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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Calhoun County
Edgar W. Dickson, Circuit Court Judge

TITUS BANTAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-207130

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not calling Sharee Keitt, who was petitioner's girlfriend, to testify at his trial as an alibi witness?

STATEMENT

In January 2007, the Calhoun County Grand Jury indicted Titus Bantan on the charge of armed robbery (AR). In August 2007, the Calhoun County Grand Jury indicted Bantan on the charges of kidnapping and possession of a weapon during a crime of violence. On October 1 – 10, 2007, Bantan and his co-defendant, Phillip Spears, proceeded to trial before the Honorable Diane S. Goodstein and a jury. Bantan was represented by Margaret E. Hinds and Andrew J. Brown. Spears was represented by Charlie Jay Johnson. The state was represented by Karen N. Fryar and Bryan S. Jeffries. The jury returned a verdict of guilty on the three charges. Judge Goodstein sentenced Bantan to thirty years on the AR and kidnapping each, and five years on the weapon charge. All sentences were to run concurrently. App. 1110, ll. 14 – App. 1111, ll. 20.

Bantan filed a notice of appeal which was perfected by the Office of Appellate Defense. The Court of Appeals affirmed his convictions and sentences on March 10, 2010. State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010). App. 1416.

On May 11, 2010, Bantan filed an application for post-conviction relief (PCR). The state filed a return on November 18, 2010. An evidentiary hearing was held on August 29, 2011 before the Honorable Edgar W. Dickson. Bantan was represented by Robert Reibold, and the state was represented by Rob Corney. On December 28, 2011, Judge Dickson issued an order denying Bantan's PCR application and dismissing it with prejudice. App. 1359 – App. 1371. Bantan's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not calling Sharee Keitt, who was petitioner's girlfriend, to testify at his trial as an alibi witness.

Bantan and a co-defendant, Phillip Spears, were charged with entering Wagon Wheel store in Orangeburg County on November 6, 2006 and robbing the owner of money and cigarettes at gunpoint. Several customers were held at gunpoint. App. 504, ll. 8 – App. 506, ll. 16. The co-defendant gave a confession but Bantan did not. App. 972, ll. 7 – 19.

At his PCR hearing, Bantan testified that his trial counsel was ineffective because she did not call his witnesses to testify who could provide an alibi for him. Because of that unfairness, he wanted a new trial. App. 1318, ll. 1 – 14.

Bantan testified that he was sick in bed on the day of the robbery, and he had alibi witnesses who would testify to that including his girlfriend, Sharee Keitt. When the police came to his house, he was in the bed. App. 1308, ll. 1 – App. 1309, ll. 25. His sister was also one of the alibi witnesses, and she did testify at trial that she was at home all day and Bantan was there. App. 1310, ll. 1 – 20; App. 891, ll. 5 – App. 894, ll. 1.

Bantan stated on cross examination that he asked the trial judge at the beginning of trial to relieve his trial attorney. An ex parte hearing was held and Bantan told the judge he had alibi witnesses he wanted his trial attorney to call to testify, but his attorney would not use them. There were five potential alibi witnesses. His attorney told the trial judge she interviewed them but none were appropriate. His attorney felt Sharee and others were lying. App. 1322, ll. 3 – App. 1325, ll. 19; App. 13, ll. 13 – 24; App. 16, ll. 1 – App. 37, ll. 2.

Sharee Keitt testified at the PCR hearing that she was living with Bantan at the time of the incident as she was the mother of his two children. App. 1300, ll. 19. She remembered the day of

the robbery, November 6, as that was the day she received her food stamps. App. 1300, Ill. 20 – 23; App. 1306, ll. 1 – 14. She testified that Bantan was sick that day and was running fever as she checked his temperature. She obtained medicine for him as he was coughing and in a sweat. She left the house about twelve fifteen but her sister-in-law, Anna, was there all day with Bantan in the house. App. 1300, ll. 20 – App. 1305, ll. 11.

Bantan's trial counsel testified that she elected not to call Sharee Keitt to testify at trial because Sharee told her on one occasion that she was lying, and then told her later that she was lying before but she was not lying now. Trial counsel believed that she could not ethically put Sharee on the stand as an officer of the court. PCR counsel then asked her if she understood that she could have put Sharee on the witness stand and asked her to give a narrative description of the events. Trial counsel answered that she did understand that she could have but she "elected not to do so." App. 1337, ll. 1 – App. 1355, ll. 1.

Trial counsel testified earlier that she met with Sharee on September 6, 2007, when Sharee told her Bantan had been sick. Trial counsel met with Sharee again the next day, September 7, 2007 when Sharee recanted her story and said Bantan asked her to lie for him. On September 20, 2007, trial counsel met with Sharee who changed her mind again and said that she did lie before but was telling the truth now. Sharee viewed the video and tentatively identified the person as someone named Danny. App. 1338, ll. 21 – App. 1345, ll. 21.

