

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Pickens County

D. Garrison Hill, Circuit Court Judge

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RECEIVED

JUN 27 2013

S.C. Supreme Court

JAMES MICHAEL DOVER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212588

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PETITION FOR WRIT OF CERTIORARI

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LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
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failing to find trial counsel ineffective for not investigating the reason petitioner's acceptance into drug court was withdrawn as counsel neglected the opportunity to have the problems resolved in order for petitioner to be allowed to return to drug court and thus avoid a jury trial?

## STATEMENT

In July 2006, the Pickens County Grand Jury indicted James Michael Dover on the charges of distribution of methamphetamine and distribution of methamphetamine within the proximity of a school. On July 26-27, 2006, Dover proceeded to trial before the Honorable C. Victor Pyle and a jury. Dover was represented by John DeJong, and the state was represented by Lucas Marchant. The jury returned verdicts of guilty as indicted. Judge Pyle sentenced Dover to concurrent sentences of twenty years on the distribution charge and ten years on the proximity charge. Dover's attorney filed a notice of appeal. The Court of Appeals affirmed Dover's convictions and sentences on May 28, 2009. State v. Dover, Op. No. 2009-UP-246 (Ct. App. filed May 28, 2009).

On March 9, 2010, Dover filed a post-conviction relief (PCR) application. The state filed a return on August 20, 2010. An evidentiary hearing was held on February 27, 2012 before the Honorable D. Garrison Hill. Dover was represented by James S. Erwin, and the state was represented by Karen C. Ratigan. On June 12, 2012, Judge Hill issued an order denying Dover's PCR application and dismissing it with prejudice. Dover's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not investigating the reason petitioner's acceptance into drug court was withdrawn as counsel neglected the opportunity to have the problems resolved in order for petitioner to be allowed to return to drug court and thus avoid a jury trial.

James Dover was convicted of distributing less than a half a gram (.39 grams) of methamphetamine to a confidential informant (CI). Based on information provided by the informant, officers set up a controlled buy. The informant met Dover and their conversation was recorded. Dover was later arrested for distributing methamphetamine to the informant. App. 19, ll. 1 – App. 20, ll. 15; App. 23, ll. 15 – App. 35, ll. 19.

The jury returned verdicts of guilty and Dover was sentenced to a total of twenty years. App. 186, ll. 1 – 16.

At his PCR hearing, Dover claimed that his trial attorney was ineffective. Counsel did not do what was required to maintain Dover in drug court. Dover had already been accepted into drug court and was scheduled to plead guilty for drug court on May 19, 2006. Then he would not have had to go to trial. App. 202, ll. 3 – 16; App. 206, ll. 23 – App. 208, ll. 25.

Dover introduced his letter of acceptance into drug court at his PCR hearing. The letter showed that he had a plea date of May 19, 2006. He testified that the people from drug court told him not to bond out, but rather to stay in jail until he started drug court. App. 270; App. 218, ll. 2 – App. 219, ll. 25. He learned before his plea, that he could not get into drug court because he owed back payments for child support in the amount of approximately \$2200. He had to go before Judge Johnson for not paying child support and was sentenced to one year. Therefore, he did not get into drug court. App. 220, ll. 1- 25.

However, his family paid off the arrearages on his child support. He thought he was still going to drug court. His daughter told him that drug court said they would take him June 30 if child support paid. He told his attorney about drug court and showed him the letter of acceptance. His attorney told him drug court had been taken from him. His attorney told him he either had to plead guilty without drug court or go to trial. Dover felt he had no option. App, 221, ll. 1 - App. 225, ll. 25.

There was a seven year plea offer after drug court but Dover did not take it because he was still hoping for drug court. By the time of trial, the plea offer was no longer an option. App. 226, ll. 1 - App. 227, ll. 6.

Dover told the PCR court that he wanted a new trial. He said anything to get his life back. App. 228, ll. 1 - 23.

