

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SEP 14 2015

Certiorari to Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

S.C. Supreme Court

KANDY GILLIARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001425

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Trial counsel erred in failing to develop a mental illness defense on petitioner's behalf to present at the trial of the case.

STATEMENT

Petitioner was convicted of murder and armed robbery during the June 2001 term of the Charleston County General Sessions Court before Judge James E. Lockemy and sentenced to imprisonment for a period of life on the murder conviction and ten years on the armed robbery conviction. App. 1 – 981. Melissa Gay represented petitioner at trial and Assistant Solicitors Dale DuTremble and Damon Cook appeared on behalf of the state. Petitioner appealed, but her convictions and sentences were affirmed by the Court of Appeals on May 5, 2004. See State v. Gilliard, Op No. 2004-UP-296 (2004). Robert M. Dudek, of the Office of Appellate Defense, represented petitioner on direct appeal.

On February 15, 2005, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court alleging ineffective assistance of trial counsel in her case. App. 1152 – p. 1157. On March 14, 2007, a PCR hearing was held at the Greenville County Courthouse before Judge Roger M. Young, which action was ultimately denied and dismissed by Judge Young per Order dated July 23, 2007. App. 1215 – p. 1222. Petitioner did not enjoy the benefit of an appeal of this first PCR action.

On January 17, 2012, petitioner filed a second application for post-conviction relief alleging chiefly that she was denied an appeal of her first PCR action along with additional allegations of ineffective assistance of counsel from her case. App. 1223 – p. 1238. Two PCR hearings were held thereafter. On November 21, 2013, a PCR hearing was held at the Charleston County Courthouse before Judge Stephanie P. McDonald; and on April 15, 2014, another PCR hearing was held at the Charleston County Courthouse before Judge R. Markley Dennis. App. 1246 – 1252; App 1254 – p. 1258. On January 15, 2014, Judge McDonald issued an Order granting petitioner's requested belated PCR appeal via Austin v. State, 305 S.C. 453, 409 S.E.2d

395 (1991). App. 1260-1263. On June 19, 2014, Judge Dennis issued an Order denying relief to petitioner on the additional allegations raised in her second PCR action. App. 1264 – 1269. Petitioner appealed.

Per this Court's Order dated January 30, 2015, granting petitioner's motion for leave to reconstruct the record of the prior PCR hearing record, which could not be transcribed, a PCR reconstruction hearing in the matter was held on March 13, 2015, at the Charleston County Courthouse before Judge Roger M. Young. App. 1158 – 1203. The record was reconstructed. Therefore, in accordance with Judge McDonald's Order granting petitioner's request for an Austin PCR appeal, this petition follows.

ARGUMENT

Trial counsel erred in failing to develop a mental illness defense on petitioner's behalf to present at the trial of the case.

At trial, Sheila Mitchell testified that she was a former employee at the Game Room (video poker parlor) in Charleston, South Carolina, and that on January 5, 2000, when she arrived for work around 7:00 am she found Dawn Russ, who was also a former employee at the Game Room, on the office floor dead with an extension cord rapped around her neck and a trash bag over her head. Mitchell added that \$1,298.00 was missing from the cash register. App. 327, l. 19 – p. 333, l. 9. The cause of death for Russ was asphyxiation from strangulation. App. 341, lines 6 – 7.

State's witness Benjamin Johnson testified that around 2:00 am on January 5, 2000, petitioner came to this house and told him that Dawn Russ was in the Game Room office sleeping. The inference from the record is that petitioner and Dawn Russ would often talk while in the Game Room office, and that a friendship had developed between them. Johnson stated that on the morning in question, he and petitioner went to the Game Room, and that he put on a mask before

they went into the office. Johnson explained that after petitioner put the bag over Russ' head, he put the extension cord around Russ' neck and "choked her until she passed out;" and that meanwhile petitioner was gathering up the money in the office, which they later split between them. App. 440, l. 2 – p. 447, l. 25; App. 457, l. 14 - p. 459, l. 12.

State's witness Brian Johnson, brother of Benjamin Johnson, testified that Benjamin Johnson and petitioner told him that they had killed someone during the early morning hours of January 5, 2000. App. 488, l. 2 – p. 491, l. 9.

Petitioner was taken to police headquarters on January 9, 2000, and interviewed by Police Officer Scott Deckard. At that time, petitioner gave a statement to police admitting that Benjamin Johnson showed up at the Game Room while Dawn Russ was sleeping in her office there. Petitioner added that "they were only going to hit her for money" and that their goal was not to "hurt her," and that she put the bag on Russ' head, and that Benjamin Johnson was kneeling over Russ with the cord while she got the money. App. 515, l. 25 – p. 519, l. 9.

