

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Orangeburg County

Edgar W. Dickson, Circuit Court Judge

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DESHAUN JAMEL FORDHAM,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001443

JOHNSON PETITION FOR WRIT OF CERTIORARI

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did plea counsel render ineffective assistance by failing to investigate, marshal, and present evidence of Petitioner's lack of competency in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT

On June 21, 2012, Petitioner and several other people saw Travis Felder and his girlfriend, Cathy Mack, driving down the road. App. 12, l. 15 – App. 13, l. 12. One person thought Felder may have money due to his prior drug dealing. App. 13, ll. 7-9. Petitioner and the others began following Felder and Mack. App. 13, ll. 13-17. Ultimately, Petitioner's car pulled in front of Felder and stopped forcing Felder to stop as well. App. 13, ll. 17-23.

Petitioner and Dante Stokes got out of their car and walked to Felder's car. App. 13, l. 24 – App. 14, l. 3. When Felder and Mack ducked, Petitioner and Stokes began firing their guns toward Felder's van. App. 14, ll. 4 – 10. Although the shots fired by Petitioner caused no harm to Felder or Mack, Stokes fired multiple shots into the passenger side, two of which struck and killed Mack. App. 14, ll. 12-17.

Felder drove off – still pursued by Petitioner and the others. App. 14, ll. 18-22. Felder flagged down a police officer causing Petitioner and the others to drive away. App. 15, ll. 1-4. Within thirty minutes, the police stopped the car in which Petitioner was a passenger and arrested all the occupants. App. 15, ll. 5-11. Police searched the car, finding two handguns. App. 15, ll. 15-20. Subsequent ballistics testing showed the guns were used to fire the shell casings found at the scene. App. 15, ll. 20-22. The ballistics testing revealed the projectile that killed Mack was fired by a nine millimeter. App. 16, ll. 4-5. It was undisputed that Stokes fired the nine millimeter and the fatal shot. App. 16, ll. 4-5.

Upon his arrest, Petitioner cooperated fully with law enforcement, including providing a statement detailing his involvement. App. 15, ll. 24-25.

On November 7, 2012, an Orangeburg County grand jury indicted Petitioner for murder (2012-GS-38-1413) and attempted murder (2012-GS-38-1415). App. 72-73; App. 75-76. On

February 27, 2014, Petitioner entered guilty pleas to the charges before the Honorable Edgar W. Dickson. App. 1. Don Sorenson represented the state, and R. Douglas Mellard represented Petitioner. App. 1. Judge Dickson sentenced petitioner to thirty years' imprisonment. App. 23, ll. 10-13; App. 74; App. 77. He ordered the sentences to be served concurrently. App. 23, ll. 14-15; App. 74; App. 77.

Petitioner did not file a notice of appeal following his guilty plea. App. 26. However, on July 3, 2014, Petitioner filed an application for post-conviction relief (PCR) challenging his convictions and sentences. App. 25-32. On February 23, 2016, the matter proceeded to an evidentiary hearing before the Honorable Maite Murphy. App. 38. Clay Mitchell represented the state. App. 38. Jonathan Waller represented Petitioner. App. 38. On May 23, 2016, Judge Murphy issued her order denying Petitioner relief from his convictions and sentences. App. 66-71. On July 6, 2016, Petitioner filed and served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Plea counsel rendered ineffective assistance by failing to investigate, marshal, and present evidence of Petitioner's lack of competency in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Relevant Facts

Despite Petitioner's significant mental health history and his attempt to make plea counsel aware of it, plea counsel failed to conduct an adequate investigation into Petitioner's mental health or challenge Petitioner's competency to enter guilty pleas. Petitioner explained he had received mental health treatment since he was three or four years old. App. 57, ll. 16-18. When Petitioner attempted to discuss his mental health history with plea counsel, he was informed it "wouldn't matter." App. 57, ll. 12-15. According to plea counsel, it "wouldn't matter" that Petitioner suffered from ADHD, anxiety, depression, paranoia, bipolar disorder, and schizophrenia. App. 51, l. 12 – App. 52, l. 2. These severe mental illnesses affected Petitioner's ability to understand his conversations with plea counsel and the plea judge. App. 52, ll. 3-14. Further complicating Petitioner's mental health was the fact that he was not on medication to treat these serious mental illnesses at the time of the crime, prior to this guilty plea, or during the guilty plea proceedings. App. 51, ll. 8-11; App. 52, ll. 12-14.

During the guilty plea, Petitioner advised the judge he had been treated for ADHD. App. 8, ll. 6-8. He further informed the court that he had taken prescription medicine to assist him with coping with the symptoms. App. 8, ll. 9-11. However, at the time of his guilty plea, Petitioner was not receiving his required medication because the jail would not permit him to do so. App. 8, ll. 19-22. Instead, the jail provided sleeping medicine only. App. 8, ll. 19-22.

