

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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DEC 17 2013

Certiorari to Greenville County

S.C. Supreme Court

G. Edward Welmaker, Circuit Court Judge

CALVIN E. TODD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001162

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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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 making a motion for a directed verdict at the close of the defense's case, after Petitioner Todd testified, which prevented the appellate court from reviewing the denial of his first directed verdict motion as it was not preserved for appellate review?

STATEMENT

In October 2007, the Greenville County Grand Jury indicted Calvin Earl Todd on the charge of possession with intent to distribute (PWID) crack cocaine. On May 19-20, 2008, Todd proceeded to trial before the Honorable Alexander S. Macaulay and a jury. Todd was represented by Randall Chambers, and the state was represented by Katryna Salisbury and Joyce Monts. The jury returned a verdict of guilty. Judge Macaulay sentenced Todd to twenty years for a PWID second offense. App. 267, ll. 22 – 25. Todd's attorney filed a notice of appeal. The South Carolina Court of Appeals affirmed Todd's conviction and sentence on March 29, 2011. State v. Todd, Op. No. 2011-UP-133 (Ct. App. filed March 29, 2011).

On August 9, 2011, Todd filed an application for post-conviction relief (PCR). The state filed a return on January 30, 2012. An evidentiary hearing was held on April 18, 2013 before the Honorable G. Edward Welmaker. Todd was represented by Carolina Horlbeck, and the state was represented by Karen Ratigan. On May 3, 2013, Judge Welmaker issued an order denying Todd's PCR application, and dismissing it with prejudice. App. 321 – 329. Todd's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not making a motion for a directed verdict at the close of the defense's case, after Petitioner Todd testified, which prevented the appellate court from reviewing the denial of his first directed verdict motion as it was not preserved for appellate review.

On July 28, 2007, Officer Troy McBride and Officer Travis Graham stopped a car in Fountain Inn for violating the city ordinance against playing music too loudly in the community. Todd was the passenger in the car. When Officer McBride approached the passenger side to speak with Todd, the officer saw an open can of beer in Todd's lap. When Todd got out of the car at Officer McBride's request, Officer McBride testified that Todd consented to a search of his person. Todd then told the officer that he had a pipe in his back pocket. Todd was placed under arrest. App. 35, ll. 15 – App. 39, ll. 10.

Officer Graham told Officer McBride that he saw Todd throw down something as Officer McBride was retrieving the pipe. Officer Graham then retrieved the bag. App. 38, ll. 1 – 25.

Officer Graham testified that he retrieved the bag which did field test positive for crack cocaine. App. 48, ll. 15 – App. 51, ll. 18. The forensic chemist, James Armstrong, testified that the bag contained 8.40 grams of crack cocaine. App. 172, ll. 14 – 25; App. 178, ll. 3 – 22.

At the close of the state's case, defense counsel moved for a directed verdict on the grounds that the state had not proved that Todd had the intent to distribute. Counsel argued that the state had established that Todd possessed more than a gram for a *prima facie* case pursuant to the law, but that did not overcome the state's burden. The defense had rebutted through cross examination that there was no money found, and no evidence that proved Todd intended to distribute the crack.

Counsel argued that the defense had admitted that Todd possessed the crack. App. 181, ll. 10 – App. 182, ll. 18.

Todd testified in his own behalf and admitted that he was a crack addict with a bad habit. Todd was a forty-four (44) year old man who lived with his father, and had no significant bills to pay. Todd worked as a plumber's helper and spent the majority of his earnings on crack cocaine. He testified that he had not shared this crack with anyone and did not intend to. It was all for his personal use. Todd testified that this amount of crack cocaine would have taken him approximately two days to consume. App. 189, ll. 2 – App. 198, ll. 6.

At the close of the defense's case, when the judge asked if there was anything from the defense, defense counsel said no. There was no directed verdict motion and no renewal of the previous directed verdict motion. App. 210, ll. 1 – App. 211, ll. 25.

