STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

BERNARD DEWBERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000647

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

Defense counsel was ineffective for failing to present mitigating evidence to the sentencing judge that both petitioner and the decedent were under the influence of methamphetamines at the time of the fatal altercation, since drug use or intoxication is evidence in mitigation, and defense counsel improperly reasoned that because the sentencing judge did not approve of drugs that counsel should not present this well accepted mitigating evidence 6

Discussion 6

CONCLUSION 9

PETITION TO BE RELIEVED AS COUNSEL 10

ISSUE PRESENTED

Was defense counsel ineffective for failing to present mitigating evidence to the sentencing judge that both petitioner and the decedent were under the influence of methamphetamines at the time of the fatal altercation, since drug use or intoxication is evidence in mitigation, and defense counsel improperly reasoned that because the sentencing judge did not approve of drugs that counsel should not present this well accepted mitigating evidence?

STATEMENT

After petitioner did not accept a fifteen-year plea offer to voluntary manslaughter, this murder case was called to trial on August 22, 2016, before the Honorable Roger L. Couch in Spartanburg County. Andrea Price and James Cheek represented petitioner. Abel Gray and Allison Mabbs were the assistant solicitors. App. 1.

After a pre-trial hearing, petitioner was denied immunity under the Protection of Persons and Property Act. The trial then began, and eight state's witnesses testified before petitioner entered a plea of guilty to voluntary manslaughter. App. 262, l. 20 – 263, l. 14. The judge explained to petitioner that the sentencing range recommended by the state was now was fifteen to thirty years. App. 368 – 369.

Petitioner testified he did not understand this plea offer at the time it was made. Petitioner testified that although he now that he understood the plea offer, that he would not have accepted it if he had understood it. The plea offer was not properly explained to him by defense counsel at the time the solicitor made the offer. App. 324, l. 14 – 326, l. 15.

Petitioner testified that defense counsel, Andrea Price, became angry with him during their short discussion about the plea offer and they "got into a big argument that day about the situation." App. 325, l. 7 – 327, l. 5.

Andrea Leah Price testified that she related the offer that petitioner could plead guilty to voluntary manslaughter and receive a sentence of fifteen years imprisonment, followed by five years' probation. She said she thought petitioner understood the plea offer. App. 338, l. 15 – 338, l. 14.

As stated, after immunity was denied following a hearing under the Protection of Persons and Property Act, petitioner's case went to trial. After eight prosecution witnesses testified,

petitioner agreed to plead guilty to voluntary manslaughter with a negotiated sentence of between fifteen to thirty years imprisonment. App. 262, l. 8 – 264, l. 12.

The solicitor then told the judge that on May 9, 2015, the police found the decedent lying in the street with a single bullet wound to his back. The solicitor said from interviewing witnesses, law enforcement concluded that petitioner was in a verbal altercation with the decedent over a woman. The decedent was armed with a knife, and the petitioner shot him in the back, killing him. The state had earlier offered the cliché that petitioner "brought a gun to a knife fight." App. 281, l. 5 – 283, l. 2.

Petitioner told the judge that some of the information imparted by the solicitor was not true. When the judge pressed petitioner about what he was alleging was not true, petitioner ultimately agreed that he no longer disagreed with the statement of the case by the solicitor. App. 283, l. 3 – 285, l. 7.

Defense counsel Price then told the judge that petitioner had always been cordial to her but that "Mr. Dewberry made a terrible, terrible decision that day." She asked the judge to sentence petitioner on the "lesser end of the range here, fifteen to thirty. She noted petitioner had "been continuously incarcerated since last May. He did turn himself in. Price did not tell the judge or offer any documentation that petitioner **and** the decedent were both high on meth at the time of the fatal incident. App. 285, l. 15 – 287, l. 22.

Petitioner told the family of the decedent that "I didn't mean to do that. I want to tell my aunt that I love her and I'm sorry that I took her baby from her. I didn't mean to. I didn't mean to and I love them and I'm sorry." Petitioner asked for forgiveness from the family. App. 293, l. 16 – 294, l. 12.

The judge then said he agreed this was a tragedy for both families and he sentenced petitioner to twenty-five years imprisonment for voluntary manslaughter. App. 297, l. 11 – 298, l. 21.

Thereafter, petitioner filed an application for post-conviction relief on January 18, 2017. App. 301 – 308. The state filed a return and partial motion to dismiss dated July 25, 2017. App. 309 – 318.

An evidentiary hearing was convened on November 15, 2017, before the Honorable G. Thomas Cooper. Rodney Richey represented petitioner and Valerie Giovanoli was the assistant attorney general. App. 319.

