STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to York County

G. Edward Welmaker, Circuit Court Judge

CURTIS RANDALL SWEATT, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002629

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Was plea counsel ineffective in failing to present evidence in mitigation of Petitioner Sweatt's mental health problems at the sentencing hearing following his convictions of involuntary manslaughter and infliction of great bodily injury upon a child?

STATEMENT

Curtis Sweatt Jr., was originally indicted for homicide by child abuse (2010-GS-01685) by York County Grand Jury, but this charge was dismissed as part of his plea agreement with the state. App. 3, ll. 22 – App. 4, ll. 2. On May 20, 2011, Sweatt appeared before the Honorable Paul Burch and entered guilty pleas to the charges of involuntary manslaughter and the infliction of great bodily injury to a child. Sweatt waived presentment to the grand jury on these charges. App. 3, ll. 1 – 21. Sweatt was represented by Leland Greeley, and the state was represented by Willie Thompson. App. 1. Judge Burch sentenced Petitioner Sweatt on the infliction of great bodily injury to a child charge to twenty years suspended to the service of sixteen years and four years probation. Judge Burch sentenced him to five years on the involuntary manslaughter charge to run concurrently with the twenty years. App. 212; App. 56, ll. 1 – 15.

On March 16, 2012, Sweatt filed an application for post-conviction relief (PCR). The state filed a return on July 6, 2012. An evidentiary hearing was held on August 15, 2013 before the Honorable G. Edward Welmaker. Sweatt was represented by Tricia A. Blanchette, and the state was represented by J. Rutledge Johnson. On October 3, 2013, Judge Welmaker issued an order denying Sweatt's PCR application and dismissing it with prejudice. App. 211 – App. 225. Sweatt's PCR attorney filed a motion for rehearing pursuant to Rule 59(a), SCRCP, and/or a motion to alter or amend pursuant to Rule 59(e), SCRCP on October 30, 2013. App. 226-228. Judge Welmaker issued an order on November 23, 2013, denying Sweatt's motions pursuant to Rule 59, SCRCP. Sweatt's attorney filed a notice of appeal. A petition pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) was filed by appellate counsel on July 17, 2014. This Court issued an Order on October 9, 2014 directing the parties to submit a second petition addressing the question provided by this Court. This petition follows.

ARGUMENT

Plea counsel was ineffective in failing to present evidence in mitigation of Petitioner Sweatt's mental health problems at the sentencing hearing following his convictions of involuntary manslaughter and infliction of great bodily injury upon a child.

Curtis Sweatt,Jr., his fiancée Danielle Tucker, their toddler son, and their three month old infant daughter lived together. Danielle worked the early shift at her job and returned home about five. Sweatt worked the afternoon shift leaving after lunch so he kept the two children in the mornings. App. 10, ll. 1 – 15.

On January 7, 2010, Sweatt woke up and fixed breakfast for his son. He told the police that he then he checked on the baby girl and found she had a messy diaper. He gave her a bath. While he was drying her as he held her in his arms, as he pulled the towel out, her neck snapped back. Then her eyes began to roll back and she developed problems breathing. He promptly called 911. App. 10, ll. 16 – App. 20.

The doctors at the hospital determined that the infant had severe head injuries, and that it was unlikely she would live. The doctors also decided it was likely that the injuries were non-accidental so they called law enforcement. The infant girl died the next morning on January 8, 2010. The autopsy determined that a violent intervening act such as the acceleration/deceleration that occurred in a car accident caused the injuries. The time of the injuries was within hours of the time Sweatt called 911. App. 11, ll. 1 – 10; App. 12, ll. 4 – 20.

At his guilty plea, Sweatt's attorney stated that Sweatt could plead only to charges that did not require intentional harm because Sweatt never intended to harm his daughter. App. 13, ll. 1 – 6; App. 18, ll. 6 – 23. In mitigation, Sweatt's attorney told the court that Sweatt's story was that after the infant's bath, he took her to the nursery to dress her. The child slipped from his hands, and hit

her head on the wooden changing table. She screamed so he then held her close to him and rocked her back and forth. He heard a pop sound come from her and then her eyes rolled back. App. 15, ll. 16 – App. 16, ll. 25.

The solicitor told the plea court that there were no prior injuries to this child nor to the older boy. There was only this one incident. App. 50, ll. 18 – App. 52, ll. 4.

At the PCR hearing, Sweatt's PCR counsel advised the court that Petitioner was asking for the specific relief of resentencing or belated motion to reconsider the sentence. App. 78, ll. 2 – 19.

