

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

Opinion No. (S.C. Ct. App. filed)

06-CP-23-02947

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S.C. Supreme Court

KAREEN DONYELL LEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 21, 2011.

QUESTION PRESENTED

Did the Court of Appeals err in failing to find that PCR judge erred in refusing to find counsel ineffective for failing to have the petitioner evaluated for competency prior to the guilty plea when there was a reasonable probability that petitioner was not competent at the time of the plea?

STATEMENT OF THE CASE

In February 2005, the Greenville County Grand Jury indicted Lee for two counts of breaking into a motor vehicle, unlawful carrying of a pistol, two counts of attempted second degree burglary, two counts of second degree burglary and two counts of possession of a weapon during the commission of a violent crime. On June 2, 2005, Lee appeared before the Honorable J. Michael Baxley and pled guilty to two counts of breaking into a motor vehicle, unlawful possession of a pistol, two counts of attempted second degree burglary and two counts of second degree burglary. Judge Baxley sentenced Lee to 5 years concurrent for each breaking into a motor vehicle charge, one year concurrent for unlawful carrying of a pistol, 15 years concurrent for each attempted second degree burglary charge and 15 years concurrent for each second degree burglary charge. Lee did not appeal his sentence and conviction.

On May 2, 2006, Lee filed an application for post conviction relief. The State filed a return on June 15, 2006. An evidentiary hearing was held on November 16, 2007, before the Honorable G. Edward Welmaker. In a written order signed January 2, 2008, Judge Welmaker denied relief and dismissed the application. A timely notice of intent to appeal was filed on February 4, 2008. On October 22, 2008, a petition for writ of certiorari was filed with the South Carolina Supreme Court. On December 21, 2009, the South Carolina Court of Appeals granted the petition for writ of certiorari. On May 21, 2010, the brief of petitioner was filed.

On October 5, 2011, the case was argued before a three judge panel of the South Carolina Court of Appeals. On November 2, 2011, the Court of Appeals affirmed the denial of relief by the PCR judge. The petition for rehearing was filed on November 17, 2011. On December 21, 2011, the Court withdrew the original opinion, substituted and refiled a new opinion. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in failing to find that PCR judge erred in refusing to find counsel ineffective for failing to have the petitioner evaluated for competency prior to the guilty plea when there was a reasonable probability that petitioner was not competent at the time of the plea.

On June 2, 2005, petitioner Lee entered guilty pleas to seven separate charges including two counts of second degree burglary, violent. Lee's total exposure on all seven charges was 71 years. (Tr. p. 38, lines 1-3). Lee's aunt, Esther Lee Bailey, testified at the PCR hearing that Lee had a history of mental health problems dating back to 1994. (App. pp. 93-98). The aunt testified that Lee had been seen at Marshall Pickens, Piedmont Mental Health and Special Needs in Maudlin. (App. p. 93, lines 14- p. 94, lines 1-24). The aunt testified that she informed Lee's attorney that Lee received disability payments as a result of his mental state. (App. p. 99, lines 1-9). Lee's attorney denied speaking with any member of Lee's family in regard to his mental health status. (App. p. 109, lines 6-11). The attorney testified that Lee never informed her of his mental health history and testified, "And unfortunately, I'm not a mind reader. I don't have ESP." (App. p. 113, lines 8-10).

At the time Lee entered his guilty pleas on June 2, 2005, in Greenville County, Lee was on probation in Laurens County. (App. p. 37, lines 11-17). The guilty pleas constituted a violation of probation. On July 22, 2005, prior to the probation violation hearing in Laurens County but only about a month after the pleas in Greenville County, the Honorable James W. Johnson ordered a competency evaluation for Lee. (App. p. 125). Pursuant to the order, Dr. Gordon E. Brown with the South Carolina Department of Disabilities and Special Needs, prepared a written report based on an examination of Lee in December 2005. The report reflects that Lee has an IQ of 61. (App. p. 128). Dr. Brown found that Lee had mental retardation and was not competent to stand trial. (App. pp. 125 -130). Dr. Brown testified to his findings at the PCR hearing. (App. pp. 83 – 89). Dr.

Brown testified that Lee had been receiving mental health treatment since 2000. (App. p. 85, lines 7 – p. 86, lines 1-2). Dr. Brown had concerns about Lee’s ability to understand the process of plea bargaining. (App. p. 87, lines 17 – p. 88, lines 1-6). While Dr. Brown did not expressly testify that Lee was not competent at the time of his pleas in Greenville County, Dr. Brown did testify that the mental retardation that caused Lee to be incompetent in December of 2005, would have been present at the time of his pleas in June of 2005. (App. p. 89, lines 12-21).

