STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Certiorari to Greenwood County

Honorable R. Scott Sprouse, Circuit Court Judge

DAVID SCOTT MOONEY

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000052

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

I.

Did the PCR court err in dismissing Petitioner's claim that plea counsel was ineffective in failing to obtain the report of the drug analysis conducted by the State Law Enforcement Division (SLED) and present to the plea court as mitigation evidence that the amount SLED verified as drugs differed from the amount the State represented to the plea court as having been confiscated from Petitioner's home?

II.

Did the PCR court err in rejecting Petitioner's claim that, but for plea counsel's failure to obtain a copy of the SLED drug analysis and address the discrepancies in the weight of active drugs found, he would not have pled guilty because the analysis would have shown law enforcement confiscated no drugs from his residence?

STATEMENT OF THE CASE

Petitioner Mooney and his wife, Michelle, were staying with Petitioner's father in Greenwood in January 2015. App. 69, ll. 21 – App. 70, ll. 15; App. 5, ll. 3 – 8. On January 13, 2015, agents with the Greenwood County Drug Enforcement Unit (DEU) executed a search warrant on the home where Petitioner was living. Petitioner was found in a compartment in a set of bunkbeds in a bedroom. App. 5, ll. 3 – 10.

During the search of the property, including an outer building of the residence, DEU agents found seven different bottles[1] containing what they believed to be sludge[2] from the production of methamphetamine. App. 5, l. 12-App. 6, l. 22. The DEU agents also found coffee filters, empty blister packs, lighter fluid, lithium batteries, and other items commonly used to produce methamphetamine. App. 6, l. 21-App. 7, l. 1. The bottles field tested positive for the presence of methamphetamine. The alleged total weight of the sludge in the seven bottles was 1604 grams. App. 7, ll. 2-3.

On May 8, 2015, the Greenwood County grand jury indicted Petitioner for trafficking methamphetamine over 400 grams. App. 99-100. Petitioner's wife and father were also arrested and charged with trafficking methamphetamine. App. 101. On August 13, 2015, Petitioner thought that he was going before a judge for a bond hearing. App. 60, ll. 12-15. However, when he was transported to court, his plea counsel informed him of a plan to enter a guilty plea that involved a reduced charge and asking the judge for a suspended sentence with time in a rehabilitation facility known as The Lighthouse. App. 60, ll. 15-25; App. 60, ll. 3-12.

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[1]The bottles were reused one liter and twenty-ounce plastic soda bottles commonly used in the "one-pot" or "shake and bake" production of methamphetamine.

[2]Sludge is the toxic byproduct created during the production of methamphetamine using the "one-pot" or "shake and bake" method. Sludge is formed during the cook and is left over in the bottle once the actual methamphetamine is removed. Sludge cannot be ingested.

Petitioner appeared before the Honorable Frank R. Addy, Jr. App. 1. He was represented by plea counsel Thomass Adducci. The state was represented by Brian Moroney. App. 1. The original charge for trafficking methamphetamine was reduced to manufacturing methamphetamine. App. 3, ll. 3-7. Petitioner pled "straight up" with a possible maximum sentence of fifteen years. App. 4, ll. 6-10.

During the plea colloquy the combined weight of the bottles found during the search warrant was alleged to be "exactly 1604 grams or 3.54 pounds." App. 7, ll.1-3. The court confirmed that the weight of the drugs alleged by the state was not finished product and was only sludge. App. 7, ll. 4-6. A drug analysis was not presented to the court by either the state or defense counsel. Petitioner was sentenced to twelve years incarceration, to include the addiction treatment unit. In handing down the sentence the court stated that two factors went into Petitioner's sentence: 1) Petitioner's prior criminal history and 2) the "sheer amount of drugs" which indicated to the court that Petitioner was doing more than merely cooking for his own personal use. App. 18, ll. 14-23.

On September 22, 2015, Petitioner filed a pro se motion to reconsider sentencing. App. 21-22. Judge Addy issued an order denying the motion for reconsideration of sentence on July 5, 2016. App. 23. Petitioner did not appeal his conviction or sentence.

On November 1, 2016, Petitioner filed an application for post-conviction relief. App. 24-33. The state filed a return on February 16, 2017. App. 50-53. Petitioner, through PCR counsel, submitted an amended post-conviction relief application dated September 13, 2017. App. 35-49. An evidentiary hearing was convened on October 11, 2017 before the Honorable R. Scott Sprouse. The state was represented by Justin Hunter. Ashely McMahan represented Petitioner. App. 1.

