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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

George C. James, Jr., Circuit Court Judge

CARLTON J. HAMILTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001455

JOHNSON PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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 in refusing to find plea counsel ineffective for not obtaining mental health records to support the request for an evaluation to determine criminal responsibility and capacity to conform?

STATEMENT

In August of 2011, the Williamsburg County Grand Jury indicted Hamilton, in a three count indictment, for two counts of attempted assault and battery of a high and aggravated nature, failure to stop for a blue light and siren and resisting arrest, indictment #2011-GS-45-0154. On May 8, 2012, Hamilton appeared before the Honorable Clifton Newman and pled guilty to one count of assault and battery first degree, failure to stop for a blue light and siren and resisting arrest. Legrand Carraway represented Hamilton at the guilty plea. Tyler Brown prosecuted the case. Judge Newman sentenced Hamilton to ten (10) years for assault and battery first degree, three (3) years for failure to stop for a blue light and siren and one year for resisting arrest. Hamilton did not file a notice of intent to appeal.

On November 29, 2012, Hamilton filed an application for post conviction relief. The State filed a return on April 4, 2013. On February 26, 2014, an evidentiary hearing was held before the Honorable George C. James. J. Layton Ruffin represented Hamilton at the evidentiary hearing. Daniel Gourley represented the State. In a written order signed May 16, 2014, Judge James denied relief and dismissed the application. A timely notice of intent to appeal was served on Jul 3, 2014. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find plea counsel ineffective for not obtaining mental health records to support the request for an evaluation to determine criminal responsibility and capacity to conform.

In the *pro se* PCR application Hamilton alleged "insanity or other mental condition at time of offense" as a basis for post conviction relief. (App. p. 67). At the start of the evidentiary hearing counsel for Hamilton asserted that plea counsel was ineffective for failing to request a psychological evaluation. (App. p. 81, lines 3-10). At the evidentiary hearing Hamilton testified that at the time of the incident resulting in the charges to which he pled guilty he had been off his medication for about a week. (App. p. 91, lines 2-21). Hamilton testified that he had been diagnosed with bi-polar disorder in 1982. (App. p. 85, lines 4-18). Hamilton testified that he experienced auditory and visual hallucinations. (App. p. 85, line 19 – p. 86, lines 1-25). Hamilton testified that he currently takes Remeron[1] and Risperdal[2] to keep him balanced and focused. (App. p. 101, lines 1-24).

Plea counsel testified that Hamilton had been evaluated previously pursuant to a court order from the Clarendon County Court of General Sessions and signed by the Honorable R. Ferrell Cothran and filed on January 31, 2009. (App. p. 105, line 18 – p. 106, lines 1-7; pp. 122-133). In that report from 2009, Hamilton was found criminally responsible with the capacity to conform. (App. p. 123). When Hamilton again appeared before Judge Cothran on new charges in Williamsburg County, Hamilton requested another mental evaluation. (App. p. 106, lines 5-12). Counsel testified that Judge Cothran refused to order another evaluation unless Hamilton could provide documentation from some other mental health facility indicating that his condition may

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[1] Remeron (mirtazapine) is an antidepressant. Mirtazapine affects chemicals in the brain that may become unbalanced and cause depression. Drugs.com.

[2] Risperdal is used to treat schizophrenia and symptoms of bipolar disorder (manic depression). Risperdal is also used in autistic children to treat symptoms of irritability. Drugs.com

have changed since the 2009 evaluation. (App. pp. 106-107). Counsel testified that Hamilton was unable to provide him with any information in regard to mental health facilities where he received treatment after the 2009 evaluation. (App. p. 111, line 12 – p. 112, lines 1-12). It appears that Hamilton was treated while in the South Carolina Department of Corrections but as noted in the order of dismissal, these records were not introduced in evidence. (App. p. 139, fn1). Instead, the records from the South Carolina Department of Corrections were marked for identification during the evidentiary hearing. (App. p. 98, line 17 – p. 99, lines 1-11).

In the order of dismissal the PCR judge wrote, "This Court finds Applicant's allegation that Counsel was ineffective for failing to communicate with him and failing to urge the plea court for a mental health evaluation to be meritless." (App. p. 138). The PCR judge noted that the plea judge was aware of Hamilton's mental health history and there was no evidence that Hamilton was not competent at the time of the plea and no evidence that Hamilton did not know legal right from wrong at the time of the offense and no evidence he could not conform his conduct accordingly . (App. pp. 139-140). The PCR judge erred. Counsel was ineffective for not obtaining records from the South Carolina Department of Corrections, and any other mental health care facility where Hamilton was treated, in order to support the motion for a mental health evaluation. Hamilton was prejudiced by the deficient performance.

The McNaughten test is the standard for determining whether a defendant's mental condition at the time of the offense rendered him criminally responsible. S.C. Code §17-24-10 provides, "It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

The defendant has the burden of proving the defense of insanity by a preponderance of the evidence." "An accused who lacks the capacity to distinguish moral or legal right from moral or legal wrong at the time of the crime is relieved of responsibility for his acts." State v. Law, 270 S.C. 664, 667, 244 S.E.2d 302, 304 (1978). "This is the McNaughten insanity defense defined in S.C. Code 17-24-10." Davenport v. State, 301 S.C. 39, 39, 389 S.E. 2d 649, 649 (1990).

