

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge

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OCT 17 2019

SARAH L. TONEY,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000962

JOHNSON PETITION FOR WRIT OF CERTIORARI

Sarah E. Shipe
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err by finding counsel was not ineffective for failing to present a reasonable case in mitigation where he advised Petitioner to plead guilty without a sentencing recommendation where substantial mitigating evidence existed, but was not presented, that Petitioner had long suffered from mental health problems and was taking antipsychotic medication?

STATEMENT

On January 11, 2017, Petitioner appeared before the Honorable Steven H. John in Horry County and pled guilty to homicide by child abuse. App. 23-38. She was sentenced to twenty-seven years' imprisonment. App. 60. Petitioner was represented by J. Eric Fox and the state was represented by Scott R. Hixson. App. 1.

Petitioner filed an application for post-conviction relief (PCR) on May 15, 2017. App. 62-67. The state filed a return on July 17, 2017. App. 70-80.

On November 27, 2018, an evidentiary hearing was held before the Honorable Kristi F. Curtis. App. 82-119. James Falk represented Petitioner and Johnny James, Assistant Attorney General, represented the state. On April 15, 2019 Judge Curtis signed an order denying the application for PCR. App. 120-32.

This petition follows.

ARGUMENT

The PCR court erred in finding counsel was not ineffective for failing to present a reasonable case in mitigation where he advised Petitioner to plead guilty without a sentencing recommendation where substantial mitigating evidence existed, but was not presented, that Petitioner had long suffered from mental health problems and was taking antipsychotic medication

Relevant Facts

On November 3, 2015, Petitioner's neighbor called 911 complaining that Petitioner was in her back yard soaking wet, "talking gibberish." App. 28, l. 24-p.29, l. 11. Neighbors told police they saw Petitioner between seven and eight in the morning holding a young child. That morning the weather was very cool, and neighbors said the child was not "properly clothed." App. 31, ll. 1-15.

When police arrived, the child was missing. Petitioner indicated to police that she had taken her child in the creek behind her house. Petitioner acknowledged she tried to put her child in the water. She made several random comments including telling police the child would not stop crying. App. 29, ll. 11-19. Because of Petitioner's erratic demeanor she was taken to the hospital for a welfare check.

When Petitioner was released, police interviewed her regarding the whereabouts of the child. App. 30, ll. 2-5. Petitioner told police she carried the child into the water as well as saying, at least one time, she killed her child. At some points Petitioner seemed confused about why she was being questioned and where her child was. Later, Petitioner became angry and accused police of holding her for no reason and she eventually invoked her right to remain silent. App. 30, ll. 6-18. Petitioner was charged and transported to jail. Blood and urine samples were

collected to determine if Petitioner was under the influence of any drugs. App. 30, ll. 19-24.

Police searched the area for Petitioner's missing child. The next day the search continued and early on the following day, November 5, 2015, the child's body was found in the creek. App. 32, ll. 7-13.

Guilty Plea

Before Petitioner pled guilty a *Blair*¹ hearing was held to determine Petitioner's competency. App. 4-17. Dr. Emily Gottfried testified for the state as an expert in forensic psychology. App. 4, ll. 16-18; p. 8, ll. 3-25. Dr. Gottfried evaluated Petitioner and formed the opinion that she was competent to stand trial. Dr. Gottfried also evaluated Petitioner for criminal responsibility and formed the opinion Petitioner was both criminally responsible and had the capacity to conform her behavior to the requirements of the law. App. 11, ll. 7-9. Ultimately, Dr. Gottfried determined the episode was the result of a psychotic disorder due to substance rather than a primary psychotic disorder. Dr. Gottfried relied heavily on Petitioner's recorded interviews with police and Petitioner's toxicology reports, which showed on the day of the incident Petitioner was under the influence of methamphetamine, amphetamines, and opioids. App. 13, ll. 12-24. Dr. Gottfried testified that, while Petitioner had had several inpatient psychiatric hospitalizations, none of the hospitalizations were for psychosis. App. 15, l. 4-p.16, l. 6. Dr. Gottfried diagnosed Petitioner with borderline personality disorder and multiple substance abuse disorders. App. 14, ll. 11-20; p. 18, ll. 3-7. Plea counsel did not present expert testimony or evidence regarding any other opinions as to Petitioner's mental health.

After the trial judge accepted Petitioner's plea, counsel offered the following as mitigation evidence. App. 44-55. Plea counsel discussed Petitioner's "demonstrable history of

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

mental illness” and her struggle with postpartum depression. App. 40-42. Plea counsel told the judge that Petitioner began self-medicating and abusing drugs as a result of sexual abuse, which occurred when she was six and then again as a teenager. App. 47, ll. 1-20. He also told the judge that there was a family history of suicide due to mental illness. App. 47, ll. 5-12. Plea counsel was convinced that at the time of the incident Petitioner was suffering from postpartum psychosis. App. 44, l. 12-p. 45, l. 15. Plea counsel said, Petitioner’s admitted drug use made it impossible for him to find a doctor who could determine whether the incident stemmed from drug use or mental illness. App. 44, ll. 2-11. Thus, plea counsel could not find a doctor who would diagnose Petitioner with psychosis or postpartum depression. Plea counsel insisted that Petitioner did not intend to harm her child, however, Petitioner was not in her right mind at the time of the incident. App. 49-51. He asked the trial judge to impose the minimum sentence of twenty years. App. 55, ll. 1-3.

