

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable Thomas A. Russo, Circuit Court Judge

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FEB 08 2020

TERRY COOPER,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001197

JOHNSON PETITION FOR WRIT OF CERTIORARI

Jessica M. Saxon
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 in finding plea counsel effective where plea counsel failed to request Petitioner undergo a competency evaluation where Petitioner was on multiple mood and behavior modifying medications and was under the care of a mental health professional?

STATEMENT OF THE CASE

On June 3, 2015, just after four o'clock in the afternoon an individual wearing a hoodie, a Halloween mask, and gloves entered the BB&T Bank located at 280 North Church Street in Spartanburg, South Carolina. App. 92, ll. 7-20. The masked individual approached the teller line, handed over a note stating he had a gun, and demanded money. The two teller's who were working, Kimberly Cash and Natsha Cheeks, handed stacks of money over to the robber. Cash was able to pass the robber a stack of money containing a dye pack. The individual then left the bank on foot. App. 100, ll. 2-17.

Stephen Steading was pulling into Burnett's Appliances, located across the street from the BB&T Bank, when an individual in a mask and black hoodie ran in front of his truck. As the individual passed the truck a sudden "explosion of red dye was out in front of [the individual]." Steading parked his car and watched as the individual ran across the parking lot and went down an embankment by a bridge that led down to some railroad tracks. Steading went to the top of the embankment and saw money laying "everywhere." Looking over the edge of the embankment he saw a black male in black pants and tennis shoes come from underneath the bridge and run down the tracks. The black male did not have a shirt on. Steading was too far away to observe any other identifying features of the black male on the railroad tracks, but he called 911 to report what he had seen. App. 104, l. 9-App. 106, l. 10.

Officer Stephen McClure was responding to the scene when he heard dispatch state a suspect was running down the railroad tracks towards Magnolia Street and that officers had recovered a shirt. While driving toward the railroad tracks McClure saw a male running through a parking lot without a shirt on. McClure got out of his vehicle and attempted to speak to the man, but the individual did not stop. As the man kept jogging McClure noticed that he had red

dye on his upper abdomen. McClure drew his weapon and ordered the man to the ground. The man laid faced down on the ground at gun point until back up arrived. Upon arrest the man was identified as Petitioner. App. 142, l. 1-App. 14, l. 23.

Petitioner was taken to the police station where he was photographed and interviewed. App. 165, ll. 8-15. The interview, conducted by Investigator Jason Tapp, was audio and video recorded. App. 160, ll. 20-23. According to Tapp, Appellant was provided with a “Statement of Rights” and chose to waive them. Tapp wrote out a “Voluntary Statement” for Appellant which contained incriminating admissions. App. 162, l. 3-App. 165, l. 7. Specifically, Petitioner admitted to robbing the bank and identified Brandon Johnson as the individual who came up with the plan to rob the bank. App. 172, ll. 18-20.

In July 2015, a Spartanburg County grand jury indicted Petitioner for bank robbery. App. 309-310. On March 14, 2016, the state, represented by Circuit Solicitor Barry Barnette called the case to trial before the Honorable J. Derham Cole, and a jury. App. 1. Michael Morin represented Petitioner. App. 1.

A hearing pursuant to Jackson v. Denno¹ was conducted prior to the start of the trial. During the hearing Tapp claimed Appellant appeared to understand his rights, initialed by each line, and signed the waiver of rights form freely and voluntarily. App. 162, l. 19-App. 165, l. 7. Notably, during the interview Petitioner told Tapp that he was under the care of a mental health professional, took numerous mental health medications, and was diabetic.

¹ 378 U.S. 368 (1964)

At the pretrial hearing Petitioner testified that at the time of the interview, he had taken Remeron², Seroquel, and Neurontin. Petitioner stated the medications were for depression, nerves, and anxiety. App. 52, ll. 3-17. He further testified that he had been suffering from mental health problems all of his life and had been medicated since he was in his late teens. App. 62, ll. 17-19; App. 71, ll. 21-23. Petitioner stated that when he was eight years old, he ran into the road in front of an eighteen-wheeler in an attempt to commit suicide. While on the stand Petitioner said if he had a gun at that moment he would “blow my own brains out right here.” App. 62, ll. 21-25.

