STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

JOHN M. KIRBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000050

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in denying Petitioner relief, where plea counsel failed to investigate Petitioner's mental health and request an additional competency evaluation, where Petitioner, an individual with an IQ estimated to be between fifty-two and seventy, demonstrated a reasonable probability that he was incompetent at the time he pled guilty?

STATEMENT

Petitioner was indicted by a Spartanburg grand jury on March 12, 2015 for criminal sexual conduct with a minor. App. 123 – 124. On May 26, 2016, before the Honorable Mark Hayes, Petitioner pled guilty under North Carolina v. Alford[1]. App. 1. Lindsay Overby appeared on behalf of the State, and Matt Shealy represented Petitioner.

The evidence which supposedly would have been presented by the Assistant Solicitor at trial included a report of alleged sexual assault involving a minor female who claimed that Petitioner sexually abused her. App. 6 l. 24 – App. 11 l. 23. The State alleged that Petitioner provided an incriminating statement, although he repeatedly and vehemently denied doing so. Id.

Judge Hayes accepted Petitioner's guilty plea. App. 22 l. 19 – App. 23 l. 3. He sentenced Petitioner to fifteen years' imprisonment on each charge, to be run concurrently. Id.

On November 7, 2016, Petitioner filed an application for post-conviction relief. App. 24 – 28. He alleged that his constitutional rights were violated and that he received ineffective assistance of counsel. App. 26. Specifically, he claimed that plea counsel failed to investigate Petitioner's history of mental illness and coerced Petitioner into pleading guilty. Id. The State made its Return on or about July 3, 2017. App. 31 – 36.

An evidentiary hearing was conducted before the Honorable G. Thomas Cooper on November 14, 2017. App. 38. Susannah C. Ross represented Petitioner, and Valerie Giovanoli appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.

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[1] 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

An Order of Dismissal was issued on December 12, 2017 and filed on December 14, 2017. App. 112 – 122. The PCR judge dismissed Petitioner's application based upon a finding that Petitioner failed to prove how plea counsel was deficient and that Petitioner's plea was voluntary.

This Petition follows.

ARGUMENT

The PCR judge erred in denying Petitioner relief, where plea counsel failed to investigate Petitioner's mental health and request an additional competency evaluation, where Petitioner, an individual with an IQ estimated to be between fifty-two and seventy, demonstrated a reasonable probability that he was incompetent at the time he pled guilty.

Relevant Facts

At the outset of the evidentiary hearing, a discussion took place between counsel for both parties and the PCR judge regarding Petitioner's competency. App. 42 – 58. Counsel for Petitioner provided the PCR judge with a psychological evaluation by Dr. Karl Bodtorf. App. 42 ll. 7 – 21; App. 103 – 108. Petitioner's I.Q. was in the range of 52 to 70. Id. He informed his attorney that he was not competent. App. 49 ll. 12 – 16. As the time of the hearing, he had not received his medication for two days. App. 42 l. 22 – App. 43 l. 2. Counsel suggested that the hearing be postponed so that Petitioner could be independently evaluated. App. 43 ll. 4 – 20.

In response, counsel for the State suggested that the hearing could proceed and that "the record in this case strongly supports the presumption that the petitioner was competent at the time of entering his guilty plea." App. 44 ll. 1 – 20. The State conceded that the evaluation was not before the plea court. App. 45 ll. 2 – 23.

The hearing proceeded, and counsel for Petitioner offered introductory remarks:

> The basis - - the impetus for this plea was that Mr. Kirby gave a statement to law enforcement. He states that he was on a new medication, [and that] he really didn't know what he was doing.
>
> And that is actually - - Mr. Shealy speaks to that during the plea colloquy and says that - - that it was filled out by another officer and signed by Mr. Kirby. And his signature seemed a little funky. But we would argue that that should have been challenged at trial.

> That there was a failure to investigate or present adequate mental health mitigation or any kind of mitigation during the plea.

App. 56 l. 23 – App. 57 l. 9.

Petitioner offered some insight into why he believed allegations were made regarding supposed contact between him and a minor. His childhood was troubled, and he was treated poorly by family members:

> ... I was treated like a dog.
>
> I sat there. I get food stamps. You know, I mean, I do the best I can. And I was putting food in the house. I was trying to do what I was supposed to do to abide by my probation.
>
> I was kept at the house. They would not really let me leave the house. If I left the house they would come and look for me and bring me straight back. And ... I tried to talk to them and told them that sometimes I do need a little space free because I believe there's like a total of, like, nine or ten people living in one 2-bedroom house.

