

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

RECEIVED

OCT 11 2013

S.C. Supreme Court

FREDRICK E. JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000859

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

In August 2010, the Spartanburg County Grand jury indicted Frederick E. Johnson on the charge of murder. On October 14, 2010, Johnson proceeded to trial before the Honorable Roger L. Couch and a jury. Johnson was represented by Andrea Price, and the state was represented by Derrick B. Balsa. On the second day of trial following the testimony of the DNA expert, Johnson entered a guilty plea to voluntary manslaughter. App. 171, ll. 1 – 25. Judge Couch sentenced him to thirty years to run consecutive to the twenty-five years he was already serving on unrelated charges. App. 187, ll. 1 – 12. Johnson did not appeal his conviction or sentence.

On April 21, 2011, Johnson filed an application for post-conviction relief (PCR). The state filed a return on July 17, 2012. An evidentiary hearing was held on January 8, 2013 before the Honorable J. Derham Cole. Johnson was represented by W. Sterling Anderson, and the state was represented by Suzanne H. White. On April 2, 2013, Judge Cole issued an order denying Johnson's PCR application and dismissing it with prejudice. App. 231-App. 237. Johnson filed an 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.

In 2008, Johnson was charged with the murder of a twenty-nine year old prostitute named Iris that occurred in June 2000. The woman's body was found in some woods behind stores on East Main Street in Spartanburg. She had been stabbed over fifty times. App. 28, ll. 1 – App. 29, ll. 25.

The incident occurred in the year 2000, but there no suspects were identified until 2008. DNA was taken from the crime scene at the time of the murder, and the police got a hit on CODIS in 2008 when Johnson's DNA was identified as a match. App. 180, ll. 1 – App. 181, ll. 24.

Johnson started a jury trial. When the DNA expert, Ken Bogan, testified that Johnson's DNA matched the DNA from the crime scene, defense counsel asked to approach the bench. Counsel informed the court that this was the first that she or Johnson had heard of the DNA match. The state immediately offered for Johnson to plead guilty to the lesser charge of voluntary manslaughter. App. 163, ll. 1 – 19; App. 170, ll. 1 – 24; App. 171, ll. 1 – 25; App. 220, ll. 17 – App. 221, ll. 14.

Johnson then pled guilty to voluntary manslaughter and received a sentence of thirty years to run consecutively to the twenty-five years he was already serving on unrelated charges. App. 183, ll. 10 – 25; App. 186, ll. 22 – App. 187, ll. 7.

During the guilty plea when the solicitor recited the facts, the judge asked Johnson if that information was correct. Johnson responded:

Johnson: Well, I will---okay, yeah, I'll go along---yeah, yes sir.

Court: Is there---

Johnson: I mean, I want to voice my opinion. I got something I want---

Ms. Price: Okay.

Johnson: ---to say, Your Honor.

App. 181, ll. 25 – App. 182, ll. 10.

At that point, defense counsel told Johnson that he needed to talk to her. When the judge directed Johnson to talk to his attorney, Johnson said: “ No, everything’s straight. Okay.” App. 182, ll. 1 – 24.

At his PCR, Johnson testified that he would not have pled guilty if his attorney had not persuaded him to plead guilty, and if he had had more time to review the discovery. App. 210, ll. 1 – 8. Johnson said his attorney did not represent him correctly because she did not provide discovery to him timely although he requested it on two occasions. He produced documents indicating that he requested discovery from his attorney on November 6, 2009 and February 10, 2010. App. 205, ll. 7 – App. 207, ll. 14. He only received discovery one to two weeks before his trial in October 2010.

Plea counsel testified at the PCR hearing that she did recommend to Johnson that he plead guilty after the DNA expert testified and she learned that Johnson’s DNA was a conclusive match to the DNA from the crime scene. App. 220, ll. 17 – 23. She delivered the discovery to Johnson at the jail on April 11, 2010. App. 9 – 15. However, she believed he was referring to the DNA report that came out at trial. App. 220, ll. 19 – App. 221, ll. 14.

The PCR judge ruled that he found counsel’s testimony to be more credible than Johnson’s, and found Johnson’s testimony to be not credible. App. 234; App. 236. The PCR judge ruled that the guilty plea was voluntary and knowingly entered. App. 236. The judge found that Johnson failed to prove that plea counsel failed to render effective assistance of counsel. The order stated there was no specific evidence that counsel committed errors. The judge found that Johnson did not demonstrate prejudice from counsel’s performance. App. 236.

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).

Trial/plea counsel was ineffective for not insuring that Johnson wanted to plead guilty. Johnson's hesitation to agree with the facts at the guilty plea, and his telling the judge he wanted to say something was indicative that Johnson had doubts about pleading guilty. Plea counsel should have explored those reasons at the time.

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,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

FREDRICK E. JOHNSON,

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V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-000859

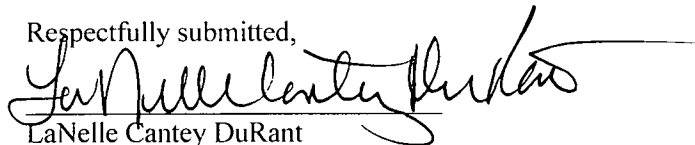
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Frederick E. Johnson 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 January 8, 2013. 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 Frederick E. Johnson.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of October, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

FREDRICK E. JOHNSON,

PETITIONER,

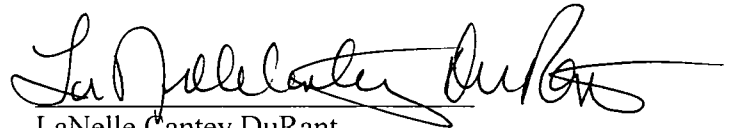
V.

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Frederick E. Johnson, #163457, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 11th day of October, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of October, 2013.

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