

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 23 2013

Certiorari to Florence County
Thomas A. Russo, Circuit Court Judge

S.C. Supreme Court

JEREMY T. DURANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213326

JOHNSON PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Plea counsel's failure to obtain an independent competency evaluation of Petitioner violated Petitioner's Sixth and Fourteenth Amendment right to the effective assistance of counsel where multiple court-ordered evaluations revealed Petitioner's long history of suffering from mental retardation and incompetence.

STATEMENT

During its October 2009, a Florence County Grand Jury indicted Petitioner for murder. App. 118-119. Petitioner entered a guilty plea, without recommendation or negotiation on July 27, 2011 before the Honorable Michael G. Nettles. The state was represented by E.L. Clements, and Grayson Smith represented Petitioner. App. 1. Judge Nettles sentenced Petitioner to forty-three years' imprisonment. App. 41; App. 120. Petitioner did not file a notice of appeal following his sentencing.

On February 1, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 78-84. The matter proceeded to a hearing on October 16, 2012 before the Honorable Thomas A. Russo. Charles Brooks represented Petitioner, and Tyson Andrew Johnson, Sr. represented the state. App. 90. Judge Russo denied Petitioner relief. App. 110, line 17 – App. 111, line 11. By written order filed October 29, 2012, Judge Russo denied Petitioner relief. App. 113-117.

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

ARGUMENT

Plea counsel's failure to obtain an independent competency evaluation of Petitioner violated Petitioner's Sixth and Fourteenth Amendment right to the effective assistance of counsel where multiple court-ordered evaluations revealed Petitioner's long history of suffering from mental retardation and incompetence.

Relevant facts

Facts produced at guilty plea hearing

Immediately after calling the case, the prosecutor informed the court of the necessity of a Blair¹ hearing. App. 3. The prosecutor also asked that four documents be made court's exhibits.² Petitioner was evaluated by the Department of Mental Health (DMH) on June 23, 2010. According to Dr. Michael Ferlauto, Petitioner struggled to read an information sheet provided to him concerning the purpose of the evaluation. App. 55. The report revealed Petitioner attended special education classes in school. App. 56. According to his school records, Petitioner had a full scale IQ of 60 and scored below the fifth percentile in all subtests of the Peabody Individual Achievement Test. App. 56. Petitioner's low-level of intelligence was observed by Dr. Ferlauto through the tests administered as part of the evaluation. App. 57. During the interview, Petitioner struggled with making change and knowledge of the correct year and state. App. 57. Dr. Ferlauto did not render an opinion as to competency to stand trial because Petitioner suffered from mental retardation and

¹ State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1982).

² Undersigned counsel requested the exhibits from the Clerk of Court in Florence County and was informed the exhibits were not found in the Clerk's possession. On March 21, 2013, the Clerk wrote to counsel explaining she had re-created the exhibits with the cooperation of the solicitor's and public defender's offices. App. 43. Counsel has included the exhibits exactly as submitted by the Clerk of Court. App. 45-77.

was not mentally ill. The evaluator referred Petitioner to the South Carolina Department of Disabilities and Special Needs (DDSN) for further evaluation. App. 58.

A report dated August 25, 2010 indicated Petitioner was not competent to stand trial, but would likely become competent with treatment. Thereafter, Petitioner was treated in a DMH facility.³ App. 61. Petitioner entered a sixty-day restoration program at DMH. DDSN evaluated Petitioner near completion of the program and determined Petitioner was competent. App. 62. IQ testing conducted on November 15, 2010 by DDSN placed him in the extremely low range of intellectual functioning, showing he had a full scale IQ of 61. Again, the doctors determined he suffered with mild mental retardation. App. 64. Even after education, Petitioner struggled to understand the meaning of “guilty” and “not guilty.” App. 64. The report concluded Petitioner was able to demonstrate an understanding of his charges and a “somewhat” rational understanding of legal proceedings. He demonstrated an adequate ability to assist in his defense and participate in the trial. However, the report warned: “In order to insure [Petitioner] is able to participate meaningfully in a trial, it will be important for his lawyer to take the time to make sure [Petitioner] understands information that will be represented in court and that he understands the consequences of any decisions he must make.” App. 65.

Thereafter, by report dated March 9, 2011, DMH found Petitioner “criminally responsible” and “had capacity to conform.” App. 46. The report was based upon an interview conducted on January 25, 2011. App. 46. The evaluator found Petitioner was criminally responsible because he allegedly instructed others to say the victim was hit by a car, ran from the scene, and tried to clean his shoes. “Such attempts to avoid detection and apprehension suggest[ed] he understood the

³ The August 25, 2010 report was not provided to counsel as one of the exhibits to the plea hearing. The information relating to the report was learned through the DDSN evaluation report dated December 20, 2010.

wrongfulness of the alleged offense.” Petitioner’s crying over the even suggested an understanding of the moral wrongfulness of his alleged conduct. App. 52. The evaluator recognized that Petitioner suffered from significant intellectual impairments, but determined his mental disorder did not likely result in a significant loss of ability to control his behavior. Any appearance of Petitioner lacking control was attributed to alcohol intoxication by the evaluator. App. 52.

During the guilty plea, plea counsel introduced an affidavit as part of the record. App. 29. A review of the affidavit indicates Petitioner understood he was entering a guilty plea to the charge of ABHAN. App. 66. The six-page affidavit further indicated Petitioner understood the maximum possible punishment for the charge to be ten years. App. 68. His understanding of the plea negotiations with the solicitor’s office was that he would receive a probationary sentence. App. 69. The affidavit was dated April 9, 2009, and Petitioner’s printed name appeared on the line labeled defendant. App. 71.

