

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Darlington County

Honorable Larry B. Hyman, Circuit Court Judge

JAMIE RAY LEWIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001778

JOHNSON PETITION FOR WRIT OF CERTIORARI

Victor R Seeger
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether Petitioner's guilty plea was involuntarily made where plea counsel failed to request a competency evaluation for Petitioner where Petitioner was on multiple mental health medications and, he was severely depressed after the recent death of his wife?

STATEMENT

During the August 2013 term, the Darlington County Grand Jury indicted Petitioner for murder, possession of a weapon during the commission of a violent crime, and strong arm robbery. App. 91 – 96.

On May 18, 2015, Petitioner pled guilty before the Honorable Roger E. Henderson. App. 1. Richard Jones represented Petitioner. Id. Kendell Burch represented the state. Id.

A negotiated plea agreement entailed Petitioner pleading guilty to voluntary manslaughter and receiving a sentence of twenty-four years' imprisonment. App. 3, ll. 2 – 8. Judge Henderson accepted Petitioner's guilty plea as freely, voluntarily, and intelligently tendered. App. 9, ll. 9 – 15.

During the plea hearing, Petitioner informed the plea court that he was currently on three different types of medication, "Roxicodine (sic), Xanax, and Soma's¹." App. 12, ll. 17 – 18. Plea counsel also explained Petitioner's problems with drugs and his wife's recent passing in an effort to mitigate Petitioner's sentence. App. 9, l. 16 – 12, l. 4.

Judge Henderson sentenced Petitioner, pursuant to the negotiated agreement, to twenty-four years' imprisonment. App. 17, ll. 2 – 7.

¹ Roxicodone is an opioid used for pain relief. Roxicodone Oral: Uses, Side Effects, Interactions, Pictures, Warnings & Dosing, WebMD, <https://www.webmd.com/drugs/2/drug-3499/roxicodone-oral/details> (last visited May 30, 2019).

Xanax is a benzodiazepine that is used for anxiety and panic disorders. Xanax Oral: Uses, Side Effects, Interactions, Pictures, Warnings & Dosing, WebMD, <https://www.webmd.com/drugs/2/drug-9824/xanax-oral/details> (last visited May 30, 2019).

Soma is a strong pain reliever that is only authorized for short-term use to treat muscle pain. Soma Oral: Uses, Side Effects, Interactions, Pictures, Warnings & Dosing, WebMD, <https://www.webmd.com/drugs/2/drug-12153/soma-oral/details> (last visited May 30, 2019)

On January 26, 2016, Petitioner filed an application for post-conviction relief (PCR) which alleged plea counsel provided ineffective assistance of counsel for failure to request a competency evaluation for Petitioner. App. 17 – 24. The state filed its Return on June 14, 2017. App. 29 – 36.

On July 23, 2018, Petitioner’s PCR hearing was held before the Honorable Larry B. Hyman. App. 38. Lance S. Boozer represented Petitioner. Id. Johnny E. James represented the state. Id.

In an order filed on August 28, 2018, Judge Hyman denied Petitioner’s PCR allegations. App. 79 – 90. Judge Hyman found no deficiency in plea counsel’s representation of Petitioner because no mental health records were brought to the PCR hearing and plea counsel testified that there was no question in his mind that Petitioner understood everything that occurred. Id.

This petition follows.

ARGUMENT

Petitioner's guilty plea was involuntarily made where plea counsel failed to request a competency evaluation for Petitioner where Petitioner was on multiple mental health medications and, he was severely depressed after the recent death of his wife.

Relevant Facts

The state alleged the facts as follows: On March 17, 2013, Petitioner went to the decedent Brewington's home. App. 7, ll. 15 – 23. Petitioner had a history of drug abuse, so he and Brewington made an agreement where Brewington would hold half of Petitioner's prescription pills to keep Petitioner from abusing them. App. 10, l. 1 – 11, l. 9. Petitioner was on multiple mental health prescriptions and severely depressed since his wife, who was also the mother of his children, passed away in December of 2012. Id.