Petitioner testified at the PCR hearing that his "biggest issue" was that the solicitor made it appear to Judge Addy that "everything" found at his house was an "ongoing active cook." However, everything they found was old and the cooking process had been completed. The solicitor made it appear that Petitioner had a "mass operation" and was selling drugs. But it was all for his personal use. App. 58, ll. 20-App. 60, ll. 25. Petitioner never saw a drug analysis despite asking for one. App. 62, ll. 2-14. Petitioner disagreed with the amount of drugs allegedly recovered from his home and maintained that the drug analysis, which he never received, would show that there were no active drugs in the bottles collected from his residence.

Plea counsel testified that the state "claimed" that 600 plus grams of methamphetamine were found in bottles in a shed behind the house. App. 70, ll. 1 – 6. On cross-examination plea counsel noted that he disagreed with the weight alleged in Petitioner's case because the state was charging Petitioner with the mixtures found in the bottle and not a finished product. App. 76, ll. 14 – App. 77, ll. 6. Counsel offered that the case law supported using the total weight of the mixture to support a trafficking charge. App. 74, ll. 18 – App. 75, ll. 17. Counsel also stated that a weight was required for a trafficking charge, but manufacturing methamphetamine did not require a weight. App. 75, ll. 18 – 24.

An order dismissing Petitioner's PCR application was issued on November 21, 2017. App. 88-98. The PCR court found that Petitioner failed to prove that counsel's performance was deficient. App. 93. Specifically, the PCR court wrote that Petitioner failed to show that he was prejudiced by counsel's actions as the amount of drugs had no bearing on whether he was guilty of manufacturing methamphetamine as the manufacturing statute only "criminalizes the action and does not consider any weight of drugs." App. 93.

Previous counsel, Appellant Defender Lanelle Durant, filed a brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1988), on behalf of Petitioner and moved to be relieved as part of that briefing process. By an order filed on October 29, 2019, this Court denied the motion to be relieved and ordered briefing on the issues set forth above.

This petition follows.

ARGUMENT

I.

The PCR court erred in dismissing Petitioner's claim that plea counsel was ineffective in failing to obtain the report of the drug analysis conducted by the State Law Enforcement Division (SLED) and present to the plea court as mitigation evidence that the amount SLED verified as drugs differed from the amount the State represented to the plea court as having been confiscated from Petitioner's home.

"[S]entencing is a critical stage of the criminal proceeding at which [a defendant] is entitled to the effective assistance of counsel." Gardner v. Florida, 430 U.S. 349, 358 (1977). The Sixth Amendment provides a right to counsel during sentencing in both noncapital and capital cases. Lafler v. Cooper, 566 U.S. 156, 165 (2012). "Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because *any amount of additional jail time has Sixth Amendment significance*." Id. (internal quotations and alterations omitted) (quoting Glover v. United States, 531 U.S. 198, 203 (2001)) (emphasis added).

Importantly, the jurisprudence of this state sets forth the principle that, where it falls to the court to determine the appropriate punishment to be imposed, and there is any discretion as to the punishment, it is the correct practice that the court hear evidence in mitigation or aggravation of the punishment. See, State v. Adcock, 194 S.C. 234, 9 S.E.2d 730, 732 (1940); State v. Green, 220 S.C. 315, 318, 67 S.E.2d 509, 510 (1951). It is therefore incumbent upon plea counsel to bring to the court's attention any relevant mitigating evidence prior to sentencing.

In the present case, plea counsel failed to obtain and introduce to the court the report from the drug analysis conducted by SLED. At no point during the plea, or in the PCR hearing,

was the drug report ever produced. While the state alleged that over three pounds of methamphetamine was recovered from Petitioner's home, Petitioner maintained that the bottles recovered from his residence were finished, not active cooks. As finished cooks Petitioner argued there would not have been any active methamphetamine in the sludge as the drug had already been removed from the bottle and used.

During the plea the judge did acknowledge that the amount was based upon sludge and not finished product. However, in sentencing the judge directly cited the "sheer amount" of drugs as a reason for the near maximum punishment. In handing down the sentence the court stated,

> "I realize it's unfinished product. I realize if the process had continued, we would be dealing with a much much smaller amount of drugs, but when you have several bottles going at the same time that indicates for the Court that this was not just for your own personal amusement or medication. This was something a little bit more substantial."