The PCR judge found that Lee failed to meet his burden of proving his guilty plea was involuntary and failed to prove he was incompetent on the day of the plea hearing. (App. p. 135). The judge wrote, “Plea counsel is not required to be clairvoyant. The Applicant was a high school graduate with an employment history and did not inform plea counsel of any prior psychiatric conditions.” (App. p. 135). As to Lee being a high school graduate, the competency report notes that Lee was classified as educable mentally handicapped at Hillcrest High School and received a completion certificate. (App. p. 127). As to employment history, the report notes that Lee was fired from Burger King after a couple of days because he did not move fast enough. (App. p. 127). The PCR judge erred in finding that Lee failed to prove that he was not competent at the time of the plea.

At the PCR hearing, Lee showed, by a preponderance of the evidence, that he was incompetent when he entered his guilty plea. Due process prohibits the conviction of an incompetent defendant. U.S.C.A. Const. Amend. 14. Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680 (1993); Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956). This right cannot be waived by guilty plea. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). The test of competency to enter a plea is the same as required to stand trial. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976). The accused must have sufficient capability to

consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Carnes v. State, 275 S.C. 353, 271 S.E.2d 121 (1980). In a PCR action, the petitioner must prove by a preponderance of the evidence that he was incompetent when he entered his guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 595-96 (1992).

A little over a month after this plea, another judge ordered that Lee undergo a competency evaluation. (App. p. 125). Six months after this plea, Lee was found not competent to stand trial. (App. p.p 125-130). The doctor who found Lee not competent wrote:

Kareen Lee functions within the mild to moderate range of mental retardation. He has received special education services on that and has also received services through the Department of Disabilities and Special Needs based on that. **Mr. Lee demonstrates a poor understanding of some of the critical element of the legal process, including the role of the Solicitor in proving guilt, the role of the Defense Attorney and the concept of a plea bargain.** He does appear to understand the charges against him except for the specific charge of probation Violation. He appears to have a marginal understanding of the legal process. One of the key requirements for competency to stand trial is that the defendant be able to adequately assist counseling (sic) in preparing a proper defense to the charges. Mr. Lee is not at this time capable of doing that. Given his level of intellectual functioning, relatively poor communication skills, and the complex nature of his charges, it is unlikely that he would attain competency in that area.

(App. p. 130). The doctor testified at the PCR hearing that the mental retardation that caused Lee to be incompetent in December of 2005, would have been present at the time of his pleas in June of 2005. (App. p. 89, lines 12-21).

The evidence presented at the PCR hearing shows, by a preponderance of the evidence, that Lee was not competent at the time he entered his plea. In Jeter, the petitioner failed to meet this burden where he submitted excerpts from medical records and no basis for the opinions

given. In contrast, at the PCR hearing, Lee proved by a preponderance of the evidence with expert testimony and records that he was not competent at the time of his plea. There is no evidence to support the PCR judge's finding that Lee failed to meet his burden. See Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984) (Any evidence of probative value to support the post conviction judge's factual findings is sufficient to uphold those findings on appeal). Lee's convictions and sentences must be reversed because he was not competent at the time he entered the guilty pleas.

Counsel was ineffective for failing to move for a competency evaluation. The PCR judge found that Lee failed to prove that counsel was ineffective in failing to have Lee evaluated for competency. (App. p. 135). The PCR judge erred. In order to prevail in the context of a guilty plea, a PCR applicant must show that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985). "In Jeter, this Court proclaimed that in proving Strickland prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, 'the [petitioner] need only show a reasonable probability that he was either insane at the time [the crime was committed] or incompetent at the time of the plea.'" Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 51 (2004) citing Jeter 308 S.C. at 233, 417 S.E.2d at 596.

While plea counsel may not be required to be clairvoyant (in the order of dismissal the PCR judge wrote, "Plea counsel is not required to be clairvoyant." App. p. 135), counsel has a duty to explore potential defenses and evidence to be presented in mitigation. Trial counsel admitted that she never spoke with any of Lee's family members. (App. p. 109, lines 6-12). A very basic

preliminary investigation would have revealed Lee's history of mental health issues, treatment at Piedmont Mental Health Center in 2000, with diagnosis of mild mental retardation, classification as educable mentally handicapped from the public school, and the facts that his 1996 IQ test revealed a full scale IQ of 61 with a verbal IQ of 56 and that he received services from the Greenville County Board of Disabilities and Special Needs. (App. pp. 127-128). Each of these factors indicates the need for a competency evaluation. This state's statutes recognize that a defendant with mental retardation, although his condition does not *necessarily* render him incompetent to enter a guilty plea, should be further evaluated for competency to stand trial by experts at the Department of Disabilities and Special Needs. S.C. Code Ann. § 44-23-410 (Supp. 2001). Counsel's performance in failing to learn of Lee's mental retardation and seek an evaluation from the Department of Disabilities and Special Needs was deficient.

