

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 26 2014

Certiorari to Florence County
William H. Seals, Jr., Circuit Court Judge

S.C. Supreme Court

WILLIAM L. GAINEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2013-002755

JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP
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 PRESENTED2

STATEMENT3

ARGUMENT6

CONCLUSION9

PETITION TO BE RELIEVED AS COUNSEL.....10

ISSUE PRESENTED

Whether the record supports the PCR court's finding that plea counsel provided effective assistance where Petitioner was charged after suddenly "blacking out" and viciously attacking a former girlfriend with a box-cutter; where Petitioner had a history of head injuries and substance abuse; where the General Sessions court ordered an evaluation of Petitioner's competency to stand trial and his capacity to conform his behavior to the requirements of law; and where plea counsel failed to obtain an examination of Petitioner's capacity to conform his behavior to the requirements of law?

STATEMENT

On November 18, 2010, the Florence County Grand Jury indicted Petitioner William Lee Gainey for attempted murder. App. 115-116. On June 21, 2010, Petitioner attacked his former girlfriend, Jennifer Roscoe, in her car as she was leaving her work around lunchtime. Petitioner approached her after she got in the car and used a box-cutter to slice her neck and stomach repeatedly. App. 44, line 2—App. 45, line 25.

Petitioner turned himself in to the Darlington County Sheriff's Office later that day. App. 47, lines 10-17. He claimed that after she opened the car door to speak to him, she swung at him, and he “blacked out” and did not remember what happened next. App. 1; App. 49, lines 18-21. He thought the two were getting back together, and then he “just lost it” and “went into a daze.” App. 51, lines 10-23. The Court of General Sessions ordered evaluations for Petitioner's competency to stand trial and for criminal responsibility pursuant to South Carolina code sections 44-23-410¹ and 17-24-10,² respectively. App. 1—App. 15.

¹ This section provides:

A) 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 if the person is suspected of having a mental illness or designated by the Department of Disabilities and Special Needs if the person is suspected of having intellectual disability or having a related disability or by both sets of examiners if the person is suspected of having both mental illness and intellectual disability or a related disability.

² This section provides:

On August 29, 2011, the South Carolina Department of mental health evaluated Petitioner for his competency to stand trial. The Department issued its report on August 12, 2011. Under “Type of Evaluation,” the report listed “Competency to Stand Trial.” Under “Referral Information,” the report stated Petitioner “was ordered by the Florence County Court to undergo an evaluation of his competency to stand trial, pursuant so S.C. Code Ann. § 44-23-410.” The report explained that Petitioner did not graduate high school. At age fifteen, he was involved in a moped accident and suffered head injuries and a broken pelvis. In 2000, he suffered further head injuries in another car accident. He admitted he drank alcohol excessively every day since he was sixteen. In 2010 he was diagnosed with mild depression, moderate anxiety, and moderate poor sleep. At that time he also reported “snapping” mentally at times and having auditory hallucinations. He was also diagnosed with intermittent explosive disorder. The report concluded Petitioner was competent to stand trial based on his responses to questions showing an understanding of courtroom personnel and legal procedures. App. 21—App. 26.

On September 19, 2011, Petitioner appeared at a plea hearing before The Honorable Thomas A. Russo. John M. Ervin represented Petitioner and E. L. Clements, III represented the State. App. 27. After a routine plea colloquy, the solicitor for the State informed the court about the results of the mental health examination:

[W]e have a report back signed by Doctor Jeffrey Musick, chief psychologist there at the Department of Mental Health, and also signed by Kimberly Harrison, Ph.D., who is chief psychologist as well at the Department of Mental Health, and they found Mr. Gainey was competent to stand trial and pursuant to McNaughten.

A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

App. 38, line 16—App. 42, line 14; App. 42, line 20—App. 43, line 9. The court admitted the report into evidence. App. 43, lines 28-23. Judge Russo accepted the plea and sentenced Petitioner to seventeen years' incarceration. App. 67, lines 3-10.

On February 15, 2012, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 69—App. 75. The State filed a return on May 4, 2012. App. 76-80. On October 8, 2013, Petitioner attended an evidentiary hearing before The Honorable William H. Seals, Jr. William Runyon represented Petitioner and Joshua Thomas represented the State. App. 81. Petitioner testified about the head trauma resulting from his moped accident. App. 86, lines 4-14. He reiterated that he blacked out at the time of the attack on Roscoe and turned himself in when he came to. App. 87, lines 9-15. He also testified that plea counsel never reviewed the Department's report with him. The two only discussed trial and making a plea starting the day before his hearing was scheduled. App. 91, lines 4-11; App. 92, lines 10-20. Counsel testified that he did not recall seeing the working papers from the Department of Mental Health. App. 103, line 22—App. 104, line 4.

On November 27, 2013, the PCR court issued its order of dismissal. The order stated Petitioner failed to prove ineffective assistance of counsel based on the failure to fully investigate Petitioner's case.