S.C. Code §17-24-20 provides, "A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law. To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill."

The ordering of a competency examination is within the discretion of the trial judge. State v. Drayton, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978); State v. Singleton, 322 S.C. 480, 483, 472 S.E.2d 640, 642 (Ct. App. 1996). The refusal to grant such an examination will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Drayton, 270 S.C., at 584, 243 S.E.2d at 459; State v. Buchanan, 302 S.C. 83, 85, 394 S.E.2d 1, 2 (Ct. App. 1990). "This is so, because the determination of whether there is 'reason to believe' a defendant lacks a certain mental capacity necessarily requires the exercise of discretion." State v. White, 364 S.C. 143, 147-48, 611 S.E.2d 927, 929 (Ct. App. 2005) (citing and quoting State v. Bradshaw, 269 S.C. 642, 644, 239 S.E.2d 652, 653 (1977)). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v.

Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct. App. 2006).

Prior to the guilty plea Hamilton told Judge Newman, "The last judge I talked to, Ferrell Cothran, he tell me I got to get my mental health record, for if I have to come to a trial. so I'd like to get evaluated too." (app. p. 4, lines 11-14). After hearing from Hamilton and the State Judge Newman ruled, "But I don't see any need for any further mental evaluation. That's – this has been looked into by Judge Cothran. This is a relatively recent examination from the Department of Mental health. And you're – you're not showing me any signs that – that you don't know what's going on. You seem to understand perfectly well what's going on." (App. p. 12, line 22 – p. 13, lines 1-3). The prior evaluation was completed over three years earlier in 2009. (App. p. 123). In denying Hamilton's request for a second evaluation, Judge Newman did not have the benefit of Hamilton's records from the South Carolina Department of Corrections or records from any other mental health care facility where Hamilton was treated after the 2009 evaluation. Plea counsel was ineffective in failing to obtain the mental health records to support the second requested mental health evaluation.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under

prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The Strickland test operates similarly when an applicant claims counsel was ineffective in the context of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). A guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "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.' " Hill, 474 U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

"The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59, 106 S.Ct. 366. "A defendant who enters a plea on the advice of counsel may only attack the

voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

Plea counsel was ineffective in failing to obtain the mental health records to support the second requested mental health evaluation. There is a reasonable probability that if counsel had obtained the mental health records, a second mental health evaluation would have been ordered which could have provided an insanity defense or at the least mitigation in the form of a plea of guilty but mentally ill. The plea transcript supports the position that a second evaluation could have provided a defense or mitigation. When the judge asked Hamilton, "Now, what did you do that makes you guilty?" Hamilton replied, "My family." (App. p. 19, lines 15-17).

The judge then asked, "So, Mr. Hamilton, what makes you guilty of assault and battery first degree? What did you do?" (App. p. 22, lines 6-7). After conferring with his attorney, Hamilton responded, ""I tried to attempt to run the officer off the road." (App. p. 22, line 9). Later, however, Hamilton denied trying to cause the officers to wreck by knocking them off the road. (App. p. 30, lines 8-23). At the PCR hearing Hamilton was asked by the State, "Do you remember telling the judge that you were guilty of assault and battery in the first degree for attempting to run an officer off the road in a stolen vehicle?" (App. p. 96, lines 14-17). Hamilton responded, "At the time my lawyer tell me to go ahead and plead guilty to it. I am making the judge mad right now." (App. p. 96, lines 18-20).

Additionally, during the guilty plea Hamilton's elderly aunt testified that she was unable to obtain Hamilton's medical records while he was in jail. (App. p. 42, lines 2-11). During the guilty plea Hamilton told the judge that he saw dead people, heard voices and hallucinated. (App. p. 49,

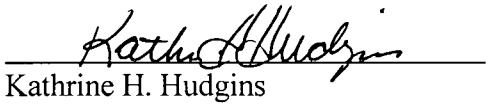
line 19 – p. 50, lines 1-11). Hamilton also told the plea judge he was not taking his medication at the time of the incident. (App. p. 51, lines line 3 – p. 52, lines 1-10).

Counsel was ineffective in failing to obtain Hamilton's mental health records to support a second mental health evaluation. There is a reasonable probability that but for counsel's deficient performance; the outcome of the proceeding would have been different. Hamilton may have been able to assert an insanity defense or enter a plea of guilty but mentally ill and used the finding to argue for a sentence less than the ten year maximum imposed for assault and battery first degree.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO WILLIAMSBURG COUNTY
GEORGE C. JAMES, JR., CIRCUIT COURT JUDGE

CARLTON J. HAMILTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001455

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carlton J. Hamilton 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 February 26, 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 Carlton J. Hamilton.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of April, 2015

STATE OF SOUTH CAROLINA

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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 in this case have been served on Daniel Gourley, Esquire and Carlton J. Hamilton, #262583, at Macdougall Correctional Institution this 29th day of April, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of April, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.