

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED

AUG 16 2013

S.C. Supreme Court

ROBERT FRANK GRANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213678

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ATTORNEY FOR PETITIONER

INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	7
PETITION TO BE RELIEVED AS COUNSEL.....	8

ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not properly conveying to petitioner the length of the sentence he was facing, which was thirty years on a third offense, as opposed to the benefits of accepting the plea offer of eight years on a first offense of distribution of crack cocaine?

STATEMENT

In March 2007, the Greenville County Grand Jury indicted Robert Frank Grant, Jr. on the charges of possession with intent to distribute (PWID) crack cocaine within the proximity of a school; distribution of crack third offense; and threatening the life of a public official. On March 11-12, 2008, Grant proceeded to trial before the Honorable Edward W. Miller and a jury. Grant was represented by Caroline Horlbeck and Elizabeth Wiygul. The state was represented by Jennifer Tessitore and Katrina Salisbury. The jury returned a verdict of guilty on the PWID proximity and distribution third offense, and not guilty on threatening the life of a public official. App. 250, ll. 1 – 15. Judge Miller sentenced Grant to fifteen years on the PWID proximity charge and twenty years on the distribution charge. The judge later revised the sentence on the distribution to fifteen years to run concurrently with the proximity sentence. App. 279, ll. 15 – App. 280, ll. 1.

Grant's attorney filed a notice of appeal. The appeal was perfected by the Division of Appellate Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal on February 4, 2010. State v. Grant, Op. No. 2010-UP-105 (Ct. App. filed February 4, 2010). App. 323.

Grant filed an application for post-conviction relief (PCR) on July 21, 2010. The state filed a return on December 16, 2010. An evidentiary hearing was held on October 31, 2012 before the Honorable Markley Dennis, Jr. Grant was represented by Richard Warder, and the state was represented by Karen Ratigan. On December 17, 2012, Judge Dennis filed an order denying Grant's PCR application and dismissing it with prejudice. App. 322 – 329. Grant's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not properly conveying to petitioner the length of the sentence he was facing, which was thirty years on a third offense, as opposed to the benefits of accepting the plea offer of eight years on a first offense of distribution of crack cocaine.

On January 10, 2007, Deputy Brian Tollison was working as an undercover officer in a high crime area of Greenville. However, he was not equipped with audio or video surveillance equipment. App. 50, ll. 1 – App. 53, ll.24. Deputy Tollison’s version was that as he and another deputy were walking near the Super Lodge Motel, he was approached by Grant who asked if he was straight meaning if he needed drugs. Grant allegedly sold them a twenty dollar piece of crack rock. Deputy Tollison admitted that he made a mistake and did not write down the serial number of the twenty dollar bill. Grant was arrested . When he was handcuffed, another piece of crack fell from his hand. App.54, ll. 1 – App. 58, ll. 24.

At his PCR hearing, Grant testified that his trial attorney was ineffective because she did not fully explain the eight year plea offer he received from the solicitor. He was arrested in January 2007 and got out on bond. The he was rearrested in Laurens County. While there, his trial attorney called him and told him that the state had offered a straight up plea of eight years. He then tried to tell her that there never was a twenty dollar bill. She never finished discussing the plea offer in full detail with him. App. 280, ll. 17 – App. 282, ll. 25.

When he returned to Greenville County in December, his attorney brought him a letter from the solicitor with the written eight year plea offer. That was the first time he knew that the plea offer was for a first offense. However, the offer had expired by then. App. 284, ll. 1 – App. 285, ll. 24. His attorney had not told him the eight years was for a first drug offense. If he had known that, he

would have taken the plea offer. App. 286, ll. 1 – 20. He said again at the end of his testimony that he would have taken the eight year plea offer if his attorney had explained it. App. 296, ll. 5 – 11.

Grant was arrested in January 2007 and bonded out in May 2007. He was then arrested in Laurens County , and that is where his attorney called him about the plea offer. He then made a counteroffer for his attorney to ask the solicitor for a five year non-violent plea. The next time he talked to his attorney, the eight year plea offer was off the table. App. 296, ll. 14 – App. 299, ll. 25.

Trial counsel testified at the PCR hearing that she was appointed to represent Grant. App. 302, ll. 13 – App. 303, ll. 25. There were actually two plea offers for Grant. The first one was received July 13, 2007 which was for a cap of ten years on all the charges and for a first offense on the distribution of crack. She was not able to convey that offer to him because he was out, and she could not get him to come in or come to court. That offer expired September 29, 2007. App. 306, ll. 23 – App. 307, ll. 17.

The solicitor made a second plea offer on September 28, 2007 for a cap of eight years and a first offense on the distribution charge. That offer expired November 3, 2007. She did talk to Grant about this second offer in October 2007. However, he wanted a recommendation for probation and would not plead without that. The solicitor would not agree to do that. Then Grant wanted a trial. App. 307, ll. 15 - App. 308, ll. 23.

The PCR judge ruled that he found Grant's testimony to not be credible while he found trial attorney's testimony to be credible. App. 326. The judge wrote that Grant failed to meet his burden of proof in proving that trial counsel did not properly convey and discuss the plea offer. He said that Grant rejected the offer. App. 326. The PCR judge then rule that Grant failed to prove that trial counsel did not render reasonably effective assistance under prevailing professional norms. App. 328.

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).

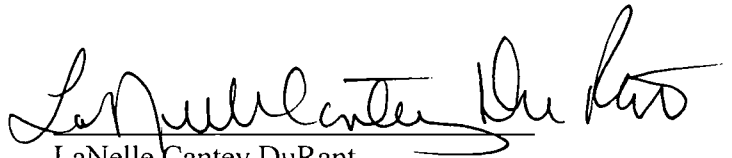
In Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009), the South Carolina Supreme Court held that defense counsel was ineffective for not conveying the initial plea offer to Davie, and Davie was prejudiced because the initial offer was for fifteen years and Davie received twenty-seven years on his guilty plea.

Grant was in a similar situation in that he was prejudiced by his trial counsel not fully explaining the eight year plea offer as he would have received eight years instead of fifteen years.

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", written over a horizontal line.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
R. MARKLEY DENNIS, JR., CIRCUIT COURT JUDGE

ROBERT FRANK GRANT,

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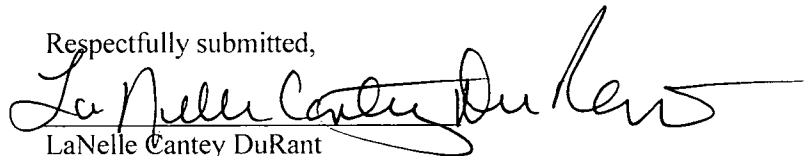
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Frank Grant, Jr. 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 October 31, 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 Robert Frank Grant, Jr..

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of August, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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ROBERT FRANK GRANT,

PETITIONER,

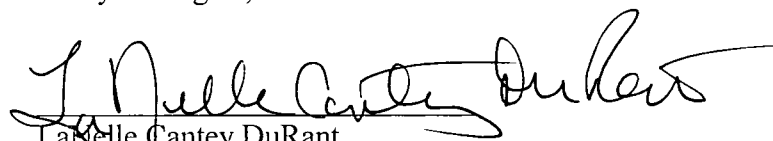
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CERTIFICATE OF SERVICE

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 Karen Ratigan, Esquire and Robert Frank Grant, Jr., #277198, at Ridgeland Correctional Institution this 16th day of August, 2013.



Lanelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of August, 2013.

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