Based on the exchange between Petitioner and the plea judge at the guilty plea hearing, it was clear plea counsel was aware of Petitioner's mental health condition – at least at the time of the guilty plea. Nonetheless, at the PCR hearing, plea counsel indicated he had no concerns regarding Petitioner's competency. App. 60, ll. 17-19. Plea counsel claimed that when he opened Petitioner's file, he "sent off for this mental health records." App. 60, ll. 19-20. He admitted those records showed Petitioner's struggle with ADHD. App. 60, ll. 20-21. Despite this evidence, plea counsel claimed to have "no concerns about his mental status" based upon plea counsel's "numerous" conversations with Petitioner. App. 60, ll. 21-23. Plea counsel opined Petitioner understood their conversations, including the legal theory of "the hand of one is the hand of all." App. 61, ll. 2-8. Plea counsel even noted that he had explained "the elements of murder,...the elements of attempted murder,...the elements of the hand of one and the hand of all" in a letter to Petitioner. App. 61, ll. 8-15.

Judge Murphy denied Petitioner relief, stating Petitioner "failed to meet his burden to prove that counsel's performance was either deficient or ineffective for failing to investigate [Petitioner]'s competency." App. 70. Further, Judge Murphy found plea counsel's "testimony that he had no concerns with [Petitioner]'s competency credible because he was able to understand and effectively communicate with him." App. 70. Oddly, the judge then made reference to the lack of evidence "that would diminish his culpability on the charges." App. 70. Additionally, Judge Murphy determined the allegation rested "entirely on speculation because no records were produced at the hearing." App. 70.

Discussion

In PCR actions, the burden is on Petitioner to prove his allegations by a preponderance of the evidence. Rule 71.1(e), SCACR. In order to prove ineffective assistance of counsel, Petitioner

must show that counsel rendered deficient performance resulting in prejudice to him. Strickland v. Washington, 466 U.S. 668, 687 (1984). In light of the fact that Petitioner pled guilty to the charged offense, Petitioner must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.E.2d 203 (1985).

As this Court explained, "criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Although attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant, the decision not to investigate must be reasonable. Wiggins v. Smith, 539 U.S. 510, 533 (2003)(holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); see also Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004)(holding trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from "'major depressive episodes with severe symptoms of anxiety and possible prepsychotic features'").

In Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 615 (Ct. App. 2012), the Court of Appeals found trial counsel ineffective for failing to interview personally a potential alibi witness where the defendant claimed he was with the alibi witness and the alibi witness had corroborated the defendant's claim in a taped interview. The Court was not persuaded by the state's argument that the defense pursued a consent defense at trial and an alibi defense would have run afoul of such. "This argument mischaracterizes the role of strategy in the analysis of trial counsel's performance." If the defendant's attorney had investigated properly, the defense of alibi and then made an informed strategic decision, then the argument would be more persuasive. However, trial counsel failed to conduct an adequate investigation and therefore, she could not have made an informed strategic choice. Id. at 237, 723 S.E.2d at 615; see also Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

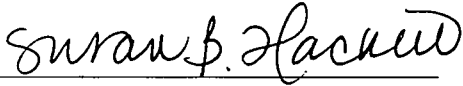
Plea counsel's assistance fell below reasonable prevailing norms because he did not investigate, marshal, and present evidence of Petitioner's lack of competency despite numerous red flags that Petitioner's competency was at issue. Plea counsel admitted he was aware of Petitioner's mental health struggles in light of the mental health records he received during the course of his representation of Petitioner. Nevertheless, plea counsel relied upon his own evaluation of Petitioner's abilities, instead of realizing the records before him mandating obtaining a professional opinion regarding Petitioner's competency and ability to move forward with his case. In failing to investigate, marshal, and present evidence of Petitioner's lack of competency, plea counsel rendered deficient performance.

Turning to the second prong, trial counsel's deficient performance resulted in prejudice to Petitioner because Petitioner would have insisted upon going to trial rather than plead guilty had plea counsel investigated, marshalled, and presented evidence of Petitioner's lack of competency.

Petitioner testified at the PCR hearing that had he would have gone to trial. App. 53, ll. 21-24. Thus, had plea counsel rendered reasonable assistance by investigating, marshalling, and presenting evidence of Petitioner's competency, Petitioner would not have pled guilty and would have insisted upon a trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition, but dispenses with briefing, Petitioner respectfully requests this Court reverse the decision of the PCR court, vacate his guilty plea, and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of December, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Edgar W. Dickson, Circuit Court Judge

DESHAUN JAMEL FORDHAM,

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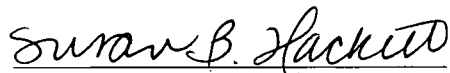
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Deshaun Jamel Fordham 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 record of Petitioner's hearing before Judge Edgar W. Dickson, which was held on February 23, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Deshaun Jamel Fordham.

Respectfully Submitted,


Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 15th day of December, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Susan B. Hackett
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This 15th day of December, 2016.

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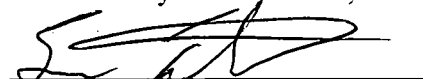
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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Deshaun Jamel Fordham, #342917, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 15th day of December, 2016.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 15th day of December, 2016.

 (L.S)

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