After a day and a half trial Petitioner was convicted as indicted and sentenced to twenty-eight years imprisonment. App. 214-216. Petitioner’s direct appeal was perfected by Appellate Defender Taylor Gilliam. Appellate Defender Gilliam filed a brief pursuant to Anders v. California³ and the appeal was dismissed in October 2017.

On March 13, 2018, Petitioner filed an application for post-conviction relief alleging, inter alia, that trial counsel was ineffective for failing to have him mentally evaluated prior to trial. App. 219-250. The state filed a return on August 3, 2018. App. 251-259. An evidentiary hearing was convened before the Honorable Thomas A. Russo on March 3, 2019. Petitioner was represented by PCR Counsel Rodney Richey. The state was represented by Johnny James and Jacob Isenberg. App. 260. Petitioner, trial counsel Morin and the prosecuting solicitor Barry Barnette testified at the hearing. App. 261.

² At trial Petitioner refers to the medication as “Ramrod”, however upon information and belief, Remeron was the correct name of the medication Petitioner was referring to.

³ 386 U.S. 738 (1967)

At the end of the hearing the PCR court denied Petitioner's application. App. 293-294. The order of dismissal was filed on July 12, 2019. App. 298-308. In denying Petitioner's application the PCR court found that Petitioner offered no objective evidence in support of his claimed mental health problems and that trial counsel offered credible testimony that he did not have concerns about Petitioner's competency. The PCR court concluded that Petitioner had taken an active roll in the defense of his case, that the record showed Petitioner was a lucid, cogent individual at the time of trial and that Petitioner had never claimed insanity or any other mental defense but asserted his actual innocence. App. 305. Petitioner's application was denied, with prejudice. This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred in finding plea counsel effective where plea counsel failed to request Petitioner undergo a mental health evaluation where Petitioner was on multiple mood and behavior modifying medications and was under the care of a mental health professional.

An individual's constitutional right to due process of law prohibits the conviction of an incompetent defendant. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992) *citing* Bishop v. United States, 350 U.S. 961 (1956). Competency requires that the defendant must have the ability to consult with his attorney with a reasonable degree of rational understanding and have an understanding of the proceedings against him. Id. The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 7011 (2018) (quoting Godinez v. Moran, 509 U.S. 389 (1993)) (emphasis in original).

To find that trial counsel was ineffective for failing to request a competency evaluation the petitioner must show that counsel was deficient, and that the deficiency prejudiced the outcome of the proceedings. Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50–51 (2004) *citing* Strickland v. Washington, 466 U.S. 668 (1984); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992). Petitioner need only show a *reasonable probability* that he was either insane at the time the crime was committed or *incompetent at the time of the proceedings*. Jeter, 308 S.C. at 233, 417 S.E.2d at 596 (emphasis added). If a PCR applicant claims he was rendered incompetent due to medication, he must show his mental faculties were so impaired by drugs during the original proceedings that he was incapable of fully understanding the proceedings. Garren at 15, 813 S.E.2d at 712.

Petitioner was under the care of a mental health professional at the time of the incident and had been for the majority of his life. He was also taking a cocktail of medications to address his mental health problems. Specifically, he remembered taking Remeron, Seroquel and Neurotin⁴. Notably, when taken together, these drugs interact with one another to increase the likelihood of side effects which include dizziness, drowsiness, confusion, difficulty concentrating, impaired thinking and judgment, and impaired motor coordination.⁵

While trial counsel stated he believed Petitioner understood their conversations, he was also aware that Petitioner was under the care of a doctor and taking mental health medication. App. 280-281. Thus, trial counsel was aware that Petitioner's competency was, at least in some respect, in question. Accordingly, trial counsel was required to adequately investigate the question of Petitioner's competency as it related to possible defenses, mitigation, and culpability. *See Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). Failure to conduct an adequate investigation and request a competency evaluation was deficient performance.