Petitioner testified that he wanted defense counsel Price to offer evidence in mitigation that both he and the decedent were under the influence of methamphetamines at the time of the fatal incident. Petitioner explained he thought this evidence in mitigation was necessary for the sentencing judge to understand, "because me and him [the decedent] was so close -- you know what I'm saying -- so the drug played -- the drug played -- you know what I'm saying -- a major role" in the altercation. Petitioner said he understood this was not a defense to the homicide but that methamphetamines having played "a major role in the situation" was evidence in mitigation that the judge should have considered if defense counsel had offered it to him during the sentencing proceeding. App. 333, l. 23 – 334, l. 24.

Price explained that the state reextended "the voluntary offer except that it was not going to be a fifteen year offer at this time" during the trial. App. 347, l. 20 – 349, l. 3. Price offered that she did not tell the sentencing judge about the methamphetamine use involved in the fatal encounter, reasoning, "Judge Couch has very strong opinions about drugs." App. 348, l. 23 – 349, l. 14.

The PCR court found defense counsel's reasoning "not to use intoxication . . . in mitigation to be a reasonable one based on professional judgement." App. 362. Petitioner submits the PCR court erred in finding the conscious failure to offer well recognized mitigating evidence was sound professional judgment.

ARGUMENT

Defense counsel was ineffective for failing to present mitigating evidence to the sentencing judge that both petitioner and the decedent were under the influence of methamphetamines at the time of the fatal altercation, since drug use or intoxication is evidence in mitigation, and defense counsel improperly reasoned that because the sentencing judge did not approve of drugs that counsel should not present this well accepted mitigating evidence.

Discussion

Intoxication by way of drug use or alcohol consumption has long been understood to be a mitigating circumstance at sentencing. In capital cases, S.C. Code § 16-3-20(C)(b)(2), (6), and (7) have all been commonly instructed mitigating circumstances when a defendant was allegedly under the influence of drugs or intoxicated due to alcohol consumption at the time of the crime.

For example, in State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002), this Court held the trial court committed error by not charging the mitigating factors set forth in S.C. Code § 16-3-20(C)(b)(6) and (7) where there was evidence Stone was intoxicated at the time of his crime. Further, the failure to instruct the jury on these mitigating circumstances where there was evidence the defendant was using drugs or intoxicated cannot be harmless error. State v. Stone, 350 S.C. 442, 444, 567 S.E.2d 244, 249 (2002).

This Court in Stone noted that to the extent the failure to charge these mitigating intoxication mitigators did not allow the jury to consider the mitigating evidence of drug use, this neglect also violated the Eighth Amendment. See Eddings v. Oklahoma, 456 U.S. 104, 114 (1982).

In State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1991), this Court held that the failure of the trial court to instruct during the sentencing phase on the mitigating circumstances involving drug use and intoxicated during the commission of the crime was not harmless error.[1]

In this case, petitioner correctly reasoned that the sentencing judge should consider the fact that both he and the decedent were under the influence of methamphetamines. This mitigating evidence would have been even more compelling since petitioner **and** the decedent were both using drugs, they were friends, they were related, and "close." Defense counsel asked the judge to impose a sentence on the lower side of fifteen to thirty years, and she had good evidence in mitigation that these friends – petitioner and the decedent – were both unfortunately using drugs which further mitigated the fatal incident. She was deficient in not using this evidence in mitigation.

Defense counsel's reasoning that the sentencing judge did not like drug use was not a valid legal reason not to offer accepted evidence in mitigation about drug use or intoxication. While the sentencing judge, like most judges, may not have approved of recreational drug use, he was a long-time trial judge who obviously understood the impact of drugs vis-a-vis crime. Moreover, the decedent was also under the influence of drugs which made the evidence of drug use all the more compelling.

The PCR court erred, under the highly unusual facts of this case, by finding defense counsel's conscious failure to offer mitigating evidence that both petitioner and the decedent were under the influence of methamphetamines a valid "strategic reason" not to offer this evidence in mitigation.

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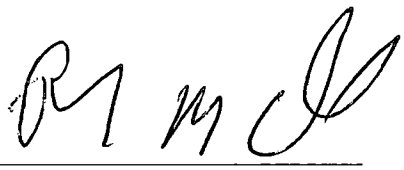
[1] Rev'd on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Petitioner was originally offered a plea to voluntary manslaughter with a cap of fifteen years imprisonment, and five years' probation. At the time of sentencing following the guilty plea, the sentencing recommendation was 15-30 years. It is not too much to say that if counsel had offered this evidence in mitigation that both petitioner and the decedent, petitioner's friend, were under the influence of methamphetamines, that petitioner's sentence would have been less than the twenty-five-year sentence imposed by the sentencing judge for voluntary manslaughter.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bernard Dewberry states:

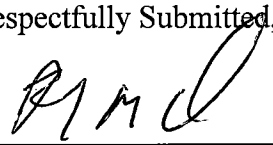
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge G. Thomas Cooper, which was held on November 15, 2017, 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 Bernard Dewberry.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of November, 2018.

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."

Robert M. Dudek
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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 Jordan Cox, 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 Bernard Dewberry, #278949, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 26th day of November, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of November, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.