Dover's daughter testified at the PCR hearing that she paid off the child support arrearages and thought everything was set for her father to go to drug court. During her testimony, the PCR attorney introduced Applicant's Exhibit 5 which was a printout from the Clerk's Office with a record of child support payments by Dover. The daughter testified that the exhibit indicated that on June 22, 2006, she paid \$2062 and the \$100 dollar fine. App. 276. She spoke with the drug court coordinator and the solicitor's office and all said he was good to go to drug court. She never discussed the child support issue with trial counsel. App. 230, ll. 5 - App. 232, ll. 9; App. 235, ll. 1 - 9.

Trial counsel testified that he knew Dover had been accepted into drug court, but he did not remember when he learned that Dover could not go to drug court. He thought Dover was rejected just shortly before his plea date which he knew was May 19, 2006. He did not recall talking with anyone about the child support problem. App. 243, ll. 10 - 22; App. 248, ll. 17 - App. 249, ll. 22.

The solicitor, Lucas Marchant, testified at the PCR hearing that he signed off approving Dover for drug court. He received a letter from drug court telling him of the child support problem and that Dover could not get in until he resolved the financial problems. He had no written communication in his file that this information was provided to trial counsel. He did have an email that he sent to trial counsel on May 18, 2006 telling him that the only client he had for May 19 drug court was someone other than Dover. However, Marchant felt that he and trial counsel had discussed the child support issue based on the relationship they had. Solicitor Marchant said he would still have allowed Dover to enter drug court once the child support problem was resolved. App. 236, ll.7 – App. 240, ll. 25.

The PCR judge held that he found Dover's testimony to not be credible while finding trial counsel's testimony credible. App. 285. The judge wrote that Dover failed to meet his burden of proving that trial counsel should have had the case resolved by a guilty plea into drug court. The judge held there was no evidence presented to show that Dover communicated the child support arrearage to trial counsel. App. 287.

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that a criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. The Court wrote that counsel has a duty to make an independent investigation of the facts and circumstances of the case.

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). Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Counsel representing a criminal defendant has a duty to conduct a reasonable investigation, which encompasses the defendant's right to interview potential witnesses against him. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000).

Dover's trial counsel had a duty to investigate the reason Dover was rejected from drug court. Counsel did not need to wait for Dover to tell him. Counsel knew a drug court plea was scheduled May 19 and he knew on May 18 that Dover was not going to drug court. It was his responsibility to learn why. He was communicating with the solicitor as shown by the email. Counsel was ineffective for not assisting Dover with drug court especially after had had been accepted. The Clerk's records show that a payment was made of \$2000 on June 22, 2006 which substantially reduced the amount. This was a month before his trial.

Although the solicitor testified that his understanding was that drug court required that any financial obligations would have to be completely resolved prior to admission, S.C. Code Section 16-1-130, which is titled "Persons not eligible for diversion program" and lists drug court as one of the diversion programs included, does not state that financial obligations have to be resolved.

Dover was prejudiced because he would not have had to go through a trial and receive a lengthy sentence if he had gone to drug court.

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,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of June, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Pickens County  
D. Garrison Hill, Circuit Court Judge

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JAMES MICHAEL DOVER,

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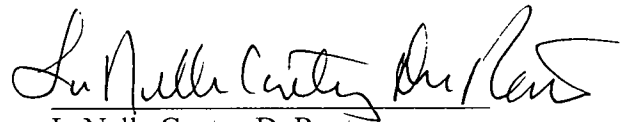
APPELLATE CASE NO. 2012-212588

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CERTIFICATE OF SERVICE

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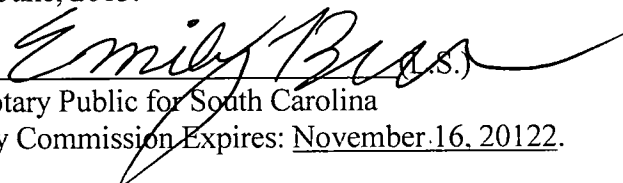
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire this 27th day of June, 2013.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day  
of June, 2013.



(S.S.)  
Notary Public for South Carolina  
My Commission Expires: November 16, 2012.