

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN - 5 2014

Certiorari to Lexington County

S.C. Supreme Court

R. Lawton McIntosh, Circuit Court Judge

GREGORY MARK CROLLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001416

JOHNSON PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 11

The PCR court erred in finding that Petitioner’s plea counsel provided effective assistance of counsel where plea counsel, who knew that Petitioner was suffering from a mental illness, did not advise Petitioner that he had the option to seek a jury verdict of guilty but mentally ill and did not seek to have Petitioner evaluated to determine if because of a mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

CONCLUSION 15

PETITION TO BE RELIEVED AS COUNSEL 16

ISSUE PRESENTED

Whether the PCR court erred in finding that Petitioner's plea counsel provided effective assistance of counsel where plea counsel, who knew that Petitioner was suffering from a mental illness, did not advise Petitioner that he had the option to seek a jury verdict of guilty but mentally ill and did not seek to have Petitioner evaluated to determine if because of a mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law?

STATEMENT

Indictment

During the August 2009 term of court, the Lexington County Grand Jury indicted Petitioner Gregory Mark Crolley of one count of assault with intent to kill. App. 149-150.

Guilty Plea

On May 25, 2010, Petitioner appeared before the Honorable Clifton Newman to plead guilty to assault with intent to kill. App. 1; 4, ll. 3-7. Petitioner was represented by Richard L. Bolen, and the State was represented by Assistant Solicitor J. Angela Garrick. App. 1.

At the beginning of the plea hearing, the Assistant Solicitor informed Judge Newman that Petitioner had undergone a competency evaluation and was found competent to stand trial in a report dated March 9, 2010. App. 4, ll. 10-16. Petitioner's plea counsel agreed with the competency evaluation and stated that his client understood "his mental facilities [were] intact and he's able to cooperate and help me in his defense and he understands the charges and he understands the consequences that he's exposed to." App. 4, ll. 20-24. Petitioner agreed with plea counsel's statement. App. 4, l. 25 – 5, l. 1. The plea judge found Petitioner competent to stand trial and proceed with the guilty plea. App. 5, ll. 10-12.

The plea judge asked Petitioner what he did that makes him guilty of assault with intent to kill. The following exchange occurred:

Court: And what did you do that makes you guilty?

Petitioner: I drove my car at the trooper, near him.

Court: You were trying to run him over?

Petitioner: That wasn't really in my mind right then to run him over or anything.

Court: What were you trying to do?

Petitioner: I really don't know what I was trying to do because I was shot in the head and I don't remember.

Court: You were shot in the head?

Petitioner: Yes, sir.

Court: At that time or at some previous time?

Petitioner: Right then and there.

App. 6, ll. 6-21.

The Assistant Solicitor provided the factual basis for the plea. The incident occurred on March 16, 2009 after Trooper Ledbetter of the Highway Patrol made a traffic stop on Highway 6 near Swansea in Lexington County. Petitioner's wife was driving the car. The trooper suspected Petitioner's wife of DUI and asked her to get out of the car and while the trooper was trying to conduct a DUI investigation, Petitioner became verbally angry and at one point got out of the car. The trooper had Petitioner get back in the passenger seat of the car. App. 6, l. 25 – 7, l. 11.

The Assistant Solicitor said that after Petitioner got back in the car, he began to drive away and made three attempts to run over the trooper and also came close to running over his wife who was standing outside of the trooper's car. The incident was captured on the trooper's in-car video, which the plea judge viewed. App. 7, l. 12 – 8, l. 4. Trooper Ledbetter did fire his gun into Petitioner's car, and Petitioner was shot. App. 8, ll. 5-7.

Petitioner was also charged with assault with intent to kill his wife, but as a part of the guilty plea, the State decided to drop that charge against Petitioner. App. 8, ll. 9-13.

The Assistant Solicitor acknowledged that Petitioner had some mental health issues which were revealed in the competency evaluation, but she asked the plea judge to send him to prison because she believed Petitioner was a danger to the community. App. 12, ll. 15-21.

