

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED

SEP 03 2013

CEDRIC KEARSE,

S.C. Supreme Court

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213198

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 insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly?

STATEMENT

On August 13, 2008, the Orangeburg County Grand Jury indicted Cedric Dion Kears on the charges of trafficking in cocaine between 10 and 28 grams 3rd offense, possession with intent to distribute crack cocaine 3rd offense (PWID), and failure to stop for a blue light (FTSBL). On August 25, 2008, Kears appeared before the Honorable Kristi Harrington to be heard on his motion to have his counsel relieved. Judge Harrington denied his motion. Supp. App. 1-19. Kears was represented by Jillian D. Ullman, and Margaret Hinds. The state was represented by Kelly Burbage.

On August 26, 2008, Kears appeared before Judge Harrington and entered guilty pleas to the lesser charges of trafficking cocaine between 10 and 28 grams 2nd offense, PWID crack cocaine 2nd offense, and FTSBL. Judge Harrington sentenced Kears to thirteen years each on the trafficking charge and the PWID charge. She sentenced him to three years on the FTSBL. All sentences were to run concurrently. App. 28, ll. 20 – App. 29, ll. 25. Kears's attorney filed a notice of appeal. An appeal was perfected by the Division of Appellate Defense. The Court of Appeals affirmed Kears's convictions and sentences on June 28, 2010. State v. Kears, Op. No. 2010-UP-329 (Ct. App. filed June 28, 2010).

On January 14, 2011, Kears filed an application for post-conviction relief (PCR). The state filed a return on June 20, 2011. An evidentiary hearing was held May 22, 2012 before the Honorable DeAndrea G. Benjamin. Kears was represented by Nicole Singletary, and the state was represented by Salley Elliott. On June 4, 2012, Judge Benjamin issued an order denying Kears's PCR application and dismissing it with prejudice. App. 102 – 110. Kears'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.

Cedric Kears was stopped on April 12, 2008 by a highway patrolman for speeding. When Trooper Panarelli approached the vehicle, he asked Kears about the odor of alcohol. Kears admitted that he drank alcohol that night. When the trooper asked Kears to step out of the vehicle, Kears drove away. App. 15, ll. 9 – 25; App. 16, ll. 1 – 15.

The trooper pursued the vehicle which reached a speed of 90-100 miles per hour. The vehicle flipped over and Kears then ran on foot. The trooper and a sheriff's deputy who responded to the call caught Kears and he was taken to the jail. App. 16, ll. 15 – 25; App. 17, ll. 1 – 4.

An inventory of the car revealed drugs on the floorboard on the driver's side. Analysis showed it to be 26.69 grams of cocaine and 4.57 grams of crack App. 17, ll. 5 – 15.

On August 25, 2008, Kears appeared before Judge Harrington where the solicitor discussed the plea offer which he said was good until 5:00 that same day. He said the case was set for trial the following day. Supp. App. 4, ll. 1 – 25; Supp. App. 5, ll. 1 – 4.

Kears told the court that he did not understand any of the plea offer regarding second and third offenses. Supp. App. 6, ll. 1 – 16. Kears told the court then that his attorney had walked out the last time he saw her on the previous Thursday. He said he had seen her a couple of times. Supp. App. 6, ll. 17 – 25; Supp. App. 7, ll. 1 – 7. His attorney explained that on the previous Thursday that she and Kears could not agree so she slipped out and asked another attorney in her office to discuss the issue with Kears. Supp. App. 9, ll. 18 – 24.

Kearse told the court that he was not taking the plea offer. Supp. App. 12, ll. 1 – 8. Kearse’s attorney told the court that Kearse felt he was being pressured to taking the deal. Supp. App. 13, ll. 11 – 14.

Later that day, Kearse appeared before Judge Harrington again and made a motion to the court to have his attorney relieved. Supp. App. 14, ll. 19 – 25; Supp. App. 15, ll.1 – 21. He told the court that he did not feel he could be properly defended because he had not had time to talk to his attorney about the case and he was “being pressured to go to trial tomorrow.” Supp. App. 15, ll. 4 – 10.

Kearse said that he had talked to his attorney twice before this date and now he had to go to trial the next day and there was not enough time to prepare. Supp. App. 15, ll. 7 – 25; Supp. App. 16, ll.1 – 6. Kearse said:

I don’t feel I can be defended properly by her.

Supp. App. 17, ll. 8-9.

The judge denied his motion and said the jury would be present at 10:00 the next morning. Supp. App. 18, ll. 8 – 25; Supp. App. 19, ll. 1 – 11.