Counsel should have known about a prior evaluation and finding of mental retardation by Dr. Narayan on November 21, 2002. (App. p. 126). Because of the finding of mental retardation, Dr. Narayan made no finding as to competency and referred the case to the Department of Disabilities and Special Needs [DDSN]. (App. p. 127). Petitioner pled guilty and received probationary sentences on July 9, 2003, before DDSN conducted an evaluation. The DDSN evaluation conducted later on December 1, 2005, references a letter from Howard Steinberg, Assistant Solicitor, to James Hill, SC DDSN General Counsel, declining a Competency Evaluation by DDSN, dated February 27, 2004. (App. p. 126). It appears that the competency evaluation was declined because petitioner had already pled guilty. At the time of the guilty plea on June 2, 2005, which is the subject of this PCR action, petitioner was on probation for those charges which were the subject of Dr. Narayan's evaluation. The guilty plea constituted a violation of those probationary sentences. Plea counsel certainly should have known that her client was on probation

at the time of the guilty plea and a brief review of the Clerk's file would have revealed, at the very least, the order for a competency evaluation.

Under the prejudice prong, there is a reasonable probability that Lee was not competent at the time he entered the pleas. As discussed above, Lee presented evidence meeting the higher standard of preponderance of the evidence showing that he was not competent at the time he entered his guilty pleas. Trial counsel's failure to request a competency evaluation prejudiced Lee under the Jeter standard because there was, at a minimum, a reasonable probability that Lee was incompetent at the time of his guilty pleas. See Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 51 (2004).

The Court of Appeals affirmed the denial of relief by the PCR judge writing:

In this case, under our standard of review, we are constrained to affirm the PCR court's decision. Some evidence in the record supports the PCR court's findings. Although the PCR court found Lee did not present evidence of incompetence at the time of plea, the psychiatrist's testimony that Lee's mental status dated back to when he was in school and he had a documented history of mental retardation was sufficient to show a reasonable probability that he was incompetent at the time of the plea. However, Lee also had to demonstrate plea counsel's performance was deficient. Plea counsel could not be deficient if she had no indication of Lee's mental status. Although Lee's aunt testified she informed plea counsel of Lee's mental status, plea counsel testified she did not recall a conversation with her. Further, plea counsel testified Lee indicated he had no prior mental conditions and none of his answers led her to suspect otherwise. We are required to defer to the PCR court's findings of credibility, and the PCR court found plea counsel "extremely credible."

Lee v. State, Op. No 4901 (S.C.Ct.App. filed December 21, 2011). The Court of Appeals correctly found that there was a reasonable probability that Lee was not competent at the time of guilty plea. The Court erred in finding that counsel was not deficient. While plea counsel credibly testified that

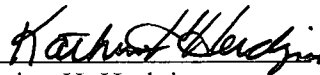
she did not know about the prior evaluation, the facts and circumstances presented at the PCR hearing support the fact that she should have known about the prior evaluation and petitioner's history of mental health issues. Counsel's failure to fully investigate petitioner's mental status constitutes deficient performance.

On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, the Court will reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)). There is no evidence of probative value sufficient to support the PCR judge's finding that petitioner failed to prove, by a preponderance of the evidence, that he was incompetent at the time of his guilty pleas. Counsel was ineffective in failing to fully investigate petitioner's mental status. Plea counsel's failure to investigate and subsequent failure to request a competency evaluation and *Blair* hearing prejudiced petitioner under the Jeter standard because there was a reasonable probability that petitioner was incompetent at the time of his guilty plea. Pursuant to Matthews v. State, 358 S.C. 456, 596 S.E.2d 49 (2004), petitioner's guilty plea should be vacated.

CONCLUSION

Based on the above argument the petition for writ of certiorari should be granted and the plea vacated. Alternatively, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 27th day of April, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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KAREEN DONYELL LEE,

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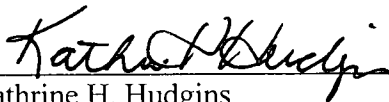
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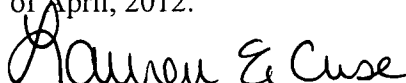
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Karen Ratigan, Esquire, and the S.C. Court of Appeals this 27th day of April, 2012.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of April, 2012.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2012.