

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
J. Ernest Kinard, Jr., Circuit Court Judge

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APR 24 2015

S.C. Supreme Court

DANNY RAY PITTMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002101

JOHNSON PETITION FOR WRIT OF CERTIORARI

TIFFANY L. BUTLER
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

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ISSUE PRESENTED

Did the PCR judge err by finding counsel provided effective representation where counsel failed to present mitigating medical evidence that Kimberly Dawn Faile suffered from migraine headaches and her son suffered from a speech impediment prior to the alleged assault by Petitioner, since the plea judge considered the injuries that Faile and her son sustained during the assault, as well as the medical conditions caused by the injuries, before sentencing Petitioner to twenty-five years' imprisonment?

STATEMENT OF THE FACTS

On December 20, 2012, Petitioner waived presentment to the York County Grand Jury and pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to two counts of assault and battery of a high and aggravated nature (ABHAN) and one count of grand larceny, before the Honorable Michael G. Nettles. App. 1. Petitioner was originally charged with two counts of attempted murder and grand larceny. App. 3. Harry A. Dest represented Petitioner. Lisa Collins represented the State. App. 1.

Judge Nettles sentenced Petitioner to twenty years for one count of ABHAN and five years for the second count of ABHAN to run consecutively. The judge also sentenced Petitioner to five years for the grand larceny charge to run concurrent to the sentences for ABHAN, for a total of twenty-five years' imprisonment. App. 37 – 38. Petitioner did not appeal his guilty plea.

On August 16, 2013, Petitioner filed a PCR application. App. 49. Respondent filed its return on January 3, 2014 requesting an evidentiary hearing. App. 58. On August 4, 2014, a PCR hearing was held before the Honorable J. Ernest Kinard. App. 62. W. Michael Hemlepp, Jr. represented Petitioner. J. Rutledge Johnson represented the State. App. 62.

On September 26, 2014, Judge Kinard issued an order of dismissal. App. 95 – 100. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred by finding counsel provided effective representation where counsel failed to present mitigating medical evidence that Kimberly Dawn Faile suffered from migraine headaches and her son suffered from a speech impediment prior to the alleged assault by Petitioner, since the plea judge considered the injuries that Faile and her son sustained during the assault, as well as the medical conditions caused by the injuries, before sentencing Petitioner to twenty-five years' imprisonment.

Guilty Plea

According to the State, during the late night hours of February 1, 2012, officers with the York County Sheriff's Department responded to the residence of the victim, Kimberly Dawn Faile, in York County, South Carolina. App. 8, lines 1 – 10. Faile's eleven-year-old daughter had called 9-1-1 to report that Faile had been injured in the head. App. 8, lines 1 – 10. When officers responded, they also discovered Faile's sixteen-year old son lying outside in a pool of blood and barely conscious. App. 8, lines 11 – 19. Faile could not recall what happened but informed officers that Petitioner was the only other person who had been at her home earlier that evening. App. 8, lines 20 – 25. Faile's vehicle was missing from the home. App. 9, lines 1 – 3.

Law enforcement located and arrested Petitioner in Horry County, South Carolina. App. 9, lines 6 – 9. DNA matching that of Faile's son was discovered on Petitioner's clothes, and blood matching the sixteen-year old victim was found on Petitioner's "right shoe." App. 9, lines 18 – 23. Petitioner admitted that "he had eaten approximately 30 – 50 hydrocodone pills on the day of the assault, and that he blacked out." App. 10, lines 5 – 8. However, Petitioner never admitted to "striking" Faile and her son in any of his statements to police. App. 10, lines 23 – 25.

Faile and her son had multiple skull fractures and underwent neurosurgery for injuries to their scalp. App. 11, lines 12 – 18. According to the solicitor, Faile had “repeated migraines that [were] debilitating” and had to go back to the hospital numerous times because of her injuries. App. 12, lines 1 – 13. Faile’s son recalled Petitioner texting him asking him to come outside to help feed the dog, which was where the son was assaulted. App. 14, lines 5 – 8. The son also sustained skull fractures and an increased likelihood of seizures. App. 26, lines 1 – 6.

At the time of sentencing, the plea judge explained that “there are a number of factors” that he had to consider, including the victims, how the injuries have “affected them physically,” and how “[t]hey’re going to have permanent impairment for the rest of their life (sic).” App. 36, lines 6 – 11.

PCR Hearing

Petitioner testified at the PCR hearing. Petitioner stated that he had given defense counsel medical records which proved Faile and her son had pre-existing medical conditions. App. 69, lines 3 – 25. Petitioner recalled that the plea judge based his twenty-five year prison sentence on the injuries that Faile and her son sustained as a result of the assault. App. 11, lines 13 – 17. Petitioner explained that since Faile and her son had medical conditions that existed prior to the alleged assault, he did not cause all of the injuries to the victims like the State claimed. App. 75, lines 14 – 21.

Defense counsel also testified at the PCR hearing. Counsel acknowledged that Petitioner had given him the medical records. App. 87, lines 10 – 16. Counsel explained that according to the records, Faile suffered from migraine headaches before the assault. App. 86, lines 3 – 5; App. 87, line 24 – App. 88, line 5. Faile’s son “had a history of a speech impediment.” App. 87, lines 20 – 23.

