

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County

Edgar W. Dickson, Circuit Court Judge

RECEIVED

MAY 14 2012

S.C. Supreme Court

JEFFREY BATES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

BREEN RICHARD STEVENS
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court reversibly erred in finding Petitioner knowingly and voluntarily withdrew his first PCR application in 2005, thus improperly denying review of Petitioner's initial PCR claim that his guilty plea was not voluntary because the withdrawal was made while Petitioner was unable to understand the proceedings, or the consequences of his actions due to his mental condition?

STATEMENT

Petitioner Jeffrey Wayne Bates was indicted by the Dorchester County grand jury on February 21, 2002 for murder, armed robbery, and first degree burglary. (App. 123; App. 125—App. 126; App. 128—129). Petitioner's case proceeded to a plea hearing on July 25, 2003, before the Honorable Diane S. Goodstein. Appellant was represented by Gene W. Dukes, while the State was represented by Walter Bailey. (App. 1).

The court conducted a hearing regarding Petitioner's competency at the plea proceedings, and primarily relied upon a mental health report—which itself was based upon evaluations made on March 25 and September 16—as well as a colloquy with Petitioner regarding his mental health. (App. 4, ln. 18—App. 10, ln. 9). At the conclusion of the colloquy, the plea court made the following observations:

I have had a chance now to observe Mr. Bates for several minutes and he seems exactly as he said. He seems sad, but he is not tearful. But he seems [quiet], a little bit. His demeanor certainly seems appropriate to me. He said he had his medicine last night and that he is feeling pretty good, he says. I don't see any evidence that he has not understood, and he certainly been responsive. I agree with the findings of the doctors that I have mentioned.

(App. 10, ln. 19—app. 11, ln. 3). Petitioner pled guilty to the three charged offenses, which the plea court accepted. (App. 22, ln. 6-11; App. 24, ln. 18-23). Pursuant to the negotiated plea agreement, Petitioner was sentenced to concurrent terms of thirty-five years for murder, thirty years for armed robbery, and thirty-five years for first degree burglary. (App. 28, ln. 18-21; App. 29, ln. 5-19).

On January 5, 2004, Petitioner filed his first post-conviction relief (PCR) application. (App. 31). In his application, Petitioner asserted the following claims:

- (a) Ineffective assistance of counsel.

1. My attorney broke the rule of attorney-client privilege.
 2. My attorney only visited me twice before my plea hearing.
 3. *My attorney allowed me to plead guilty while I was heavily medicated and not able to understand the proceedings, or the consequences of my actions.*
 4. My attorney never informed me that I had a right to direct appeal.
- (b) An illegal sentence has been imposed upon me.
1. I was sentenced to 35 years and the maximum penalty prescribed by statute for murder with no aggravating circumstances is 30 years.
 2. I was sentenced to 30 years for grand larceny (auto) and the maximum penalty prescribed for grand larceny is 10 years.
- (c) I was sentenced on the same day I pled guilty to murder and the Judge should have waited twenty-four hours for my sentencing proceedings.

(App. 33—App. 34) (emphasis added). An evidentiary hearing was held before the Honorable B. Hicks Harwell on November 17, 2005. Petitioner was represented by Christopher Lizzie, while the State was represented by Paula Magargle. (App. 45). At the hearing, PCR counsel's first words to the court were, "Your Honor, at this time I make a motion to withdraw the PCR." (App. 47, ll. 6-7). The first PCR court subsequently conducted a colloquy with Petitioner, and granted the motion. Only then did PCR counsel apprise the court that petitioner took medication for mental illness, which petitioner himself identified as Thorazine. (App. 47, ln. 8—App. 49, ln. 17). The first PCR court nonetheless granted the motion to withdraw Petitioner's PCR application, and explained its ruling with the following observations:

I feel that he's competent and that he understands the colloquy that I've had with him. He impresses me as a person with the ability to understand and knows what he's doing. And it is free and voluntary

and he's had competent counsel who is experienced, I know personally, in criminal defense as well as PCR's.

