

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger M. Young, Circuit Court Judge

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S.C. Supreme Court

D'EL GRANT,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2013-000135

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Was trial counsel ineffective in failing to object to the sentencing judge's improper consideration of the fact that Petitioner's family was not present at sentencing in refusing leniency and sentencing Petitioner to life imprisonment?

STATEMENT

In November of 2006, the Charleston County Grand jury indicted Grant for two counts of murder, indictments #2006-GS-10-11480, 481. On November 5, 2007, Grant proceeded to jury trial before the Honorable Howard P. King. Attorney Margaret Helen Fanning represented Grant at trial. Attorneys Burns Malone Wetmore and Peter McKoy prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge King sentenced Grant to two concurrent life sentences. A timely notice of intent to appeal was filed and the direct appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). On August 25, 2010, the South Carolina Court of Appeals dismissed the appeal. State v. Grant, Op. No. 2010-UP-388 (S.C. Ct.App. filed August 25, 2010).

On December 31, 2010, Grant filed an application for post conviction relief. The State filed a return on April 1, 2011. On December 6, 2012, an evidentiary hearing was held before the Honorable Roger M. Young, Sr. Attorney Arie Bax represented Grant at the PCR hearing. Attorney Ashleigh Wilson was present on behalf of the State. In a written order signed January 3, 2013, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on January 16, 2013. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel was ineffective in failing to object to the sentencing judge's improper consideration of the fact that Petitioner's family was not present at sentencing in refusing leniency and sentencing Petitioner to life imprisonment.

The jury found Appellant guilty in the fatal shooting of Sadiris Nelson, "Little D." and Robert Bryant, "Evil." At trial DeShawn Gathers testified that earlier in the day Michael Mitchell, "Project," shot at Appellant's brother, Gary Grant. (App. p. 75, lines 13-25). Gathers testified that Gary Grant believed that "Little D" and "Evil" were involved in the earlier shooting with "Project." (App. pp. 80-81). According to Gathers, when Gary Grant confronted "Little D" and "Evil," Appellant then shot them both. (App. pp. 81 – 82). Gary Grant, however, testified at trial that he shot "Little D" and "Evil" not his brother Appellant D'el Grant. (App. pp. 438-439). Gary Grant testified that Appellant was not present at the time of either of the shootings. (App. p. 443, lines 11-17).

The jury found Appellant guilty of both murders. At sentencing the judge said. "There [are] no winners here, only victims. The victims are the two young men that were killed and this young [man] is a victim as well. This is a tragedy for everyone involved. I, too, am shocked that this young man has no family support. It's very difficult for this court to show leniency when there is apparently indifference from his own family." Counsel for Appellant tried to use the fact that Appellant's mother was not present during the trial and had never been supportive as mitigation at sentencing. (App. p. 567, lines 15-23). Counsel advised the judge that Appellant's sister and cousin had been present for most of the trial but the cousin had lupus and was sick on the day of sentencing. (App. p. 567, lines 7-13). Due to his sister's young age, Appellant did not want her present at sentencing. (App. p. 567, lines 13-15).

The judge's failure to show leniency based on the absence of Appellant's family at sentencing was improper. While the judge attributed the family's absence as indifference to the appellant, this was specifically contradicted as to the cousin and the sister. The mother's absence in general was outside any control of the Appellant. Trial counsel failed to move to reconsider sentence based on the judge's consideration of an improper sentencing factor. Trial counsel erred.

In State v. Burkhart, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007), the South Carolina Supreme Court noted, in the context of a death penalty case, that a sentencing determination should be based on factors relevant "to the character of the defendant or the circumstances of the crime." Burkhart, citing State v. Copeland, 278 S.C. 573, 370 S.E.2d 63 (1982). See, also, Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 2743 (1983); Eddings v. Oklahoma, 455 U.S. 455, 104, 112, 102 S. Ct. 869, 875 (1982).

The fact that Appellant's family was not present at sentencing was not relevant to the character of the Appellant or the circumstances of the crime. The mother's absence in general as well as Appellant's concern for his younger sister in asking that she not be present for sentencing are mitigating factors supporting leniency. Trial counsel was ineffective for not filing a motion to reconsider sentence based on the improper sentencing consideration by the judge.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052. "Under

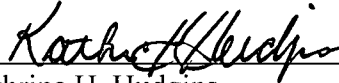
this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Counsel was ineffective in failing to move to reconsider the sentence of life imprisonment imposed based on the improper sentencing consideration that Appellant’s family was not present at sentencing. There is a reasonable probability that if counsel had moved for reconsideration, the trial judge, without considering the improper factors, would have sentenced Appellant to a sentence less than life.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
ROGER M. YOUNG, CIRCUIT COURT JUDGE

D'EL GRANT,

RESPONDENT,

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STATE OF SOUTH CAROLINA,

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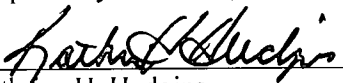
PETITION TO BE RELIEVED AS COUNSEL

Counsel for D'el Grant 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 December 6, 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 D'el Grant.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of September, 2013

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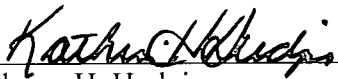
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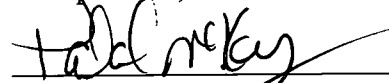
CERTIFICATE OF SERVICE

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 Ashleigh R Wilson, Esquire and D'el Grant, #285741, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 Lee Correctional Institution 990 Wisacky Hwy. Bishopville, SC 29010 this 3rd day of September, 2013.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of September, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.