

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Lee S. Alford, Circuit Court Judge

Opinion No. 2012-up-651 (S.C.Ct.App. filed Dec. 12, 2012)

THE STATE,

RESPONDENT,

v.

BEN ROBERT STEWART,

PETITIONER,

PETITION FOR REHEARING AND
MEMORANDUM IN SUPPORT

The pro se Petitioner making its Petition for Rehearing and Memorandum in Support pursuant to Rule 221. sec. (a) SCACR. and also Rule 226. sec. (b) Consideration governing review, of sound judicial discretion, and will be granted only where there are special and important reasons. The Courts power to grant review in general are: (1) Where there are novel questions of law. (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. (4) Where substantial constitutional issues are directly involved. and (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

STATEMENT OF THE CASE

On February 27, 2009, petitioner was convicted of accessory before the fact to murder, accessory before the fact to robbery, accessory before the fact to kidnapping, accessory after the fact to murder, robbery, and kidnapping, possession of a firearm during a commission of a violent crime, and criminal conspiracy and was sentenced to thirty (30) years after the current sentence in Pennsylvania where the petitioner is confined. On direct appeal, petitioner's appeal was dismissed by the South Carolina Court of Appeals. Opinion No. 2012-up-651 (S.C.Ct.App. filed Dec. 12, 2012) .

Petitioner now seeks a rehearing on the following:

ARGUMENT

I.

In 1956, the Supreme Court of the United States in, *Bishop v. United States*, 350 U.S. 961 (1956) vacated judgment and the case was remanded to the District Court for a hearing on the sanity of the petitioner at the time of his trial. Prior to going to trial, petitioner indicated to the trial Court that he was under psychiatric medication. Nevertheless, the trial Court based its decision on the mental evaluation that was done at an earlier date. The decision in *Dusky v. United States*, 362 U.S. 420 (1960) the Supreme Court reversed judgment of the Court of Appeals on the grounds of the insufficiency of the record to support the District Courts finding that the accused was mentally competent to stand trial. By the petitioner taking psychiatric medication and going to trial he was entitled to find out whether or not such medication had side effects that would render him unable to meet the standard for trial. It was also the trial Court duty to make sure the petitioner had a fair trial. In, *Washington v. Harper*, 494 U.S. 210 (1990).

ARGUMENT

II.

In *Washington v. Harper*, 494 U.S. 210 (1990)

The United States Supreme Court, Justice, Kennedy, held that: (3)
Administrative procedures set by policy, including provision for review by administrative panel as opposed to judicial decision maker, comported with requirement of procedural due process. *Harper*, Id. at. 231. states; " notwithstanding the risk that are involved, we conclude that an inmate's interest are adequately protected, and better served, by medical professionals rather than a judge."

At trial, the trial Court ruled that the petitioner could conduct a defense under psychiatric medication, and explained how many people could do the same, which was error. At trial, the following was stated:
P.p. 32, line 11-21. -

COURT: All right, sir. You know, I'm basing my decision, he's been evaluated and they found him competent to stand trial. Plenty of people take Prozac and other antidepressants and they are still able to understand and ready to proceed and assist counsel with defense and render him competent. If he feels he has a problem with his understanding and being able to assist his attorney with the defense of the case, then he should say so. All right, but he choose not say so. At any rate, I find based on all information in front of me, including the mental evaluations, mental health evaluations, he's competent to stand trial and able to assist counsel with his defense and is ready to proceed with trial. (END OF R.)

The inquiry on the petitioner's competency at trial was abandon, the trial Court was suppose to look further on about the petitioner's competency before trial, thus, providing the petitioner with a fair trial and due process. It was not the petitioner nor trial Court's duty to decide whether or not the petitioner was able to stand trial. *Harper*, answer's this clearly, " better

served by medical professionals rather than a judge".

ARGUMENT

III.

In *Drope v. Missouri*, 420 U.S. 162. (1975) The United States Supreme Court Burger, Ch.J. opinion, expressing the unanimous views of the Court, it was held (1) the defendant's due process right to fair trial was violated by the trial Court failure to suspend the trial pending a psychiatric examination to determine the defendant's competency to stand trial. *Drope, Id.* at. [420 U.S. 818][1d] [11] [12a] states; Even when a defendant is competent at the commencement of his trial, a trial Court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standard of competence to stand trial.

In this case, it meets the standard of *Drope*, it was clearly circumstances that suggested a change of mental competency of the petitioner when he was at trial under psychiatric medication and the correct course was for the trial Court to suspend the trial until such facts could be concluded and an evaluation could be made.

ARGUMENT

IV.

