

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable D. Craig Brown, Circuit Court Judge

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OCT 31 2016

ALBERT OWENS,

S.C. SUPREME COURT

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000649

JOHNSON PETITION FOR WRIT OF CERTIORARI

John H. Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

The PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to investigate Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea, as evinced by Petitioner's established history of mental illness and Petitioner's inability to cogently answer questions at the PCR hearing.

STATEMENT

Petitioner was indicted for two counts of burglary second degree during the June 2013 term of the Lexington Grand Jury. App. 80 - 82. On October 31, 2013, Petitioner pled guilty to one count of burglary second, nonviolent, and one count of burglary second, violent, before the Honorable Steven H. John. App. 1 - 22. Erik Drylie represented Petitioner and Assistant Solicitor Kate Ursy represented the State.

Judge John sentenced Petitioner to a total sentence of ten years imprisonment. App. 21, ll. 9-25. Judge John also revoked Petitioner's probation in full. *Id.* Petitioner did not appeal.

Petitioner filed an application for post-conviction relief on May 6, 2014. App. 24 - 36. The State filed a Return on June 25, 2015. App. 37 - 43. An evidentiary hearing was held before the Honorable D. Craig Brown on December 7, 2015. App. 44 - 68. Aimee Zmroczek represented Petitioner and Assistant Attorney General Patrick Schmeckpeper represented the State.

Judge Brown denied Petitioner's application. App. 66, l. 18 - 66, l. 11. A written order of dismissal was filed on January 15, 2016. App. 69 - 79. This petition follows.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to investigate Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea, as evinced by Petitioner's established history of mental illness and Petitioner's inability to cogently answer questions at the PCR hearing.

Relevant Facts

Petitioner was arrested for burglarizing two West Columbia area businesses. Petitioner first came to police attention when the owner of one of the businesses found Petitioner trying to sell some of the stolen items to a metal recycling company the day after the burglary. App. 12, l. 14 - 13, l. 21. Once in police custody, Petitioner confessed to burglarizing the two businesses. App. 18, l. 7 - 21, l. 8.

Guilty Plea

In exchange for pleading guilty, the State agreed to dismiss pending burglary charges arising out of a series of break-ins at a bingo parlor. App. 13, l. 9 - 14, l. 21. The State also dismissed several charges related to the burglary of the two businesses, including: safecracking, grand larceny, and enhanced property offenses. *Id.*

There was no recommendation or negotiation as to the sentence. Following a brief recitation of the relevant facts, Judge John accepted Petitioner's guilty plea and sentenced him to a total of ten years imprisonment. App. 21, l. 10 - 22, l. 2. The court also revoked Petitioner's probation in full and converted all restitution owed into a civil judgment. *Id.*

PCR Application and Evidentiary Hearing

Petitioner testified at the evidentiary hearing, but was unable to answer many of the questions presented to him. For instance, Petitioner did not remember who represented him on contemporaneous charges in Richland County. App. 50, ll. 2-17. Additionally, Petitioner did

not understand basic questions posed to him at the hearing such as: why did he want plea counsel to go to the scene of the burglaries and whether plea counsel ever reviewed discovery with him. App. 51, l. 12 - 52, l. 23.

Unable to provide detailed, cogent answers, Petitioner vaguely alleged that plea counsel failed to investigate his mental health problems. App. 50, ll. 14-22. Petitioner explained that, in addition to a serious drug problem, he also suffered from “major depression disorder, anxiety and I can’t remember the other ones.” *Id.*

Petitioner recalled that plea counsel met with him twice before having him enter into the guilty plea. App. 52, l. 15 - 53, l. 24. Plea counsel never asked Petitioner about his drug use or any mental illness. *Id.* Petitioner admitted that he was using crack cocaine and marijuana at the time of the burglaries. App. 54, ll. 1-13. He further testified that, had plea counsel adequately investigated his mental illness, Petitioner would not have pled guilty, but would have insisted on standing trial. *Id.*

Plea counsel testified that he was aware of Petitioner’s lengthy history of mental illness, but that he saw no reason to believe that Petitioner was mentally incompetent. Rather, counsel believed that Petitioner was manifesting the common, deleterious mental effects of long-term drug abuse. App. 59, l. 17 - 61, l. 21. Counsel had no concerns regarding Petitioner’s ability to knowingly enter into the guilty plea.

Counsel claimed that he always had clients evaluated when he had any suspicion that they may not be competent to stand trial. *Id.* He then reiterated that he had no such concerns with respect to Petitioner. Plea counsel testified that - to the best of his recollection - Petitioner was “actually fairly happy with the ten-year sentence compared to what could have happened at that plea.” App. 62, ll. 4-12.

After brief summation arguments by counsel, Judge Brown denied Petitioner's application in an oral ruling from the bench. App. 66, l. 18 - 67, l. 5. Judge Brown held that "this Court finds the [Applicant] has failed to show that counsel was deficient and furthermore failed to show [how] such performance prejudiced the Applicant." *Id.*

Written Order of Dismissal

A written order of dismissal was filed on January 15, 2016. App. 69 - 79. In the order, Judge Brown held that Petitioner failed to show how plea counsel was "ineffective in failing to raise his mental health issues" and "has failed to show he was insane at the time he committed the charged offenses, or at the time of his plea." App. 74.

