

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 22 2013

Certiorari to Oconee County
Clifton Newman, Circuit Court Judge

S.C. Supreme Court

RICKY DEAN DUNCAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213472

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Plea counsel's failure to obtain an independent mental health evaluation of Petitioner violated Petitioner's Sixth and Fourteenth Amendment right to the effective assistance of counsel where the court-ordered evaluation revealed Petitioner's long history of suffering from auditory and visual hallucinations coupled with the bizarre nature of the underlying facts placed plea counsel on notice of Petitioner's unstable mental health.

STATEMENT

On November 1, 2010, an Oconee County Grand Jury indicted Petitioner for attempted burglary in the first degree and threatening the life, person, or family of a public employee. App. 147-148; App. 150-151. The state, represented by David Wagner, called the case for trial on July 25, 2011 before the Honorable Alexander S. Macaulay and a jury. App. 1. R. Daniel Day and Keith Denny represented Petitioner. App. 1. After the parties selected a jury, Petitioner decided to change his plea from not guilty to guilty. App. 20, line 3 – App. 28, line 21; App. 36, line 12. Judge Macaulay sentenced Petitioner to thirty days for threatening the life of a public employee and fifteen years suspended upon the service of fifty-four months' imprisonment and five years' probation. App. 62, line 21 – App. 63, line 6; App. 149; App. 152. Petitioner did not file a notice of appeal following his sentencing.

On December 19, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 64-71. Subsequently, Petitioner amended his application. App. 79-81. The matter proceeded to a hearing on October 1, 2012 before the Honorable Clifton Newman. Suzanne Earle represented Petitioner, and Karen C. Ratigan represented the state. App. 82. Judge Newman found “no basis whatsoever to grant this PCR.” As a result, the judge denied Petitioner relief. App. 124, lines 7-8. By written order filed October 24, 2012, Judge Newman denied Petitioner relief. App. 138-146.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Plea counsel's failure to obtain an independent mental health evaluation of Petitioner violated Petitioner's Sixth and Fourteenth Amendment right to the effective assistance of counsel where the court-ordered evaluation revealed Petitioner's long history of suffering from auditory and visual hallucinations coupled with the bizarre nature of the underlying facts placed plea counsel on notice of Petitioner's unstable mental health.

Relevant facts

Facts produced at guilty plea hearing

During the plea colloquy, the judge inquired of plea counsel if he were aware of any physical, emotional, or mental condition affecting Petitioner's ability to understand the proceedings. Plea counsel responded that Petitioner "tells me he does take medication, but I've gone over that with him. I believe he understands what's going on. We had discussed it in great detail here today." App. 38, lines 1 – 7. Upon further questioning, plea counsel informed the court that Petitioner had been evaluated for competency and the determination was made that Petitioner understood the charges against him and could participate in the defense. App. 38, lines 8 – 15. Petitioner informed the judge that he had been diagnosed with mental illness in 1978 or 1979. App. 40, lines 9 – 14. Petitioner denied that his current medication affected his ability to understand the proceedings. App. 41, lines 10 – 13. Petitioner further denied any physical, mental, or emotional problem that would prevent him from understanding the proceedings. App. 41, lines 14 – 17.

Petitioner informed the court that prior to the day of the alleged crime he had run out of medication and was enduring the side effects of such when the alleged crime occurred. App. 40, line 24 – App. 41, line 6. Petitioner informed the court of the following facts concerning his conduct on the day in question:

I, I went to the house and knocked on the door and told her something. She shut the door. I kicked on the door and told her to come out, to bring what I wanted out, that we, the sons of the confederate nation and holy spirits of all told me that you will do certain things, and I wanted something and they wanted something in there, something to be done on an something to be stopped, and that's exactly what I said.

App. 46, lines 14 – 21. Later, Petitioner informed the court that he told the homeowner that the holy spirits wanted their \$25,000. App. 53, lines 2 – 4.

According to the prosecutor, the alleged victim claimed that Petitioner commented that Jesus had sent him to get \$25,000. Additionally, the alleged victim claimed Petitioner commented about “the Confederate something or other.” App. 50, lines 4 – 9. The alleged victim described Petitioner as having “a wild look in his eyes.” App. 50, line 11. The prosecutor further informed the judge that Petitioner had been evaluated by the Department of Mental Health on October 28, 2010. The evaluator found Petitioner competent. The evaluation was made a court's exhibit. App. 54, line 16 – App. 55, line 15; App. 126 – 137.

