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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable R. Lawton McIntosh, Circuit Court Judge

ANTHONY TEREZ BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000103

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily entered where no competency examination was requested by plea counsel when Petitioner had a documented history of mental illness and mental deficiency?

STATEMENT OF THE CASE

On the morning of April 13, 2004, "Banks" Anthony Lamar Brown, April Hampton, and Ray Nelson met up at a place in Colleton County known as the Chase. App. 24, ll. 7-10. Hampton called Petitioner, Anthony Terez Brown[1], which resulted in Banks, Hampton, and Nelson going to pick up Petitioner from his home. App. 24, ll. 10-11; App. 37, ll. 23-25. Petitioner provided Banks with a .380 pistol and the group drove[2] to a concrete company. Banks and Petitioner entered the concrete company and robbed Carolyn Maloney[3] of a purse, bank bag, and diaper bag. App. 24, ll. 16-24; 146. Petitioner exited the building with the purse in his hands. Petitioner and Hampton heard a shot ring out, and then Banks exited the building. The money and items taken were distributed between the four co-defendants. App. 24, ll. 14-24; app. 43, ll. 4-9.

All four co-defendants were eventually arrested. In July 2004 the Colleton County grand jury indicted Petitioner for murder and armed robbery. App. 144-147. Petitioner, Hampton, and Nelson cooperated with the State and were prepared to testify at Banks' trial, but Banks ended up entering a guilty plea. App. 97, ll. 17-21. On March 13, 2007, Petitioner, along with Hampton and Nelson, appeared before the Honorable Carmen T. Mullen to enter a guilty plea to the armed robbery charge. App. 1-2. The State was represented by Terry Alexander. Petitioner was

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1 Petitioner was nineteen years old at the time of the incident. His only prior conviction was a juvenile offense from when he was either twelve or thirteen years old. App. 40, l. 21-App.41, l. 4.

2 Based on various statements provided by the three cooperating co-defendants (which included Petitioner) the state alleged that the group may have first returned to the Chase to do drugs prior to driving to the concrete company. App. 24, ll. 14-15.

3 Unfortunately, Maloney died as a result of the gunshot wound. Petitioner and the others only learned of the homicide after reading about it in the newspaper. App. 39, ll. 19-22.

represented by James Wegmann. App. 2. Based on the investigation and their cooperation Solicitor Alexander dismissed the murder indictment against all three co-defendants, telling the court that he was "firmly convinced neither one of the three realized what was going to happen to Ms. Maloney" and that he was "confident that the right person [Banks] has pled to murder." App. 23, ll. 22-24; App. 28, ll. 22-23.

The court took the plea of Hampton, Nelson, and Petitioner at the same time. App. 4. At the request of their counsel, sentencing was deferred for Hampton and Nelson. App. 5-6. Solicitor Alexander did not make a recommendation in the case, stating he had done what he could by dismissing the murder indictments, but asked the court to "give whatever consideration you can to them." App. 29, ll. 11-17. Prior to sentencing, Counsel Wegmann highlighted Petitioner's cooperation with the investigation which included turning himself in, helping police locate the murder weapon, and giving consistent statements about the incident. App. 35, l. 24-App. 36, l. 8. Judge Mullen sentenced Petitioner to thirty years imprisonment. App. 46, ll. 19-23.

Petitioner filed a notice of appeal,[4] which was dismissed by the Court of Appeals as untimely on March 13, 2014. App. 49. An application for post-conviction relief was filed on May 6, 2014, alleging an involuntary guilty plea. App. 48-54. The State filed a return and motion for a more definite statement dated July 8, 2020. App. 55-70. An evidentiary hearing was convened via WebEx on August 28, 2020, before the Honorable R. Lawton McIntosh. Petitioner was represented by Timothy Griffith. The State was represented by Benjamin Limbaugh. App. 71.

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[4] According to the State's return, Counsel Wegmann filed a motion to reconsider the sentence on March 21, 2007, that was denied by Judge Mullen on September 25, 2009. A notice of appeal was filed on September 28, 2009, and ultimate dismissed as untimely. App. 75.

At the start of the hearing the parties informed the court that they had held a status conference prior to the hearing wherein Counsel Griffith notified AG Limbaugh of the specific nature of Petitioner's claims. App. 74, ll. 7-18. At the hearing Petitioner asserted that he received ineffective assistance of counsel because Counsel Wegmann did not inform the Solicitor that Petitioner had "a mental deficiency" which rendered his guilty plea involuntary. App. 79, ll. 7-14.

Petitioner testified that he had suffered from mental difficulties his entire life. Petitioner stated that he had been evaluated as a juvenile and was ordered to go to counseling which continued throughout his entire life. Additionally, Petitioner had comprehension problems from a young age. However, Petitioner testified that he refused to take any medication for his mental problems. App. 79-80; App. 81, ll. 8-10; App. 88, ll.18-22. Petitioner stated that he did not know how to tell Counsel Wegmann that he did not understand what was occurring during the plea. App. 82, ll. 5-11. He remembered "answering yes to every question to get the proceeding through" but could not recall if he had been asked specific questions about his mental health. App. 86, ll. 11-20. The State entered into evidence an advisement of rights sheet initialed and signed by Petitioner and Counsel Wegmann. App. 108-110. Petitioner testified that he would have gone to trial instead of pleading because the evidence would show he did not commit murder and was not armed during the robbery. App. 82, ll.19-22; App. 84, ll. 5-13.

