

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

 ORIGINAL

DAVID ANTHONY TYRE,

PETITIONER

RECEIVED

DEC 27 2017

V.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001141

JOHNSON PETITION FOR WRIT OF CERTIORARI

Wanda H. Carter
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to develop a mental illness defense in the case.

STATEMENT

Petitioner David Anthony Tyre was convicted of homicide by child abuse and infliction of great bodily injury upon a child per jury trial held during the October 2010 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole and sentenced to life imprisonment on the homicide conviction and twenty years for the bodily injury conviction. App. 1-508. Petitioner was represented by Doug Brannon and Shawn M. Campbell at trial, and Assistant Solicitors Harold Gowdy, Barry Joe Barnette, and Cindy Crick appeared on behalf of the state. Petitioner appealed, but his convictions and sentences were affirmed on appeal. See State v. Tyre, 2013-UP-286 (S.C. Ct. App. filed June 26, 2013). App. 510-515. Breen R. Stevens and Carmen Vaughn Ganjehsani, both formerly of the Office of Appellate Defense, represented petitioner on direct appeal.

On January 25, 2015, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. App. 518-526. The respondent filed a return dated August 14, 2015, and an amended return dated July 22, 2016, requesting that a PCR hearing be held in the case. App.527-536.

A PCR hearing was convened on September 20, 2016, at the Spartanburg County Courthouse before Judge Paul M. Burch. App. 537-598. On November 2, 2016, Judge Burch issued an Order of Dismissal denying petitioner's PCR allegations. App. 600-609.

Petitioner appealed Judge Burch's Order of Dismissal. This petition follows.

ARGUMENT

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

The ten-year old child in this case who had special needs due to cerebral palsy was brought into the hospital on July 5, 2009 for breathing problems after what was thought to be a seizure had occurred. The state's theory of the case was that petitioner was responsible for the child's broken arm that occurred on June 22, 2009, and that he also caused the child's death on July 5, 2009, by dropping her on her head after swinging her from the ankles. App. 405, l. 1 – p. 418, l. 4; App. 315, l. 13-22. The three medical doctors who testified on behalf of the state concluded that the child's head bleed came from a non-accidental abusive and blunt head trauma injury. App. 275, l. 10 – p. 285, l. 10; App. 319, l. 2 – p. 321, l. 21; App. 327, l. 5 – p. 329, l. 11.

Petitioner testified at trial and explained that he had raised the child up and had picked her up by the arms when her arm broke, and that on July 5, 2009, he was swinging the child by her ankles and that he heard a “thud” sound when he put the child down. App. 355, l. 11 – p. 375, l. 6.

During the PCR hearing held in the case, petitioner testified that he mentioned to trial counsel that he had been treated for mental illness by a doctor and he thought counsel contacted his doctor. Petitioner stated that he had been diagnosed previously with depression, sullenness, and inability to deal with small frustrations, and it all started when his father died, and that when he was in his 20's he took Zoloft, but he stopped in 2007/2008 and was not on his medication. App. 544, l. 8 – p. 548, l. 7; App. 561, l. 2-20. Petitioner added that he asked for a psychiatric evaluation when he was in the detention center and ultimately found no assistance other than a doctor from the state

of Minnesota. App. 548, l. 21 – p. 550, l. 2; App. 561, l. 21 – p. 562, l. 2. Petitioner stated his depression led to him give a statement. App. 551, l. 20-22. Petitioner testified as follows:

Q: Why do you believe [counsel] should have asked for a psychological evaluation?

A: [I] was making threatening comments about my safety.

Q: Did you have these kinds of suicidal issues before all this happened?

A. Yes.
App. 550, l. 4-18.

A. I was going through a bad depression phase and I had actually tied a rope I had around the doorknob and hung it over my door just to see what it would be like...[and] in a hotel room and I was looking up wondering if a sprinkler head could hold my weight.
App. 551, l. 1-8.

In conclusion, petitioner stated that his untreated depression affected his actions on the days the events occurred. Petitioner stated that no lesser charge was sought based on his defense. App. 552, l. 19-21; App. 554, l. 20 – App. 555, l. 1.

Petitioner's mother Hazel Tyre testified that she believed petitioner suffered from depression as early as 1995, and that he began treatments with Wellbutrin after that time. Hazel Tyre stated that petitioner began to withdraw after his father died, and that there was a time when he put a gun to his mouth. App. 566, l. 7 – App. 572, l. 2. Co-worker Terry Lacowski testified that she could tell that petitioner suffered from depression. App. 572, l. 15 – p. 574, l. 6.