Bantan's sister, Anna Miranda, testified that he was at home all day sick. However, she also admitted that she received a disability check because she was a slow learner. App. 891, ll. 5 – App. 894, ll. 1.

The PCR judge ruled that Bantan failed to carry his burden in proving that trial counsel was deficient in her performance and did not prove any prejudice in the alibi witness not being called. App. 1365. The judge wrote that the alibi witness was not able to provide a credible alibi for Bantan that would have changed the outcome of the trial. App. 1366. The judge also wrote in describing Sharee Keitt's testimony that she was unable to provide a specific date or day of the week. App. 1364.

This was in error as Sharee's testimony at the PCR hearing was that she could not remember the day of the week but she knew it was November 6, 2007 as that was the day she received her food stamps. App. 1306, ll. 13 – 14.

Bantan's sister, Anna Miranda, testified at trial as an alibi witness that Bantan was at home all day sick. However, she also admitted that she received a disability check because she was a slow learner. App. 891, ll. 5 – App. 894, ll. 1.

In State v. Walker, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012), the Court of Appeals held that to qualify as an "alibi," a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime.

Sharee Keitt testified that Bantan was at home sick the morning of November 6, 2007, and she was there except when she ran to the store to obtain medicine for a few minutes. The cashier of the Wagon Wheel, Natasha Rivers, testified at trial that the robbery occurred between the hours of nine and ten o'clock in the morning of November 6, 2007. App. 333, ll. 7 – App. 334, ll. 11; App. 336, ll. 23 – App. 337, ll. 25.

In State v. Grier, 299 S.C. 321, 384 S.E.2d 722 (1989), the Supreme Court held that failure of defense counsel to call alibi witnesses constituted deficient performance. Petitioner notes that

Grier has been overruled to the extent that “where it can be read to suggest that a PCR applicant’s mere speculation what a witness’s testimony would have been is sufficient to satisfy the applicant’s burden of showing prejudice.” Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

In Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992), the Supreme Court found that defendant was deprived of effective assistance of counsel by counsel failing to call medical personnel as a witness who would have cast doubt on the sole witness’s identification of the petitioner . The Court went to say that since this witness’s identification was crucial to the case, the omission of the witness was prejudicial to the petitioner.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

Trial counsel was ineffective for not calling Sharee Keitt as an alibi witness in Bantan’s trial. Counsel admitted that she could have put Sharee on the witness stand to provide a narrative of the events in question. Rule 3.3, SCACR, Rules of Professional Conduct, provides that a lawyer shall not knowingly offer evidence that the lawyer knows to be false. Comment (7) of Offering

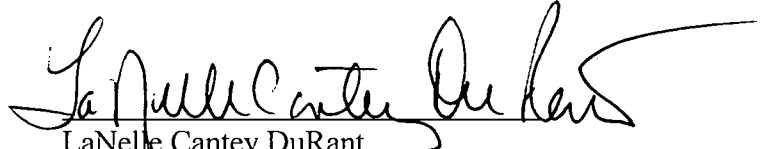
Evidence under the rule provides that the lawyer may allow the accused to give a narrative statement but the lawyer may not examine the witness or use the false testimony in closing argument. Comment (8) provides that this prohibition only applies if the lawyer knows that the evidence is false.

Bantan's trial counsel did not know if Sharee's proposed testimony was false or not. Sharee admitted she lied at one point but was not lying now. The lawyer was taking the place of the jury because Sharee's credibility was an issue for the jury. All that was needed was to raise reasonable doubt. Although Bantan's sister testified as an alibi witness, her credibility was in question due to her being on disability because she was a slow learner.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 23th day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CALHOUN COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

TITUS BANTAN,

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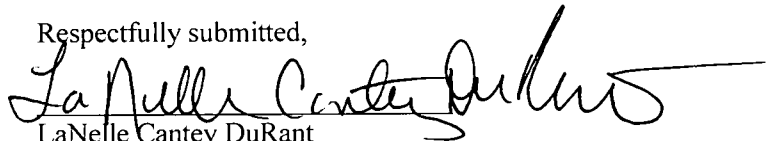
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Titus Bantan 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 August 29, 2011. 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 Titus Bantan.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 23th day of May, 2013

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TITUS BANTAN,

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CERTIFICATE OF SERVICE

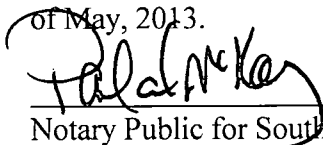
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Titus Bantan, #324515, at Lieber Correctional Institution this 23th day of May, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23th day
of May, 2013.



_____(L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.