In *Pate v. Robinson*, 383 U.S. 375 (1975) the Supreme Court of United States, held that the respondent was constitutionally entitled to a hearing on the issue of his competency to stand trial, but that since it was too late for the District Court to conduct a meaningful hearing on the issue, the case would be remanded to the District Court with directions

that it order the respondent discharge after affording the state an opportunity to try him again within reasonable time.

A meaningful hearing as to the petitioner competency was not held and while that presents an error, the trial Court explained how the petitioner and many other people under psychiatric medication could conduct a defense at trial which also brings about a violation of the petitioner's due process. In all five United State Supreme Court decisions, the Court vacated judgment, reversed judgment granting a new trial, or discharge such matter because the defendant at trial was not afforded proper due process while he was not mentally competent at that the time of trial. The trial Court of petitioner spoke as a expert for such circumstances and, In, the Court of Appeals of South Carolina under Rule 701. SCACR as to sub (c) states' ":

" that expert testimony is essential where the topic is not a matter within the common knowledge and experience of most lay person ".

This is requirements that satisfies due process as well and by the trial Court's error's it brings substantial grounds that should be reversed due to not concluding whether the medication taken by the petitioner at trial render him competent or not. In United States v. Damon, 191 F.3d 561 (4th.Cir) A defendant's guilty pleas remanded for determination of whether any drug taken by defendant had the capacity to impair his judgment sufficiently to render him incapable of entering a knowing and voluntary plea. South Carolina's federal Courts find and conclude the same as well.

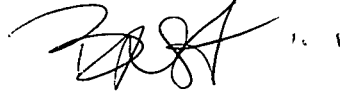
The petitioner provided this Court with Exhibits that refer's to what petitioner is diagnosed with which is Cyclothymia disorder, a milder form of Bipolar. EXHIBIT A. is Fluoxetine, the interpretation of what it is, brand name: Prozac. EXHIBIT B. is the evaluation from the Pennsylvania, Bureau of Disability only one year before being confine. EXHIBIT C. is the information based on Cyclothymia. EXHIBIT D. is the brain of a person having bipolar. EXHIBIT E. is information from the internet at Prozac. com. EXHIBIT E. is information from the inter net at Prozac. side effects. com. and that explains side effects that are common are; anxiety, drowsiness, nervousness, and for the severe side effects they are: bizarre behavior, confusion, decreased coordination, hallucination, aggressiveness, exaggerated feelings of well being, suicidal thoughts or attempts. EXHIBIT G. is a print of Wolters Kluwer Health, Inc. Copyrights 2012 and it was issued August 8,2012. It explains general provisions of the antidepressant (porzac) this also states that "it may impair your thinking or reactions. All facts presented to this Honorable Court should be sufficient grounds for a Rehearing.

The petitioner's case should be granted review for the prior Supreme Court of the United States decisions, the substantial constitutional issues that are involved, and where this federal question conflicts with a decision of the United States. Supreme Court.

CONCLUSION

The petitioner Ben Robert Stewart, prays this Court consideration
undre Rule . 226. SCACR (b). and also moves for appeal to be
in petitioner's favor.

Respectfully Submitted,



Ben Robert Stewart,.

1 Kelley Drive
Coal Township, PA 17866-1021

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IN THE COURT OF APPEALS

Appeal from York County
Lee S. Alford, Circuit Court Judge

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THE STATE,

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RECEIVED

DEC 31 2012

SC Court of Appeals

v.

BEN ROBERT STEWART

PETITIONER,

PROOF OF SERVICE

I, Ben Robert Stewart, certify that the original and 6 copies is sent to the South Carolina Court of Appeals , and also I served the respondent at; Post office box 11549, Columbia SC. 29211.

December 24, 2012

Respectfully Submitted,



Ben Robert Stewart
1 Kelley Drive
Coal Township PA 17866-1021

Ben Robert Stewart-HK9369

1 Kelley Drive

Coal Township, PA. 17866-1021

December 24, 2012

The South Carolina Court of Appeals,

Post Office Box, 11629

Columbia, SC. 29211

Re;Petition for Rehearing pursuant to Rule. 221 (a).

The State v. Stewart, Ben Robert, Appellate Case No. 2009-142106.


Dear Clerk,

2009-142106.

Regarding the decision of the Court, in Opinion No. 2012-up651 (S.C.Ct. App. filed Dec. 12, 2012) the above Appellant respectfully moves for a rehearing.

Enclosed are (6) copies of petition for rehearing. *With original*

Respectfully,



Ben Robert Stewart,

CC: Donald J. Zelenka

PO Box 11549

Columbia SC. 29211-1549

RECEIVED

DEC 31 2012

SC Court of Appeals