Counsel Wegmann testified that he did not recall Petitioner having any comprehension or mental health problems. App. 90, l. 16-App. 91, l. 13. He stated he did not request a mental evaluation of Petitioner because he did not have any suspicions of mental incompetence. Counsel Wegmann further testified that it was his general practice to adapt his counseling of a client based on their education level and perceived understanding. App. 90, l. 14-App. 91, l. 2;

App. 92, l. 21-App. 93, l. 3. Counsel Wegmann reviewed his notes and did not have anything in them dealing with any mental health issues, medications, or "anything like that." App. 92, ll. 16-20. Counsel Wegmann testified that he believed Petitioner understood what he was doing, the sentence he was facing and his decision to plead guilty. App. 95, ll. 1-7.

At the end of the hearing, Judge McIntosh stated "[A]bsolutely no evidence has been presented that had anything to do with the applicant's mental health at the time of his plea. By his own admission he said that he didn't even bring it up to Mr. Wegmann or make that known to him at all." Judge McIntosh proceeded to deny Petitioner's application but gave Counsel Griffith thirty days to supplement the record with mental health records that went back to Petitioner's condition at the time of his plea. App. 98, ll. 18-23. Records were provided by email on September 23, 2020, and were entered into evidence as Applicant's Exhibit A. App. 100-107.

A final order of dismissal was filed on January 25, 2021. App. 113-124. In the order, the PCR court noted that the records[5] received by the court did not cover the time of the plea, and therefore Petitioner had not offered any evidence to prove that he was mental incapacitated at the time of his plea. Additionally, the court noted that while the records did reflect that Petitioner experienced at least some mental health difficulties in his life, they were not specific enough nor did they explain to a reasonable degree of medical certainty how those prior difficulties would have prevented Petitioner from entering a knowing and voluntary plea. App. 123.

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5 The records entered as Applicant's Exhibit A cover a period from 1994 to 2002. Petitioner's guilty plea was in 2007. App. 102-107

ARGUMENT

The PCR court erred in finding Petitioner's guilty plea was knowingly and voluntarily entered where no competency examination was requested by plea counsel when Petitioner had a documented history of mental illness and mental deficiency.

An individual's constitutional right to due process of law prohibits the conviction of an incompetent defendant. U.S.C.A. Const. Amend. 14. 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). This right cannot be waived by guilty plea. Pate v. Robinson, 383 U.S. 375 (1966). The test of competency to enter a plea is the same as required to stand trial. State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 91976).

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. Jeter at 232, 417 S.E.2d at 595. 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). In a PCR action, the petitioner must prove by a preponderance of the evidence that he was incompetent when he entered his guilty plea. Jeter at 232, 417 S.E.2d at 595-96.

Generally, in order to prevail in the context of a guilty plea, a PCR applicant must show that counsel's representation was below the standard of reasonableness and that, but for counsel's

unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). "In Jeter, this Court proclaimed that in proving Strickland prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, 'the [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.'" Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 51 (2004) *citing* Jeter 308 S.C. at 233, 417 S.E.2d at 596 (emphasis added).

A criminal defense attorney has a duty to conduct a reasonable investigation into all aspects of a case including the defendant's mental competency. *See* Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007); Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir.1990) (stating counsel has a duty to investigate his client's mental status when he has reason to believe an investigation is warranted "because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court"). The failure of Counsel Wegmann to both conduct an adequate investigation into Petitioner's lengthy mental health history and to request a competency evaluation was deficient performance. Admittedly, Petitioner did not inform Counsel Wegmann of his mental health history. However, a seasoned attorney such as Counsel Wegmann should have known to question Petitioner about any potential mental health issues that could have mitigated his involvement in the incident.

The PCR court erred in finding that Petitioner had not offered evidence of his mental incapacity at the time of his guilty plea. The records that were provided showed a history of mental health problems dating back to when Petitioner was a mere twelve or thirteen years old and note that Petitioner was "emotionally disturbed." The DSM-IV diagnostics codes showed Petitioner had been diagnosed with a childhood onset conduct disorder, oppositional defiant

disorder, and an adjustment disorder. Petitioner testified that he received lifelong treatment for his mental difficulties, and that testimony was substantiated by the records entered into evidence.

These disorders, along with any other mental incapacity, should have been apparent to a seasoned attorney such as Counsel Wegmann. Even if he ultimately did not request a mental competency evaluation, Counsel Wegmann still had a duty to investigate Petitioner's background as he was "the sole hope" that any conditions would be brought to the attention of the court. See Bouchillon at 597. Based on the evidence and testimony from the PCR hearing, Petitioner has shown by a preponderance of evidence that there was a reasonable probability that he was mentally incompetent at the time of his guilty plea. Thus, the failure of counsel to investigate Petitioner's mental health history and to request a competency evaluation was ineffective assistance of counsel. 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 9th day of July, 2021.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Terez Brown 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 R. Lawton McIntosh, which was held on August 28, 2020, 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 Anthony Terez Brown.

Respectfully Submitted,

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of July, 2021.

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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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This 9th day of July, 2021.