

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County
Kristi Lea Harrington, Circuit Court Judge

S.C. Supreme Court

WILLIAM C. DOAR, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001653

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in denying the Motion to Substitute Counsel where PCR counsel stated that substitution was in his “client’s best interests,” the PCR hearing record reveals that PCR counsel was not prepared, and the State did not object to the substitution?

STATEMENT OF THE CASE

On March 7, 2011, Petitioner was indicted by the Charleston County grand jury for two counts of criminal sexual conduct with a minor, second degree.¹ App. 72 – 79.

On November 28, 2011, Petitioner appeared before the Honorable Roger M. Young, Sr. and pled guilty to the above offenses. Petitioner was represented by Rodney Davis, and the State was represented by assistant solicitor Debbie Herring-Lash. App. 1. Judge Young accepted Petitioner's guilty plea.² App. 6, ll. 23-24. Petitioner was sentenced in accordance with the terms of the negotiated plea to fifteen years incarceration, suspended upon the service of seven years, followed by three years of probation, which will terminate upon successful completion of a sex offender treatment program. App. 4, l. 20 – 5, l. 3; App. 9, l. 20 – 10, l. 3.

On November 19, 2012, Petitioner filed an application for post-conviction relief. App. 12 – 19. The State filed its Return on April 16, 2013. App. 20 – 24. On January 15, 2014, an evidentiary hearing was held before the Honorable Kristi L. Harrington. Petitioner was represented by Joseph C. Good, III and the State was represented by Assistant Attorney General Ashleigh Wilson. App. 25. The only witnesses at the hearing were Petitioner and plea counsel, Rodney Davis. No exhibits were introduced. App. 26.

¹ Petitioner was indicted for five counts of criminal sexual conduct with a minor, second degree, and two counts of contributing to the delinquency of a minor. The remaining counts were *nolle prossed*, though there was nothing in the record at the guilty plea hearing indicating that the *nolle prosses* were a part of the plea negotiations. App. 31, l. 1 – 32, l. 6; App. 53, l. 25 – 54, l. 7.

² The Court accepted Petitioner's plea prior to the State setting forth the factual basis. App. 2 – 12. The State indicated that Petitioner assaulted his younger, twin sisters, one by digital penetration and one by penile penetration. App. 7, ll. 1-21. However the two indictments under which he pled guilty were 2011GS1001605 alleging digital penetration and 2011GS1001611 alleging cunnilingus. App. 72 – 79. Neither the solicitor nor plea counsel raised this error to the plea court and this error was not raised or addressed at the PCR hearing.

On March 3, 2014, Judge Harrington issued an Order of Dismissal, denying Petitioner's application for post-conviction relief. App. 61 – 71.

This Petition for Writ of Certiorari follows.

ARGUMENT

The PCR court erred in denying the Motion to Substitute Counsel where PCR counsel stated that substitution was in his “client’s best interests,” the PCR hearing record reveals that PCR counsel was not prepared, and the State did not object to the substitution.

Relevant Facts

At the beginning of the hearing, PCR counsel made a motion to substitute counsel, stating that he had discussed some questions that he had about Petitioner’s case with Charles Brooks and that Mr. Brooks suggested that he “let [Brooks] jump in and take the reins on [this] one.” App. 27, ll. 15-22. Though Mr. Brooks was not present at the January 15, 2014 hearing, PCR counsel indicated that Mr. Brooks would be handling other PCR hearings soon. App. 27, l. 23 – 28, l. 2. PCR counsel stated that substitution of counsel would be in his client’s best interest and that he could get a consent order of substitution signed and to the court immediately. App. 28, l. 5-8. The State did not take a position or have any objection to the request. App. 28, l. 10-11.