At his PCR hearing, Sweatt testified that his plea counsel was ineffective because things were not done the way they should have been during his guilty plea. He wanted a resentencing hearing so the sentencing judge could hear all of the facts, or a new trial. He was indicted on the charge of homicide by child abuse but pled guilty to involuntary manslaughter and infliction of great bodily injury to a child. App. 112, ll. 8 – App. 113, ll. 1; App. 77, ll. 1 – 16.

Sweatt had no intent to hurt his baby and testified that it was an accident. App. 116, ll. 1 – 25. Sweatt had been treated for mental health problems but his attorney did not present any of that to the plea court in mitigation. Sweatt's claim was that his attorney should have presented this information. App. 122, ll. 16 – App. 123, ll. 25.

Sweatt explained that he had been seeing Dr. Eric Johnson for mental health issues prior to this incident and had been on medication for severe anxiety and major depressive episodes. He stopped the medication because he thought it was not helping, and to see if he felt better. App. 118, ll. 1 – App. 123, ll. 7.

Sweatt also saw Dr. Gaye Allan-Cooke in preparation for his PCR hearing. App. 81, ll. 1 – 25. She diagnosed him as suffering from post-traumatic stress disorder. Sweatt believed that was exactly what he was experiencing. His attorney made no efforts to talk with Dr. Allan-Cooke before

his plea. App. 123, ll. 8 – 25. His plea counsel told him that he was likely to get a lenient sentence because there was no intent in the two charges he was pleading to, and that he was a good qualifier for probation. App.124, ll. 8 – App. 126, ll. 9.

In Sweatt's opinion, if his plea counsel had objected to some of the things the prosecutor said related to the autopsy such as the child suffered pain, and if his attorney had presented the Sweatt's mental health issues, the judge would have given him a lighter sentence. App. 141, ll. 1 – App. 143, ll. 11. The prosecutor went into great detail regarding the injuries of the child such as her brain was like mush with tremendous swelling at the brain stem which caused the infant to have trouble breathing and caused her suffering. App. 46, ll. 4 – App. 49, ll. 9.

Dr. Gaye Allan-Cooke testified on Sweatt's behalf at the PCR hearing. She was qualified as an expert specializing in trauma and abuse. Dr. Allan-Cooke testified that she saw Sweatt in preparation for his PCR hearing. App. 78, ll. 21 – App. 81, ll. 16. In her opinion, Sweatt suffered from anxiety, and was overzealous. His memory regarding the death of his child was sketchy. She would diagnose him as suffering from PTSD based on what he had been through. She described him as extremely saddened and remorseful concerning the death of his child. App. 82, ll. 24 – App. 84, ll. 23.

Dr. Eric Johnson also testified at the PCR hearing. H had e started treating Sweatt in 2005. At first, he diagnosed him as having anxiety, depression, and focus problems. By 2009, Dr. Johnson diagnosed Sweatt as having a form of bi-polar disorder. In November 2009, shortly before this incident in January 2010, Sweatt was doing well and wanted to reduce his medication which Dr. Johnson thought was okay. Dr. Johnson did not advise Sweatt to stop his medicine. He would have been willing to come to Sweatt's guilty plea to explain his treatment of Sweatt, but Sweatt's attorney never contacted him. App. 154, ll. 11 – App. 158, ll. 25.

Danielle Tucker, Sweatt's fiancée and the mother of the deceased child and also their young son, testified at the PCR hearing stating that she was there in support of Sweatt. She presented a letter from the baby's pediatrician who wrote that he had seen the baby several times since her birth and saw nothing of concern. He wrote that Sweatt and Ms. Tucker were caring parents. App. 87, ll. 2 – App. 92, ll. 19.

Both Sweatt's mother and father testified at his PCR hearing. His mother, Lynn Sweatt, was a registered nurse who had worked as a delivery nurse and as a grief counselor for parents who had lost a child. App. 96, ll. 20 – App. 97, ll. 25. She testified that Sweatt was a good father, and she believed this tragic incident was the result of something accidental. App. 102, ll. 4 – App. 103, ll. 4. The plea sentence was not what they expected because plea counsel told them Sweatt would probably get the five years on the involuntary manslaughter because counsel did not think the court would pursue the charge of inflicting great bodily injury . App. 101, ll. 3 – 21; App. 102, ll. 4 – App. 104, ll. 7.