App. 69 l. 12 – App. 70 l. 6. Petitioner continued: "I ended up getting mad and flipping on [my dad and brother], telling them I can't stand this no more. My dad and brother literally jumped me in the middle of the road." App. 69 l. 12 – App. 70 l. 16. After that, Petitioner was kicked out of the house where he had been living, into a snowstorm, at midnight. Id. He believed that the allegations came as a result of this incident. Id.

Petitioner opined that his attorney was ineffective for advising him to plead guilty. App. 59 ll. 2 – 4. Plea counsel convinced Petitioner to plead guilty by advising him that he had no defenses and that the jury would have "hung [him]" if he had gone to trial. App. 59 ll. 5 – 8. Counsel advised Petitioner that the strongest evidence against him was the statement written by a detective. App. 61 ll. 12 – 15; App. 108 – 111.

This statement was not in Petitioner's handwriting, and it was unrecorded. App. 61 ll. 20 – 25. Law enforcement actually wrote the statement. App. 83 ll. 21 – 23. Petitioner did not recall making the statement, and he testified that he would not have said any of those things. App. 62 ll. 3 – 6. Petitioner outright professed his innocence. App. 62 ll. 13 – 17; App. 66 ll. 9 – 15; App. 71 ll. 19 – 22; App. 100 ll. 1 – 8. Counsel testified to the facts as relayed to him by Petitioner:

> He told me he didn't do it. And I said, well, that's - - that's fine, why would they be making this up. And he told me about how they had treated him poorly there. And I have no doubt that that was true. I do not think that these people were particularly kind to him.

App. 89 ll. 6 - 12.

Petitioner also advised plea counsel of his mental state at the time during which he allegedly provided the statement to law enforcement, including "grogginess, tired[ness], [and] sluggishness." App. 63 ll. 3 – 7. Plea counsel was receiving mental health treatment around that time from a doctor recommended by Dr. Bodtorf. App. 63 l. 18 – App. 64 l. 9. Some of the side effects of the medications taken by Petitioner included diminished memory capabilities. Id. Petitioner made sure to speak with his attorney about all of this. Id.

However, in response, plea counsel indicated that "it really wouldn't matter." App. 64 ll. 12 – 17. Plea counsel never informed Petitioner that the statement could be challenged. App. 64 ll. 18 – 25. Similarly, plea counsel never advised Petitioner of the possibility of either pleading guilty but mentally ill or getting an evaluation of his mental health and intellectual functioning. App. 67 ll. 15 – 20.

Petitioner agreed with the notion that had he gone to trial and presented evidence of his horrible home environment, a jury would have found him not guilty. App. 70 ll. 17 – 22.

Instead, at his guilty plea, he cried while plea counsel "did not stand up" and "say that's not right." App. 71 ll. 1 – 18.

Even though the statement was a "substantial obstacle to overcome," counsel never attempted to suppress it. App. 97 l. 13 – App. 98 l. 2. Plea counsel admitted that he "certainly could have" moved to suppress the Petitioner's statement but did not believe he would have been successful. App. 84 ll. 17 – 23. He inexplicably concluded that he did not see any basis for challenging the statement, written by law enforcement, of a man with an IQ in the double digits who was deprived of necessary medications. App. 84 l. 24 – App. 86 l. 5.

Plea counsel outright admitted that Petitioner wanted him to file a motion to suppress, although counsel did not do so. Id. The statement alleged to be Petitioner's contained a handwritten note on the first page which appeared to indicate that Petitioner never gave law enforcement permission to write any statement. App. 87 ll. 3 – 21; App. 108. Counsel admitted that "whether a statement is knowingly, voluntarily made" depends on "the mental state when someone gives a statement." App. 98 ll. 3 – 7.

In addition to moving to suppress the statement, counsel also could have interviewed witnesses who were living at the home. Counsel was told by Petitioner that approximately nine other people were living in the home, including a grandmother, Petitioner's father, Petitioner's stepmother, and stepsiblings. App. 90 ll. 14 – 25; App. 95 l. 25 – App. 96 l. 11. Counsel did not see any reason to investigate or talk to those potential witnesses, because "those [weren't] the people against whom the allegations were made." Id.

