STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

TARUS TRAMAINE HENRY, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000847

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
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

INDEX

ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for advising Petitioner that the State's offer to allow a plea of guilty but mentally ill would likely result in a life sentence?

STATEMENT

In December of 2008, the Florence County Grand Jury indicted Petitioner, Tarus Tramaine Henry, for assault and battery with intent to kill [ABWIK], arson second degree and two counts of unlawful conduct toward a child, indictment #2008-GS-21-01877. On July 27, 2009, Petitioner proceeded to jury trial before the Honorable Ralph King Anderson, Jr. Karen Parrott represented Petitioner at trial. Stephen Hill prosecuted the case. The jury found Petitioner guilty as indicted. Judge Anderson sentenced Petitioner to ten (10) years concurrent for the unlawful conduct towards a child charges, twenty (20) years consecutive for ABWIK and twenty (20) years consecutive for arson, resulting in an aggregate sentence of fifty (50) years.

On July 17, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on September 14, 2016. On January 31, 2018, an evidentiary hearing was held before the Honorable Michael G. Nettles. Jonathan Waller represented Petitioner at the PCR hearing. Lindsey A. McCallister represented the State. In a written order signed April 16, 2018, Judge Nettles denied relief and dismissed the application. A timely notice of intent to appeal was served on May 4, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for advising Petitioner that the State's offer to allow a plea of guilty but mentally ill would likely result in a life sentence.

A jury found Petitioner guilty of ABWIK, arson and two counts of unlawful conduct toward a child. The trial judge sentenced Petitioner to an aggregate sentence of fifty (50) years. At the beginning of the PCR hearing PCR counsel advised the judge that Petitioner was proceeding on three issues, including the allegation that trial counsel was ineffective in failing to properly explain the State's offer to allow Petitioner to plead guilty but mentally ill [GBMI]. (App. p. 658, lines 17-25).

When asked about conveying the plea offer to Petitioner, trial counsel testified, "In my discussions with Mr. Henry, I had been going over with him multiple times what was going on with this case, and I make notes whenever I meet with my clients. And so I have – and it's simply – it really is a quick note, but on May 29th at 3:06 p.m., I have GBMI, 15 years, mental health and then to prison. So I discussed with that – I discussed that with him on May the 29th." (App. p. 680, lines 12-19). Trial counsel then testified, "Then on July 15th of 2009, I have my notes where I did a visit at the jail with – or a visit with Mr. Henry, as well as the investigator, Mr. White of my office, and I went over at 2:10 p.m. the indictment, that guilty but mentally ill would likely be a life sentence in this case." (App. p. 680, lines 20-24). When asked what she explained to Petitioner about the GBMI plea, trial counsel testified, "I explained to him that a guilty but mentally ill plea in this case would not have necessarily any kind of end date because the simple fact is is that a person is put in for treatment and if mental health never believes that that person is actually cured from that, then there is no end date." (App. p. 682, lines 4-9). Trial

counsel further explained, "I would've explained that to him and that's – that's what that note is back from May the 29th and from the other one is that it's an un – an unending incarceration." (App. p. 682, lines 12-14). Trial counsel's notes were admitted in evidence without objection as State's Exhibit Number 1. (App. p. 689, lines 24 – p. 690, lines 1-7; pp. 702-705).

The PCR judge then questioned both Petitioner's PCR counsel and counsel representing the State about trial counsel's understanding of a GBMI plea. (App. p. 682, line 16 – p. 683, lines 1-15). The PCR judge asked:

> I was operating – I have always operated under the impression that if it's an insanity defense, then they keep you until they think you get better, but if it's guilty but mentally ill, it's a finite amount. Like, if you get 18 years when you max out, you're out. Or do you – you think if they give you treatment, if they get you leveled out on meds, then you go into the general population and then you max out? But you're saying there's a possibility that if you go in and they never put you out of the mental health facility, they can hold you forever?

(App. p. 682, line 21 – p. 683, lines 1-6). Both attorneys agreed. (App. p. 683, lines 7-14). As discussed below, both attorneys were wrong. A GBMI does not result in an indefinite period of incarceration.