Plea counsel explained that Petitioner was not taking his medication on the day in question and had not taken his medication for some time preceding that day. App. 56, lines 5 – 9. Petitioner informed the court “I definitely wasn't at myself that day, that's for sure.” App. 61, lines 11 – 12.

Although the psychiatrist who evaluated Petitioner on October 28, 2010 diagnosed Petitioner as malingering of psychotic symptoms, the psychiatrist candidly admitted that Petitioner had a long history of talking to himself and engaging in very bizarre behaviors. The psychiatrist made clear that the current diagnosis of malingering did not exclude the possibility of past genuine psychosis. The report included observations by Petitioner's brother that Petitioner claimed to be in the Confederate Army and would attack trees that he believed were soldiers. Additionally, the psychiatrist had available to him medical records which confirmed Petitioner's unusual beliefs and bizarre behaviors in the past. The psychiatrist admitted Petitioner's diagnosis was greatly

complicated by substance use and Petitioner's self-isolation during periods when he struggled with his thinking. Based on the data available, the psychiatrist determined that it was more likely than not that Petitioner experienced substance induced psychosis. App. 134. The report noted that Petitioner had been hospitalized three times in 1989, relating to psychotic episodes. App. 131. Although Petitioner reported to the psychiatrist that he was experiencing auditory and visual hallucinations throughout the interview, the psychiatrist noted, Petitioner never appeared to respond to the internal stimuli. App. 133. The psychiatrist opined that Petitioner was not experiencing symptoms of mental illness or deficits at the time of the evaluation to such an extent that would significantly compromise his capacity to understand the proceedings against him or to assist in his own defense. Therefore, the psychiatrist found Petitioner competent to stand trial. App. 136.

Facts produced at PCR hearing

Plea counsel testified that a mental evaluation of Petitioner was requested based upon the unusual facts of the case. App. 92, lines 14 – 16. Although the evaluation revealed some disturbing things about Petitioner, plea counsel did not request or move for funding for an independent evaluation of Petitioner. App. 92, lines 19 – 25.

Petitioner testified that on the day of the guilty plea, he was severely ill as a result of major blockages in his stomach and lower bowels. As a result of that physical illness, he was not mentally stable. According to Petitioner, when he arrived at the Reception and Evaluation Center following sentencing, he had emergency surgery to remove the blockages. App. 188, line 18 – App. 189, line 14.

Petitioner argued that plea counsel was ineffective in failing to secure an independent evaluation of Petitioner's mental health. Petitioner noted that the mental health evaluation performed by the Department of Mental Health noted Petitioner's repeated hallucinations since

childhood placing plea counsel on notice of Petitioner's precarious mental condition. App. 114, line 6 – app. 115, line 16.

The state argued that because Petitioner had not presented an independent psychiatric evaluation to the PCR court, it would be “speculative to determine whether or not such an evaluation would have changed the outcome of the case.” The state also relied upon plea counsel's testimony that he had no problems communicating with Petitioner.¹ According to the state, there were “no red flags or warnings” that would have necessitated an independent evaluation. App. 122, lines 13 – 21.

At the conclusion of the hearing, Judge Newman found that Judge Macaulay “went to great pains in his colloquy with [Petitioner] regarding what occurred and regarding his mental status and the facts of the case.” He was forced to admit the underlying facts presented a “sort of a strange scenario.” App. 123, lines 1-10. Judge Newman was “satisfied that the defense is correct, that there's some loose screws somewhere in [Petitioner] to cause him to do what he did.” App. 123, lines 21 – 23. He elaborated on this point: “But as is the case with most people who are incarcerated, there's something wrong with them. But it doesn't rise to the level of – – that necessitates wasting State's resources by giving independent psychiatric examinations and doing the other things, the defense would have us do here today.” App. 124, lines 1-6. Judge Newman

¹ In fact, plea counsel testified that Petitioner “would tend to, as I would say, get on his high horse and decide he didn't want to talk to anybody. He would do that sometimes. He was agitated and upset about being in jail which I could understand.” App. 99, lines 6-10. Contrary to the state's assertion that plea counsel testified he had no problems communication with Petitioner, plea counsel actually testified that his communication was made difficult by Petitioner's frequent refusal to communicate with him. The self-isolation described by plea counsel mirrors the self-isolation described by the psychiatrist as indicative of when Petitioner suffered from hallucinations.

determined that the sentencing judge “apparently took into consideration that [Petitioner was] not thinking as rationally as [he] should have been thinking.” App. 124, lines 13-15.