Defense counsel stated that he felt mitigation should center on Petitioner's drug use and that Petitioner needed help for his long-term drug addiction. App. 84, lines 4 – 7. Although counsel requested an eight to ten-year sentence, he did not think that filing a motion to reconsider Petitioner's twenty-five year sentence would have been in good faith. According to counsel,

“[W]hen you looked at the crime scene photos, the amount of blood that was lost, the fact that they had fractured skulls, . . . I [did not] think it would have made any difference at all to get back in front of the Court to argue those, which I would consider, minor points.”

App. 86, lines 5 – 10.

Order of Dismissal

Judge Kinard denied Petitioner's allegations. App. 99. The judge stated that defense counsel negotiated with the State in Petitioner's best interest. App. 99. According to the PCR judge, Petitioner failed to prove that counsel was deficient in his performance and that Petitioner was prejudiced, thereby. App. 99.

Discussion

The PCR judge erred by finding counsel provided effective representation. Counsel failed to present mitigating medical evidence that Kimberly Dawn Faile suffered from migraine headaches and her son suffered from a speech impediment prior to the alleged assault by Petitioner. Before sentencing Petitioner to twenty-five years' imprisonment, the plea judge considered the injuries that Faile and her son sustained during the assault, as well as the medical conditions caused by those injuries.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). In the context of a guilty plea, a court will conduct a two-prong test when determining whether defense

counsel's assistance was ineffective. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Hill, 474 U.S. at 58 – 59. Whether defense counsel was "deficient" turns on whether the guilty plea was entered voluntarily, knowingly, and intelligently. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000). See Hill, 474 U.S. at 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970))).

Second, the applicant must show that he was prejudiced by defense counsel's deficient performance during the guilty plea process. Hill, 474 U.S. at 59. Specifically, the applicant must show that "but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Id. When a court is evaluating guilty plea issues, "it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Defense counsel has a duty to "discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the state." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citing Wiggins v. Smith, 539 U.S. 510, 524 – 25 (2003)). See Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014) (finding defense counsel ineffective for failing to offer DNA evidence which would have rebutted the State's theory that defendant cut his eye while exiting the victim's apartment through the glass patio door). See also Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (finding counsel rendered deficient performance which supported ineffective assistance of counsel claim where, during penalty phase of

capital murder case, counsel failed to present mitigation evidence that defendant was merely present at the scene and even if defendant was the actual perpetrator, he suffered from mental deficiencies at the time of the murder).

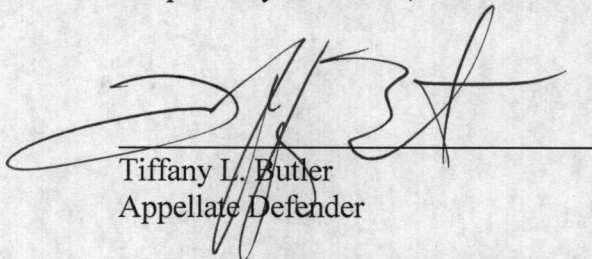
Here, defense counsel failed to provide effective representation. Counsel acknowledged Petitioner's request to explain to the plea judge that both victims had medical conditions which existed prior to the assault on February 1, 2012. Counsel also agreed that he, in fact, possessed the medical records which belonged to Faile and her son. Despite having medical evidence which would have rebutted the State's allegation that Petitioner caused the victims' permanent medical conditions, counsel did not offer the evidence to the court.

Even after the judge made it clear at sentencing that he was considering the medical conditions of Faile and her son as a result of the assault, counsel did not file a motion to reconsider Petitioner's sentence after Petitioner was given twenty-five years in prison. Because defense counsel failed to introduce medical evidence which confirmed Petitioner's alleged actions were not the sole cause of the victims' physical conditions, Petitioner was given a higher sentence than anticipated. Had Petitioner known he would be sentenced to twenty-five years' imprisonment, he would not have entered an Alford plea.

CONCLUSION

For the reasons argued above, Petitioner Danny Ray Pittman respectfully requests this Court to grant his petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', is written over a horizontal line. The signature is stylized and cursive.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

DANNY RAY PITTMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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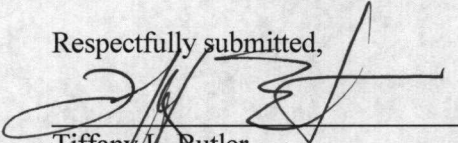
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Danny Ray Pittman 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 August 4, 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 Danny Ray Pittman.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender
ATTORNEY FOR PETITIONER

This 24th day of April, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

J. Ernest Kinard, Jr., Circuit Court Judge

DANNY RAY PITTMAN,

PETITIONER,

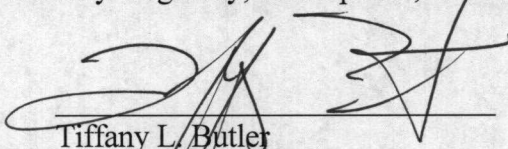
V.

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 J. Rutledge Johnson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Danny Ray Pittman, #294081, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 24th day of April, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of April, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.