

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Jocelyn J. Newman, Circuit Court Judge

GREGORY FITZGERALD YOUNG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001653

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the judge erred when she denied Petitioner's application for post-conviction relief where plea counsel failed to hire an independent doctor to evaluate Petitioner or to request a competency evaluation by the court despite being aware of Petitioner's incompetency?

STATEMENT

The Oconee County Grand Jury indicted Petitioner on two counts of criminal sexual conduct in the first degree on June 2, 2014. App. 97 – 100. On January 6, 2015 Petitioner was indicted by the Oconee County Grand Jury on two counts of criminal sexual conduct in the third degree. App. 93 – 96.

On January 15, 2015, Petitioner entered a guilty plea to the charge of criminal sexual conduct in the second degree in exchange for dismissal of the two counts of criminal sexual conduct in the first degree and the two counts of criminal sexual conduct in the third degree, before the Honorable Eugene C. Griffith, Jr. App. 1. Lindsey Simmons represented the state and Suzanne E. Earle represented Petitioner. Id. The prosecution made a recommendation of a twenty year sentence. App. 2, ll. 9 – 10. Judge Griffith, Jr. accepted Petitioner's guilty plea and sentenced him to twenty years in prison. App. 17, ll. 6 – 8.

Petitioner filed for post-conviction relief (PCR) on August 20, 2015. App. 17 – 32. He filed two amendments to his PCR application on September, 24, 2015 and August 25, 2016, respectively. App. 33 – 36; App. 37 – 48. The state filed its return on May, 25, 2017. App. 50 – 56. On June 27, 2017, his PCR hearing was held before the Honorable Jocelyn J. Newman. App. 57. Rodney W. Richey represented Petitioner and Lindsey A. McCallister represented the state. Id. Judge Newman issued her order on July 25, 2017 denying Petitioner post-conviction relief. App. 82 – 90.

This petition follows.

ARGUMENT

The judge erred when she denied Petitioner's application for post-conviction relief where plea counsel failed to hire an independent doctor to evaluate Petitioner or to request a competency evaluation by the court despite being aware of Petitioner's incompetency.

Relevant Facts

Plea counsel provided ineffective assistance because despite evidence that Petitioner's competency was at issue, she did not hire an expert to evaluate Petitioner nor did she request the court for a competency evaluation by the Department of Mental Health.

Petitioner presented evidence that showed plea counsel was on notice that Petitioner's competency was at issue. At the guilty plea hearing the judge asked Petitioner if he was satisfied with the advice of his counsel. Petitioner responded, "I tried to understand what she was talking about," indicating his difficulty understanding the consequences of the matter. App. 13, ll. 15 – 16. Petitioner then explained that he was diagnosed by his doctor, Christy Heel, with a sleeping disorder that affects his memory. App. 16, ll. 2 – 5.

During sentencing, plea counsel informed the court that Petitioner was enrolled special education classes all throughout school. App. 15, ll. 14 – 16. Plea counsel requested the plea court to consider his lack of capacity as a mitigating factor in sentencing, "I would ask you to take into consideration that he has - - does have difficulty understanding what he's charged with, what the consequences may be," which showed counsel knew of the mental difficulties of Petitioner. App. 15, ll. 19 – 23.

At PCR, Petitioner testified that he made plea counsel aware of his inability to read or write. App. 60, ll. 12 – 16. Plea counsel claimed that she, "could not recall," if Petitioner requested a competency evaluation. App. 67, ll. 6 – 12. She did recall however that Petitioner informed her of

his limited education and limited ability to understand. Id. Moreover, plea counsel testified at length that Petitioner asked her *repeatedly* to look into the sexual history of the alleged victim as evidence that he did not commit the alleged crimes, and that plea counsel needed to explain to him *repeatedly* that she could not introduce that type of evidence. App. 68, ll. 2 – 15. (emphasis added)

All of this information put plea counsel on notice that Petitioner’s competency was called into question. Her failure to hire a doctor to conduct an evaluation or to move the court for a competency evaluation constituted ineffective assistance that prejudiced Petitioner.

Discussion

The proper standard for appellate review of a PCR court’s grant of relief is whether, “any evidence of probative value” exists to sustain the PCR court’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If any probative evidence exists to support the PCR court’s decisions, the ruling *must* be upheld. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). The reviewing court must give great deference to the PCR court’s findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

To prove a claim of ineffective assistance of counsel, the petitioner must show that counsel provided was deficient and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688, 104 S.Ct. at 2064. An attorney’s performance is measured against prevailing professional norms. Id. at 688, 104 S.Ct. at 2065. 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).

An individual’s constitutional right to due process of law prohibits the conviction of an incompetent defendant. This right may not be waived by a guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). The competency required to enter a guilty plea is the same as required to stand trial. Id. at 232, 417 S.E.2d at 596. The defendant must have the ability to consult with his attorney with a reasonable degree of rational understanding and have an understanding of the proceedings against him. Id. A guilty plea may not be accepted unless it is voluntary and understandingly made. State v. Rosier, 312 S.C. 142, 148, 439 S.E.2d 307, 309 (1993) (citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976)).