Petitioner's plea counsel advised the plea judge that as a result of the gunshot wound to Petitioner's head, Petitioner now had permanent brain damage and had been receiving medical attention the entire time he had been incarcerated awaiting his trial or plea. Plea counsel also advised that even before the incident, Petitioner received Social Security disability for mental health conditions that he suffered. On the night of the incident, Petitioner was also suicidal because that night happened to be two years from the night Petitioner's father died. Plea counsel believed that Petitioner may have been attempting suicide by officer – goading the officer to shoot and kill him. App. 14, l. 1 – 15, l. 21.

Plea counsel argued to the plea judge that Petitioner needed to be placed in a mental health facility where he could get proper treatment for his physical and mental conditions. Plea counsel asked the plea judge to sentence Petitioner to a five-year sentence suspended on a year of time served and five years probation with the appropriate mental health requirements and medical requirements that probation would require. App. 16, l. 2 – 17, l. 17.

At the conclusion of the guilty plea hearing, Judge Newman sentenced Petitioner to the maximum sentence of ten years for assault with intent to kill. App. 20, l. 13 – 21, l. 2. Petitioner did not file a direct appeal.

Application for Post-Conviction Relief and Evidentiary Hearing

Petitioner filed his application for post-conviction relief (“PCR”) on January 25, 2011, alleging in part that his plea counsel was ineffective in failing to enter evidence on Petitioner’s mental health issues. App. 23 – 29. The State filed its Return on or about September 7, 2011. App. 30 – 35.

An evidentiary hearing was held before the Honorable R. Lawton McIntosh on January 31, 2013. App. 36 – 110. Petitioner was represented by John E. Duncan, and the State was represented by Assistant Attorney General John W. Whitmire. App. 36. Dr. Donna M. Schwartz-Watts, Petitioner, and Petitioner’s plea counsel each testified at the evidentiary hearing. App. 42 – 106.

At the beginning of the PCR hearing, Petitioner’s PCR counsel stated the grounds for the PCR petition were that Petitioner “had ineffective assistance of counsel in that there was not a proper examination and investigation of his criminal responsibility at the time of the action and that there - that that fell below the standards of reasonable conduct as an attorney.” App. 40, ll. 11-16.

Dr. Donna Schwartz-Watts, a senior psychiatrist at Bryan Hospital and a forensic psychiatrist in private practice, testified on Petitioner’s behalf. App. 42, ll. 7-15. She evaluated Petitioner and met with him in-person and also viewed Trooper Ledbetter’s in-car video of the incident. App, 42, l. 19 – 43, l. 17.

Dr. Schwartz-Watts testified that Petitioner had an extensive history of mental illness and believed his condition was consistent with schizo-affective disorder, bipolar type. She said this disease manifests itself as a thought disorder and mood disorder and that at times Petitioner is psychotic. She testified that Petitioner can develop paranoid thinking

and racing thoughts. She indicated that medications can control his symptoms. She noted that his mental illness was not caused by lifestyle or anything like that - that this was a medical illness. App. 44, l. 5 – 45, l. 25.

Dr. Schwartz-Watts further testified that Petitioner had been placed in the ICS program at the Department of Corrections ever since 2010 when he was sentenced. She testified that this mental health program is pretty intensive, that Petitioner has his own case manager there, receives his medications every day, and is housed with other mentally ill inmates. App. 46, l. 6 – 47, l. 4.

Dr. Schwartz-Watts testified that prior to the incident which led to Petitioner's assault with intent to kill charge, his history of mental illness was well documented even during periods when he was sober. She also noted that his family members had a history of mental illness, including Petitioner's mother who suffered from anxiety disorder and Petitioner's brother who was bipolar. App. 51, l. 13 – 52, l. 2.

In Dr. Schwartz-Watts' opinion to a reasonable degree of medical certainty, she had no doubt that Petitioner's actions on the night in question were driven at least partially by his mental illness. App. 53, ll. 1-5. She noted that on the trooper's in-car video, you could hear Petitioner say "Shoot me in the God damn chest" when he gets out of his wife's vehicle. After Petitioner was shot, you could also hear Petitioner say "I'm schizophrenic, man." Dr. Schwartz-Watts opined that this was certainly evidence that Petitioner was suicidal. App. 53, ll. 6-13.