The court inquired as to the procedural history of the case, including any prior continuances. The case was from 2012 but had only been set once before because the transcript had not been received. App. 28, ll. 12-23. The court then asked PCR counsel at what point he realized that he would be “unable to handle this case and [that it would] be better for Mr. Brooks [to handle it].” App. 28, l. 24 – 29, l. 1. PCR counsel responded that he was “fine to keep going with it,” to which the court immediately responded “Well, then let’s go.” App. 29, ll. 4-7. The court then told Petitioner that the court was going forward with his PCR application, PCR counsel “says he is ready to proceed.” She also asked Petitioner if he needed any more time to meet with his attorney. App. 29, ll. 8-11. Petitioner responded that PCR counsel has said “that he feels he’s ready a couple of times.” App. 29, ll. 12-13. In the Order of Dismissal, the PCR court stated that it “denied counsel’s request [for substitution] and proceeded with the hearing based on counsel’s

representation that he was prepared to go forward with the Applicant's evidentiary hearing." App. 69.

The remainder of the PCR hearing focused on the allegations raised in Petitioner's PCR application, including the failure to procure mental health records of Petitioner and the victims and failure to obtain a mental health evaluation on Petitioner. While they discussed whether the application actually contained an allegation related to the failure to obtain a mental health evaluation, the PCR court allowed the presentation of evidence and argument on that allegation and made findings and conclusions related to it. App. 32, l. 7 – 33, l. 17; App. 62; App. 68 – 69.

Petitioner testified that he has been undergoing mental health treatment since 2004 and was diagnosed with bipolar II disorder, depression, posttraumatic stress disorder, and obsessive compulsive disorder. App. 36, l. 13 – 37, l. 2. He also stated that his doctors told him that weight loss would help balance the chemicals in his brain – at the time of the plea he weighed approximately 480 pounds, over two-hundred pounds more than his weight at the PCR hearing. App. 37, ll. 3-14. Petitioner testified that despite telling his attorney about his mental health history and that of the victims, no mental health records were ever obtained. App. 37, ll. 15-24; App. 40, l. 18 – 41, l. 1. He also asked plea counsel to obtain a mental health evaluation, which was never done. App. 41, ll. 2-7.

Plea counsel, Rodney Davis, confirmed that he and Petitioner had several discussions regarding Petitioner's mental health history, though he did not recall discussions of any mental health records pertaining to the victims. App. 45, l. 17 – 46, l. 2; App. 48, l. 23 – 49, l. 4; App. 55, ll. 3-9. Plea counsel had no record of whether any mental health records of Petitioner were actually obtained by his investigator. App. 46, ll. 3-6. His notes reflected consideration of mental health evaluations by both a private doctor and a doctor at MUSC, which he discussed with Petitioner on

August 17, 2011 but believed would go to mitigation more so than competence. App. 50, l. 17 – 51, l. 6; App. 51, ll. 12-15; App. 55, ll. 14-24. He decided not to pursue either evaluation once the solicitor indicated that an evaluation would not change the plea offer. App. 46, l. 6 – 47, l. 6; App. 66, ll. 5-12.

Notably, PCR counsel did not present any mental health records to the PCR court, obtain a mental health evaluation, or call any mental health professionals to testify on Petitioner's behalf.

In the March 3, 2014 Order of Dismissal, the court noted its denial of PCR counsel's motion to substitute counsel. The court further found that plea counsel's performance was not deficient. App. 70. Regarding the failure to obtain mental health records, the PCR court found plea counsel's testimony credible that he was not aware of any mental health records related to the victims and that Petitioner failed to show how he was prejudiced by the failure to obtain his mental health records. App. 69 – 70. Regarding the failure to obtain a mental health evaluation, the court found that Petitioner failed to prove that he would have been found incompetent at the time of his guilty plea. App. 68 – 69. No motion to alter or amend pursuant to Rule 59(e) was filed.

Discussion

The PCR court's Order of Dismissal states that it denied the motion to substitute counsel based on counsel's representation that he was prepared to go forward with the Applicant's evidentiary hearing. App. 69. However, a review of the relevant portion of the PCR transcript reveals that counsel's response was not nearly so pronounced. App. 29, ll. 2-3. Further, the remainder of the transcript reveals that despite his appointment on December 6, 2012, PCR counsel was not prepared for Petitioner's PCR hearing on January 15, 2014.