Trial counsel testified during the hearing and stated that the defense theory was that this death was accidental, and that petitioner appeared to understand the legal process, and that petitioner never mentioned his medications and depression. App. 576, l. 9-25; App. 578, l. 15-24; App. 580, l. 2-7; App. 587, l. 1-9; App. 588, l. 20 – p. 589, l. 6. Counsel stated that he was unaware of the fact

that a circuit court judge ordered him to be evaluated. App. 581, l. 2-5. However, lead counsel admitted that petitioner's mom raised the depression issue during a pre-trial bond revocation hearing. App. 588, l. 10-14; App. 593, l. 18-24. Lead counsel's testimony follows:

Q: [D]id you ever have that psychological evaluation done or tried to get it done based on the judge's order?

A: I can't remember the result of that...I know we tried to get him evaluated because we were trying to get him out of jail...but I just can't remember.

Q: There's no reason to believe, strategically, you avoided it because of the outcome of the evaluation?

A. No....I was not concerned about his mental health in regards to it hurting or helping the case. The only reason I was concerned about his mental health was to get him out of jail on bond.
App. 593, l. 3-17.

Counsel admitted that he failed to explore the mental health issue as mitigation in the case. App. 594, l. 2 – p. 595, l: 20.

The PCR judge ruled that petitioner presented no medical records or expert testimony to prove a mental illness would have in effect been a defense in the case. App. 607-609.

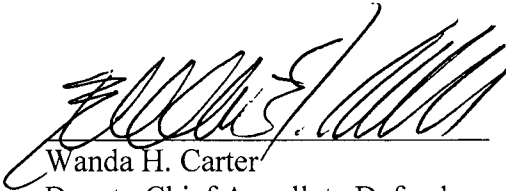
As a rule, counsel has a duty to conduct adequate and appropriate investigations in a case. Strickland v. Washington, 466 U.S. 668 (1984). Also, with respect to cases where mental issues abound, counsel has a duty to investigate, prepare, and present evidence of mental illness on behalf of the defense. See Von Dohlen v. State, 360 S.C. 598, 601 S.E.2d 738 (2005), where the Court found that counsel was ineffective in failing to provide the psychiatrist who testified at trial with all 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 and a death sentence avoided. Also, compare Wiggins v. Smith, 539 U.S. 510 (2003), where trial counsel was found ineffective in failing to

expand the investigations into the defendant's background with sufficiency in order to learn of the defendant's diminished mental capacity and childhood abuse, rape, and molestation in order to show his impaired mental and psychological state. Compare further, Davenport v. State, 301 S.C. 39, 389 S.E.2d 649 (1990), where the Court held that counsel was ineffective in failing to develop an insanity defense when the state's psychiatrist diagnosed the defendant as legally insane. Also, compare Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017), where the Court held that trial counsel was ineffective in failing to conduct an independent evaluation for a defendant who was obviously incompetent to plead guilty and that the defendant was prejudiced as a result of that deficiency. Finally, in the federal court cases of People v. Coroma, 80 Cal. App. 3d 684, 145 Cal. Rptr. 899 (1st Dist. 1978); Ramseyer v. Glodgett, 853 F. Supp. 1239 (WD.Wash. 1994), and Hull v. Hyler, 190 F.3d 88 (C.A. 3PA, 1999), the courts found counsel ineffective in failing to investigate into evidence establishing their clients' mental incompetence.

Clearly, in the case at bar, counsel's failure to investigate into and develop a mental illness defense constituted deficient legal representation that was below the range of competence demanded of criminal attorneys in violation of the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668 (1985). But for counsel's error in this regard, a reasonable likelihood exists that petitioner's trial would have ended differently.

CONCLUSION

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

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of December, 2017.

STATE OF SOUTH CAROLINA

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—————
PETITION TO BE RELIEVED AS COUNSEL
—————

Counsel for David Anthony Tyre states that:

1. She is Deputy Chief 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 trial before Judge Paul M. Burch, which was held on September 20, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve her as counsel for David Anthony Tyre.

Respectfully Submitted,

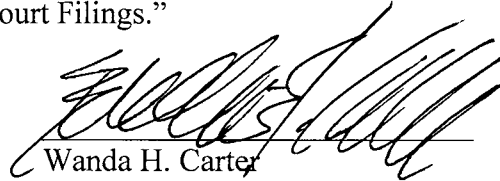

Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of December, 2017.

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."



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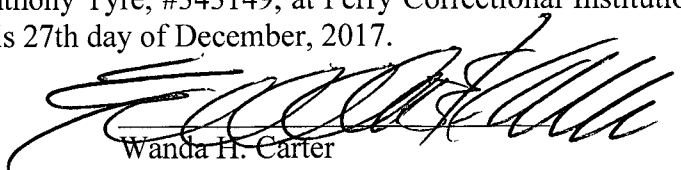
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CERTIFICATE OF SERVICE
—————

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 Valerie Garcia Giovanoli, 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 David Anthony Tyre, #343149, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 27th day of December, 2017.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 27th day of December, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 7/05/2027.