

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

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JERMAINE HARRIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000675

—————
PETITION FOR WRIT OF CERTIORARI
—————

VICTOR R SEEGER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel provided ineffective assistance of counsel for failing to request a mental health evaluation and Blair hearing for Petitioner where plea counsel was on notice of Petitioner's history of mental health treatment and current mental health problems before the guilty plea hearing?

STATEMENT

During the January 2015 term, the Richland County grand jury indicted Petitioner for armed robbery. App. 76 – 78.

On January 14th, 2015, Petitioner pled guilty before the Honorable Robert E. Hood. App. 1. Joanna McDuffie represented the state. Id. Constantine Pournaras represented Petitioner. Id. Judge Hood accepted Petitioner’s guilty plea as freely, voluntarily, knowingly, and intelligently made. App. 10, l. 23 – 11, l. 3. Judge Hood sentenced Petitioner to fifteen years’ imprisonment, pursuant to the negotiated range of not less than ten years’ imprisonment but not more than fifteen years’ imprisonment. App. 6, ll. 10 – 24; App. 14, ll. 5 – 9.

On December 18th, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 16 – 20. Petitioner alleged, inter alia, that plea counsel provided ineffective assistance of counsel for failing to request a mental health evaluation pursuant to Blair¹. App. 17. On June 28th, 2016, the state filed its Return. App. 21 – 27.

On August 31st, 2016, Petitioner’s PCR hearing was held before the Honorable Jocelyn Newman. App. 29. Jessica E. Kinard represented the state and Jonathon D. Waller represented Petitioner. Id.

On May 26th, 2021, an order of dismissal was filed denying Petitioner’s PCR application. App. 64 – 73. The PCR court determined that despite plea counsel being aware of Petitioner’s history of mental health problems “plea counsel offered credible testimony that... he believed that [Petitioner] was competent.” App. 71. Moreover, despite Petitioner explaining at the PCR hearing his mental health treatment history, including involuntary commitment for approximately a year, and the difficulties his mental problems caused him in understanding the consequences of his

¹ State v. Blair, 275 S.C. 529, 533, 273 S.E.2d 536, 538 (1981).

guilty plea, the PCR court found that Petitioner “failed to present any evidence whatsoever of any probability that he would have been deemed not competent if Plea Counsel had requested an evaluation.” App. 71. Accordingly, the PCR court denied his PCR application. App. 73.

This petition for writ of certiorari follows.

ARGUMENT

Plea counsel provided ineffective assistance of counsel for failing to request a mental health evaluation and Blair hearing for Petitioner where plea counsel was on notice of Petitioner's history of mental health treatment and current mental health problems before the guilty plea hearing.

Relevant Facts

On November 28th, 2011, a man entered the Days Inn hotel in the Dentsville area of Richland County. App. 7, l. 24 – 9, l. 21. The man jumped over the counter and pointed a laser pointer at the desk clerk which she thought was a gun with a laser sight. Id. The man stole money from the register and the desk clerk's cell phone. Id.

The suspect did not wear a mask inside the Days Inn. Id. Police used the hotel's surveillance camera footage to obtain a still frame photograph of the suspect. Id. The photograph was sent to media outlets and people from the area identified Petitioner as the suspect, allegedly including Petitioner's sister. Id.; App. 56, ll. 13 – 23. The police took the photograph and made a photo identification lineup for the desk clerk to make an identification. App. 7, l. 24 – 9, l. 21. She identified the suspect as Petitioner. Id. Petitioner was subsequently arrested and, upon the advice of his plea counsel, pled guilty² to armed robbery. App. 39, ll. 6 – 15.

During Petitioner's PCR hearing, he testified that he did not understand the consequences of pleading guilty and during the guilty plea hearing he informed plea counsel repeatedly that he did not "understand what was going on." App. 36, l. 18 – 37, l. 2; App. 38, l. 12 – 39, l. 4; App. 44, ll. 6 – 22. Petitioner had an extensive history of mental illness and mental health treatments, but he told the plea court that he had never been treated for mental health problems because he

² Petitioner pled guilty to auto breaking at the same guilty plea hearing; however, his PCR application only regarded the conviction for armed robbery. App. 16.

“didn’t know what was going on” and “didn’t understand the proceeding.” App. 3, ll. 15 – 19; App. 38, ll. 12 – 22. Petitioner explained he was coached by plea counsel on how to answer the plea court during the plea colloquy. App. 38, l. 12 – 39, l. 4. Accordingly, Petitioner’s answers during the plea colloquy should be seen as the product of plea counsel’s instructions. App. 41, ll. 1 – 17; App. 41, l. 22 – 42, l. 7.