While PCR counsel are not held to the same standard as plea and trial counsel, the South Carolina Rules of Professional Conduct require that a lawyer provide competent representation,

which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.1, RPC, Rule 407, SCACR. At least initially, it appears that PCR counsel recognized his own limitations and asked the court to allow substitution of a more experienced PCR attorney due to the “important issues” in Petitioner’s case. App. 27, l. 15 – App. 28, l. 8. PCR counsel’s later averment that he was “fine to keep going with [Petitioner’s case]” contradicts his earlier statement that representation by Mr. Brooks was in his client’s best interest. Moreover, that response was made only after the court’s loaded inquiry as to when counsel knew “he could not handle the case”, at which point counsel’s pride or pressure from the court got in the way of the more important matter – his client’s best interests. App. 28, l. 24 – 29, l. 3.

In evaluating whether a lower court abused its discretion in denying the motion to substitute counsel, the reviewing court ordinarily considers several factors, including the timeliness of the motion, the adequacy of the lower court’s inquiry into the defendant’s complaint, and whether the attorney-client conflict was so great that it resulted in a total lack of communication, thereby preventing an adequate defense. State v. Sims, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991) (citing U.S. v. Gallop, 838 F.2d 105 (4th Cir. 1988)). However, the present case involves a motion to substitute raised by PCR counsel that was not based any specific complaint from Petitioner but rather appointed counsel’s admission that substitution would be in the best interests of his client. App. 27, l. 15 – 28, l. 8. Thus, though Sims provides a guiding framework, the factors it employed are not squarely on point.

In the present case, the motion to substitute counsel was made at the second call of the case for an evidentiary PCR hearing. The one prior continuance of the case was related only to obtaining the transcript. App. 28, ll. 18-23. Without the transcript, PCR counsel was unable to

fully evaluate his ability to represent Petitioner at the prior call of the case. The only witnesses in the case were Petitioner and plea counsel, such that an additional continuance to allow for substitution would not have been unduly burdensome to either party. Moreover, the State did not object to the request. App. 28, l. 10-11.

Regarding the adequacy of the lower court's inquiry, the exchange between the court and counsel is rather brief. At first, PCR counsel was resolute that the substitution was in his client's best interests. App. 28, ll. 5-8. However, he later stated that he was fine with keeping Petitioner's case, at which time the court instantly reacted by stating "Well, then let's go. We are ready. Mr. Doar is here." and "Mr. Davis is here. All right." App. 29, ll. 2-7. Though the PCR judge asked Petitioner if he needed additional time to meet with PCR counsel and if he was ready to go forward, that was only after she said "Mr. Doar, we are going to go forward on your application for post-conviction relief." App. 29, ll. 8-16. Additionally, Petitioner responded "[h]e [PCR counsel] says that he feels he's ready a couple of times," indicating Petitioner's own skepticism of PCR counsel's preparedness. App. 29, ll. 12-13.

Lastly, since the reason for substitution here is not related to a "total lack of communication" the relevant inquiry is whether the attorney's unpreparedness is so great that it prevented adequate representation. When asked at the outset of the case if he knows "what we are doing here today," Petitioner responded that they are "scheduling another date of hearing." App. 27, ll. 6-10. This is an understanding that Petitioner could have only learned from PCR counsel and a belief that PCR counsel likely shared based on the mediocre representation that ensued. The court then inquired of PCR counsel why they would be scheduling another hearing, at which time he explained that he discussed Petitioner's case with "Charles Brooks who handles lots of PCR cases." App. 27, ll. 11-18. PCR counsel indicated that he asked Mr. Brooks

questions “about some authority on some issues that I think are important in this case” and that Mr. Brooks said “I think you ought to let me jump in take the reins on that one . . .” App. 27, ll. 18-22. He then stated that substitution would be in Petitioner’s best interest. App. 28, ll. 5-7. Thus, the problem here was greater than one of communication – it was whether counsel was prepared.

