

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

William Jeffrey Young, Circuit Court Judge

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AUG - 2 2013

S.C. Supreme Court

KELVIN PEARSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213296

JOHNSON PETITION FOR WRIT OF CERTIORARI

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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 insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly by not requiring the state to show the video and audio recordings of the drug transactions to petitioner while maintaining the plea offer?

STATEMENT

In March 2009, the Clarendon County Grand Jury indicted Kelvin Pearson on two counts of distribution of marijuana greater than a first offense; two counts of distribution of marijuana within the proximity of a park or school; two counts of distribution of cocaine base greater than a first offense; two counts of distribution of cocaine base within the proximity of a school or park. In May 2009, the Clarendon County Grand Jury indicted Pearson on distribution of marijuana greater than a first offense; distribution of cocaine base; and distribution of cocaine base within the proximity of a school or park.

On August 26, 2009, Pearson appeared before the Honorable R. Ferrell Cothran and entered a guilty plea to two counts of distribution of marijuana, two counts of distribution of marijuana within proximity; two counts of distribution of cocaine base; and two counts of cocaine base within proximity. Pearson was represented by Scott Robinson, and the state was represented by Amy Land. Judge Cothran sentenced Pearson to nine years for each distribution charge, and ten years on each proximity charge. All sentences were to run concurrently. App. 10, ll. 23 – App. 11, ll. 25.

On August 27, 2009, Pearson appeared before the Honorable R. Ferrell Cothran and entered a guilty plea to distribution of marijuana greater than first offense; distribution of cocaine base greater than a first offense; and distribution of cocaine base within the proximity. Pearson was again represented by Scott Robinson, and the state by Amy Land. Judge Cothran sentenced Pearson to nine years on each of the distribution charges and ten years on the proximity charge. App. 19, ll. 2 – 18. Pearson did not appeal his convictions or sentences.

On July 16, 2010, Pearson filed an application for post-conviction relief (PCR). The state filed a return on February 17, 2011. An evidentiary hearing was held on September 18, 2012 before the Honorable William Jeffrey Young. Pearson was represented by Charles T. Brooks, and the state

was represented by Megan E, Harrigan. On October 16, 2012, Judge Young issued an order denying Pearson's PCR application, and dismissing it with prejudice. Pearson's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly by not requiring the state to show the video and audio recordings of the drug transactions to petitioner while maintaining the plea offer.

Kelvin Pearson was charged with selling marijuana and cocaine base (crack) to a confidential informant (CI) with the Manning Police Department on four occasions in 2008 at the same location on Dixon Street in Manning. These included January 18, 2008; February 15, 2008; August 12, 2008; and August 28, 2008. App. 7, ll. 1 – App. 8, ll. 5.

At the guilty plea, the solicitor stated that these were actually third offenses but were being treated as second offenses with a recommendation of nine years. App. 8, ll. 6 – 15.

The following day, August 27, 2009, Pearson pled guilty to distribution of marijuana, distribution of cocaine base (crack) and proximity. His attorney explained to the court that these were charges that were overlooked the day before at his guilty plea then, and he asked for the same sentence. App. 15, ll. 1 – 14; App. 19, ll. 2 – 6.

On these charges on August 27, 2009, Pearson was charged with selling the drugs to a CI with the Manning Police Department on July 3, 2008. The CI was equipped with audio and video equipment to record the transaction. App. 17, ll. 14 – App. 18, ll. 8.

At his PCR hearing, Pearson testified that his plea counsel was ineffective because Pearson did not see the discovery and did not understand the evidence against him. He did not receive his discovery information until after his guilty plea. App. 38, ll. 16 – App. 40, ll. 2. Pearson wanted to see the video and audio recordings because he wanted to know who was on the video. He said his attorney could not tell him. He would have gone to trial if he had known back then what he knew

now. He did not know all of the evidence against him when he pled guilty. App. 40, ll. 5 – App. 41, ll. 22.

On cross examination, Pearson said if he had seen the video, he would have known his accuser and could have decided whether to go to trial or not; whether he wanted to confront his accuser. He pled guilty to take advantage of the nine year plea offer because he was scared. App. 42, ll. 1 – App. 44, ll. 1.

Pearson's plea counsel testified at the PCR hearing that it was the policy of Clarendon County Solicitor's Office, when a CI was involved, that the defendant did not see the video or audio recordings unless they went to trial. It was for the protection of the CI. If the defendant saw the video, all plea offers were off the table. The attorney for the defendant could watch the video and explain it to the defendant. App. 46, ll. 1 – App. 49, ll. 12.

The PCR judge ruled that Pearson did not meet his burden of proof in proving that plea counsel was ineffective. The judge found that counsel's testimony was credible while finding Pearson's testimony not credible. The judge wrote that Pearson did not show any prejudice he suffered. App. 58.

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).

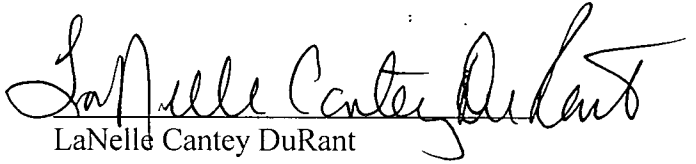
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (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).

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused has the right to be informed of the nature and cause of the accusation against him, and to be confronted with the witnesses against him. The Constitution states in **all** [emphasis added] criminal prosecutions which would include guilty pleas. Pearson had a right to know who the CI was and a right to see the evidence against him such as the videos. The state violated his constitutional rights by not allowing him to see the videos unless he went to trial and probably faced a greater penalty because he would lose the plea offer.

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

ATTORNEY FOR PETITIONER

This 2nd day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CLARENDON COUNTY
WILLIAM JEFFREY YOUNG, CIRCUIT COURT JUDGE

KELVIN PEARSON,

PETITIONER,

V.

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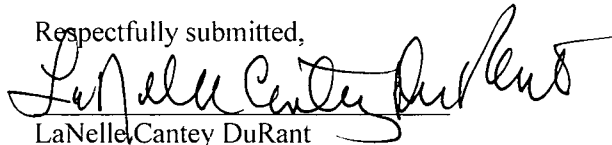
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kelvin Pearson 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 September 18, 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 Kelvin Pearson.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of August, 2013

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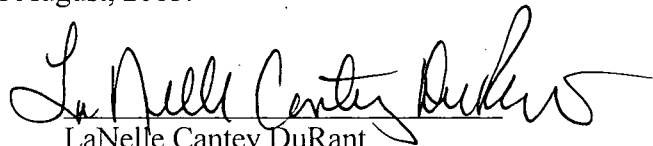
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RESPONDENT


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 Megan Harrigan, Esquire and Kelvin Pearson, #276641, at Walden Correctional Institution this 2nd day of August, 2013.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of August, 2013.


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