

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY 21 2014

S.C. Supreme Court

Appeal from Charleston County
The Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2013-000898

BROOKE JEWELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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TABLE OF AUTHORITIES

Cases:

Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

Other Authorities:

Uniform Post-Conviction Relief Act. S.C. Code § 17-27-20(4), 45(c).

QUESTION PRESENTED

I. Whether the lower court properly held the Petitioner failed to carry his burden of proving the results of a drug sensitivity test were newly discovered evidence when the testimony of Dr. Kurtz explaining the test results was cumulative to the testimony presented by plea counsel in mitigation during the guilty plea, and it is unlikely Dr. Kurtz's testimony and the drug sensitivity test results would have resulted in a different sentence for the Petitioner?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Petitioner was indicted at the October 2000 term of the Charleston County Grand Jury for first degree burglary (2000-GS-10-6747) and first degree criminal sexual conduct (2000-GS-10-6748). Andrew Savage, Esquire, represented the Petitioner. On November 15, 2001, the Petitioner pled guilty as indicted and was sentenced by the Honorable Edward Cottingham to confinement for 15 years for burglary and 21 years for criminal sexual conduct. The sentences were to run concurrently.

A timely Notice of Appeal was filed on the Petitioner's behalf and an appeal perfected. Following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the Petitioner's appeal. State v. Jewell, Op. No. 2005-UP-296 (S.C. Ct. App. April 25, 2005). The Petitioner then filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Petitioner subsequently filed a Motion to Dismiss indicating he wish to voluntarily dismiss the Petition for Writ of Certiorari. The motion was granted by Order dated April 21, 2006.

The Petitioner filed his first application for post-conviction relief on May 24, 2006. The Respondent made its Return on July 27, 2006. The Petitioner chose to voluntarily withdraw his PCR application with prejudice. A Consent Order of Dismissal with prejudice was signed by the Honorable Deadra L. Jefferson on October 29, 2009.

The Petitioner subsequently filed a second application for post-conviction relief on June 15, 2011. The Respondent made its Return and Motion to Dismiss on October 24, 2011. A hearing on the Respondent's motion was held on July 23, 2012, at which the Petitioner was represented by Jeremy Thompson, Esquire. The Respondent was represented by Karen Ratigan,

Esquire, of the South Carolina Office of the Attorney General. By Order dated July 31, 2012, the Honorable Stephanie P. McDonald denied the Respondent's Motion to Dismiss as to the issue of newly discovered evidence and granted the Respondent Motion to Dismiss as to all other allegations raised by the Petitioner in his second application.

An evidentiary hearing was held on the Petitioner's newly discovered evidence allegation on December 6, 2012 at the Charleston County Courthouse. The Petitioner was present and represented by Jeremy Thompson, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Office of the Attorney General represented the Respondent. By Order filed Marcy 27, 2013, the Honorable Roger M. Young denied and dismissed the Petitioner's application for post-conviction relief with prejudice.

The Petitioner filed a timely Notice of Appeal and a Petition for Writ of Certiorari to this Court. This Return follows.

ARGUMENT

I. There is probative evidence to support the lower court's finding that the Petitioner failed to carry his burden of proving newly discovered evidence when all of the requirements for newly discovered evidence outlined in Hayden v. State were not met, the testimony of Dr. Kurtz was cumulative to the testimony presented by plea counsel in mitigation, and it is unlikely Dr. Kurtz's testimony and the drug sensitivity test results would have resulted in a different sentence for the Petitioner.

The Petitioner asserts the lower court erred by finding the results of the Petitioner's drug sensitivity testing were not newly discovered evidence warranting a new sentencing proceeding. Specifically, the Petitioner claims the test results and testimony of Dr. David Kurtz were newly discovered evidence which differed from the mitigation testimony presented by the medical professionals during his guilty plea because the drug sensitivity testing results were specific and "unique" to the Petitioner. The Respondent submits the lower court properly found the Petitioner failed to carry his burden of proving the presence of newly discovered evidence. The Respondent submits the newly discovered evidence presented was cumulative to the mitigation evidence presented by counsel during the guilty plea and it is unlikely the alleged newly discovered evidence if presented to the Court would have resulted in a reduced sentence for the Petitioner.

