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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Laurens County

Clifton Newman, Circuit Court Judge

BENJAMIN R. NABORS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001797

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether the PCR court erred in allowing petitioner to waive PCR counsel when it did not advise petitioner of the dangers and disadvantages of self-representation?

II. Whether plea counsel was ineffective in failing to request an independent mental health examination to help petitioner better understand his options in deciding whether to plead guilty?

III. Whether petitioner's case should be remanded to see if he was competent to proceed pro se at his PCR hearing?

STATEMENT

On October 19, 2010, petitioner appeared before the Honorable Derham Cole in Laurens County and pled guilty to armed robbery and carjacking. He was sentenced to twenty-five (25) years for armed robbery and to twenty (20) consecutive years for carjacking. That 20-year sentence was suspended during probation for five (5) years. Alex Stalvey, Esquire, was plea counsel. C. Yates Brown, Jr. was the assistant solicitor. (App. p. 150 – p. 181).

Petitioner filed an application for post-conviction relief on March 30, 2011. (App. p. 182 – p. 186). Respondent filed a return dated August 18, 2011. (App. p. 187 – p. 191). On June 5, 2012, a hearing was held before the Honorable Thomas A. Russo to continue the PCR action so that PCR counsel, Caroline Horlbeck, Esquire, could consult with Dr. Martin, a psychiatrist at the Greenville County Detention Center, who had evaluated petitioner prior to his guilty plea. It was her understanding that Dr. Martin would testify that with the extent of drugs petitioner has taken over his lifetime, it would have caused permanent brain damage and mental illness. Under State v. Hartfield, 300 S.C. 469, 388 S.E.2d 802 (1990), this would have allowed petitioner to present a defense of insanity or to attempt to obtain a verdict of guilty but mentally ill. Petitioner maintained that plea counsel did not tell him this was a defense prior to trial or prior to the guilty plea. Judge Russo granted the continuance. (App. p. 195, line 18 – p. 207, line 7). On November 14, 2012, a hearing was held before the Honorable Frank R. Addy, Jr., on a motion to relieve Ms. Horlbeck as PCR counsel. Judge Addy granted that motion. (App. p. 204 – p. 226). On March 13, 2013, the actual PCR hearing was held before the Honorable Clifton B. Newman. Petitioner was present and was represented by Rodney Richey, Esquire. Respondent was represented by J. Rutledge Johnson, Esquire. Mr. Richey was relieved as counsel during the hearing and petitioner proceeded pro se. Alex Stalvey, Esquire, who was plea counsel, testified at the hearing. (App. p. 227 – p. 347). On

April 25, 2013, Judge Newman issued an order denying and dismissing the application for post conviction relief. (App. p. 348 – p. 358).

This petition follows.

ARGUMENT I

The PCR court erred in allowing petitioner to waive PCR counsel when it did not advise petitioner of the dangers and disadvantages of self-representation.

After the discussion about petitioner wanting PCR counsel to be relieved, the court put him under oath and asked him if he wanted to represent himself. The court asked this question two more times and petitioner finally said he would represent himself. (App. p. 237, line 3 – p. 238, line 14). The court then relieved counsel and told petitioner to represent himself. (App. p. 241, lines 3 – 4). Nowhere during this proceeding did the court ever advise petitioner of the dangers and disadvantages of self-representation. His waiver of counsel, therefore, could not have been knowing and intelligent.

Rule 71.1(d), SCRCP, provides:

> If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent....

In Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992), the court wrote:

> In our view, the plain and unambiguous language of Rule 71.1(d) mandates the appointment of counsel for indigent PCR applicants whenever a PCR hearing is held to determine questions of law or fact. Therefore, we hold that when a PCR application is not dismissed *before* a hearing is held, the PCR judge must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant. To establish a valid waiver of the right to counsel, the PCR applicant must be made aware of the right to counsel and the dangers of self-representation. *See. e.g., Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990).

In Prince v. State cited above, the court held that in the absence of a specific inquiry by the judge addressing the disadvantages of a pro se defense, the Supreme Court, in determining whether there was a valid waiver of counsel, will look to the record to determine whether petitioner had sufficient background or was appraised of his rights by some other source. In that case, the Court found that the defendant was not sufficiently aware of the dangers of self-representation to make an

informed decision to proceed pro se, where the defendant was mentally disturbed and exhibited little understanding of criminal proceedings. As a result, the order dismissing Whitehead's PCR application was reversed and the case was remanded for a new PCR hearing.

Because the PCR court failed to advise petitioner of the dangers and disadvantages of self-representation and because of his competency issues, the order of dismissal should be reversed and his case should be remanded for a new PCR hearing.

ARGUMENT II

Plea counsel was ineffective in failing to request an independent mental health examination to help petitioner better understand his options in deciding whether to plead guilty.