Specifically, the court found that plea counsel "was no doubt in the best position to make the initial determination on whether to pursue any sort of [mental illness] evaluation. App. 76. In denying relief, the court summarily dismissed plea counsel' testimony - which it had otherwise found credible - acknowledging that he was aware of Petitioner's history of mental illness at the time that Petitioner entered into the guilty plea. *Id.*

Discussion

The PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to investigate Petitioner's fitness to stand trial when there was a reasonable probability that Petitioner was incompetent at the time of the plea, as evinced by Petitioner's established history of mental illness and Petitioner's inability to cogently answer questions at the PCR hearing.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has created a

two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. The two-part test adopted in *Strickland* also “applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). However, “[p]lea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements.” *Stalk v. State*, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

“In order to find that petitioner's [plea] counsel was ineffective for refusing to request a *Blair* hearing¹ on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings.” *Matthews v. State*, 358 S.C. 456, 459, 596 S.E.2d 49, 50–51 (2004). To show “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*, 358 S.C. at 459, 596 S.E.2d at 50 (alterations by court) (quoting *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)).

Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. *Jeter*, 308 S.C. at 232, 417 S.E.2d at 595. To prevail in a PCR action, the petitioner must prove by a preponderance of the evidence he was incompetent when he entered his guilty plea. *Matthews*, 358 S.C. at 458 – 59, 596 S.E. 2d at 51; *see also* Rule 71.1(e), SCRPC. Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal. *Jeter*, 308 S.C. at 232, 417 S.E.2d at 596.

¹ *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

Furthermore, “[t]he test of competency to enter a plea is the same as required to stand trial.” *Id.* “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.” *Id.*

Deficient Performance

In this case, plea counsel should have fully investigated whether Petitioner was competent to plead guilty because plea counsel knew of Petitioner’s history of mental illness. App. 76; *Cf. Lee v. State*, 396 S.C. 314, 322, 721 S.E.2d 442, 447 (2011) (finding “[p]lea counsel could not be deficient if she had no indication of [Petitioner’s] mental status”).

Petitioner’s mental illness and general reduced mental functioning was further evidence by his inability to assist in presenting his post-conviction relief claims. App. 50, l. 5 - 53, l. 20. At the hearing, Petitioner was unable to remember key people and events surrounding his guilty plea. He was also unable to recall the specific allegations of ineffectiveness that he filed against counsel. App. 50, l. 5 - 53, l. 20.

Consequently, plea counsel was deficient for failing to investigate Petitioner’s history of mental illness prior to advising him to plead guilty. App. 74 - 76 *Matthews*, 358 S.C. at 460, 596 S.E.2d at 51; *see generally Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836 (1966) (finding when evidence of a defendant’s mental deficiencies raise doubt as to his competence, due process requires the judge to order a competency hearing).

Prejudice

As to prejudice, plea counsel failed to fully explore and investigate Petitioner’s mental incompetence because he maintained that “there was definitely a long history of substance abuse and some effects from that, but I don’t think that there was anything where he didn’t understand

anything that I had ever gone over with him.” App. 61, ll. 18-21. Notably, Petitioner testified that had he not been mentally incompetent at that time, he would not have pled guilty. App. 54, ll. 7-13.

Thus, there was a ‘reasonable probability’ that petitioner was incompetent at the time of his guilty plea” and plea counsel should have - at a minimum - sought an evaluation. *Matthews*, 358 S.C. at 460, 596 S.E.2d at 51. Therefore, the PCR court erred in finding that plea counsel provided effective assistance of counsel. App. 74 - 76.

CONCLUSION

Based on the foregoing reasons, Albert Owen's petition for writ of certiorari should be granted to allow full briefing on the issue.

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of October, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Honorable D. Craig Brown, Circuit Court Judge

ALBERT OWENS,

PETITIONER,

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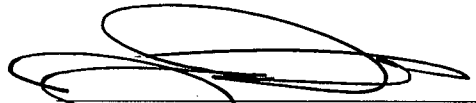
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Albert Owens states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
 2. He has reviewed the record of petitioner's trial before Judge D. Craig Brown, which was held on December 7, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
 3. He 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 him as counsel for Albert Owens.

Respectfully Submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st day of October, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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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STATE OF SOUTH CAROLINA

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ALBERT OWENS,

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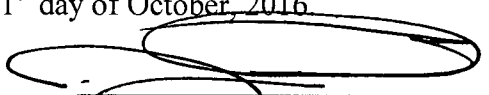
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE
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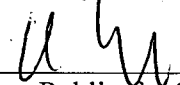
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Patrick Schmeckpeper, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Albert Owens, #178478, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 31st day of October, 2016.


—————
John H. Strom

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2016.


————— (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025