Counsel did not pursue a guilty but mentally ill plea, because when an individual pleads guilty but mentally ill, "[the government] send[s] them to Gilliam for a little while. They juice them up and then send them to a regular facility." App. 92 ll. 12 – 16.

Discussion

In Ramirez v. State, this Court reaffirmed the notion that in the context of establishing prejudice for counsel's failure to request a mental competency evaluation, a PCR applicant who raises issues of competency in the context of a plea need only show a reasonable probability that he was incompetent at the time of the plea. 419 S.C. 14, 21, 795 S.E.2d 841, 844-45 (2017). Ramirez was indicted for assault and battery with intent to kill, kidnapping, first-degree criminal sexual conduct with a minor, first-degree burglary, and lewd act upon a child at the age of sixteen. Id. at 17, 795 S.E.2d at 842. A doctor at the South Carolina Department of Mental Health noted "Ramirez exhibited certain speech difficulties, had difficulty reading the words 'solicitor,' 'evaluation,' and 'competency,' and struggled to remember the name of his attorney." Id. at 17, 795 S.E.2d at 843. The Department doctor concluded that Ramirez had "sufficient factual and rational understanding of the charges against him," and therefore was competent to stand trial. Id.

After Ramirez's counsel received this report, counsel requested that Ramirez undergo a psychological examination with a second doctor. Id. at 18, 795 S.E.2d at 843. This doctor met with Ramirez for a total of approximately seventeen hours. Id. It was concluded that Ramirez had "poor judgment and an impaired ability to regulate his impulses." Id. Additionally, Ramirez was found "to be highly malleable, easily confused, and suffering limitations across the entire range of cognitive function, resulting in severely limited language and reading comprehension skills." Id. Ramirez's IQ was found to fall within the range of thirty-one to forty-four. Id. This Court referred to the DSM-IV for the conclusion that "an IQ of approximately [seventy] or below" indicates "[s]ignificantly subaverage intellectual functioning." Id. at n.3.

Ramirez was diagnosed with an adjustment disorder with mixed disturbance of emotions and conduct, severe mental retardation, and was concluded to function at the intellectual level of a four to seven-year-old child. Id. at 18, 795 S.E.2d 843. He pled guilty but mentally ill to all of the charges. Id. at 19, 795 S.E.2d at 843. Both medical evaluations were submitted, but "**there was no request for a further competency evaluation.**" Id. at 19, 795 S.E.2d at 844. (emphasis added).

Ramirez argued at PCR that his plea counsel was deficient in failing to obtain an independent mental examination. Id. At the evidentiary hearing, plea counsel admitted that he should have moved to have Ramirez's competency reevaluated after comparing the two medical evaluations. Id. The PCR court denied relief, and the South Carolina Court of Appeals affirmed based upon the "any evidence" standard, even though the record established at least a reasonable probability that Ramirez was incompetency at the time of his plea and that the PCR court's conclusion that there was no deficiency was unsupported by the evidence.

This Court applied existing jurisprudence, Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) and Matthews v. State, 358 S.C. 456, 596 S.E.2d 49 (2004) and held that Ramirez presented sufficient evidence to establish a reasonable probability that he was incompetent at the time of his plea. Ramirez at 21, 795 S.E.2d 841, 845.

Recognizing that Ramirez's mental capacities were slightly more diminished than Petitioner's, plea counsel was nonetheless ineffective for failing to request a competency evaluation.

In reviewing a PCR court's decision, this Court will uphold the PCR court's findings if there is any evidence of probative value to support them. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). However, if the PCR court's conclusions are controlled by an error of

law or are unsupported by the evidence, this Court must reverse the decision. Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

When alleging ineffective assistance of counsel, a PCR applicant must satisfy the two-prong Strickland test. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the applicant must establish plea counsel's performance was deficient. Edwards, 392 S.C. at 456, 710 S.E.2d at 64. Second, generally the applicant must demonstrate plea counsel's "deficient performance prejudiced the [applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052).