App. 18, ll. 16-23. The court further reasoned that while it recognized Petitioner was taking responsibility by entering a plea, the amount of drugs involved compelled the court to sentence Petitioner to twelve years.

Counsel's failure to either discover reasonably available mitigating evidence or present mitigating evidence at sentencing can support a finding of ineffective assistance of counsel. See Pike v. Gross, 936 F.3d 372, 379 (6th Cir. 2019) *citing* Williams v. Taylor, 529 U.S. 362, 395-96 (2000); *citing* Wiggins v. Smith, 539 U.S. 510, 521 (2003). See also Campbell v. Polk, 447 F.3d 270, 282 (4th Cir. 2006). It is clear from the record that the amount of drugs alleged by the state to have come from Petitioner's residence directly impacted the sentence. Thus, failure of counsel to mitigate the alleged weight of the drugs was ineffective assistance of counsel resulting in the prejudice of a near maximum allowable sentence.

In McCarty v. State, 802 N.E.2d 959 (2004), the Indiana Court of Appeals held that plea counsel's failure to present mitigating circumstances was deficient performance. McCarty was charged with four counts of child molestation. Pursuant to a plea agreement, which capped his exposure at forty years per charge, McCarty pled guilty to two counts of child molestation. During the plea hearing, counsel for McCarty failed to present any mitigating evidence regarding McCarty's mental deficiencies, his troubled family background or the fact that McCarty himself had been molested. McCarty was sentenced to forty years, concurrent, on each molestation charge.

McCarty filed an application for post-conviction relief alleging that his plea counsel was ineffective for failing to investigate and present mitigating evidence to the plea court. The Indiana Court of Appeals found counsel was ineffective and McCarty was prejudiced by the deficient performance. Specifically, the court held,

> "[T]he prejudice McCarty suffered arose not because the court declined to recognize the mitigators but *because the mitigating circumstances were not placed before the court at all; the court was therefore unable to even consider them.* McCarty was prejudiced by trial counsel's failure to investigate and present the available mitigation evidence because it *deprived the sentencing court of the information it needed to make an informed decision and left the court little to balance against the aggravating circumstances.*"

Id., at, 967 (emphasis added).

In Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (2014), this Court held counsel ineffective for failing to request DNA testing on the state's key piece of evidence. Bagwell was charged with first degree burglary. He had allegedly broken through a glass patio door and cut himself, leaving blood at the scene. Neither the state nor defense had the blood tested. At trial the state argued that a cut on Bagwell's face left the blood at the scene and definitively placed him at the crime scene. At the PCR hearing, PCR counsel introduced the DNA test results

indicating blood found on the glass recovered from the scene did not match Bagwell. The PCR court found Bagwell's counsel was not ineffective in failing to test the blood because the results of the DNA test could have damaged Bagwell's defense. Further, the PCR court ruled that there was no prejudice to Bagwell because the blood from the scene not being a match to him did not preclude him from being in the victims' apartment on the night of the incident.

This Court reversed the PCR court's findings, holding that not only was counsel ineffective but that Bagwell was prejudiced. In considering the merits of Bagwell's case this Court noted,

> Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691 (1984). Thus, "[a] *criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.*" McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) ... "*[A]t a minimum, counsel has the duty to...make an independent investigation of the facts and circumstances of the case.*" Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted).

Bagwell at 265, 763 S.E.2d at 633–34 (emphasis added). In holding that Bagwell was entitled to relief this Court found that the failure of counsel to conduct an *independent* investigation that would have *mitigated* the strength of the state's evidence was deficient performance.

In the present case, plea counsel's failure to obtain, review and submit to the court the SLED drug report was deficient performance. Plea counsel had a duty to ensure that the substances taken from Petitioner's home were in fact drugs and to have the proper weight of those alleged drugs. This failure to mitigate the state's case and Petitioner's culpability was ineffective assistance of counsel. Petitioner was directly prejudiced by the near maximum sentence that the judge imposed due to the large amount of drugs allegedly removed from his home.

II.

The PCR court erred in rejecting Petitioner's claim that, but for plea counsel's failure to obtain a copy of the SLED drug analysis and address the discrepancies in the weight of active drugs found, he would not have pled guilty because the analysis would have shown law enforcement confiscated no drugs from his residence.

