

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to York County

John C. Hayes, III, Circuit Court Judge

S.C. Supreme Court

PRINCETON THROWER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001005

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel's performance was deficient for failing to obtain an independent evaluation of Petitioner's competency to stand trial where Petitioner suffered severe head trauma in a car wreck at the time of his arrest and where plea counsel relied on an evaluation ordered by the lower court because he believed that the matter was to be raised, investigated, and considered solely by the trial court.

STATEMENT OF THE CASE

On January 19, 2012, the York County Grand Jury indicted Petitioner Princeton Alex Thrower for trafficking cocaine base more than ten grams but less than twenty-eight. App. 94-95. On September 10, 2012, Petitioner appeared at a plea hearing before The Honorable Edward W. Miller. Hemphill Pride represented Petitioner and E.B. Springs represented the State. App. 1. The State alleged that early on the morning of July 9, 2011, two local law enforcement officers observed from their vehicle Petitioner cross the center line of the highway in his vehicle. The officers signaled him to pull over. A high speed chase ensued, at the end of which Petitioner wrecked and flipped his vehicle. The officers approached Petitioner still inside and found in his hand a bag of crack cocaine. App. 9, line 5—App. 10, line 13.

During a routine plea colloquy, Petitioner pled guilty. App. 6, line 15—App. 9, line 2. However, Petitioner was unable to agree with the State's recitation of facts because he was unable to remember the incident. App. 11, lines 10-18. Nevertheless, the plea judge accepted the plea and found a substantial factual basis existed for it. App. 12, lines 7-11. The judge then sentenced Petitioner to twenty-seven years' incarceration. App. 18, lines 8-12.

On March 20, 2013, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. App. 20-26. The State filed a return on January 16, 2014. App. 27-31. On April 14, 2014, Petitioner appeared at an evidentiary hearing before The Honorable John C. Hayes, III. W. Michael Hemlepp, Jr. represented Petitioner and J. Rutledge Johnson represented the State. App. 32.

Sheila Thrower, Petitioner's mother, appeared and testified that after Petitioner's wreck, he was airlifted to a hospital and was "out of it" for two weeks. His injuries were so severe that he needed plastic surgery for his face and leg. App. 38, line 22—App. 39, line 3. Petitioner then

testified about his recollection of the plea hearing. Petitioner testified that he could not say why he went to court and barely remembered being in the hospital. App. 56, lines 8-13; App. 61, lines 17-19. He understood that he had to repeatedly ask his mother about the hearing because he apparently did not know what was happening. App. 60, lines 1-4.

Plea counsel gave testimony supporting Petitioner's claims: ". . . I also attempted to talk with him about the facts in the case and I never did get a clear conversation. . . . He would always tell me, 'I don't remember anything about the automobile accident.'" App. 68, line 24—App. 69, line 3. He later stated that "the kind of accident [Petitioner] had, he is lucky to be here. . . . There is no question about the severity, the brain damage and the jaw" App. 81, lines 4-8. He testified that the plea hearing lasted an unusually long time because of difficulties communicating with Petitioner. App. 70, line 25—App. 71, line 6.

On cross-examination, plea counsel answered questions about a competency evaluation report from the Department of Mental Health. App. 72, line 10—App. 83, line 14. The report, issued in response to an order of the York County Court of General Sessions, presented findings for purposes of a determination of Petitioner's competency to stand trial. Supp. App. 2. The report stated that Petitioner was examined on January 8, 2012, on March 6, 2012, and for fifteen days after admission on June 20, 2012. During these evaluations Petitioner repeatedly failed simple calculation and information recall exercises. Supp. App. 3-5. The report's conclusion restated Petitioner's very poor performance in competency assessments. However, it also stated the examiners believed Petitioner was "faking" his mental condition, and they had not seen a sufficient basis on which to determine Petitioner was incompetent to stand trial. Supp. App. 7-8. Plea counsel admitted he did not consider getting another evaluation. App. 76, lines 5-9. He believed that the matter was to be raised, investigated, and considered solely by the trial court using the Department

of Mental Health. App. 77, lines 3-9. Thus, he did not move for a hearing specifically to determine Petitioner's competency. App. 81, lines 8-13.