Randy Sweatt, Petitioner's father, testified that plea counsel did not properly represent his son. Plea counsel advised him that his son would be out of prison in three years based on the manslaughter charge. Mr. Sweatt said his son was always very gentle with the baby and there was no way he would ever believe that his son hurt his baby girl. App. 106, ll. 19 – App. 111, ll. 14.

Plea counsel testified that if Sweatt had gone to trial, it would have been on the charge of homicide by child abuse, and he believed Sweatt would have received a life sentence. App. 160, ll. 14 – App. 164, ll. 24. Counsel negotiated with the solicitor for charges that did not have an intent element because counsel did not believe there was intent by Sweatt. App. 166, ll. 7 – App. 167, ll. 18.

Counsel admitted that he had family members speak in mitigation at the plea but he did not present any medical mitigation. He did not speak with any medical person on behalf of Sweatt. Counsel knew Sweatt had been taking medications for anxiety and depression but did not think that was relevant for sentencing or mitigation. He did not think he could get a doctor to come in and say Sweatt did not intend to harm his child. App. 168, ll. 3 – App. 170, ll. 25.

The PCR judge held that he found plea counsel's testimony to be credible but found testimony of Sweatt to not be credible. App. 220. The PCR court found that plea counsel was competent and diligent in his representation and counsel's advice that Sweatt accept the plea offer was a reasonable professional decision. Therefore, Sweatt could show no prejudice. App. 221. The Court found that Sweatt did not meet his burden of proof that plea counsel was ineffective for not investigating his mental health history because it was not relevant to the defense theory of accident; Sweat stopped taking his medication on his own, and Sweatt could not show the result would have been different if Dr. Johnson had been called. App. 221-222.

The PCR order provided that plea counsel's decision not to call an expert in mitigation met the norm of prevailing professional judgment. App. 222. In sum, the PCR judge found that plea counsel's representation did not fall below the reasonable professional standard. Sweatt had not proved that the outcome of the proceeding would have been different but for counsel's errors. App. 224.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of

competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

The American Bar Association (ABA) has provided guidelines for a defense counsel's performance regarding sentencing. It is:

> Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to defense counsel, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is not presentence report or if it is not disclosed, defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case with consent of the accused, be prepared to suggest a program of rehabilitation.

American Bar Association Guidelines For the Appointment and Performance of Defense Counsel in Death Penalty Cases, reprinted in 31 Hofstra L.Rev 913, 1015 (2003).

The South Carolina Supreme Court followed the ABA standards regarding the performance of defense counsel as it related to investigation in Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). There, the Supreme Court ruled that defense counsel's performance was deficient and prejudicial to the defendant because counsel failed to make an independent investigation of the facts

and circumstances of the case. Counsel failed to discuss gunshot residue analysis with the state's expert witness which hindered counsel's ability to prepare effective cross examination. The Court held that a criminal defense attorney has a duty to investigate, and at a minimum to interview potential witnesses. The investigation is limited to reasonable investigation.

In Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), the Supreme Court reversed the PCR court's denial of Von Dohlen's PCR application finding that trial counsel was ineffective during the penalty phase of this capital murder trial. Counsel performed deficiently by failing to investigate and present evidence during the penalty phase that the defendant had been suffering from the major mental illness of severe chronic depression at the time of the murder. Although counsel had one psychiatrist testify that the defendant suffered from adjustment reaction disorder and pathological intoxication related to the murder of the defendant's brother two weeks before the murder incident involving the defendant, counsel failed to obtain other crucial medical records which would have allowed a more accurate diagnosis and explanation of the defendant's mental condition. The testifying psychiatrist testified at the PCR hearing that if he had been provided with the additional medical records before trial, he would have diagnosed the defendant as suffering from major depressive episodes with severe symptoms of anxiety and possible prepsychotic features at the time of the murder.

In State v. Franklin, the Supreme Court held that "if justice is to be done, a sentencing judge should know all of the material facts." The Court continued to rule that fair administration of justice required that the judge should impose sentences with "insight an understanding." The judge should listen and consider any information relevant to punishment.

Sweatt's plea counsel was ineffective for not presenting evidence of Sweatt's mental health history of problems. Counsel knew Sweatt had been on medication for mental health problems. The

least he could have done, and the norm for professionalism of legal representation would have been to at least talk to Sweatt's previous mental health provider who had prescribed the medications. He could have obtained the psychiatric medical records to present a more complete description of Sweatt. This was prejudicial because there was a reasonable probability that the plea judge would have been more lenient than the twenty years for inflicting great bodily harm to a child.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of November, 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, and Mr. Curtis R. Sweatt #346121, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 7th day of November, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of November, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.