Petitioner allegedly robbed Brewington, who was a friend of Petitioner's father, of prescription medication. App. 7, l. 24 – 8, l. 10. During the alleged robbery, Petitioner and Brewington got into an altercation where Brewington died from multiple stab wounds. Id.

Petitioner testified at his PCR hearing that plea counsel was ineffective for failing to request a competency evaluation before Petitioner entered his guilty plea. App. 46, ll. 14 – 24. Petitioner stated he had been suffering from "severe depression" since his wife died a few months prior to the incident, and was, "still going through it," at the time of the PCR hearing. App. 47, ll. 2 – 12. Petitioner also explained that he was still being medicated while in SCDC custody. App. 47, ll. 13 – 16.

Petitioner informed plea counsel of these factors that affected his competency prior to the guilty plea hearing. App. 47, ll. 20 – 25. Most importantly, Petitioner testified that had plea

counsel provided effective assistance of counsel, Petitioner would have proceeded to trial. App. 52, l. 19 – 53, l. 19.

Plea counsel testified at the PCR hearing as well. App. 55, l. 5. Plea counsel said he did not see a reason to request Petitioner’s competency be evaluated. App. 57, ll. 16 – 23. He stated he, “never had the impression that [Petitioner] did not understand exactly what was going on... There was not a question in my mind that he had any incompetency either temporarily or permanently.” Id.

Plea counsel admitted he never did an “in depth” investigation into Petitioner’s case, which would presumably include evidence of incompetency, because plea counsel thought that Petitioner did not want to go to trial. App. 62, ll. 11 – 13. Plea counsel also admitted he was not ready for trial on the day of the plea hearing. App. 64, ll. 8 – 10.

In spite of being aware of the several mental health medications Petitioner was using and his severe depression, plea counsel did not request that Petitioner’s competency be evaluated. App. 47, ll. 20 – 25. Accordingly, Petitioner pled guilty while not being aware of the consequences of his actions.

Discussion

Plea counsel provided ineffective assistance of counsel when he failed to request that Petitioner be evaluated for competency where plea counsel was on notice Petitioner’s competency was in question prior to the plea hearing.

An individual’s constitutional right to due process of law prohibits the conviction of an incompetent defendant. This right may not be waived by a guilty plea. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). The competency required to enter a guilty plea is the same as required to stand trial. Id. at 232, 417 S.E.2d at 596. 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.* A guilty plea may not be accepted unless it is voluntary and understandingly made. *State v. Rosier*, 312 S.C. 142, 148, 439 S.E.2d 307, 309 (1993) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Lambert*, 266 S.C. 574, 225 S.E.2d 340 (1976)).

When a petitioner challenges counsel's failure to request a *Blair*² hearing on petitioner's competency to stand trial, petitioner must show: counsel was deficient and the deficiency prejudiced the outcome of the proceedings. *Matthews v. State*, 358 S.C. 456, 459, 596 S.E.2d 49, 50-51 (2004). 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 plea*. *Id.* at 459, 596 S.E.2d at 50. (emphasis added)

To prove a claim of ineffective assistance of counsel, the petitioner must show that counsel provided was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. *Id.* at 688. An attorney's performance is measured against prevailing professional norms. *Id.* at 688. The two-part test adopted in *Strickland* also "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). However, "[p]lea counsel is ineffective within the meaning of the Sixth Amendment only when the applicant satisfies both requirements." *Stalk v. State*, 383 S.C. 559, 561, 681 S.E.2d 592, 593 (2009).

Matthews v. State, *supra*, parallels Petitioner's case. Matthews plead guilty to armed robbery, attempted armed robbery, carjacking, and accessory after the fact to murder. *Id.* at 458, 596 S.E.2d at 50. Matthews filed a PCR application and was denied relief. *Id.* Matthews appealed the

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

PCR judge's decision and alleged his plea counsel provided ineffective assistance of counsel because he failed to request a competency hearing to determine whether Matthews was competent to stand trial. Id.

This Court held in Matthews that plea counsel was ineffective for failing to request a Blair hearing because Matthews proved, by the preponderance of evidence, his incompetency at the PCR hearing. Id. at 460, 596 S.E.2d at 51. Matthews presented a psychiatrist at PCR to testify to his incompetency. Id. at 459, 596 S.E.2d at 51.

