our conversations. I don't recall him having any issues." (App. p. 385 line 25- p. 386 line 4). Trial counsel then testified he "felt no need whatsoever" to have Petitioner evaluated for mental incompetence. (App. p. 386 line 16). Additionally, trial counsel stated: "I certainly thought that [Petitioner] needed a little more time to process things, but nothing that would make me think that [Petitioner] had any difficulty understanding or appreciating what [Petitioner] was going through the process." (App. p. 386 line 25- p. 387 line3).

On cross-examination, trial counsel reiterated: "I never felt at all that [Petitioner] had any deficiencies which would have impaired [Petitioner's] ability to participate. Quite the opposite. [Petitioner] was very engaging. [Petitioner] wrote me letters- or someone wrote me letters. [Petitioner] was very talkative..." (App. p. 389 lines 7-11). Trial counsel also testified he has had experience with having clients mentally evaluated, but Petitioner presented no reasons for an evaluation. (App. p. 389 lines15-25).

On direct examination of Petitioner, PCR counsel asked, "Do you remember understanding the charges that were filed against you?" (App. p. 392 lines 4-3). To which

Petitioner replied, "The say- I – they say I- they say I broke in a house. They say I broke in a house and I never – I never broke in no house." (App. p. 392 lines 5-7).

During the PCR court's questioning of Petitioner, the following exchange occurred:

> **The Court**: But you knew you were being on trial. You were being tried for the State saying that you did something.
>
> **[Petitioner]**: I said I was going- I said that I was in the courtroom. I was going to court.
>
> **The Court**: For what?
>
> **[Petitioner]**: For a- for a charge of burglary- of burglary.

(App. p. 399 lines 13-20).

Additionally, this colloquy followed:

> **The Court**: But you knew when you came into a courtroom why you were coming into a courtroom, didn't you?
>
> **[Petitioner]** Right.
>
> **The Court**: And you knew that you had a charge pending against you and the judge, or somebody, could determine whether you went to jail or not, did you not?
>
> **[Petitioner]**: Right, and that's why I left it all in the judge's hand, but they – the jury- the jury- the jury found me guilty and gave me fifteen years for something I didn't do.
>
> **The Court**: And you talk to your lawyer about the fact you didn't do it?
>
> **[Petitioner]**: Yes, sir.
>
> **The Court**: And you knew your lawyer was on your side and trying to help you?
>
> **[Petitioner]**: I thought he was.

(App. p. 400 line 11- p. 401 line 1).

"Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea." Lee v. State, 396 S.C. 314, 320, 721 S.E.2d 442, 446 (Ct. App. 2011). "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." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066 (1984). To prevail in a PCR action, the petitioner must show by a preponderance of the evidence that he was incompetent when he stood trial. Jeter v. State, 308 at 232, 417 at 596. To demonstrate prejudice for failing to have a defendant evaluated, medical evidence needs to be presented at the PCR hearing to show the defendant was incompetent to stand trial or to participate in his own defense. See Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997). Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992).

In the case at bar, Trial counsel testified he met with Petitioner and had very lively and interactive conversations with Petitioner concerning the charges in this case. Trial counsel also testified he did not recall Petitioner informing him of any mental deficiencies Petitioner may have had. Trial counsel stated he has prior experience in having clients evaluated for mental incompetence and found no reason whatsoever for Petitioner to be mentally evaluated. Thus,

Trial counsel justly relied on the information, or lack thereof, that Petitioner provided to him in this case in making the decision not to have Petitioner mentally evaluated.

Additionally, it is clear that Petitioner understood the charges against him and participated in his own defense. Through the colloquies with the PCR court, Petitioner understood he was being charged with burglary of a house. He also knew that Trial counsel was assigned to defend his rights. Through Trial counsel's testimony, it is obvious that Petitioner assisted in his own defense. Petitioner was engaging in conversation and wrote letters, or had someone write letters, to Trial counsel about Petitioner's case. Thus, Petitioner had "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." Jeter, supra.

Furthermore, Petitioner provided no documentation of his mental health history to show how Trial Counsel's failure to present mental illness as a defense prejudiced the outcome of his trial. Further, Petitioner provided no professional medical documentation that he was mentally incompetent during his trial pursuant to Jeter and Wolfe, supra. Therefore, Petitioner has failed to show any resulting prejudice in this case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court grant the Petition for Writ of Certiorari only to allow a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Further, it is respectfully submits that this Court deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as the issue of mental illness as a defense was not preserved for appellate review, Trial counsel render effective assistance of counsel in this case, and Petitioner failed to meet his burden of proving resulting prejudice. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
S.C. Bar #78871

BY: _____
J. Rutledge Johnson

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

October 28, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No.: 2012-213721

Mason Johnson..... Petitioner,

v.

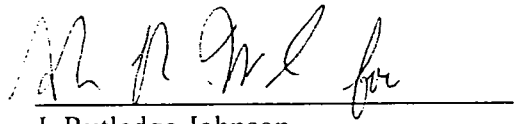
State of South Carolina..... Respondent.

PROOF OF SERVICE

I, J. Rutledge Johnson, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner and Brief of Respondent Pursuant to White V. State by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served, this 28th day of October, 2013.



J. Rutledge Johnson
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803)734-3737

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
OCT 28 2013
S.C. Supreme Court

October 28, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***RE:* Mason Johnson v. State of South Carolina**
2012-213721

Dear Mr. Shearouse:

I am enclosing the original and fourteen (14) copies of the Brief of Respondent and the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Wanda H. Carter, Esquire
Trisha Allen, Victim Services