(App. 51, ll. 6-12). On November 28, 2005, an order of dismissal was filed by the first PCR court dismissing Petitioner's PCR application based upon the motion to withdraw. (App. 54—App. 55).

Petitioner filed his second application for PCR on March 14, 2008. (App. 57). Specifically, Petitioner alleged *inter alia* that he did not knowingly and voluntarily withdraw his first PCR application. (App. 59; App. 65—App. 69). On July 23, 2008, Petitioner filed his amended application for PCR, wherein he asserted that he was not in the proper state of mind at the time of his first PCR hearing because he did not receive his medication of Thorazine on that day. Petitioner further explained that his medication has since been changed to Seroquel for proper treatment of his diagnosed mental health condition of schizophrenia, without which he cannot process rational thoughts. (App. 78—App. 79).

An evidentiary hearing was held before the Honorable Edgar W. Dickson on December 18, 2010. Petitioner was represented by Charles T. Brooks, III, while the State was represented by Mary S. Williams. (App. 90). Over the State's objections based upon State v. Rush,¹ and the doctrine of laches, the court permitted Petitioner to testify as to whether he voluntarily withdrew his first PCR application. (App. 93, ll. 5-25; App. 94, ln. 20—App. 95, ln. 25; App. 101, ll. 4-9).

Petitioner testified that at the time of his first PCR hearing in 2005, he was prescribed Thorazine as medication for his mental health condition because he heard voices. (App. 97, ln. 21—App. 98, ln. 2). He further testified that his medication was changed in 2007, and he is now prescribed Seroquel and Remeron, which help him “deal with reality a lot better.” (App. 98, ll. 3-7).

¹ 368 S.C. 144, 628 S.E.2d 42 (2006).

Additionally, petitioner indicated that his change in medications was due to the fact that he could not comprehend what was going on when he was under the influence of Thorazine. (App. 98, ll. 18-22). In essence, Petitioner asserted that his current medication is properly treating mental health condition whereas the Thorazine did not. (App. 98, ln. 23—App. 100, ln. 18). Moreover, even after Petitioner began treatment on his new medication and 2007, it still took more time for the proper dosage to be determined by mental health professionals. (App. 100, ll. 8-14).

Petitioner also indicated that he was not even on any medication to control his mental health issues at the time he pled guilty in 2003.² (App. 101, ll. 11-15). As a result, petitioner asserted that his decision to plead guilty was not voluntary. (App. 103, ll. 1-3). Moreover, petitioner averred that the same week he pled guilty, he was served by his attorney with a notice from the Solicitor of intent to seek death. Petitioner also stated that his mother passed away the same week. (App. 103, ll. 3-15). Petitioner recalled that, when the plea court repeatedly asked if he was alright and had a bailiff get a chair to let Petitioner sit down, he was hallucinating and heard the voices telling him that he “was going to be strapped down and injected with poison.” (App. 111, ln. 18—App. 112, ln. 17). Accordingly, Petitioner testified that his guilty plea was not a rational or intelligent choice. (App. 108, ll. 23-24).

The Order of Dismissal was filed on September 26, 2011. (App. 116). As to the issue of whether petitioner knowingly and voluntarily withdrew his first PCR application, the PCR court initially acknowledged that “incompetence, if found, may toll the statute limitations.” (App. 119).

² Petitioner explained to the PCR court that he was not on any medication when he appeared before Judge Goodstein, but received it later while he was in the county jail. (App. 105, ll. 7-12).

However, the court went on to hold that Petitioner “failed to demonstrate that he was incompetent when he withdrew his application or in the years that have elapsed between withdrawal of [the initial PCR action] and the filing of the present application.” (App. 119). The court based its opinion upon the “transcript of the prior proceedings and findings of competence contained therein,” and that Petitioner’s “PCR testimony stands in contrast to his statements in prior proceedings and lacks credibility.” (App. 119). Finally, the PCR court stated that “no expert testimony has been offered to support [Petitioner’s] claim of incompetence.” (App. 119). As a result, the PCR court specifically held that Petitioner “failed to demonstrate that the procedural bars of successiveness and the statute of limitations should not be applied to his case.” (App. 119—App. 120).