Plea counsel testified at the evidentiary hearing that petitioner was evaluated by the Department of Mental Health. Petitioner also had some issues at the Laurens County Detention Center. Counsel said they were evaluating a possible insanity defense so they reviewed petitioner's prior criminal history. There also was a psychiatrist, Dr. Martin, who was treating him when petitioner got moved to the Greenville County Detention Center. Dr. Martin diagnosed petitioner with paranoid schizophrenia, but he was not prepared to offer a specific finding concerning petitioner's criminal responsibility. The doctor would also have testified on the use of methamphetamine and how it interacted with paranoid schizophrenia. They were also going to call into question the credibility of the evaluation of the State's psychiatrist at the Department of Mental Health. (App. p. 311, lines 17 – 25; app. p. 312, line 21 – p. 313, line 17; app. p. 315, lines 20 – 25).

Initially, petitioner was extended a plea offer of twelve (12) years, but he didn't want to take the deal. So they decided on going to trial and it actually started and the next day petitioner said, "I want to get this over with." So, he decided to plead guilty. (App. p. 316, line 5 – p. 319, line 21). From the sentence received, it appears petitioner derived little benefit from pleading guilty.

In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), the Supreme Court of the United States wrote that the "longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant.'" (citations omitted). In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, the Court held that when a defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a State provides access to a

psychiatrist's assistance on this issue, if a defendant cannot afford one. Further, S.C. Code § 44-23-410(C) provides:

> If the person or the person's counsel requests, the court may authorize the person to be examined additionally by a designated examiner of the person's choice. However, the court may prescribe the time and conditions under which the independent examination in conducted.

In State v. Hartfield, 300 S.C. 469, 388 S.E.2d 802 (1990), the Court held that voluntary intoxication or the use of drugs is not a defense to a crime but insanity caused by the use of drugs or intoxication may be a defense where insanity is permanent and destroys a defendant's ability to know right from wrong. In such cases, a defendant is entitled to present a defense of insanity or attempt to obtain a verdict of guilty, but mentally ill.

Plea counsel should have requested an independent mental health examination before petitioner proceeded to trial and before his decision to plead guilty. Given petitioner's mental health issues, a failure by a court to grant an independent examination would have been an abuse of discretion. Counsel failed to render reasonably effective assistance of counsel by not asking for an independent examination. Petitioner was not able to make a voluntary and intelligent choice among alternative courses of action.

ARGUMENT III

Petitioner's case should be remanded to determine if he was competent to proceed pro se at his PCR hearing.

During petitioner's PCR hearing, appointed counsel, Rodney Richey, Esquire, advised the court that petitioner did not want him to represent petitioner. Counsel said petitioner wanted witnesses to be called and he also wanted to have a psychiatrist present for an insanity defense. Petitioner said he had not seen his discovery yet and he had been waiting 4 ½ years. He said he only wanted 7 or 8 witnesses that could give information about his mental health. He said he was not guilty of committing any crimes. He was temporarily insane and he suffered from schizophrenia. He said he had never gotten a Blair hearing. He was highly medicated and was incompetent to enter a guilty plea at the time. (App. p. 230, line 19 – p. 232, line 16).

The State argued that this was petitioner's fourth PCR attorney. He was not able to get along with his other attorneys. If PCR counsel got relieved, the State asked that the case go forward. (App. p. 234, line 8 – p. 235, line 3). The PCR judge asked if petitioner was claiming he was incompetent, could you have a PCR hearing without a determination being made that he was competent to proceed at the hearing? The State responded that there was case law that held when there were fact-intensive issues an applicant did not have to be competent to proceed because the lawyer is doing most of the work. (App. p. 235, lines 4 – 15).

The case the State was referring to is Council v. State, 359 S.C. 120, 597 S.E.2d 782 (2004). The court held that a mentally incompetent prisoner could not seek an indefinite stay for his PCR proceedings. The court noted in that case that the prisoner's incompetency would not inhibit his PCR challenge because none of the issues presented for review require his competency to assist his counsel. Later, in Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009), the court emphasized that Council did also state:

> "if, at a future date, the petitioner regains his competency and discovers that at his original PCR hearing, his incompetency prevented his ability to assist his counsel on a fact-based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding."

382 S.C. at 617, 677 S.E.2d at 601, quoting Council, 359 S.C. at 129, 597 S.E.2d at 787.

In this case, petitioner is not seeking an indefinite stay. Because petitioner was seeking to have counsel relieved, the issue was whether he was competent to represent himself without the assistance of counsel. For that reason, petitioner's case should be remanded to determine if he was competent to proceed pro se at his PCR hearing.

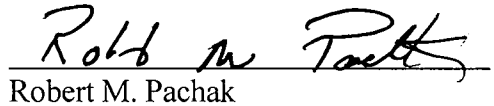
CONCLUSION

As to Argument I, the order dismissing his PCR application should be reversed and the case remanded for a new PCR hearing.

As to Argument II, petitioner's case should be remanded for an independent mental health examination to determine if his guilty plea should be vacated.

As to Argument III, petitioner's case should be remanded to determine if he was competent to proceed pro se at his PCR hearing.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of September, 2014.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of September, 2014.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day of September, 2014.

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