On April 15, 2014, the PCR judge filed an order of dismissal. App. 88—App. 93. Specifically, the order cited *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) and stated that Petitioner failed to establish ineffective assistance because he did not adduce an independent medical evaluation indicating that Petitioner was incompetent at the time of his plea.

ARGUMENT

THE RECORD SHOWS PLEA COUNSEL'S FAILURE TO INVESTIGATE PETITIONER'S COMPETENCY WAS DEFICIENT AND CREATED A PRESUMPTION OF PREJUDICE; THEREFORE, THE PCR COURT'S DISMISSAL CONSTITUTES REVERSIBLE ERROR.

The record shows Plea counsel's failure to investigate petitioner's competency was deficient and created a presumption of prejudice; therefore, the pcr court's dismissal constitutes reversible error. 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). "[P]rejudice is presumed when the defendant is completely denied counsel at a critical stage of his trial." *Graves v. Padula*, 773 F. Supp. 2d 611, 619 (D.S.C. 2010) (quoting *Glover v. Miro*, 262 F.3d 268, 275 (4th Cir. 2001)).

"[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). In determining whether a criminal defense counsel sufficiently investigated the underlying facts, a court must identify an affirmative decision not to investigate further and assess the reasonableness of the decision under the facts and circumstances within counsel's knowledge:

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.”

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)).

In this case, the record shows Plea counsel's failure to independently investigate petitioner's competency was deficient. Plea counsel was aware that Petitioner was involved in a high speed car chase in which his vehicle flipped and Petitioner suffered atypically severe traumatic injuries, including to his head. Plea counsel admitted he was never able to clearly converse with Petitioner about the incident because Petitioner could not remember it. Indeed, during the plea hearing itself, Petitioner was unable to agree with the State's recitation of facts because he was unable to remember the incident; he had so much trouble communicating that the hearing lasted much longer than usual; and he had to repeatedly ask his mother about the hearing because he did not know what was happening. Thus, under these circumstances that were plainly manifested, plea counsel had a duty to undertake an investigation of Petitioner's competency.

Plea counsel could have only refrained from seeking an independent competency evaluation consistent with the mandates of the Sixth Amendment by making an affirmative decision not to investigate further that was reasonable under the circumstances. However, the record shows plea counsel's decision not to further investigate was unreasonable. He admitted he did not consider obtaining an independent evaluation solely because he believed that the matter was to be raised, investigated, and considered solely by the trial court and the Department of Mental Health. Such a

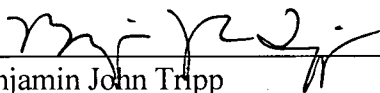
belief was legally unsupported, professionally unreasonable, and resulted in a complete lack of adversarial testing during the competency phase of the proceedings against Petitioner. Thus, regardless of the findings of the investigation conducted by the lower court, plea counsel was required to exercise independent judgment as an adversarial advocate for his client. A fortiori, the report of the evaluation by the Department of Mental Health confirming Petitioner's inability to perform simple calculations and information recall exercises strongly counseled for further investigation.

Furthermore, the PCR court's order of dismissal was based on an error of law insofar as it concluded that Petitioner failed to establish ineffective assistance because he did not adduce an independent medical evaluation indicating that he was incompetent. Plea counsel's mistaken belief, which resulted in a complete lack of an adversarial advocate during the competency phase of the proceedings, created a presumption of prejudice. Accordingly, Petitioner was not required to show actual prejudice, and the PCR court should have concluded Petitioner was denied effective assistance.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court reverse the decision of the PCR court and remand for a new criminal trial.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
JOHN C. HAYES, III, CIRCUIT COURT JUDGE

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APPELLATE CASE NO. 2014-001005

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Princeton Thrower states:

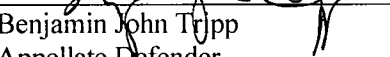
1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 14, 2014. 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 Princeton Thrower.

Respectfully submitted,


Benjamin John Topp
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of December, 2014

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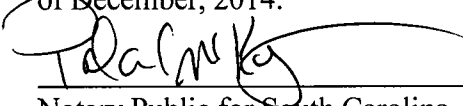
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on J. Rutledge Johnson, Esquire, and Princeton Thrower, #300701, at Broad River Correctional Institution, this 1st day of December, 2014.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of December, 2014.



Notary Public for South Carolina

(L.S.)

My Commission Expires: July 24, 2022.