Additionally, the PCR court held that the appellant would not be entitled to belated appellate review of his initial PCR application pursuant to Rush v. State because the first PCR court granted the motion to withdraw. (App. 120).

This Petition follows.

ARGUMENT

The PCR court reversibly erred in finding Petitioner knowingly and voluntarily withdrew his first PCR application in 2005, thus improperly denying review of Petitioner's initial PCR claim that his guilty plea was not voluntary because the withdrawal was made while Petitioner was unable to understand the proceedings, or the consequences of his actions due to his mental condition.

The Constitution demands that a defendant enter a guilty plea voluntarily, and that the related waivers “not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468-69 (1970). The difference “between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea.” Berry v. State, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009). The longstanding test for determining the validity of a plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985) (internal quotations omitted) (applying the two-part test for claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) to claims of the same against plea counsel). First, “the voluntariness of the plea depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases.” Id. On the other hand, the prejudice requirement focuses on whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” Id. 474 U.S. at 59, 106 S.Ct. at 370.

A person enters a guilty plea intelligently when he is “advised by competent counsel, . . . made aware of the nature of the charge against him, *and there is nothing to indicate that he was incompetent or otherwise not in control of his mental faculties.*” Appleby v. Warden, Northern

Regional Jail and Correctional Facility, 595 F.3d 532 (4th Cir. 2010) (quoting Brady, 397 U.S. at 756, 90 S.Ct. at 1473) (emphasis added). If Petitioner was mentally incompetent due to his mental health conditions, then his statements to the plea court—and later, to the first PCR court— would have likewise been incompetent. See, e.g. Pate v. Robinson, 383 U.S. 375, 384, 86 S.Ct. 836, 841 (1966) (stating “it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.”); Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992) (“Due Process prohibits the conviction of a person who is mentally incompetent. This right cannot be waived by a guilty plea.”) (internal citation omitted); see also Walton v. Angelone, 321 F.3d 442 (4th Cir. 2003) (“The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally incompetent defendants.”).

In the case at bar, the PCR court acknowledged that, “[Petitioner] stated that he had not taken his medication for schizophrenia, Thorazine, when he withdrew his application on November 7, 2005. Applicant further testified that the medication he first received had not been the right medication, and that he now takes different medications for his condition.” (App 121). However, the court relied on Petitioner’s colloquy with the first PCR court in finding that petitioner was competent at that time, rather than analyzing the testimonial evidence placed before this PCR court at the evidentiary hearing regarding Petitioner’s mental capacity at the time he withdrew his first PCR application. (App 121 – 122). In short, the overwhelming testimonial evidence produced at the PCR hearing regarding Petitioner’s state of mind—both at the time of his guilty plea in 2003, and at the time of his first PCR hearing in 2005—indicated Petitioner was not mentally competent to either plead guilty in 2003 or waive his initial PCR

application in 2005. See, e.g., Narciso v. State, Op. No. 27104 (S.C. filed March 14, 2012) (Shearouse Adv. Sh. No. 10 at 35-36), 723 S.E.2d 369, 371, (2012) (indicating this Court will affirm the PCR court only “if any evidence of probative value in the record exists to support the findings of the PCR court.”) (citing Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011)). Under these circumstances, Counsel’s performance was constitutionally deficient, and Petitioner’s plea was not knowingly and voluntarily made in 2003. Hill, 474 U.S. at 56, 106 S.Ct. at 369; see also Appleby, 595 F.3d at 532. Additionally, these circumstances likewise indicate that Petitioner’s waiver of his PCR rights in 2005 was not knowingly and voluntarily made either.