Order denying relief

The court found Petitioner had failed to meet his burden of proof regarding his claim of ineffective assistance of plea counsel. The court found plea counsel conducted a proper investigation. App. 141. Specifically, the court found Petitioner failed to meet his burden of proving plea counsel was ineffective because of his failure to obtain an independent psychiatric evaluation. The PCR court found plea counsel’s testimony regarding his ability to discuss the case with Petitioner to be credible. The PCR court relied upon the pretrial evaluation concerning Petitioner’s competence to stand trial as well. The court further refused to speculate as to whether an independent evaluation would have had any effect on the case because no independent evaluation was offered during the PCR proceeding. App. 142.

Discussion

In order to prove ineffective assistance of counsel, Petitioner must show that counsel rendered deficient performance resulting in prejudice to him. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel’s performance is measured against prevailing professional norms. When an attorney’s performance is unreasonable under professional norms, then the attorney rendered deficient performance. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

As this Court explained, “criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). Although attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the

defendant, the decision not to investigate must be reasonable. Wiggins v. Smith, 539 U.S. 510, 533 (2003)(holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); see also Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004)(holding trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from "'major depressive episodes with severe symptoms of anxiety and possible prepsychotic features'").

In Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 615 (Ct. App. 2012), the Court of Appeals found trial counsel ineffective for failing to interview personally a potential alibi witness where the defendant claimed he was with the alibi witness and the alibi witness had corroborated the defendant's claim in a taped interview. The Court was not persuaded by the state's argument that the defense pursued a consent defense at trial and an alibi defense would have run afoul of such. "This argument mischaracterizes the role of strategy in the analysis of trial counsel's performance." If the defendant's attorney had investigated properly, the defense of alibi and then made an informed strategic decision, then the argument would be more persuasive. However, trial counsel failed to conduct an adequate investigation and therefore, she could not have made an informed strategic choice. Id. at 237, 723 S.E.2d at 615; see also Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

The bizarre underlying facts of the alleged criminal act, the revelations in the court-ordered competency evaluation of Petitioner, and Petitioner's conduct and interactions with plea counsel placed plea counsel on notice of Petitioner's precarious mental health status and required plea counsel to seek an independent evaluation of Petitioner's mental health. Concerning Petitioner's conduct on the day of the alleged crime, the alleged victim informed the police that Petitioner had a "wild look in his eyes" and claimed he was part of the Confederacy. The competency report detailed Petitioner's long battle with psychosis, including three prior hospitalizations for hallucinations. According to the report, Petitioner long-believed he was a Confederate soldier and acted accordingly. Thus, Petitioner's historical hallucinations accorded with his conduct on the day of the crime. In other words, it requires very little psychiatric or psychological training to deduce that Petitioner's conduct on the day of the crime was the result of auditory and visual hallucinations in line with his prior psychotic episodes. Additionally, plea counsel's interactions with Petitioner provided ample evidence of Petitioner's suffering from a psychotic break. Plea counsel sardonically referred to Petitioner "getting on his high horse" and refusing to communicate with counsel, but a closer examination of the conduct, especially when equipped with the mental health report, demonstrated Petitioner's refusal to communicate mirrored his self-isolation during episodes of a psychotic break.

Plea counsel's failure to obtain an independent evaluation of Petitioner's mental health despite the numerous and repeated indications that Petitioner suffered from severe mental illness violated Petitioner's right to the effective assistance of counsel. The PCR court's holding otherwise was in error.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO OCONEE COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

RICKY DEAN DUNCAN,

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STATE OF SOUTH CAROLINA,

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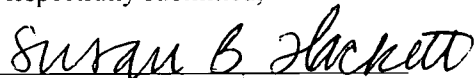
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ricky Dean Duncan states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing which was held on October 1, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Ricky Dean Duncan.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of April, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Clifton Newman, Circuit Court Judge

RICKY DEAN DUNCAN,

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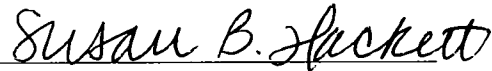
V.

STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

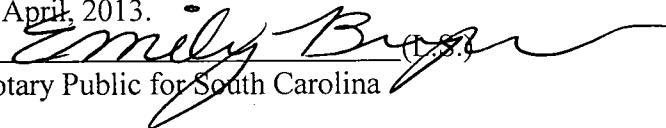
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Ricky Dean Duncan, #110304, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 22nd day of April, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of April, 2013.


Notary Public for South Carolina

My Commission Expires: November 16, 2022.