PCR Evidentiary Hearing

At the PCR hearing, plea counsel testified that when he took the case he was convinced there was something amiss with Petitioner’s mental health because, from the recorded police interviews, Petitioner appeared to him “manic” and then suddenly “strangely calm.” App. 87, l. 9-p. 88, l. 5. Plea counsel could not recall whether he filed a notice of insanity defense in Petitioner’s case.² App. 89, ll. 17-23. It was plea counsel’s understanding that unless Petitioner was diagnosed with psychosis or postpartum depression, the state would not offer a sentence less than twenty years. App. 88, ll. 13-17. Plea counsel claimed his initial plan was to assert the defense not guilty by reason of insanity (NGRI) at trial. However, plea counsel was unable to find a mental health professional that would diagnose Petitioner with psychosis or postpartum

² At the plea hearing, plea counsel told the judge he had filed a notice of insanity defense. App. 35, l. 21-p. 36, l. 4.

depression because of her admitted drug use. App. 88, ll. 17-20; p. 93, ll. 8-12. Plea counsel contended he spoke with multiple experts and hired Dr. Geoffrey McKee to do an independent evaluation of Petitioner. Dr. McKee concluded Petitioner experienced a drug-induced hallucination rather than a mental hallucination, although, it was impossible for McKee to make a determination because the two are so intertwined. App. 91-95. In addition to Petitioner's self-reported use of methamphetamine there was a contemporaneous toxicology report that showed Petitioner was under the influence of methamphetamine as well as other drugs. App. 93, ll. 8-10. Plea counsel said plea negotiations ended when he was unable to find an expert that would diagnose Petitioner with either postpartum depression or psychosis and, therefore, Petitioner ended up pleading without a negotiated sentence rather than face a jury trial without a NGRI defense. App. 88, ll. 20-25; p.99, ll. 4-14.

Petitioner argued plea counsel was ineffective because he failed to have a private psychiatrist or expert testify on her behalf at the plea hearing. App. 69. Petitioner asserted if she had been able to tell her story to a jury, they would not have convicted her. App. 110, ll. 11-16. Petitioner maintained, while she had used methamphetamine three days prior, she was not under the influence of any drugs on the day of the incident. App. 103, ll. 1-19. Petitioner stated that during her pregnancy her OBGYN was concerned about her mental health and referred her to a specialist in Florence. Petitioner testified she had been admitted to psychiatric hospitals a total of four times. App. 104, l. 13-p. 105, l. 13. Petitioner said she had been diagnosed with borderline personality disorder, bipolar disorder, and schizophrenia. *Id.* Petitioner also testified she had been prescribed antipsychotic medications including Risperdal, Haldol, and was currently taking Lithium while incarcerated. App. 105, ll. 14-19.

Discussion

While counsel is not required to investigate or submit every imaginable line of mitigating evidence, a decision not to investigate must be reasonable. Strategic choices made after less than complete investigation are only reasonable if reasonable professional judgment supports the limits on the investigation. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009) (holding counsel's investigation as to mitigation evidence was inadequate and incomplete).

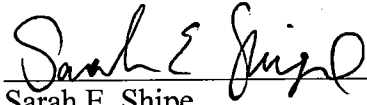
Here, plea counsel was ineffective for failing to successfully investigate Petitioner's serious mental health problems in order to negotiate a better plea deal and instead recommending that Petitioner plea without a sentencing recommendation. *See Judge v. State*, 312 S.C. 554, 471 S.E.2d 143 (1996) (a defendant is entitled to effective assistance of counsel during plea negotiations). Additionally, plea counsel failed to call an expert, or even a treating psychiatrist, in order to present mitigating evidence on behalf of Petitioner.

Plea counsel's testimony as well as Petitioner's testimony demonstrate that Petitioner suffered serious mental health problems due to early sexual abuse, a genetic predisposition to mental illness, and the recent birth of her child. While she was pregnant her treating physician was so concerned about Petitioner's mental well-being, she referred Petitioner to a specialist. On the day of the incident Petitioner had an episode in which she believed her six-month-old child wanted to go into the creek behind her home. At that time, she thought the child was communicating with her through tapping her leg. While Petitioner was awaiting trial she was treated with antipsychotic medication. While incarcerated Petitioner has been, and is currently being, treated with antipsychotic medications, and yet plea counsel claims he was unable to find an expert to diagnose Petitioner with psychosis. Furthermore, plea counsel failed to have any

defense expert testify at Petitioner's plea proceeding and instead just agreed with the state's expert regarding Petitioner's competency and criminal responsibility.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to allow full briefing on this issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of October, 2019.

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SARAH L. TONEY,

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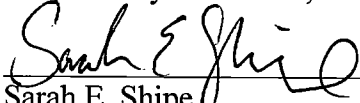
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sarah L. Toney states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Kristi F. Curtis, which was held on November 28, 2018, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Sarah L. Toney.

Respectfully Submitted,

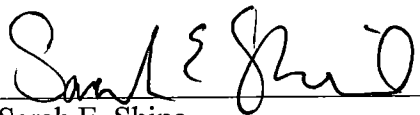


Sarah E. Shipe
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of October, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."



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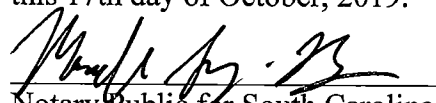
CERTIFICATE OF SERVICE

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 Johnny Ellis James, Jr., 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 Sarah L. Toney, #371030, at Camille Griffin Graham Correctional Center, 4450 Broad River Road, Columbia, SC 29210, this 17th day of October, 2019.



Sarah E. Shipe
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028