When a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong Strickland analysis still applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice. Specifically, when establishing Strickland prejudice in the context of plea counsel's failure to request a mental competency evaluation, "the [applicant] need only show a 'reasonable probability' that he was ... incompetent at the time of the plea." Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992); see also Matthews v. State, 358 S.C. 456, 458–60, 596 S.E.2d 49, 50–51 (2004) (expanding the reasonable probability standard as the burden for proving both the deficiency of counsel and the prejudice prongs).

Petitioner only received an eleventh-grade education in school. App. 5 ll. 3 – 5. He was in jail awaiting trial for eight hundred and forty-five days. App. 4 ll. 3 – 5. At Petitioner's plea, counsel informed the court that Petitioner was "of limited intellectual functioning." App. 17 ll. 3 – 4. Counsel offered some insight into Petitioner's history and mental disabilities:

> I understand he's told Your Honor that he has a GED, but in dealing with him, it does take a while to speak with him. He has been in some kind of State custody for the vast majority of his life, not necessarily because he's been a bad child but because he has had some mental health issues again him self. Those mental health issues have been variously diagnosed as things ... like ADHD but also ... bipolar, oppositional defiant disorder, things of that nature. He's been on a number of different medications throughout his life. Judge, he is denying to me this entire time that he committed these crimes. I have confronted him a number of times with his statement, and he tells me that he doesn't remember - - he doesn't really remember writing that statement.

App. 17 ll. 4 – 17.

The psychological evaluation performed by Dr. Bodtorf at the behest of the U.S. Probation Office, three years prior to Petitioner's guilty plea, contained countless examples of Petitioner's intellectual limitations. App. 103 – 107. Plea counsel was on notice of these deficiencies, and he should have sought an additional competency examination. Petitioner misidentified the address and city of Dr. Bodtorf's office. He was unable to recall the name of the most recent past president. He gave up after becoming frustrated when asked to perform subtraction calculations. He did not possess a driver's license. Petitioner struggled to remember what his most recent job was. His longest span of continuous employment was about half a year. Id.

Petitioner was homeless at the time that he was charged with a federal crime. In the past, he had been diagnosed with bipolar disorder and ADHD. He reported four prior psychiatric hospitalizations following suicidal thoughts and attempts. He did not receive his GED until he became incarcerated. App. 103 – 107.

Petitioner's responses to the tests performed by Dr. Bodtorf were largely inconsistent. The potential reasons provided for this included reading difficulties, carelessness, and/or confusion. He also received a type seven (7) configuration according the Carlson Psychological Survey (CPS). Individuals with this type profile are suggestive of "a disturbed personality and

psychiatric treatment is often recommended." Id. According to the Shipley Institute of Living Scale, Petitioner's results fell "very much below average functioning."[2] Id. His IQ was believed to fall within the range of 52-70. His word knowledge skills were not only very much below average but were also found to be significantly less well developed than his abstraction skills which were just below average. Notably, Dr. Bodtorf found that Petitioner "**would be expected to experience difficulties in any environments where academic type skills would be necessary/required.**" Id. (emphasis added). Petitioner was diagnosed with adjustment disorder and attention deficit hyperactivity disorder.

The Bodtorf evaluation was not requested by counsel or a party with a duty of loyalty to Petitioner. Nonetheless, it provided notice to plea counsel that Petitioner was performing at below average levels cognitively and therefore Petitioner may have been incompetent at the time he pled guilty. Counsel was deficient in failing to obtain a mental competency evaluation that was more up-to-date, considering the Bodtorf evaluation took place almost three years before Petitioner's guilty plea. Petitioner was institutionalized beginning at age eleven. He appeared unable to adapt and struggled to function in society. Although his IQ was estimated by Dr. Bodtorf, there was never any follow-up. As noted by the State, there was never a separate

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2 The Shipley Institute of Living Scale measures the intellectual ability and impairment of individuals age 14 years and older. See Harold L. Kaplan & Benjamin J. Saddock, Synopsis of Psychiatry: Behavioral Sciences/Clinical Psychiatry (8th ed.1998). The Shipley test measures the discrepancy between vocabulary and abstract concept formation, providing a useful measure of cognitive impairment. See Id. It is used as a convenient intelligence measure because it is self-administrating and brief. The rationale for the Shipley test is that pathology does not influence an individual's cognitive abilities equally. Clinical research suggests that vocabulary is relatively resistant to change whereas abstract thinking is more susceptible to cognitive deterioration associated with brain dysfunction, mental disorders and normal aging. Id.
Welsh v. Barnhart, No. 1:01-CV-220, 2002 WL 32073076, at *15 (E.D. Tex. Dec. 23, 2002), report and recommendation adopted, No. 1:01-CV-220, 2003 WL 1908082 (E.D. Tex. Jan. 22, 2003)