Although, in the instant case, Petitioner did not hire a psychiatrist for evaluation purposes to testify at PCR, the plea transcript and PCR transcript considered together show Petitioner did not understand his attorney and did not understand the consequences of the plea. App. 9, l. 16 – 12, l. 4; App. 12, ll. 17 – 18. Under these circumstances plea counsel provided ineffective assistance for not requesting an evaluation or at a minimum a competency hearing.

In Lee v. State, 396 S.C. 314, 721 S.E.2d 442 (2011) the Court of Appeals distinguished the decision in Matthews. Even though Lee presented a psychologist to testify to his incompetency at his PCR hearing, the trial court held that Lee had not proven plea counsel was ineffective for failure to obtain a competency evaluation prior to his guilty plea. Id. at 318, 721 S.E.2d at 444; Id. at 319, 721 S.E. 2d at 445. Specifically, this Court found that although Lee was incompetent at the time of the plea, plea counsel was not on notice that Lee's competency was an issue at the plea hearing and thus did not provide ineffective assistance. Id. at 321, 721 S.E.2d at 446. The decision in Lee, illustrated that the real issue is whether or not trial counsel was on notice that the petitioner's competency was in question.

In the instant case, plea counsel's performance was deficient because, unlike the plea counsel in Lee, here plea counsel knew Petitioner's competency was at issue during the plea

hearing. App. 9, l. 16 – 12, l. 4. Moreover, while Petitioner did not have a physician testify at PCR to his incompetency, he did prove his incompetency by the preponderance of evidence through other means.³

Petitioner presented evidence that he was on multiple medications at the time of the plea hearing. App. 12, ll. 9 – 18; App. 46, ll. 14 – 24. Petitioner also presented evidence that he suffered from severe depression since his wife, who was also the mother of his children, died a few months prior to the incident in question. App. 9, l. 16 – 12, l. 4; App. 47, ll. 2 – 12.

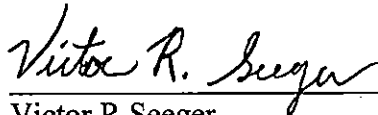
Plea counsel's testimony at the plea hearing showed that he knew about of the medications Petitioner was taking and the depression he suffered. App. 9, l. 16 – 12, l. 4. Thus, plea counsel was aware that Petitioner's competency was in question prior to pleading guilty. Accordingly, plea counsel provided deficient performance because was he aware of the reasonable probability that Petitioner was incompetent at the plea hearing and he never requested that Petitioner be evaluated.

Petitioner would not have plead guilty but for counsel's deficient performance because he testified during his PCR hearing that he wanted a jury trial instead of pleading guilty. App. 52, l. 19 – 53, l. 19. Therefore, Petitioner was prejudiced because plea counsel's deficient performance induced him to plea when he would have otherwise insisted on going to trial.

³ Obviously, a Petitioner still has the burden of proving incompetence. However, this Court has held in the context of insanity, that lay testimony may be sufficient. State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989); State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255 (1993); State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997).

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing on this issue.

A handwritten signature in cursive script that reads "Victor R. Seeger". The signature is written in black ink and is positioned above a horizontal line.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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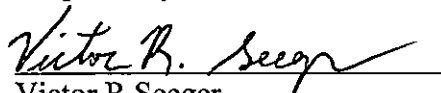
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jamie Ray Lewis states:

1. He is 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 Larry B. Hyman, which was held on July 23, 2018, 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 Jamie Ray Lewis.

Respectfully Submitted,



Victor R Seeger

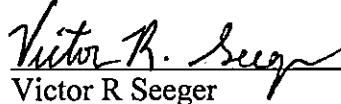
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2019.

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."



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Appellate Defender

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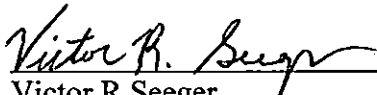
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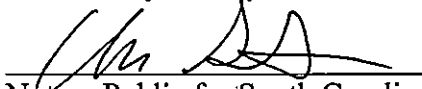
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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon 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 Jamie Ray Lewis, #299085, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of May, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of May, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: October 26, 2019