Despite Petitioner telling the plea court he had never been treated for mental health problems, Petitioner had a long history of mental health trouble and treatments. App. 34, l. 3 – 35, l. 9. Petitioner received mental health treatment continuously from the time he was a teenager, when he was diagnosed as bipolar, through to the time of his PCR hearing. *Id.*; App. 66. Approximately a year of that treatment consisted of Petitioner being *involuntarily committed* into inpatient counselling at the Department of Mental Health. App. 34, l. 3 – 35, l. 9.

Petitioner took multiple medications throughout the decade of mental health treatment he underwent. App. 45, ll. 9 – 16. However, Petitioner was off his medications at the time of his arrest. App. 36, ll. 12 – 25. Petitioner testified at his PCR hearing that he was back on *some* of his medications, Risperdal and Remeron, while he was incarcerated at the county jail and at the plea hearing, but he still needed help understanding the consequences of the guilty plea because those medications primarily only helped calm him down. App. 37, ll. 1 – 25; App. 43, ll. 15 – 22; App. 46, l. 22 – 47, l. 4.

Petitioner informed plea counsel, and provided to plea counsel documentation, about all the information on his mental health history, the treatments he underwent, and the medications he took. App. 33, l. 19 – 34, l. 2; App. 35, ll. 10 – 17; App. 45, ll. 9 – 16. Petitioner explained that after he informed plea counsel of his mental health history and current mental health problems, plea counsel told Petitioner that he would request a mental health evaluation. App. 33, l. 19 – 34,

l. 2. That mental health evaluation pursuant to Blair, was never requested, and never occurred, such that Petitioner entered his guilty plea involuntarily because there was a reasonable likelihood he would have been found incompetent had the evaluation been conducted. Blair, at 533, 273 S.E.2d at 538.

Plea counsel testified at Petitioner's PCR hearing as well and admitted that Petitioner informed him of the extensive mental health problems Petitioner has had throughout his life. App. 48, l. 24 – 49, l. 5. Plea counsel admitted he was aware that Petitioner was on mental health medications. App. 49, ll. 17 – 25; App. 52, ll. 14 – 17. However, he claimed he was unaware that Petitioner was involuntarily committed at the Department of Mental Health despite Petitioner giving all his mental health history documents to plea counsel. App. 35, ll. 6 – 25; App. 49, ll. 6 – 16.

Plea counsel, who was not a mental health professional, relied on his own perceptions to conclude that Petitioner was competent to plead guilty rather than requesting a mental health evaluation for a medical professional to make that determination. App. 52, l. 18 – 53, l. 4. He argued at the PCR hearing that he failed to request the mental health evaluation because he “didn't feel” that Petitioner's mental health problems “met the level” where plea counsel could request for the lower court to have him evaluated for responsibility or competence. Id.

Plea counsel also argued that he explained the trial process and waiver of constitutional rights to Petitioner and thought Petitioner understood. App. 55, l. 6 – 56, l. 12. However, plea counsel recollected instances where Petitioner would be “irritable,” “get angry,” and yell at plea counsel during their meetings but he claimed that he did not believe those instances implicated Petitioner's competency or warranted a mental health evaluation. App. 51, ll. 14 – 25.

The PCR court denied Petitioner's PCR allegation that his guilty plea was entered involuntarily because plea counsel failed to request for a mental health evaluation pursuant to Blair, supra, prior to the guilty plea hearing. App. 70 – 71. The PCR court found plea counsel testified credibly that “he believed [Petitioner] was competent.” Id. Furthermore, the PCR court found that Petitioner “failed to present any evidence whatsoever of any probability” he was incompetent at the time of the guilty plea hearing, or insane at the time of the crime, despite the evidence Petitioner presented, that plea counsel was aware of, regarding his history of mental health problems, treatments, and medications. Id.

Discussion

Plea counsel provided ineffective assistance of counsel when he failed to have Petitioner's mental health and competency evaluated prior to Petitioner entering a guilty plea to armed robbery and auto-breaking where plea counsel was on notice before the guilty plea hearing that there were serious questions about Petitioner's mental health. App. 48, l. 24 – 49, l. 5; App. 49, ll. 17 – 25; App. 52, ll. 14 – 17; App. 35, ll. 6 – 25; App. 49, ll. 6 – 16.