evaluation done. App. 45 ll. 2 – 15. "[T]hat would have come at counsel's request." Id. Even though "[t]he record shows that counsel was aware of [Petitioner's] mental health," he never sought an additional evaluation. App. 47 ll. 16 – 17. Based upon the Bodtorf evaluation, there existed a reasonable probability that Petitioner was incompetent at the time he pled guilty.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." Gallman v. State, 307, S.C. 273, 276, 414 S.E.2d 780, 782 (1992). Petitioner had numerous psychological problems and intellectual deficiencies that had manifested themselves and possibly gone untreated while he was incarcerated. Petitioner informed PCR counsel that he was not competent and "that due to the constant medications that he's on and off he doesn't understand what's happening." App. 49 ll. 12 – 16. At the time of the evidentiary hearing, Petitioner had not received his medication for two days. App. 49 ll. 19 – 21. Prior to that, Petitioner's medications had been switched, resulting in memory problems. App. 63 l. 23 – App. 64 l. 17. It is certainly reasonable to conclude that Petitioner may have been incompetent at the time he pled guilty.

After the State presented the facts which it alleged would be offered at trial, Petitioner, in response to a question by the court, indicated that the State was "substantially correct" in stating the facts. App. 12 ll. 1 – 14. Plea counsel interjected and provided that Petitioner believed that those would be the facts that the State would present. Id. Petitioner was not familiar with the law or the plea process; he was answering questions posed by the plea judge in the affirmative in order to proceed with the plea. He was incompetent at the time, and counsel should have requested an updated and more precise evaluation. However, the two never spoke about an additional evaluation. App. 67 ll. 18 – 20.

The Order of Dismissal did not reference Ramirez, supra. Under the PCR court's Findings of Fact and Conclusions of Law, subsection Failure to investigate mental health, the PCR court indicated that it "observed Applicant testify and respond to questions posed by this Court, PCR Counsel, and the State and finds Applicant to be fully capable of giving reasoned answers and engaging in meaningful conversations." App. 118. This was an error of law. PCR counsel refrained from making this mistake at the outset of the evidentiary hearing when she admitted that she was not a psychologist and was unable to determine competency. App. 49 ll. 4 – 16. There exists a myriad of cognitive disabilities that may allow an individual to appear competent during a five to ten minute conversation but would be noticeable by a trained professional. This is the purpose of Blair[3] hearings. This Court has previously held counsel ineffective for refusing to request a hearing on competency. See Matthews v. State, 358 S.C. 456, 596 S.E.2d 49 (2004). The United States Supreme Court has explained the standard as follows:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial any and prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors, standing alone, may, in some circumstances, be sufficient.

Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 104 (1975). (citations omitted).

Plea counsel was clearly on notice from the Bodtorf evaluation and conversations with his client that Petitioner suffered from intellectual limitations, including significant subaverage intellectual functioning based on the IQ estimation alone. Counsel was deficient in not requesting an additional competency evaluation. The Bodtorf evaluation and plea counsel's own awareness of Petitioner's communicative and intellectual limitations should have prompted him

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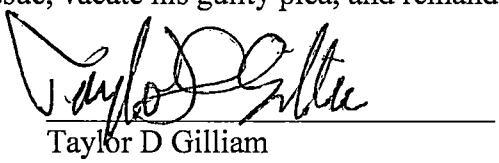
[3] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

to seek an additional competency evaluation. Petitioner had an IQ in the double digits and was charged with a crime based upon vindictive family members. He repeatedly challenged the statement written by law enforcement and never admitted to having committed these acts.

CONCLUSION

Based upon the foregoing reasons, Petitioner requests that this Court grant the petition for writ of certiorari to allow full briefing on this issue, vacate his guilty plea, and remand the case.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

JOHN M. KIRBY,

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V.

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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 Jordan Cox, 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 John M. Kirby, #319119, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 16th day of July, 2018.

Taylor D Gilliam
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 16th day of July, 2018.

ATTORNEY FOR PETITIONER

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022