The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Ann. § 17-27-20(4). If the Petitioner contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the Petitioner or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(c). In order for the Petitioner to obtain a new trial based on newly discovered evidence, the party requesting the new trial must show the evidence (1) is such as would probably change the result if a new trial was had; (2) has

been discovered since trial; (3) could not by the exercise of due diligence have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

On January 15, 2001, the Petitioner pled guilty to first degree burglary and first degree criminal sexual conduct. The Petitioner was said to have been taking Paxil for depression at the time of the incident. (App. 72:1-7). During the course of the guilty plea, counsel for the Petitioner presented extensive evidence to the Court in mitigation. The bulk of the mitigation evidence was to show what counsel described as “the impact that these medications had on him [the Petitioner] at the time, and the failure of the medical community to recognize that he was one of those one percenters or two percenters, when they take these SSRI’s, that they have adverse reaction.” (App. 73:3-). Counsel then proceeded to present to the Court the testimony of several expert witnesses from the medical profession.

Counsel began by presenting the testimony of Dr. Jenkins. Dr. Jenkins testified at the plea hearing that after evaluating the Petitioner he concluded he suffered from a mood instability disorder (App. 74:16-24). He testified that because the Petitioner suffered from this mood instability disorder, energizing anti-depressants caused the Petitioner to suffer from periods of depression, irritability, racing thoughts, poor judgment, and impulsivity. (App. 75:11-20). Dr. Jenkins testified further that the Petitioner’s medical professionals had not yet figured out that the Petitioner suffered from a mood swing disorder and prescribed for the Petitioner another anti-depressant- Paxil. (App. 76:24-77:7). He testified the Petitioner also did poorly on Paxil and continued to suffer from racing thoughts, suicidal thoughts, impulsivity, and rage while on Paxil. (App. 77:4-17). He testified the Petitioner was aware of the difference between right and wrong, but could not conform his behavior because of his mental state. (App. 79:1-6).

Counsel also presented the testimony of Dr. Jack Booth. Dr. Booth testified he met with the Petitioner regularly and the Petitioner never denied his guilt and always exhibited extreme remorse for his actions. (App. 83:17-22).

Counsel presented the testimony of Dr. Randy Waid. Dr. Waid testified he reviewed all the work that had been conducted and saw that the Petitioner had a disturbing response to a variety of agents, not just Paxil, that would make him more agitated and manic like. (App. 86:11-19). Dr. Waid testified the whole group of anti-depressants were problematic for the Petitioner. (App. 87:1-5). He also testified he was convinced "at an expert level and a professional level that he [the Petitioner] was, one, driven by the antidepressant, and induced into a manic state." (App. 89: 22-24). Dr. Waid testified further people in manic states are hostile, aggressive and the Petitioner's behavior matched that state. (App. 89:25-90:7). Dr. Waid concluded by telling the Court without the Petitioner being on anti-depressants leading up to the crime it is likely the crime would not have happened. (App. 91:4-6).

Lastly, counsel presented the testimony of Dr. Peter Breggin- a national authority on anti-depressant medications. Dr. Breggin testified side effects from the use of Paxil include mania, agitation, anxiety, nervousness, insomnia, emotional instability, impaired concentration, paranoia, psychosis, and hostility. (App. 94-96). Dr. Breggin also referenced several articles showing SSRI's as the cause for mania and compulsive suicidality and examples of other criminal cases he knew of where the defendant's bizarre behavior was attributed to anti-depressants. (App. 100-101, 104-108).

In support of his claim of newly discovered evidence, the Petitioner presented the testimony of Dr. David Kurtz at his post-conviction relief hearing. After reviewing the Petitioner's drug sensitivity testing results, Dr. Kurtz testified the Petitioner was a poor

metabolizer and had a mutation in the gene for an enzyme called cytochrome 2D6, which is the main enzyme in the liver that metabolizes Paxil. (App. 183:2-13). He testified that when Paxil enters the bloodstream of the Petitioner it is broken down much slower and the peak level that reaches the Petitioner's bloodstream is higher. (App. 183:17-25). Dr. Kurtz testified that because drugs peak in the Petitioner's system at a slightly higher rate, he has an increased likelihood of any side effect from a drug and it is impossible to say whether chronic or acute side effects are increased. (App. 195:9-15). Dr. Kurtz concluded by saying because of the Petitioner's mutation it was more likely that an act of violence was caused by Paxil. (App. 199:7-17).

The Respondent submits the testimony presented by Dr. Kurtz during the Petitioner's evidentiary hearing was cumulative to the testimony presented by counsel in mitigation at the guilty plea. The common thread in the testimony of Dr. Kurtz and the medical experts who testified at the guilty plea is the Petitioner suffered adverse side effects when using anti-depressants which likely caused him to commit the crimes he pled guilty to.