The record in this case further illustrates PCR counsel’s unpreparedness to represent Petitioner and the inadequacy of his representation. The PCR allegations with the most potential merit were ineffective assistance of counsel related to plea counsel’s failure to obtain Petitioner’s mental health records and failure to request a mental health evaluation of Petitioner. Despite this, PCR counsel failed to procure the mental health records, which were necessary for any favorable decision on this allegation. Not only would the PCR court need to review the records, PCR counsel could not possibly argue the worth of the records to Petitioner’s defense and the resulting prejudice without knowing their content. See Harris v. State, 377 S.C. 66, 77, 659 S.E.2d 140, 146 (2008) (finding that it was necessary to provide the PCR judge with a copy of the transcript in order to show that the petitioner was prejudiced by its absence at the second trial, without which petitioner did not meet his burden of proving that trial counsel was deficient and that the result of his trial would have been different but for this alleged deficiency; “It was merely speculative that the transcript would have aided in his defense.”).

PCR counsel also failed to present any testimony from a mental health professional regarding how Petitioner’s diagnosis affected Petitioner’s competence. See Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) (holding that Petitioner must show a reasonable probability he would have been determined to be incompetent); see also Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997) (“Wolfe presented no medical evidence at the PCR hearing suggesting he had

been incompetent to stand trial or to participate in his defense. Given the absence of such evidence, Wolfe has failed to demonstrate he was prejudiced by the trial court's failure to grant a continuance." To the extent that the mental health evaluation would have been relevant to mitigation, PCR counsel should have provided a current evaluation to the court; otherwise the relevance and prejudice was again speculative. He should have also filed a Motion to Alter or Amend when this theory of relevance and prejudice was not addressed in the Order of Dismissal. See Marlar v. State, 375 S.C. 407, 408–10, 653 S.E.2d 266, 266–67 (2007) ("Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRPC.") (internal citations and quotations omitted).

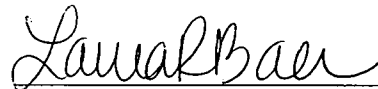
Further, despite PCR counsel's discussions of relevant authority related to Petitioner's case with Mr. Brooks, PCR counsel cited no authority in his argument to the court. App. 57, ll. 2-19; App. 58, l. 25 – 59, l. 7. With this representation, Petitioner had no chance of success before the PCR court.

Therefore, the PCR court erred in denying the motion for substitution. Importantly, it was not until the PCR court phrased the question of substitution as being that PCR counsel was "unable to handle [Petitioner's] case" that PCR counsel waived regarding the necessity of the substitution. Even then, his response was not a "representation that he was prepared to go forward with the Applicant's evidentiary hearing." Application of the relevant factors all point in favor of allowing substitution in this case, especially where there was no opposition from the State. Petitioner is accordingly entitled to a new hearing on his PCR application with new counsel.

CONCLUSION

For the reasons set forth herein, Petitioner William C. Doar, III respectfully requests this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
KRISTI LEA HARRINGTON, CIRCUIT COURT JUDGE

WILLIAM C. DOAR, III,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2014-001653

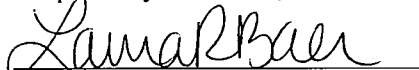
PETITION TO BE RELIEVED AS COUNSEL

Counsel for William C. Doar, III 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 15, 2014. 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 William C. Doar, III.

Respectfully submitted,



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of April, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

WILLIAM C. DOAR, III,

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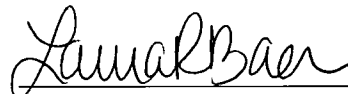
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001653

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 Ashleigh R Wilson, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and William C. Doar, III, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 13th day of April, 2015.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of April, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.