Further, despite the PCR court’s initial acknowledgment of the rule of law in South Carolina tolling the Statute of limitations for filing a PCR application where the applicant is incompetent,³ the court nonetheless ruled Petitioner’s present PCR action was barred as successive. This ruling was also erroneous; as previously indicated, not only was Petitioner was incompetent to waive his initial PCR application in 2005, but also Petitioner remained incompetent for over two years after his 2005 hearing due to improper medication given to him in efforts to control his diagnosed mental health condition of schizophrenia. Therefore, the proper point of inquiry to determine whether Petitioner was entitled to review of his guilty plea based upon the issues he raised in his first PCR hearing is whether Petitioner was competent to even waive his first PCR action in 2005. Under Petitioner’s stated circumstances, he was not competent to waive either his initial PCR application, or his right to PCR review of his guilty

³ Ferguson v. State, 382 S. C. 615, 619, 677 S.E.2d 600, 602 (2009) (“[C]ase law warrants a holding that, in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute should be tolled.”).

plea due to the running of the statute of limitations. Accordingly, the PCR court's reliance upon Rush v. State, 368 S.C. 144, 628 S.E.2d 42 (2006) was misplaced,⁴ as was the court's failure to apply the rule established in Ferguson v. State, 382 S. C. 615, 677 S.E.2d 600 (2009) to account for the gap in time between waiver of Petitioner's initial PCR application in 2005 and filing of the present PCR application in 2008. Therefore, PCR court's ruling on this matter is controlled by erroneous applications of law, and Petitioner should be entitled to review of his guilty plea based on the issues raised in his first PCR application.

Petitioner was prejudiced by the PCR court's errors. Had the PCR court properly determined that Petitioner was incompetent to waive his initial PCR application in 2005, then it would necessarily have reviewed whether Petitioner was competent to plead guilty in 2003. As discussed above, Petitioner testified that he was unmedicated during the plea hearing; as such, Petitioner's mental health condition of schizophrenia was uncontrolled when he pled guilty. Moreover, Petitioner's testimony at the PCR hearing indicated he experienced hallucinations during the guilty plea. Therefore, based on the testimonial evidence produced at Petitioner's present PCR hearing, his guilty plea was not voluntarily made because he was under the debilitating effects of his mental health condition at the time of the plea.

⁴ Holding a petitioner is not entitled to appellate review of an order granting his motion to withdraw his post-conviction relief action. Rush, 368 S.C. at 145, 628 S.E.2d at 43.

CONCLUSION

For the foregoing reasons, Petitioner Jeffrey Bates respectfully requests this Court to grant his Petition for Certiorari, and reverse the PCR court's Order of Dismissal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of May, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

JEFFREY BATES,

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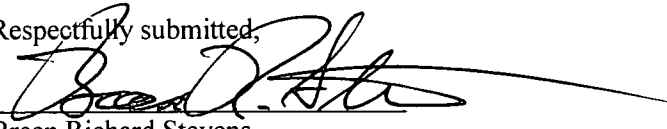
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeffrey Bates states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on December 8, 2010. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He 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 him as counsel for Jeffrey Bates.

Respectfully submitted,


Breen Richard Stevens
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of May, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Edgar W. Dickson, Circuit Court Judge

JEFFREY BATES,

PETITIONER,

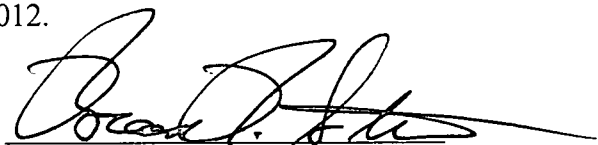
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

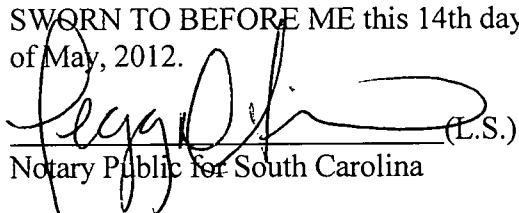
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Brian Petrano, Esquire and Jeffrey Bates, #235501, at Perry Correctional Institution this 14th day of May, 2012.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of May, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.