As stated above in Bagwell, *supra*, this Court has held that defense counsel has a duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably availably evidence tending to rebut any aggravating evidence introduced by the state. See also Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (holding counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence was unreasonable and clearly deficient). The failure to investigate then can support the contention that a plea was involuntary. In Hill v. Lockhart, 585 U.S. 52 (1985) the United States Supreme Court addressed the analysis to be used in addressing such ineffective assistance claims. The Court explained,

> "Where the alleged error is failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than to go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."

Hill at 59.

In Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010)[3], the South Carolina Supreme Court held that counsel was deficient in failing to procure pertinent discovery materials. Kolle was charged with trafficking in cocaine, twenty-eight to one hundred grams. The drugs were recovered during the execution of a search warrant of the apartment where Kolle was staying. Counsel challenged the search warrant but did so without pertinent discovery materials, in particular the call/dispatch logs and the search warrant. After failing obtain a favor ruling suppressing the drugs, counsel advised Kolle to plead guilty.

In determining prejudice, the Supreme Court explained that with the pertinent discovery materials counsel for Kolle had a stronger challenge to the validity of the search warrant which could have impacted the outcome of the suppression hearing. Further, counsel could have advised Kolle to proceed to trial in order to preserve the challenge to the validity of the search warrant on direct appeal. The Court noted that "Kolle entered his guilty plea without the benefit of all exculpatory information...Because Kolle was unaware of this information, his claim of ineffective assistance of counsel clearly impinged upon the voluntariness and knowledge with which he entered his plea." Id. at n. 5.

Petitioner is similarly situated to Kolle. Plea counsel for Petitioner failed to obtain the SLED drug report which was the most pertinent piece of discovery. The drug report was key to the case and would have either contained highly exculpatory or inculpatory information. Under the analysis in Hill, *supra,* if the report contained the exculpatory information that there were no

[3]Abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 n.2 (2018) "We clarify that appellate courts review questions of law de novo, with no deference to trial courts. While we uphold the analysis and result of the following decisions, we now direct that none of these decisions should be read to suggest an appellate court gives any deference to a PCR court's conclusions of law."

active drugs seized from Petitioner's residence counsel would not have recommended Petitioner plead guilty.

Importantly, while Petitioner pled to manufacturing methamphetamine, he was charged with the greater offense of trafficking in methamphetamine. For the trafficking charge to proceed to trial the state would have been required to produce proof of the chemical analysis of the alleged drugs, as well as the exact weight. Rule 6, SCRCrimP.[4] This could not have been done without the SLED report. Regardless of what the report stated, counsel could not give adequate advice as to whether to plea or go to trial, under prevailing professional norms, without the official drug analysis.

There is nothing in the record to indicate that plea counsel ever received a drug report, requested a drug report, or recommended on waiting for the results of the drug report before taking any action. In recommending that Petitioner enter a guilty plea, counsel relied on the presumptive field test and field weights, neither of which would be sufficient evidence at trial. Counsel's advice was based on incomplete evidence and thus renders Petitioner's plea involuntary. Hill v. Lockhart, 585 U.S. 52 (1985).

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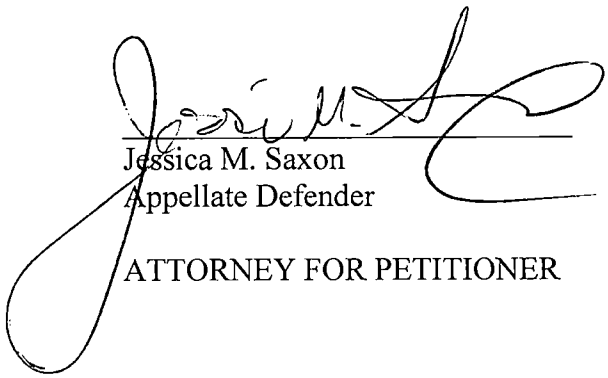
[4]For the purpose of establishing the physical evidence of a controlled substance or other substance regulated by Title 44, Chapter 53 of the Code of Laws...a report signed by the chemist or analyst who performed the test or tests required concerning its nature shall be evidence that the material delivered to him or her was properly tested under procedures approved by the State Law Enforcement Division (SLED), that those procedures are legally reliable and that the material is or contains the substance or substances stated.

CONCLUSION

By reason of the foregoing arguments, this Court should grant Petitioner's writ of certiorari to allow full briefing on these issues.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of January, 2020.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari have been served on David Scott Mooney, #186128, at Lieber Correctional Institution, PO Box. 205, Ridgeville, SC 29472, this 2nd day of January, 2020.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 2nd day of January, 2020.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.