

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

FEB - 7 2014

S.C. Supreme Court

DEVIN MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001390

JOHNSON PETITION FOR WRIT OF CERTIORARI

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

INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	8
PETITION TO BE RELIEVED AS COUNSEL.....	9

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 January 2007, the Dorchester County Grand Jury indicted Devin Miller on the charge of murder. On August 26, 2008, Miller appeared before the Honorable James C. Williams, Jr., and entered a guilty plea to the lesser charge of voluntary manslaughter. Miller was represented by Thomas R. Sims, and the state was represented by Harrison Bell. Judge Williams sentenced Miller to twenty years imprisonment. App. 27, ll. 10 – 24. Miller's attorney filed a notice of appeal which was dismissed by the South Carolina Court of Appeals for failure to provide an explanation showing there was an issue which could be reviewed for appeal.

On May 15, 2009, Miller filed an application for post-conviction relief (PCR). He filed an amended PCR application on July 13, 2009. The state filed a return on November 16, 2009. An evidentiary hearing was held on March 1, 2010 before the Honorable Diane S. Goodstein. Miller was represented by Charles T. Brooks, and the state was represented by Mary S. Williams. A second PCR hearing was held on December 1, 2011 before Judge Goodstein with the same parties. App. 77. On June 11, 2013, Judge Goodstein issued an order denying Miller's PCR application and dismissing it with prejudice. App. 89 – 94. Miller's attorney filed a notice of 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

Devin Miller was charged with the murder of Earnest Wright on July 19, 2007. Miller had previously lived in the apartments, where the incident occurred in the parking lot, with a girl whom he continued to see surreptitiously. App. 11, ll. 5 – 20; App. 17, ll. 1 – 17 – 25. Miller asked a man that he knew to find this girl and tell her Miller was there. Instead, the man went to the girl's current boyfriend and told him Miller was there and wanted to see the girl. The boyfriend and his friend Wright and some others went to find Miller. The men saw Miller in his car and as they approached the car, Miller started firing. Wright was fatally shot. App. 11, ll. 5 – App. 14, ll. 21.

At his guilty plea, plea counsel told the court that they were ready to go to trial because he believed Miller had a strong self defense case. The men in question who came to Miller's car had beat him up earlier a couple of times. Miller also thought the deceased had a weapon. App. 16, ll. 22 – App. 21, ll. 9.

At his PCR hearing, Miller told the court that he was acting in self-defense, and his attorney did not tell him that he had a strong self-defense case. App. 50, ll. 1 – App. 53, ll. 24; App. 59, ll. 16. He did not know that a .45 caliber bullet was found at the scene until the guilty plea. Miller had a Highpoint 9 millimeter gun. That was the reason that Miller was asking the court to set aside his guilty plea, and grant him a new trial. App. 56, ll. 12 – App. 59, ll. 24.

Plea counsel testified at the PCR hearing that he was retained by Miller's family to represent him. He felt Miller had a strong self defense case, and the attorney thought he could win a trial. However, Miller's grandparents and his mother did not want him to go to trial. Therefore, Miller decided to plead guilty. App. 62, ll. 11 – App. 66, ll. 17.

According to plea counsel, he reviewed all of the evidence with Miller. The .45 caliber bullet was found in the area but was not next to the victim. App. 66, ll. 6 – App. 67, ll. 24.

The PCR judge asked the state to draft a proposed order for her review. App. 73, ll. 22 – App. 74, ll. 10.

On December 1, 2011, a second PCR hearing was held before Judge Goodstein with the same attorneys. App. 77. The judge explained that she had received a letter from Miller after the first PCR hearing where he said his PCR attorney was not prepared. The judge asked the state to not prepare an order but rather bring Miller back when the judge was presiding. App. 79, ll. 1 – 22.

At this second hearing, Miller told the judge that he felt he was not prepared because he did not receive the notice of the hearing until after the PCR hearing. He did not have proper time to present his case. His PCR attorney felt that the Department of Corrections (SCDC) was slow in getting mail to the inmates. App. 81, ll. 22 – App. 83, ll. 4.

The judge inquired of the PCR counsel if all of the issues were adequately presented at the first hearing. The attorney did not know of any thing else that they did not discuss. He knew Miller wanted his PCR granted for a new trial. App. 83, ll. 1 – 25.

The judge said she was going to order the transcript from the first PCR hearing and determine if it was proper before she ruled. App. 85, ll. 1 – App. 87, ll. 25.

The PCR judge ruled that she found plea counsel's testimony to be very credible while she found Miller's testimony to not be credible. App. 92. The order provided that Miller failed to carry his burden of proof that plea counsel was ineffective. The judge found Miller's argument that plea counsel was ineffective to be without merit. The judge ruled that plea counsel demonstrated the degree of skill and professional judgment that was expected of an attorney who practices criminal law. App. 93-94.

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).

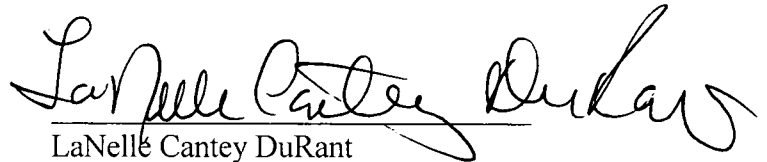
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (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).

Plea counsel was ineffective for not insuring that Miller had plenty of notice to prepare for his PCR hearing. Counsel should have insured that Miller understood all of the evidence against him, and that his plea was knowingly and voluntarily entered.

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,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

DEVIN MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001390

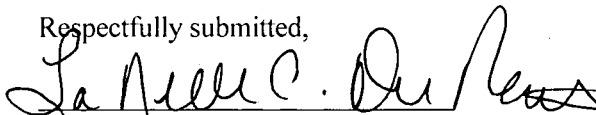
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Devin Miller 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 1, 2011. 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 Devin Miller.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of January, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

DEVIN MILLER,

PETITIONER,

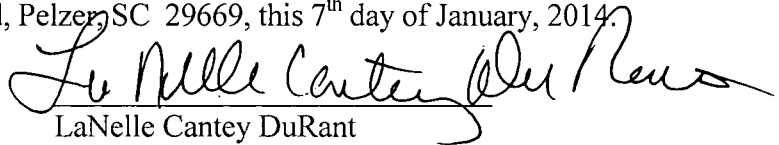
V.

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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Devin Miller, #330228, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of January, 2014.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of January, 2014.

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