At trial, petitioner in effect that she operated under duress because Benjamin Johnson forced her to get the money and assist him during this incident by threatening her. App. 745, l. 17 – p. 750, l. 23.

At the close of the first PCR hearing, the PCR judge noted that the state mental evaluation indicated that petitioner was mentally competent, and went on to address petitioner's allegation that trial counsel erred in failing to develop a mental illness defense in the Order of Dismissal as follows.

I find the Applicant has failed to prove by a preponderance of the evidence that she lost competency to stand trial during her trial. It is clear from the trial transcript that trial counsel was adequately prepared for trial. In fact, the Applicant admits that trial counsel was not ineffective in preparing for trial or actually conducting the trial except for failing to bring to the trial court's attention that the Applicant could not assist in her own defense. I believe that counsel's testimony at the post-conviction relief hearing is an attempt

to “fall on the sword” for a young client who received a life sentence. However, the trial record, viewed as a whole and with an objective eye finds that at no point did the Applicant act in such a way as to indicate a lack of cognitive or volitional abilities during the course of her trial such that indicates she lacked capacity to understand what was going on or to assist her attorney. Therefore, this Court finds that trial counsel was not ineffective. App. 1220.

The State argues that even if trial counsel was ineffective, the Applicant has failed to carry his burden in this action and cannot show prejudice: I disagree. If the Applicant became incompetent during trial the court should have continued the trial or declared a mistrial until such time as Applicant became competent. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). However, because I find that Applicant failed to show her counsel was ineffective, this cannot be considered the basis for a grant of relief. App. 1220 – 1221.

Also in the PCR judge’s order appears the following:
Trial counsel testified that she could communicate with the Applicant but that she did not seem to appreciate the seriousness of the charges. Trial counsel later testified that at some point after the co-defendant testified, the Applicant had a “mental break” and could no longer assist in her own defense. App. 1219.

To the contrary, however, trial counsel’s testimony at the PCR hearing, and in particular at the reconstruction hearing, did not support the PCR judge’s denial of PCR relief to petitioner. During the reconstruction hearing, trial counsel testified that petitioner was delusional and that petitioner’s thoughts were not based on reality, and further that she was unaware of petitioner’s long mental history and the depth of her depression and mental illness. Tr. 1201, l. 1 – 6; Tr. 1191 – 1192. App. 1200, l. 21 – p. 1201, l. 6.

Trial counsel stated that although petitioner was found competent for trial by the state doctor, it was noted by the state doctor that petitioner was difficult to talk with and it was not clear whether petitioner “couldn’t understand or couldn’t communicate about why she was being charged.” App. 1187, lines 2 – 8. However, trial counsel explained that she recognized ultimately that

petitioner's views were different from reality and that she (petitioner) did not believe she was a player or "principle" in the homicide. App. 1187, l. 12 – 23. Counsel added that "petitioner's creation of her own reality" made it difficult to talk to her and that petitioner was living out "her own version of the facts" and did not see herself as culpable. App. 1184, l. 22 – p. 1185, l. 15. Counsel stated further that since petitioner was out of touch with reality, then some days she could talk to her, but could not do so on other days, and that petitioner never understood why she had been charged with murder. App. 1188, l. 3 – p. 1189, l. 1.

Trial counsel admitted that she failed to put forth a mental defense App. 1189, lines 2 – 8. Counsel admitted also that by the second day of the trial it was obvious that petitioner had become "flat" and was "zoned out" and "staring into space" in a "shutdown" mode, and stayed unresponsive and mentally "not there". App. 1190, l. 1 – p. 1191, l. 2. App. 1198, l. 2 – 11. Counsel admitted further that she did not subpoena the jail records which would have educated her on petitioner's mental status. App. 1199, lines 23 – 24; App. 1200, lines 10 – 20. App. 1190, l. 16 – 20; App. 1191, l. 8 – p. 1192, l. 14; App. 1193, l. 9 – 18. Counsel testified that petitioner was hard to control and was "out there," and that she had no realization of the depth of what petitioner's mental problems were all about. App. 1194, lines 2 – 9; App. 1195, l. 19 – 24. Counsel stressed the fact that petitioner's behavior during her testimony was bizarre and that petitioner actually reenacted the events for the jury. App. 1189, lines 14 – 15; App. 1192, l. 25 – App. 1193, l. 8.

Finally, counsel concluded that her "20/20" "hindsight" clearly revealed that petitioner was a person with ongoing mental problems (depression suicidal) and that she had a history of mental illness and was probably being medicated and treated from mental issues while she was a pre-trial detainee. Counsel assessed that petitioner undoubtedly could not assist in her defense. App. 1199, l. 3 – 24.