Dr. Schwartz-Watts also noted that Petitioner had a history of suicide attempts, even an attempt two days prior to the incident. App. 53, ll. 14-16. She testified that these suicide attempts were further evidence of Petitioner's mental illness. App. 54, ll. 14-16.

Dr. Schwartz-Watts further testified that it was apparent from the trooper's in-car video that Petitioner was unable to perceive the reality of the situation. The trooper was not being disrespectful of Petitioner's wife or mistreating Petitioner's wife, but because of Petitioner's mental illness, his perception of reality was skewed and he actually believed in his mind that the trooper was disrespecting his wife. App. 58, l. 1 – 59, l. 8.

It was Dr. Schwartz-Watts' opinion that it was clear that Petitioner knew what he was doing was wrong on the night of the incident but that he lacked the capacity to conform his conduct at that time. App. 60, ll. 8-11. In her opinion, there was no doubt that Petitioner knew legal right from wrong but had no ability to control his actions that night and lacked the capacity to conform. App. 60, l. 21 – 61, l. 9. She believed that if Petitioner's plea counsel had undertaken an investigation of Petitioner and determined his diagnosis after the incident, that would have assisted Petitioner in his defense as far as a presentation to the trial judge or a jury. App. 61, l. 11 – 62, l. 5.

On cross-examination by the State's attorney, Dr. Schwartz-Watts stated that her conclusion was that Petitioner was guilty but mentally ill because of the schizo-affective disorder. App. 62, l. 24 – 63, l. 1.

Petitioner testified that he had been incarcerated at the ICS program at Kirkland since he was sentenced in 2010. App. 66, ll. 13-20. He testified that he had a lengthy history of mental illness of which he informed his plea counsel. App. 66, l. 23 – 67, l. 8. He testified that despite discussing his mental illness issues with his plea counsel, his plea counsel never informed him about the concept of guilty but mentally ill and he would have wanted to know that information before making a decision on whether to plead guilty or have a jury to decide his fate. App. 70, l. 23 – 71, l. 12. In fact, Petitioner testified that he

would have rather proceeded to trial to have a jury decide whether he was guilty but mentally ill. App. 71, ll. 5 – 20. Petitioner had never heard of the concept of being found guilty but mentally ill until his PCR attorney advised him of that option. App. 71, ll. 21 – 23.

On cross-examination, Petitioner confirmed that he desired a new trial even though he would be facing up to twenty years on the two counts of assault with intent to kill – the count he pled to and the count the State dropped as a part of the plea negotiations - and even though he would be maxing out of prison in 2014. App. 72, l. 11 – 73, l. 9.

Petitioner also testified that he would have at least wanted his plea judge to know about his diagnosis of guilty but mentally ill if his plea counsel had developed that theory. App. 74, ll. 12-15.

At the evidentiary hearing, plea counsel admitted that he had notations in his file on Petitioner's case which indicated that Petitioner was likely suffering from a mental illness and needed to be evaluated to determine whether he was guilty but mentally ill. App. 76, l. 25 – 89, l. 12. Plea counsel's file contained notations that Petitioner received Social Security disability benefits since 1999 for schizo-affective disorder and that Petitioner received medications and treatment from the Department of Mental Health. App. 76, l. 25 – 79, l. 1. Plea counsel had additional notations in his file that Petitioner got "psych meds." App. 82, ll. 6-11. Plea counsel knew these medications were schizophrenic bipolar medications. App. 82, ll. 13-14. There was additional documentation in plea counsel's file that Petitioner suffered from visual hallucinations and felt "disconnected from reality." App. 85, ll. 1 – 25.

Plea counsel admitted it would have been nice to have had Petitioner evaluated for criminal responsibility, but he nevertheless thought it was not necessary and did not believe Dr. Schwartz-Watts' report would have made any difference in sentencing by the plea judge because even if Petitioner had pled guilty but mentally ill, the plea judge could have given Petitioner the same sentence. App. 91, l. 1 – 96, l. 17; 98, l. 10 – 99, l. 13.