On August 26, 2008 at the guilty plea, when Judge Harrington asked Kearse if he had any complaints that day about his attorney. He replied that he just wanted to plead as he was “at a different point right now.” The judge asked if he was prepared to go forward with his attorney on that day. He told the court: “No, I’m not, Ma’am.” App. 12, ll. 2 – 15.

Kearse told the court that he was not satisfied with his attorney’s services as they did not have enough time to talk. App. 12, ll. 15 – 20. He said:

Well, I feel I haven’t talked to her that much. I mean, I only talked to her one time and the second time I talked to her she didn’t have my file. The third time I talked to her she walked out and the next time I see her is Monday then Tuesday is the trial.

App. 12, ll. 21 – 25; App. 13, ll. 1 – 3.

Kearse told the court that his attorney did provide him with discovery and he did see the video of the incident the previous week. App. 19, ll. 12 – 20.

The judge accepted his guilty plea. App. 24, ll. 2 – 6.

At his PCR hearing, Kearse testified that his plea counsel was ineffective for several reasons. She did not explain his charges thoroughly to him; she did not explain adequately the drug enhancement statute which increased his charge on trafficking to a third offense. She mailed the first plea offer of eight years to him at the jail on June 17, 2008. The offer expired on July 9, but he did not hear from his attorney until July 30, and the offer had expired. App. 46, ll. 2 – App. 52, ll. 25; App. 62, ll. 2 – 22.

Kearse said he filed a motion to have his attorney relieved because he did not want to go to trial with her because she was ineffective. The judge denied his motion. App. 54, ll. 2 – 23. He felt pressured to plead guilty. App. 59, ll. 1 – 25. He would have gone to trial if he had known all the evidence to be used against him, and if he believed his trial attorney would adequately defend him. App. 61, ll. 1 – App. 62, ll. 18; App. 70, ll. 1 – 17. .

Kearse's trial attorney testified at the PCR hearing that Kearse did have trouble understanding the drug enhancement law. He thought it meant that he had to have a drug trafficking third offense which he did not have. She tried to explain to him that it was for any drug and drug offense. App. 76, ll. 1 – 25. Every time they talked, Kearse seemed to have a lack of understanding about the drug enhancement law. App. 91, ll. 1 – 14. She admitted that Kearse wanted a trial, and she planned to prepare for trial even without a real defense. App. 78, ll. 1 – App. 179, ll. 9.

The PCR judge ruled that she found Kearse's testimony to not be credible while finding trial counsel's testimony to be credible. The judge found that trial counsel "adequately conferred with

Applicant; conducted a proper investigation; was thoroughly competent in her representation; and her conduct did not fall below the objective standard of reasonableness. App. 108.

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

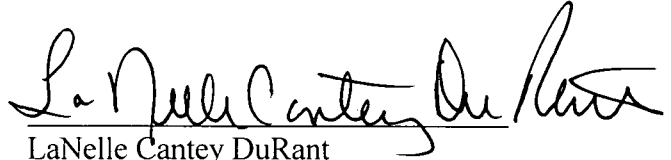
waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

The PCR judge erred in not finding trial counsel ineffective for not insuring Kearsse's plea was voluntary.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction and sentence 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 3rd day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

CEDRIC KEARSE,

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V.

STATE OF SOUTH CAROLINA,

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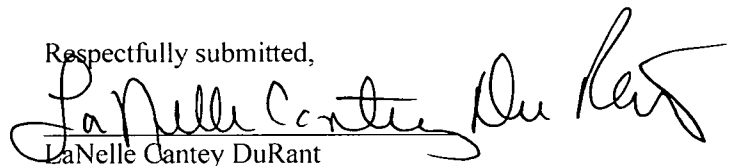
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Cedric Kearsse 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 22, 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 Cedric Kearsse.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of September, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

DeAndrea G. Benjamin, Circuit Court Judge

CEDRIC KEARSE,

PETITIONER,

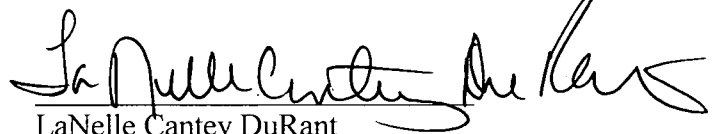
V.

STATE OF SOUTH CAROLINA,

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, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Cedric Kears, #330288, at Macdougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 3rd day of September, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rdday
of September, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.