At his PCR hearing, Todd testified that his trial counsel was ineffective for not making a directed verdict motion at the end of the trial. His appeal affirmed his conviction because the directed verdict motion was not renewed at the end of the case on one of the issues. If counsel had moved for the directed verdict motion at the end of the case, he believed it would have made a difference in the outcome. His defense was that he did not have the intent to distribute. App. 294, ll. 1 – App. 296, ll. 6.

Trial counsel testified at the PCR hearing that Todd was not a drug dealer but the drugs were for his personal use. He stated that the statute provided that distribution did not have to mean selling; it could just be sharing. The jury was allowed to infer from an amount over one gram that the person in possession of over one gram intended to distribute. App. 310, ll. 13 – App. 315, ll. 25.

The PCR judge ruled that he found Todd's testimony to not be credible while finding trial counsel's testimony to be credible. The order provided that Todd did not meet his burden in proving

that trial counsel did not properly represent him at trial. App. 325. The PCR judge found that Todd failed to meet his burden in proving that he “was entitled to relief because trial counsel did not renew the motion for a directed verdict at the end of the defense case.” The judge held that the trial judge can grant a directed verdict on his own motion. App. 327 – App. 328.

The Court of Appeals affirmed Todd’s conviction and sentence in an unpublished opinion on March 29, 2011. The Opinion held on Issue Two, where Todd argued that the trial court erred in denying his motion for a directed verdict, that if a defendant presented evidence after the denial of his motion for a directed verdict at the close of the state’s case, in order to preserve the issue for appeal, he must make another motion for a directed verdict at the close of all evidence. The Court cited State v. Adams, 332 S.C. 139, 144-45, 504 S.E.2d 124, 126-27 (Ct. App. 1998) for this ruling.

On appeal of a denial of a directed verdict of acquittal, the Supreme Court must look at the evidence in the light most favorable to the state. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Arnold, *supra*. A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

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*.

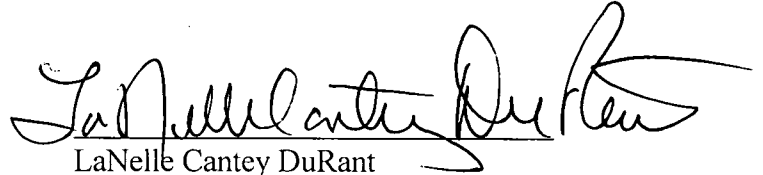
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would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

Trial counsel was ineffective for not moving for a directed verdict at the close of the defense case. Todd was denied the opportunity for the appellate court to review his directed verdict issue because it was not preserved. The evidence established that Todd personally consumed extraordinary amounts of crack cocaine and that the amount of crack cocaine found in his possession was no more than a two-day-supply. The State was unable to contradict Todd's account or to establish beyond a reasonable doubt that he intended to distribute the drugs where no money was found in his possession and no cell phone.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction and sentence reversed, and the case remanded for the entry of a directed verdict.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written in a cursive style with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

CALVIN E. TODD,

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STATE OF SOUTH CAROLINA,

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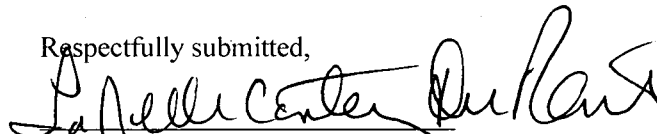
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Calvin E. Todd 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 April 18, 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 Calvin E. Todd.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of December, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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CALVIN E. TODD,

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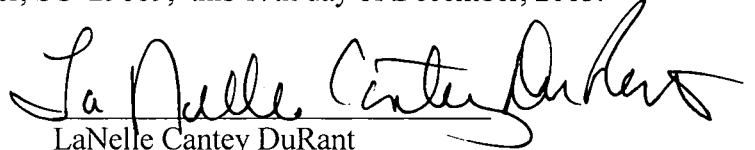
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STATE OF SOUTH CAROLINA,

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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Calvin E. Todd, #266990, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 17th day of December, 2013.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of December, 2013.

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