The guilty plea occurred on July 27, 2011, over two years after the affidavit was dated and over six months after Petitioner’s last evaluation. During the plea colloquy, Petitioner struggled to answer the questions asked by the judge. When asked if he was experiencing any physical or mental problem that could prevent him from understanding the proceedings, Petitioner responded affirmatively. After the judge repeated the question and Petitioner conferred with plea counsel, Petitioner continued to state he did not understand what was going on. App. 13. Plea counsel informed the court of Petitioner’s low intellectual functioning. Additionally, plea counsel stated he understood that Petitioner was competent to stand trial and criminally responsible based upon the findings of DMH and DDSN. App. 30. According to plea counsel, Petitioner “was so out of touch with reality” that he asked for probation during their first meeting. App. 30-31. Plea counsel expressed his opinion that on the day of the guilty plea hearing, Petitioner was “much more in tune

with the gravity of the situation.” He further opined that Petitioner understood what he was doing. App. 31.

Facts produced at PCR hearing

Petitioner testified that plea counsel rendered deficient performance prejudicial to him by failing to have an independent evaluation conducted. App. 95, line 11 – App. 96, line 11. Plea counsel testified that at the beginning of his relationship with Petitioner he was “very concerned with his ability to communication and whether that may be indicative of some deeper-seated problems.” As a result, Petitioner was evaluated. App. 103, lines 22-25. Although plea counsel testified at the PCR hearing that he “took issue even with the notion that somebody’s mental retardation could be restored,” he failed to retain the services of an independent psychiatrist to evaluate Petitioner. App. 104, lines 16-18. When asked why he did not get an independent evaluation, plea counsel answered: “What mitigated against doing an independent evaluation was the progression or the progress that I felt [Petitioner] and I made in our relationship.” He admitted that in hindsight he may should have had Petitioner evaluated by an independent psychiatrist or psychologist. He did not, however, because Petitioner “became much more in tune” over the course of the relationship. App. 105, lines 1-10. Plea counsel claimed that Petitioner showed a vast change in his understanding over the course of the representation. “He went from just being completely out of touch to really understanding and was visibly – visibly affected by the consequences of his actions.” App. 105, lines 18-21.

Again, plea counsel relied upon the affidavit of guilty plea that he and Petitioner allegedly prepared to support his opinion that Petitioner was competent. App. 105, lines 11-17; App. 105, lines 22-23. On cross-examination, plea counsel testified that the affidavit was ten to twelve pages of a “thorough colloquy.” App. 106, lines 15-25. Plea counsel testified that he did not believe the

state's version of events that Petitioner attempted to move the body of the deceased to make it appear that the deceased died as a result of a car accident. He further explained that the first time the prosecution made that allegation was on the day of the guilty plea hearing. App. 107, lines 15-19. Nevertheless, plea counsel was willing to opine that the conduct showed Petitioner had the mental capacity to try to cover up his actions if the allegations were true. App. 108, lines 3-9.

Order denying relief

The PCR judge found plea counsel's performance was not deficient under the circumstances. The judge was persuaded that plea counsel's decision not to obtain an independent evaluation was reasonable due to the March 10, 2011 report from DMH and an affidavit prepared in preparation of the plea, which demonstrated Petitioner's mental comprehension to counsel.⁴

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

⁴ During the PCR hearing, the PCR judge noted that on page 29 of the transcript, the affidavit of guilty plea was made a part of the record. The judge admitted he did not have a copy of the affidavit before him while making his decision on the merits of the PCR application. App. 109, lines 2-9.

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).

Plea counsel admitted that his initial interaction with Petitioner alerted him that Petitioner did not comprehend his circumstances and that an evaluation was in order. The evaluations conducted by DMH and DDSN clearly demonstrated Petitioner's lacking of intellectual functioning. In fact, DDSN concluded he was incompetent and found him competent only after a ninety-day restoration program. Even the report finding Petitioner competent warned that Petitioner would require additional time to understand the information presented to him and the consequences of his decisions. Petitioner's IQ as measured by the school district was extremely low – 60. DDSN also tested his intellectual functioning and arrived at a score of 61. Therefore, it was undisputed that Petitioner suffered from mental retardation, as his IQ was at least two standard deviations below average. The report finding Petitioner competent also noted Petitioner's inability to understand the meaning of the words "guilty" and "not guilty." Those concepts are basic to the criminal justice system.

Plea counsel's failure to obtain an independent competency evaluation of Petitioner despite the clear indications contained in multiple court-ordered evaluation reports that Petitioner suffered from very low intellectual functioning and 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 23rd day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
THOMAS A. RUSSO, CIRCUIT COURT JUDGE

JEREMY T. DURANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeremy T. Durant 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 16, 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 Jeremy T. Durant.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of April, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

JEREMY T. DURANT,

PETITIONER,

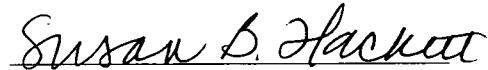
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


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 Tyson Andrew Johnson, Sr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Jeremy T. Durant, #347062, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 23rd day of April, 2013.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of April, 2013


Notary Public for South Carolina

My Commission Expires: November 16, 2022.