

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

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JUL 30 2013

S.C. Supreme Court

JONATHAN LISLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213157

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not filing a motion for reconsideration of the sentence because the co-defendant, who was more culpable because he brandished the gun, received a lesser sentence when he pled guilty the day after petitioner?

STATEMENT

In February 2009, the Dorchester County Grand Jury indicted Jonathan Bradley Lisle on two counts of armed robbery. On March 30, 2009, Lisle appeared before the Honorable Diane S. Goodstein and entered a guilty plea to the two counts of armed robbery as indicted. Lisle was represented by Mark Andrew Redmond, and the state was represented by Blair Jennings. Judge Goodstein sentenced Lisle to fifteen years on each count with both to run concurrently. App. 40, ll. 16 – App. 41, ll. 4. Lisle did not appeal his convictions and sentences.

On March 24, 2010, Lisle filed an application for post-conviction relief (PCR). The state filed a return on August 23, 2010. An evidentiary hearing was held on May 21, 2012 before the Honorable DeAndrea G. Benjamin. Lisle was represented by Ashley Ameika, and the state was represented by David Spencer. On July 24, 2012, Judge Benjamin issued an order denying Lisle's PCR application and dismissing it with prejudice. Lisle's attorney filed a Motion for Reconsideration pursuant to Rule 52 and 59, SCRPC on August 9, 2012. The state filed a return to the Motion on August 30, 2012. Judge Benjamin issued an order on September 19, 2012 denying Lisle's Motion for Reconsideration. Lisle's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not filing a motion for reconsideration of the sentence because the co-defendant, who was more culpable because he brandished the gun, received a lesser sentence when he pled guilty the day after petitioner.

Jonathan Lisle and his co-defendant, John Bowman, went to the home of John Fortunanto, on November 22, 2008 because Fortunanto called Lisle to buy a gun Fortunanto had taken from his grandmother. App. 15, ll. 23 – App. 16, ll. 16. On the way, Bowman, who had a gun, lay down in the third row seat of the Durango that Lisle was driving. When Fortunanto got in the back seat, Bowman sat up and pointed the gun at him and took Fortunanto's gun. App. 16, ll. 11 – 25.

The clip for the gun was still in the house where seven of Fortunanto's friends were. Bowman pointed the gun at them as Lisle took their cell phones. Lisle was charged with two counts of armed robbery: one for Fortunanto and one for all the other victims. App. 17, ll. 1 – 24.

At his PCR hearing, Lisle testified that his plea counsel was ineffective for not filing a motion for reconsideration of Lisle's sentence because lisle believed he and his co-defendant would receive the same sentence under the hand of one is the hand of all. He learned that his co-defendant pled guilty on March 31, 2009, the day after Lisle's plea, and the co-defendant received a sentence of only twelve years when Lisle played the lesser role in the incident. App. 116, ll. 2 – App. 117, ll. 25.

Lisle learned that his attorney did not file the motion for reconsideration. Then Lisle filed a *pro se* motion for reconsideration which was denied by the court because it was not filed within the ten days. App. 116, ll. 19 – App. 117, ll. 18.

Lisle's plea counsel testified at the PCR hearing that he did not file the motion for reconsideration. Lisle's girlfriend contacted him long after the ten day limit had passed. He also did

not file it because Lisle was facing potentially a much longer sentence –maybe sixty years. Lisle was charged initially with two counts of armed robbery, two counts of kidnapping, and burglary first degree. He pled guilty to only the two armed robberies. App. 136, ll. 4 – ll. 22; App. 138, ll. 22 – App. 140, ll. 25; App. 8, ll. 16 – 23.

The PCR judge ruled that plea counsel’s performance was not deficient for failing to move for a reconsideration of the sentence. The judge held that Lisle failed to prove prejudice because his sentence was fifteen years which was in the lower end of the recommended sentencing range of thirteen to twenty-five years. App. 155 – App. 156.

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, 466 U.S. 668, 104 S.Ct. 2052 (1984).

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). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

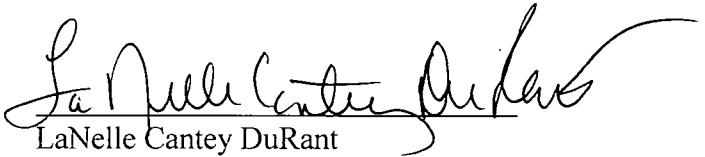
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

Plea counsel was ineffective for not moving to reconsider Lisle's sentence because it was prejudicial to Lisle when his sentence was longer than his co-defendant's who was the more culpable one.

CONCLUSION

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

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 30th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
DEANDREA G. BENJAMIN, CIRCUIT COURT JUDGE

JONATHAN LISLE,

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STATE OF SOUTH CAROLINA,

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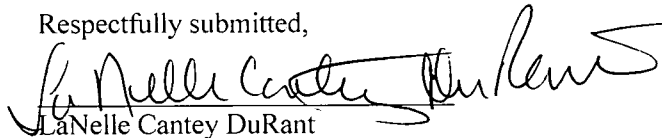
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jonathan Lisle 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 May 21, 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 Jonathan Lisle.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of July, 2013

STATE OF SOUTH CAROLINA

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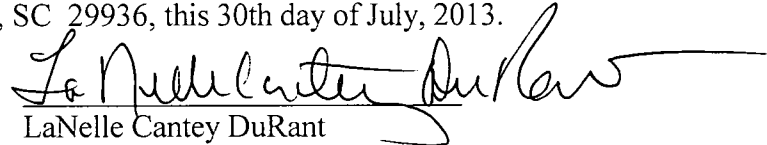
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CERTIFICATE OF SERVICE

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 Jonathan Lisle, #309262, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 30th day of July, 2013.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of July, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.