

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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OCT 16 2013

S.C. Supreme Court

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Certiorari to Anderson County  
Clifton Newman, Circuit Court Judge  
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ANTHONY L. MATTISON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000585  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not having the blue cup (open container) independently tested for alcohol because Petitioner was arrested for an open container violation which led to the discovery of the crack cocaine on his person during booking for the arrest of the open container?

## STATEMENT

In June of 2007, the Anderson County Grand Jury indicted Anthony Mattison for possession with intent to distribute crack cocaine (PWID), indictment #2007-GS-04-1889. On January 11, 2010, Mattison proceeded to jury trial before the Honorable R. Lawton McIntosh. Mattison was represented by Kurt Tavernier, and the state was represented by Lauren Sutton Hogan and Al Means. The jury returned a verdict of guilty and Judge McIntosh sentenced Mattison to twenty five (25) years. A timely notice of intent to appeal was served on January 21, 2010. The Office of Appellate Defense perfected the appeal 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. State v. Mattison, Op. No. 2012-UP-084 (Ct. App. filed February 22, 2012).

On March 21, 2012, Mattison filed an application for post-conviction relief (PCR). The state filed a return on May 22, 2012. An evidentiary hearing was held on October 3, 2012 before the Honorable Clifton Newman. Mattison was represented by Daniel Draisen, and the state was represented by Karen Ratigan. Judge Newman issued an order on November 25, 2012 denying Mattison's PCR application and dismissing it with prejudice. Mattison's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not having the blue cup (open container) independently tested for alcohol because Petitioner was arrested for an open container violation which led to the discovery of the crack cocaine on his person during booking for the arrest of the open container.

On April 10, 2007, Narcotics Investigator Casey Fouts of the Anderson Police Department was investigating drug activity in the area of the Carolina Inn. He observed a blue Cadillac pull into the parking lot of the Carolina Inn. He then saw Mattison exit the Cadillac from the driver's seat with a blue plastic drinking cup. When Mattison saw police officers, he discarded the cup which apparently had a liquid in it that was spilled on the ground. Investigator Fouts approached and smelled alcohol from the cup. Mattison was then arrested for having an open container of alcohol. App. 64, ll. 11 – App.67, ll. 3.

Mattison was transported to the local detention center. During booking, Investigator Fouts noticed that Mattison seemed very nervous, and sweaty, with erratic breathing which made Investigator Fouts suspicious that Mattison may have something else on his person. Mattison was searched, and two baggies of what proved to be five grams of cocaine base were found underneath the uncircumcised foreskin of his penis. App. 93, ll. 1 – 22; App. 67, ll. 4 – App. 68, ll. 22; App. 62, ll. 1 – 25.

In a pretrial motion, defense counsel moved to suppress the drugs based on the fact that he was arrested for having an open container of alcohol, but the cup was not tested to verify that it was alcohol. This sole basis for his arrest led to the “sequence of events which gave rise to the discovery of the alleged drugs.” Counsel moved to have all of the evidence thrown out. The state argued that the officer smelled alcohol, and that was sufficient. App. 19, ll. 14 – App 20, ll. 25.

The judge ruled that it was not necessary to have expert testimony to establish the presence of alcohol. He ruled that the officers' experience was enough to prove the presence of alcohol. He denied the motion. Defense counsel produced no further argument or objection. App. 21, ll. 1 – 22. The defense presented no evidence in the trial. App. 171, ll. 1 – 25.

At his PCR hearing, Mattison testified that his trial counsel was ineffective for not putting the state's case through "adversarial testing" by not challenging the admissibility of evidence related to the cup. The cup was neither tested for the presence of alcohol nor for fingerprints. Trial counsel did not have the contents of the cup tested and did not produce any evidence to challenge the officers' testimony of the smell of alcohol. App. 246, ll. 5 - 25; App. 257, ll. 1 – App. 258, ll. 25.

Trial counsel was not present at the PCR hearing, and no testimony from him was presented. The state explained at the beginning of the hearing that the hearing was scheduled for the day before and trial counsel was present. However, the Department of Corrections did not bring Petitioner Mattison to court that day. PCR counsel and the state agreed to hold the hearing on this date although trial counsel could not be present. The state explained that Mattison's issues were legal ones that could be refuted by the trial transcript. The judge allowed the case to go forward. App. 242 – App. 246, ll. 14.

The PCR judge ruled that the PCR court could not speculate what the result of the test of the cup would have been because no evidence was presented at the PCR hearing of an independent test of the cup. Therefore, the PCR judge found that Mattison did not prove that trial counsel was ineffective. App. 279-App. 280. The order stated that Mattison failed to prove that trial counsel did not render reasonably effective assistance of counsel under prevailing professional norms. App. 282. The order continued to state that Mattison failed to prove he was prejudiced by counsel's performance. App. 283.

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*.

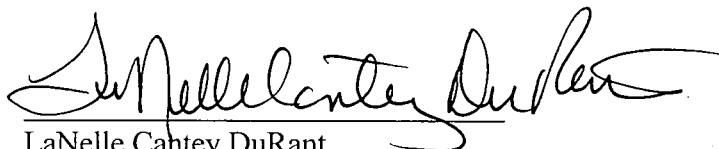
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

Trial counsel is ineffective if his failure to present evidence alters the probable outcome of the trial. Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994). The outcome of Mattison’s trial would have been very different if the cup and the drugs were excluded from evidence if the cup did not contain alcohol, and hence was an illegal arrest. In Wong Sun v. United States, 371 U.S. 471 (1963), the United States Supreme Court ruled that “the fruit of the poisonous tree doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by exploitation of that illegality.” Trial counsel was ineffective for not having an independent analysis of the contents of the cup done.

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 Cahtey DuRant", written in a cursive style.

LaNelle Cahtey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of October, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO ANDERSON COUNTY  
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

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ANTHONY L. MATTISON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-000585

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PETITION TO BE RELIEVED AS COUNSEL

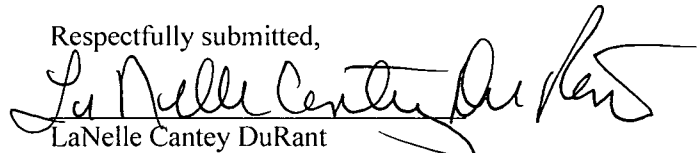
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Counsel for Anthony L. Mattison states:

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 3, 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 Anthony L. Mattison.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 16th day of October, 2013

STATE OF SOUTH CAROLINA

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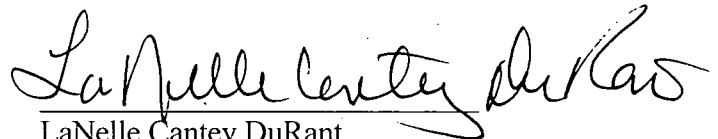
RESPONDENT

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CERTIFICATE OF SERVICE

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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 John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Anthony L. Mattison, #270904, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 16th day of October, 2013.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

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

Walter Henderson (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.