At the PCR hearing Petitioner testified about plea offers he rejected because the offers were "without a cap[1]." (App. p. 670, line 19 – p. 671, lines 1-5). Petitioner testified, "When I was in the county, they offered me the first plea of 18 years without a cap to plead to assault and battery with intent to kill and the other three charges would be dropped." (App. p. 670, lines 19-22). Petitioner explained, "And I didn't take it because without a cap, you can get the whole thing at 65." (App. p. 670, lines 24-25). Petitioner testified about a second plea offer for fifteen years without the cap. (App. p. 671, lines 2-3). Then Petitioner testified, "I didn't – I didn't

---

1 It is unclear if Petitioner believed the "without a cap" was simply the result of the State recommending a period of years or was the result of trial counsel's erroneous advice that a GBMI plea would likely result in a life sentence. It is clear that Petitioner did not understand the nature of a GBMI plea.

take that one either. So the day of the trial, they had me to step out. When I came back in, the State's final plea offer was guilty but mentally ill and I asked – and I asked my counsel how much time or what's the advantage or disadvantage of taking this plea offer, and Karen Parrott [trial counsel] and Frank White [investigator with trial counsel's office] both told me, son, we can't tell you. We can't tell you that. It's like a tunnel. That's all they could tell me. And they left me ignorant an unknowing as to what the terms was; so I didn't take it." (App. p. 671, lines 5-13). Petitioner testified that he knew the offer had been extended but did not know what it meant. (App. p. 671, lines 17-19). Petitioner's testimony is consistent with trial counsel's misunderstanding of the GBMI plea and how she advised Petitioner.

In the order of dismissal the PCR judge wrote, "Due to the nature of a GBMI plea, Counsel could not give Applicant a specific date for his sentence, and this Court finds that is why Applicant rejected the offer, not because of any lack of explanation by Counsel or insufficient time to consider it. Therefore, this Court finds Counsel's performance was not deficient, nor was Applicant prejudiced by any alleged deficiency. The allegation is therefore denied and dismissed." (App. p. 723). The PCR judge erred. There is nothing about the nature of a GBMI plea that would prevent trial counsel from advising Petitioner about the specific length of a sentence imposed. Trial counsel was ineffective for advising Petitioner that the State's offer to allow a plea of guilty but mentally ill would likely result in a life sentence.

S.C. Code Ann. § 17-24-70 provides:

> If a verdict is returned of "guilty but mentally ill" the defendant must be sentenced by the trial judge as provided by law for a defendant found guilty, however:
>
> (A) If the sentence imposed upon the defendant includes the incarceration of the defendant, the defendant must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the

general population of the Department of Corrections to serve the remainder of his sentence.

(B) If the sentence includes a probationary sentence, the judge may impose those conditions and restrictions on the release of the defendant as the judge considers necessary for the safety of the defendant and of the community.

In State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997), the South Carolina Supreme Court wrote:

> The purposes for the enactment of GBMI statutes are (1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure mentally ill inmates receive treatment for their benefit as well as society's benefit while incarcerated. State v. Wilson, 306, S.C. 498, 413 S.E.2d 19 (1992). A verdict of GBMI does not absolve a defendant of guilt. A defendant found GBMI must be sentenced as provided by law for a defendant found guilty. Id. However, under the GBMI statute, a defendant found GBMI is entitled to immediate treatment and evaluation. S.C.Code Ann. § 17–24–70 (Supp.1995).

In State v. Curry, 410 S.C. 46, 54, 762 S.E.2d 721, 725–26 (Ct. App. 2014), the South Carolina Court of Appeals wrote, "We are aware that a defendant found guilty but mentally ill 'must be sentenced as provided by law for a defendant found guilty.' Hornsby, 326 S.C. at 126, 484 S.E.2d at 872. Although a defendant's sentence is the same regardless of whether he is merely guilty or guilty but mentally ill, a defendant found guilty but mentally ill 'is entitled to immediate treatment and evaluation.' Id. (citing S.C.Code Ann. § 17–24–70 (Supp.1995))." As provided by the statute and the case law, a defendant who pleads GBMI must be sentenced as provided by law for a defendant who pleads guilty. A GBMI does not, without some type of civil commitment process, result in indefinite incarceration.

Trial counsel admitted that she advised Petitioner that a GBMI plea would likely result in a life sentence. (App. p. 680, lines 20-24). Her notes confirm the erroneous advice. (App. p. 704). Trial counsel's erroneous advice to Petitioner that a GBMI plea would likely result in a life sentence constitutes prejudicial deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Counsel was ineffective in providing erroneous advice to Petitioner about the nature of a GBMI plea. There is a reasonable probability that if Petitioner had understood that a GBMI plea could not result in a life sentence, he would have accepted the GBMI plea offer for the recommended fifteen years rather than risk the fifty-year sentence imposed after conviction at trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of December, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

TARUS TRAMAINE HENRY, SR.

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 Tarus Tramaine Henry, #336127, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of December, 2018.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.