ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Aiken County

D. Craig Brown, Circuit Court Judge

TYRONE WADE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000260

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN

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ISSUE PRESENTED

Did the PCR judge err in refusing to find that the guilty plea was rendered involuntary by the fact that plea counsel failed to explore mental health defenses?

STATEMENT

In September of 2009, the Aiken County Grand Jury indicted Petitioner Wade for murder, burglary in the first degree and possession of a weapon during the commission of a violent crime, indictments #2009-GS-02-1582, 1584, 1589. On March 28, 2011, Wade appeared before the Honorable Edgar W. Dickson and pled guilty. Wallis A. Alves represented Wade. Elizabeth B. Young represented the State. Pursuant to negotiations between the State and Wade, Judge Dickson sentenced Wade to thirty (30) years for murder, fifteen (15) years for burglary first degree and five (5) years for the weapon charge. A timely notice of intent to appeal was filed but the appeal was dismissed pursuant to Rule 203(d)(1)(B)(iv), SCACR.

On September 19, 2011, Wade filed an application for post conviction relief. The State filed a return on December 6, 2011. On July 11, 2012, an evidentiary hearing was held before the Honorable Paul M. Burch. Courtney Pope represented Wade at the PCR hearing. Megan E. Harrigan represented the State. In a written order filed July 25, 2012, Judge Burch denied relief and dismissed the application. The notice of intent to appeal was not filed.

On July 19, 2013, Wade filed a second *pro se* application for post conviction relief seeking a bleated appeal of the denial of the first application for post conviction relief. On September 5, 2013, the State filed a return and motion to dismiss all claims except for the belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). On August 18, 2014, counsel for Wade filed an amendment to the prior PCR application. On January 16, 2015, an evidentiary hearing was held before the Honorable D. Craig Brown. Lance S. Boozer represented Wade at the second hearing. Daniel F. Gourley represented the State. In a written order signed January 26, 2015, Judge Brown signed a consent order granting a belated appeal pursuant to Austin v. State. This Austin petition and a separately filed petition for writ of certiorari follow.

ARGUMENT

The PCR judge erred in refusing to find that the guilty plea was rendered involuntary by the fact that plea counsel failed to explore mental health defenses.

During the guilty plea colloquy the plea judge did not ask Petitioner if he had ever been treated for mental illness. Plea counsel admitted that Petitioner provided varying versions of what took place on the night of the fatal shooting ranging from Petitioner asserting an alibi defense to denying involvement to admitting involvement. (App. p. 65, lines 21-25). Plea counsel admitted that she did not request a mental evaluation for Petitioner. (App. p. 74, lines 6-11). Counsel was deficient in failing to explore mental health defenses.

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." Plea counsel was deficient in failing to explore Petitioner's mental health issues and possible defenses.

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).

Counsel's failure to explore mental health defenses rendered the guilty plea involuntary. There is a reasonable probability that but for counsel's failure to explore mental health defenses, Petitioner would not have pled guilty but would have insisted on going to trial and asserting a mental health defense.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue. Alternatively, the case should be remanded to address the mental health issues.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of October, 2015.

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TYRONE WADE,

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Tyrone Wade #284384, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 12th day of October, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day of October, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.