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. 145, 148, 439 S.E.2d 307, 309 (Ct. App. 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 hearing pursuant to State v. Blair, supra, on his competency to stand trial, the Petitioner has the burden of showing: 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). To satisfy that burden 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 only 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).

In Matthews v. State, supra, Matthews pled 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 alleged his plea counsel provided ineffective assistance of counsel for failure to request a competency hearing to determine whether Matthews was competent to stand trial. Id. Matthews presented a psychiatrist at PCR to testify to his incompetency. Id. at 459, 596 S.E.2d at 51. 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.

In this case, although Petitioner did not hire a psychiatrist for evaluation purposes to testify at his PCR hearing, he presented sufficient evidence through other means at the hearing to show there

was a reasonable likelihood of his incompetence at the time of the guilty plea or his insanity at the time of the incident. App. 34, l. 3 – 36, l. 25; App. 38, ll. 12 – 22; App. 41, l. 1 – 42, l. 7; App. 44, ll. 14 – 22; App. 45, ll. 2 – 16; App. 46, ll. 8 – 16; App. 48, l. 24 – 49, l. 5. 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. See State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989); see also State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255 (1993); see also State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997). Petitioner explained his mental health history, problems, and past treatments to the PCR court and testified that due to his mental health problems, he could not understand the consequences of pleading guilty. App. 35, l. 18 – 37, l. 13; App. 38, ll. 19 – 22; App. 41, l. 1 – 42, l. 7; See Jeter, at 232, 417 S.E.2d at 596 (holding a defendant must have an understanding of the proceedings against him before pleading guilty). Under these circumstances, Petitioner presented sufficient lay testimony to show plea counsel provided ineffective assistance of counsel for failing to move for a mental health evaluation and Blair, supra, hearing for Petitioner before having him plead guilty.

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 stated 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.

Thus, pursuant to the decision Lee, the PCR court here erred when it found plea counsel provided effective assistance of counsel because Petitioner showed that plea counsel failed to

request a mental health evaluation despite being on notice Petitioner's competency was in question due to his lengthy history of mental health problems, treatments, and medications. App. 35, ll. 6 – 25; App. 38, ll. 2 – 16; App. 49, ll. 6 – 19. Petitioner supplied plea counsel with his entire history of mental health problems dating back to when he was a teenager up to the guilty plea hearing. App. 35, ll. 6 – 25; App. 38, ll. 2 – 16. Plea counsel knew Petitioner was on multiple mental health medications and was informed about the extensive treatments he underwent. App. 49, ll. 6 – 19.

Petitioner also presented evidence that he was involuntarily committed for a year at the Department of Mental Health. App. 34, ll. 3 – 16. While plea counsel claimed he was unaware of Petitioner's involuntary commitment, Petitioner gave plea counsel *all* the documents regarding his mental health treatments such that it was unlikely that plea counsel was not on notice of the involuntary commitment. App. 35, ll. 6 – 25; App. 38, ll. 2 – 16. Moreover, it was questionable at best to believe that Petitioner would inform plea counsel of his mental health history and medications, as plea counsel admitted Petitioner did, but not inform him about the involuntary commitment.

Petitioner informed plea counsel of his mental health problems and plea counsel told Petitioner that he would request a mental health evaluation be conducted. App. 33, l. 19 – 34, l. 2. He repeatedly told plea counsel he did not understand what was going on during the guilty plea hearing showing he was unable to comprehend the plea proceedings. App. 33, l. 19 – 34, l. 2. Thus, after hearing that his client did not understand what was happening at the guilty plea hearing, it was incumbent upon plea counsel to request that a mental health evaluation be conducted to ensure that Petitioner was competent to plead guilty. Plea counsel failed to make that commonsense effort here.

Accordingly, plea counsel provided ineffective assistance of counsel for failing to request a mental health evaluation and Blair hearing before Petitioner pled guilty to ensure he understood the consequences of entering a guilty plea, that he was not insane at the time of the crime, and he was not incompetent at the time of the guilty plea. See Jeter, at 232, 417 S.E.2d at 596; see also Matthews, at 459, 596 S.E.2d at 50. Petitioner was prejudiced by plea counsel's ineffective assistance of counsel because, as a result of plea counsel's failure to request for a mental health evaluation and Blair hearing, Petitioner pled guilty involuntarily where there was a reasonable likelihood he would have been found incompetent had a mental health evaluation been conducted. See Hill v. Lockhart, 474 U.S. 52, 58 (1985).

CONCLUSION

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



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of December, 2021.