When a petitioner challenges counsel’s failure to request a Blair¹ hearing on petitioner’s competency to stand trial, petitioner must show that counsel was deficient and the deficiency prejudiced the outcome of the proceedings. Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50-51 (2004). 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*. Id. at 459, 596 S.E.2d at 50. (emphasis added)

Matthews v. State, *supra*, parallels Petitioner’s case. Matthews plead guilty to armed robbery, attempted armed robbery, carjacking, and accessory after the fact to murder. Id. at 458, 596 S.E.2d at 50. Matthews filed a PCR application and was denied relief. Id. Matthews appealed the PCR judge’s decision alleging ineffective assistance of counsel because his counsel failed to request a competency hearing to determine whether Matthews was competent to stand trial. Id.

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

This Court held that counsel's performance was ineffective for failing to request a Blair hearing because Matthews proved, by the preponderance of evidence, his incompetency at the PCR hearing. Id. at 460, 596 S.E.2d at 51. Matthews presented a psychiatrist at PCR to testify to his incompetency. Id. at 459, 596 S.E.2d at 51. Although, in the instant case, Petitioner did not hire a psychiatrist for evaluation purposes to testify at PCR, the plea transcript and PCR transcript considered together show Petitioner did not understand his attorney and did not understand the consequences of the plea. Under these circumstances plea counsel provided ineffective assistance for not requesting an evaluation or at a minimum a competency hearing.

In Lee v. State, 396 S.C. 314, 721 S.E.2d 442 (2011) the Court of Appeals distinguished the decision in Matthews. Even though Lee presented a psychologist to testify to his incompetency at his PCR hearing, the trial court held that Lee had not proven plea counsel was ineffective for failure to obtain a competency evaluation prior to his guilty plea. Id. at 318, 721 S.E.2d at 444; Id. at 319, 721 S.E. 2d at 445. Specifically, this Court found that although Lee was incompetent at the time of the plea, plea counsel was not on notice that Lee's competency was an issue at the plea hearing and thus did not provide ineffective assistance. Id. at 321, 721 S.E.2d at 446.

The decision in Lee, illustrated the fact that a doctor who testified at PCR to the evaluation he or she conducted on a petitioner, while proving petitioner may in fact be incompetent, is not the crux of the inquiry. While a doctor's testimony about his or her evaluation of the petitioner is one way to prove by a preponderance of the evidence petitioner's incompetence, the superseding issue is whether or not trial counsel was on notice that the petitioner's competency was in question.

In the instant case, plea counsel's performance was deficient because, unlike the plea counsel in Lee, Petitioner's plea counsel knew Petitioner's competency was at issue during the plea hearing. Moreover, while Petitioner did not have a physician testify at PCR to his incompetency, he

did prove by the preponderance of evidence his incompetency through other means.² Petitioner presented evidence that he has a disorder which affects his memory, diagnosed from his doctor, Christy Heel. App. 16, ll. 2 – 5. He testified that he did not understand the proceedings at the time of the plea. App. 60, l. 20. As in Matthews, Petitioner attended special education classes throughout school and plea counsel was aware of his attendance. App. 15, ll. 15 – 16; App. 67, ll. 21 – 22; Matthews, at 459, 596 S.E.2d at 51. Moreover, plea counsel asked the judge at sentencing, “I would just ask you to take into consideration that he has - - does have difficulty understanding what he’s charged with, what the consequences may be.” App. 15, ll. 19 – 23. Therefore, counsel’s performance was deficient because she was aware of the reasonable probability that Petitioner was incompetent at the plea hearing and never had him evaluated.

To satisfy the Strickland, *supra*, test, Petitioner must show that counsel’s deficient performance prejudiced him. However, Petitioner pled guilty to the charged offense. Therefore, in order to be prejudiced by counsel’s deficient performance, Petitioner must show 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 (1985).

Plea counsel provided ineffective assistance of counsel when she failed to have Petitioner evaluated after being on notice that there was a reasonable probability that Petitioner was incompetent at the time of the plea. Petitioner would not have plead guilty but for counsel’s deficient performance because he testified during his PCR hearing that he wanted a jury trial instead of pleading guilty. App. 64, l. 21 – 65, l. 7. Therefore, Petitioner was prejudiced because plea

² This Court has held in the context of insanity, that lay testimony may be sufficient. State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989); State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255 (1993); State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997).

counsel's deficient performance induced him to plea when he would have otherwise insisted on going to trial.

CONCLUSION

Petitioner respectfully requests this Court reverse the findings of the PCR court, vacate his conviction and sentence, and order a new trial.



Victor R. Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of March, 2018.

STATE OF SOUTH CAROLINA

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Honorable Jocelyn J. Newman, Circuit Court Judge

GREGORY FITZGERALD YOUNG,

PETITIONER

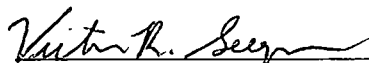
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Gregory F. Young, #362732, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 2nd day of March, 2018.



Victor R. Seeger
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 2nd day of March, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023