The Petitioner asserts the drug sensitivity test results present mitigation evidence that was "unique" to the Petitioner. However, the testimony presented by the medical professionals during the Petitioner's guilty plea was also unique to the Petitioner. The medical experts reached conclusions specific to the Petitioner after evaluation of the Petitioner or review of his medical records. Dr. Waid specifically testified that his evaluation of the Petitioner indicated the Petitioner was induced into a manic state by the use of the anti-depressants. Like Dr. Kurtz interpretation of the Petitioner's drug sensitivity test results, Dr. Waid's conclusion was also unique to the Petitioner and based on his personal interactions with and evaluations of the Petitioner. The Respondent submits the lower court properly held the drug sensitivity test results

as interpreted by Dr. Kurtz were merely cumulative to the experts presented during the plea proceeding and therefore did not constitute newly discovered evidence.

The Respondent also submits there is probative evidence to support the lower court's ruling that it is unlikely Dr. Kurtz's testimony and the Petitioner's test results would probably not have affected the sentence given by the Court. Dr. Kurtz's conclusion that the Petitioner suffered from side effects caused by anti-depressants at a higher rate than the normal person was simply an expansion upon the testimony of the experts presented by counsel during the guilty plea and did not have added anything new for the Court to consider in mitigation in sentencing.

Also, the record reflects the plea court took into consideration the severity of the nature of the crime committed by the Petitioner and all mitigation evidence presented by counsel during the plea. This is evidenced by the plea judge's statements on the record as follows:

"Now, Mr. Jewell, you raped that young girl. You sodomized her. You tied her up. You waited in wait for her. You planned it. Just about as bad a set of circumstances under a burglary and rape that I can imagine that I've ever seen. I would have under the quote facts of the case have no hesitancy in giving you the absolute maximum provided by law. On the other hand, I know that you have candidly and openly pled guilty...I am persuaded that the Paxil may have been a contributing factor to this unusual behavior on your behalf. I regard that as not an excuse, but perhaps some mitigating circumstances...I have concluded that I'm not going to give you the maximum provided by the law, for those facts and circumstances clearly indicate that I could, and justifiably so. I am not going to give you the minimum, because that sends the wrong message to the good people of Charleston County." (App. 126:12-127:22).

Based on the plea court's obvious attempt to balance the severity of the crime with the mitigation evidence presented by the Petitioner, it is unlikely the Petitioner would have obtained a lesser sentence after presenting cumulative testimony from Dr. Kurtz. The plea judge's comments also indicate it was unlikely the Petitioner would under any mitigating circumstances have received the minimum sentence for first degree criminal sexual conduct.¹ The Respondent

¹ The Petitioner was sentenced to the 15 year minimum sentence for first degree burglary.

submits the Petitioner failed to carry his burden of proving this alleged newly discovered evidence would have affected the Petitioner's sentence. The Respondent submits the Petitioner's has failed to carry his burden of proving the new evidence presented was not cumulative and would have affected the Petitioner's sentencing proceeding. Therefore, the Petitioner has failed to prove the testimony of Dr. Kurtz and the drug sensitivity testing was newly discovered evidence under Hayden.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney General

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Assistant Attorney General

BY:


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ATTORNEYS FOR RESPONDENT

May 21, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Roger M. Young, Circuit Court Judge

BROOKE JEWELL

Petitioner,


v.

STATE OF SOUTH CAROLINA,

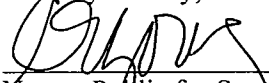
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to the Petition to Writ of Certiorari to The SC Supreme Court has been served upon opposing counsel, Wanda H. Carter, this 21stth day of May 2014.


Anne R. Henley
Legal Assistant

SWORN to before me this
21st day of May, 2014.



Notary Public for South Carolina (L.S.)
My Commission Expires 10/28/2014



ALAN WILSON
ATTORNEY GENERAL

May 21, 2014

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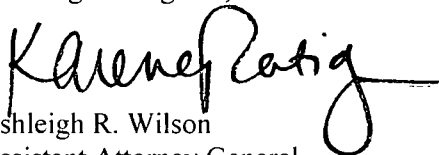
Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Brooke Jewell v. State of South Carolina
Appellate Case No. 2013-000898

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari to the South Carolina Supreme Court in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this Return to Petition for Writ of Certiorari.

With highest regards,


Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Wanda H. Carter, Esquire