Petitioner testified at the PCR hearing that the medication he was on at the time of the robbery directly impacted his statement to law enforcement. He further testified that his mental health problems affected his memory to some extent, and he did not recall exactly what he had testified to during the pretrial hearing. Petitioner stated that while he was able to talk about everything with his lawyer he would get confused during their discussions. Petitioner thought that had the jury known he was not "mentally responsible for what he allegedly did" then things might have turned out differently during the trial. App. 266-279.

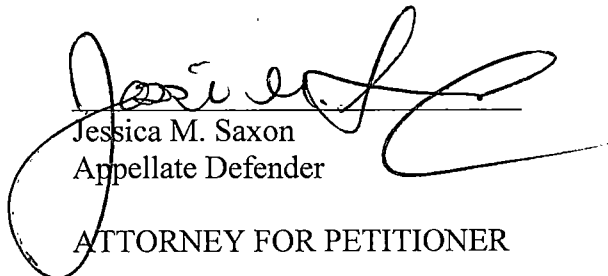
⁴ These drugs are respectively classified as an anti-depressant, an anti-psychotic and an anti-convulsant. They can be used to treat disorders other than the ones they are classified to treat. <https://www.drugs.com>

⁵ https://www.drugs.com/drug_interactions.html

At the center of Petitioner's testimony is the fact that he was likely unable to understand his rights, the proceedings against him, and the consequences of his actions due to the medication he was taking for his mental health problems. Petitioner's records and testimony indicate a reasonable probability that he was incompetent not only during trial but at the time of the alleged incident as well. Trial counsel was aware that Petitioner suffered from mental health problems and was medicated. Thus, trial counsel should have requested a competency evaluation to determine Petitioner's competency at the time of the incident and Petitioner's ability to stand trial. Failure of trial counsel to request a competency evaluation was ineffective assistance of counsel that prejudiced Petitioner. See Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50–51 (2004) *citing* Strickland v. Washington, 466 U.S. 668 (1984); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari to allow full briefing on this issue.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of February, 2020.

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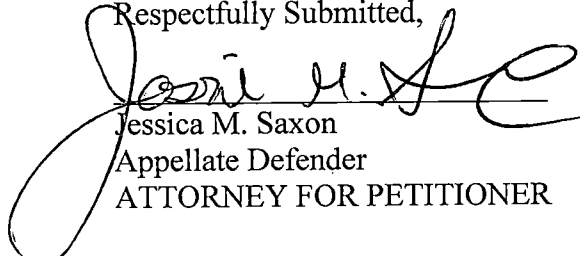
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Terry Cooper 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 Thomas A. Russo, which was held on March 7, 2019, 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 Terry Cooper.

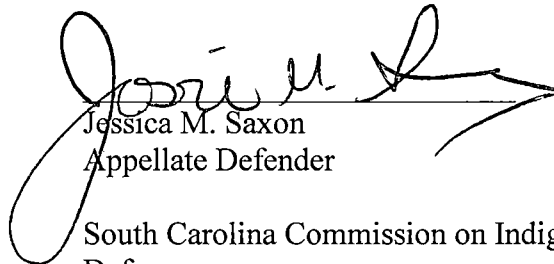
Respectfully Submitted,


Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of February, 2020.

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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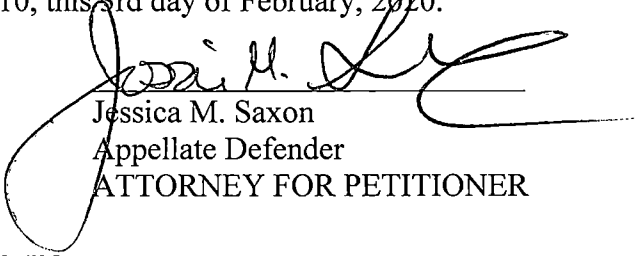
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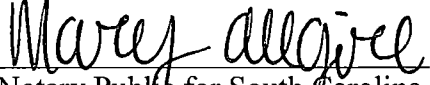
CERTIFICATE OF SERVICE

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 Terry Cooper, #118061, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 3rd day of February, 2020.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of February, 2020.

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