Petitioner did not testify at the reconstruction hearing. Also, note that petitioner broke down during her first PCR hearing held on March 14, 2007, which was discontinued because of her break down. Petitioner was evaluated after the PCR judge's March 29, 2007 Order for the same and on June 14, 2007, said PCR hearing was reconvened. At that time, no testimony was taken and the mental evaluation conducted on May 22, 2007, per the March 29, 2007 Order was submitted to the PCR judge. App 1166, l. 17 - p. 1170, l. 25.

Clearly, petitioner had mental issues which rendered her mentally incompetent to stand trial. Due process prohibits the conviction of one who is mentally incompetent. Jeter v. State, 308 S.C.230, 417 S.E.2d. 594 (1992). Counsel has a duty to conduct reasonable investigations in a case. Strickland v. Washington, 466 U.S. 668 (1984). Also, with respect to cases where mental issues abound, counsel has a duty to investigate, prepare, and present evidence of mental illness on behalf of the defense. For example, in Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2009), the Court found counsel ineffective in failing to adequately investigate and present mitigating evidence (mental incompetence) during the penalty phase at trial. Likewise, in Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), counsel was found ineffective in failing to investigate gunshot residue evidence in a capital case. Additionally, in Von Dohlen v. State, 360 S.C. 598, 601 S.E.2d 738 (2005), the Court found that counsel was ineffective in failing to provide the psychiatrist who would have testified at trial that all of the defendant's extensive medical records and information so that the defendant's true mental diagnosis of major episodes of depression with severe symptoms of anxiety and psychosis could have been presented during the penalty phase. Moreover, in Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2005), the Court reversed because trial counsel pursued a guilty but mentally ill verdict, but omitted his expert's qualifications and failed to provide the jury with any insight into petitioner's mental illness. Furthermore, in Nance v Ozmint, 367 S.C. 547,

557 S.E.2d 883 (2006), the Court found that trial counsel erred in failing to investigate into and present evidence of the defendant's mitigating social history documents outlining his troubled childhood and mental illness. Finally, in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), the Court held that trial counsel's error in failing to present evidence of the defendant's mental illness was deficient and that such deficient performance was prejudicial to the case.

Our United States Supreme Court has issued similar holdings in this genre of cases. In Wiggins v. Smith, 539 U.S. 510 (2003), trial counsel was found ineffective in failing to investigate into and present the defendant's dysfunctional background, low IQ, and tumultuous childhood as strong mitigating evidence in the capital case. Compare Williams v. Taylor, 529 U.S. 362 (1999), where trial counsel was found ineffective in failing to investigate into substantial mitigating evidence that should have been presented during the penalty phase of that capital murder case. Compare also, Rompilla v. Beard, 545 U.S. 374 (2005), where the Court held that trial counsel erred in failing to investigate into the defendant's prior conviction file in order to uncover his mental health issues for presentation at sentencing. In Strickland, counsel was arguably ineffective in failing to submit psychological evidence at the defendant's death penalty sentencing phase to show he battled depression, but the Court found that no prejudice was shown in the case in the end.

One is insane if at the time of the crime, he or she, 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 crime as morally or legally wrong. See S.C. Ann. Code § 17-24-10 (1998). State v. Hartfield, 300 S.C. 469, 388 S.E.2d 802 (1990). One is guilty but mentally ill when he or she had the capacity to distinguish right from wrong, but because of mental disease or defect he lack sufficient capacity to conform his conduct to the requirements of the law. S.C. Code Ann. § 17-24-20. See also State v.

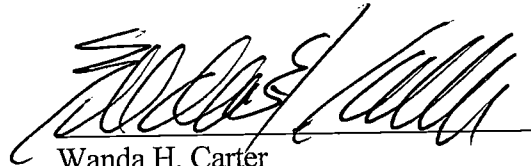
Hartfield, supra. Petitioner's case, at the very least, fell into the guilty but mentally ill category. Counsel erred in failing to pursue a guilty but mentally ill defense in petitioner's case for trial.

In the case at bar, counsel violated petitioner's Sixth Amendment right to effective assistance of counsel with the respect to her failure to develop a mental illness defense for trial in the case; and petitioner was prejudiced as a result of counsel's defective representation in this regard because but for counsel's error, a reasonable probability exists that the outcome of petitioner's trial would have been different.

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue raised above.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

KANDY GILLIARD,

PETITIONER,

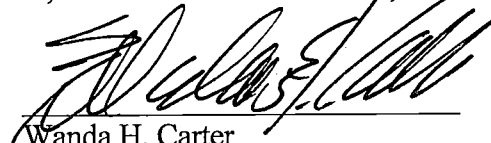
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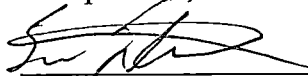
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental 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 Ms. Kandy Gilliard #275605, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 14th day of September, 2015.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of September, 2015.


(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.