

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Marlboro County
J. Michael Baxley, Circuit Court Judge

KEENA LAMONT RIVERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000476

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 trial counsel ineffective for not moving to suppress the drugs on the basis of the illegal traffic stop because Lieutenant Greg Williams cited no reason for the stop except a phone call from his wife that she saw petitioner drinking beer just before he drove away from the store?

STATEMENT

In January 2008, the Marlboro County Grand Jury indicted Keena Lamont Rivers on the charges of possession with intent to distribute crack cocaine (PWID); failure to stop for a blue light (FTSBL); and possession with intent to distribute marijuana (PWID). On June 12, 2008, Rivers proceeded to trial before the Honorable Edward B. Cottingham and a jury. Rivers was represented by Daniel L. Blake, and the state was represented by Elizabeth R. Munnerlyn. The jury found Rivers guilty as indicted. Judge Cottingham sentenced Rivers to twelve years on the PWID crack; one year on the PWID marijuana second offense; and three years on the FTSBL. All sentences were to run consecutively. App. 315, ll. 1 – App. 318, ll. 3. Rivers 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 Court of Appeals dismissed the appeal on January 28, 2010. State v. Rivers, Op. No. 2010-UP-064 (Ct. App. filed January 28, 2010).

On July 9, 2010, Rivers filed an application for post-conviction relief (PCR). The state filed a return on May 8, 2012. An evidentiary hearing was held before the Honorable J. Michael Baxley on September 10, 2012. Rivers was represented by David E. Belding, and the state was represented by T. Andrew Johnson, Sr. On December 6, 2012, Judge Baxley filed an order denying Rivers' PCR application and dismissing it with prejudice. App. 392 – 396. Rivers' attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not moving to suppress the drugs on the basis of the illegal traffic stop because Lieutenant Gregory Williams cited no reason for the stop except a phone call from his wife that she saw petitioner drinking beer just before he drove away from the store.

On December 6, 2007, LaWanda Williams was at the Exxon Station across from the hospital in Bennettsville. She saw Keena Rivers in the drivers' seat of a vehicle parked in front of the Exxon. He was drinking from a container that was covered. Another guy came out of the store with some beer and got in the vehicle with Rivers. App. 34, ll. 12 – App. 42, ll. 25.

When Rivers left the Exxon, Ms. Williams called her husband, Lieutenant Greg Williams, who was with the Bennettsville Police Department. She described Rivers' vehicle as a grey truck that was headed down Cheraw Street. App. 41, ll. 8 – App. 42, ll. 25.

Lieutenant Williams said when he received the call from his wife, LaWanda, he was already in the area. Rivers' vehicle passed him, and Williams turned around and pursued it. Detective Turner was driving the police car, and initiated a traffic stop on the grey truck. The truck pulled over on the side of the road. Detective Turner went to the truck. As Lt. Williams approached, the truck started taking off. The officer pursued it until the truck hit a dead end street, and the driver and passenger ran. They were finally apprehended. App. 50, ll. 4 – App.55, ll. 24.

Officer Aretha Poe was a patrol officer with the police department. She received a call to assist Detective Turner on December 6. When she arrived at the scene, Rivers was handcuffed. Detective Turner asked her to search Rivers. When she did, she found in his front pants pocket and found two bags of a green leafy substance and one bag of a white rock like substance. She then transported Rivers to the county detention center. App. 99, ll. 17 – App. 104, ll. 25.

At trial, defense counsel asked the court to admit the results of the Data Master Sample which indicated that Rivers' blood alcohol level was 0.00. The judge refused to get into the issue of whether Rivers was intoxicated or not because "it would only confuse the jury." App. 196, ll. 1 – App. 197, ll. 16. The judge then told trial counsel:

THE COURT: I understand but there was never a motion made to question the legitimacy of the stop itself. That motion was never made, and that issue could have been explored fully at that time ...

MR. BLAKE: Judge, that was a tactical decision on my part not to do it as a pretrial motion.

THE COURT: Okay, but it would have been given to you.

App. 197, ll. 17 – 23.

At his PCR hearing, Rivers testified that Lt. Williams initiated the traffic stop based on the phone call from his wife. Lt. Williams never accused Rivers of any "bad driving." Detective Turner later said Rivers was "left of center." App. 342, ll. 6 - App. 344, ll. 25.

Rivers told the PCR court that his trial attorney was ineffective because he never made a motion to suppress the drugs because the traffic stop was illegal. His trial counsel never challenged the legitimacy of the traffic stop. Rivers was prejudiced because the outcome would have been different if the drugs had been suppressed. App. 354, ll. 1 – App. 356, ll. 11.

Trial counsel testified that he did not ask to suppress the drugs in a pretrial motion as a tactical move because he did not want the police officers to hear his entire case as they would then know how to testify. Counsel admitted that he did not make a motion to suppress the drugs nor challenge the legality of the traffic stop although he knew that Lt. Williams gave no reason for the stop. App. 365, ll. 9 – App. 369, ll. 25.

The PCR judge ruled that he did not find Rivers' testimony to be credible while he found trial counsel's testimony to be "persuasive" and he gave it "great weight." The judge found there

was overwhelming evidence of guilt. The judge found that counsel's performance was not deficient and Petitioner Rivers failed to show that trial counsel was ineffective, and failed to show that Petitioner was prejudiced. App. 395.

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).

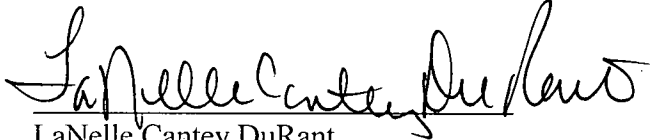
The Fourth Amendment to the United States Constitution provides that the people have a right to be secure in their persons and homes against unreasonable searches and seizures, and no warrants shall issue, but with probable cause, supported by oath and affirmation, describing the place to be searched and the things to be seized.

Trial counsel was ineffective for not challenging the traffic stop because there was no probable cause sufficient to justify the traffic stop. Rivers was prejudiced because if counsel had moved to suppress the drugs, it is highly probable and reasonable that the outcome would have been different.

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,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of September, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO MARLBORO COUNTY
J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE

KEENA LAMONT RIVERS,

PETITIONER,

V.

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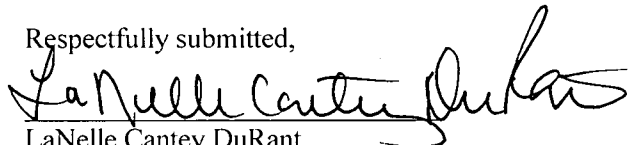
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Keena L. Rivers 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 10, 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 Keena L. Rivers.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of September, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marlboro County

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KEENA LAMONT RIVERS,

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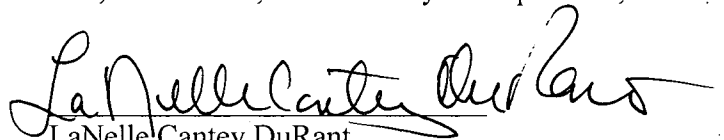
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CERTIFICATE OF SERVICE

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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Keena L. Rivers #328886, at Palmer Pre-Release Center, 2012 Pisgah Road, Florence, SC 29501, this 9th day of September, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of September, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.