However, plea counsel admitted that he nevertheless did not inform Petitioner of the guilty but mentally ill option and agreed that advising Petitioner of this option could have assisted Petitioner in making a fully informed decision on whether to plea or proceed with trial. App. 96, l. 21 – 97, l. 1.

Order of Dismissal

On April 4, 2013, Judge McIntosh issued his Order of Dismissal denying Petitioner's PCR application. App. 139-148. Judge McIntosh found that Petitioner failed to prove his plea counsel was ineffective for failing to pursue a psychiatric evaluation. App. 145. Judge McIntosh further found that plea counsel's strategy in presenting Petitioner's mental health history during the mitigation phase of the plea hearing was reasonable and effective. App. 146. Finally, Judge McIntosh ruled that Petitioner failed to prove prejudice from any alleged ineffective assistance of counsel since a guilty but mentally ill finding does not absolve a criminal defendant from guilt and only pertains to the conditions of confinement (citing S.C. CODE ANN. § 17-24-70 ("If a verdict is returned of 'guilty but mentally ill' the defendant must be sentenced by the trial judge as provided by law for a defendant found guilty")) and State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)). App. 146.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that Petitioner’s plea counsel provided effective assistance of counsel where plea counsel, who knew that Petitioner was suffering from a mental illness, did not advise Petitioner that he had the option to seek a jury verdict of guilty but mentally ill and did not seek to have Petitioner evaluated to determine if because of a mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

Petitioner’s plea counsel was ineffective in failing to advise Petitioner that he had the option to seek a jury verdict of guilty but mentally ill and in failing to have Petitioner evaluated to determine if “because of a mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.” See S.C. CODE ANN. § 17-24-20(A).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel’s representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ ” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he

was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31(1970)). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59. In other words,

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

"The defendant's undisputed testimony that he would not have pled guilty to the

charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Had plea counsel advised Petitioner to have undergone a criminal responsibility examination, Petitioner would have been found to lack the sufficient capacity to conform his conduct to the requirements of the law because of his mental disease or defect. Dr. Schwartz-Watts confirmed at the PCR evidentiary hearing that Petitioner met the statutory definition of guilty but mentally ill. App. 60, l. 8 – 61, l. 9; 62, l. 24 – 63, l. 1; § 17-24-20(A). Plea counsel was certainly aware that Petitioner suffered from a mental illness as indicated by plea counsel's extensive file notes. App. 76, l. 25 – 89, l. 12.

Petitioner's guilty plea was therefore not knowing and voluntary where he was not aware that he could seek a verdict of guilty but mentally ill from a jury or at least plead guilty but mentally ill. See Hammond v. United States, 528 F.2d 15 (4th Cir. 1975) (holding defendant's guilty plea was involuntary where he had been induced to enter plea based upon erroneous sentencing advice).

Petitioner is therefore entitled to post-conviction relief because of his plea counsel's deficient performance in failing to advise Petitioner that he had the option to seek a jury verdict of guilty but mentally ill and in failing to have Petitioner evaluated to determine if because of a mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law. Petitioner confirmed at the evidentiary hearing that he would

have asked for a trial had he been advised about the option to seek a guilty but mentally ill verdict. App. 71, ll. 5 – 20; 72, l. 11 – 73, l. 9.

CONCLUSION

For the reasons set forth herein, Petitioner Gregory Mark Crolley respectfully requests this Court to grant his petition for writ of certiorari and allow full briefing on the issue.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

GREGORY MARK CROLLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001416

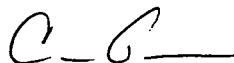
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gregory Mark Crolley states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on January 31, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Gregory Mark Crolley.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of June, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
R. Lawton McIntosh, Circuit Court Judge

GREGORY MARK CROLLEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

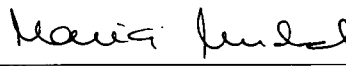
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Gregory Mark Crolley, #271217, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 5th day of June, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of June, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.