[P]lea counsel had [Petitioner] evaluated for his capacity to conform his conduct to the requirements of the law and for his capacity to assist with his defense. Both evaluations were presented to Judge Russo and made part of the record. (Plea Tr. 16:20-17:25). Accordingly, Judge Russo found [Petitioner] was competent at the time of the assault and at the time of the plea.

App. 112-113.

ARGUMENT

THE RECORD DOES NOT SUPPORT THE PCR COURT'S FINDING THAT PLEA COUNSEL ADEQUATELY INVESTIGATED PETITIONER'S MENTAL HEALTH PROBLEMS BECAUSE COUNSEL FAILED TO OBTAIN AN EVALUATION OF PETITIONER'S CAPACITY TO CONFORM HIS BEHAVIOR TO THE REQUIREMENTS OF LAW.

The record does not support the PCR court's finding that plea counsel adequately investigated petitioner's mental health problems because counsel failed to obtain an evaluation of petitioner's capacity to conform his behavior to the requirements of law. 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).

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes . . . making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). "[A] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *Taylor v. State*, 404 S.C. 350, 363-64, 745 S.E.2d 79, 104 (2013) (quoting *McKnight v. State*, 378 S.C. 33, 46, 661 S.Ed.2d 354, 360 (2008)).

The general duty to investigate includes presenting any mitigating evidence to both the prosecution before trial as well as to the trial court for purposes of sentencing. *Id.* at 524-25 (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing”) (quoting 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982)). The trial judge in return has a duty to examine any mitigating evidence in sentencing a defendant:

If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and give serious consideration to any information material to punishment.

State v. Franklin, 267 S.C. 240, 245-46, 226 S.E.2d 896, 897 (1976).

In this case, the record shows plea counsel failed to reasonably investigate Petitioner’s mental health problems by an evaluation of his capacity to conform his behavior to the requirements of law. The facts and circumstances within counsel’s knowledge would have prompted a reasonable attorney to investigate whether Petitioner had the mental capacity to recognize the illegal and wrongful nature of his actions at the time he attacked Roscoe. Roscoe was a former girlfriend whom Petitioner cared for and hoped to reconcile with. However he suddenly and viciously set out to harm her with a box cutter. Apparently, he did have the ability understand the harmful nature of his actions at that time. Afterwards, he seemed to gain an understanding as he immediately turned himself in to the Darlington County Sheriff’s Office. Further, no evidence in the record shows he contemplated his actions prior to the attack. Instead, Petitioner repeatedly state he blacked out, went into a daze, and did not remember what happened. Accordingly, the lower court appropriately ordered an evaluation of Petitioner’s capacity to conform under section 17-24-10(A).


The PCR court's order of dismissal stated that counsel did have Petitioner evaluated for his capacity to conform his conduct to the requirements of the law and that the evaluation was presented to Judge Russo and made part of the record. This finding is unsupported because, despite the State's representation during the plea, the only report adduced was an evaluation of Petitioner's competence to stand trial. The State adduced a single report signed by Doctors Jeffrey Musick and Kimberly Harrison. The August 12, 2011 report from the Department of Mental Health described the evaluation as one of "Competency to Stand Trial." Under "Referral Information," the report stated Petitioner "was ordered by the Florence County Court to undergo an evaluation of his competency to stand trial, pursuant so S.C. Code Ann. § 44-23-410," which applies when there is "reason to believe that a person . . . charged with the commission of a criminal offense . . . 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." Finally, the report's only conclusion was that Petitioner was competent to stand trial based on his understanding of courtroom personnel and legal procedures.

Nothing else in the record supports a finding that counsel reasonably investigated Petitioner's mental health problems or that he presented such information to the lower court for purposes of an affirmative defense or mitigation. At the PCR hearing Petitioner confirmed that plea counsel never reviewed the report with him. The two only discussed trial and making a plea starting the day before his hearing was scheduled. Counsel also testified that he did not recall seeing the working papers from the Department of Mental Health. Accordingly, the record does not support the PCR court's finding that counsel provided effective assistance.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tipp
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE

WILLIAM L. GAINEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLANT CASE NO. 2013-002755

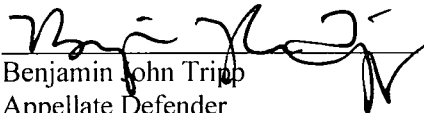
PETITION TO BE RELIEVED AS COUNSEL

Counsel for William L. Gainey 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 October 8, 2013. 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 William L. Gainey.

Respectfully submitted,


Benjamin John Tripp
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of August, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
William H. Seals, Jr., Circuit Court Judge

WILLIAM L. GAINEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

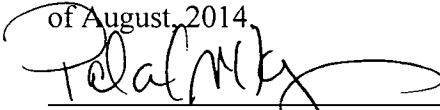
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and William L. Gainey, #347919, at McCormick Correctional Institution, 86 Redemption Way, McCormick, SC 29899, this 26th day of August, 2014.



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of August, 2014.



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