

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Greenville County

S.C. Supreme Court

G. Edward Welmaker, Circuit Court Judge

CHAVIS L. COX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001427

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 because he pled guilty without having his discovery?

STATEMENT

In April 2010, the Greenville County Grand Jury indicted Chavis Cox on the charges of murder and possession of a weapon during the commission of a violent crime. On November 4, 2010, Cox appeared before the Honorable D. Garrison Hill to the murder charge as indicted. The gun charge was not prossed. Cox was represented by Scott D. Robinson, and the state was represented by Julie J. Anders. Judge Hill sentenced Cox to forty years imprisonment. App. 88; App. 20, ll. 17 – 21. Cox did not appeal his conviction or sentence.

On September 14, 2011, Cox filed an application for post-conviction relief (PCR). The state filed a return on December 30, 2011. An evidentiary hearing was held on April 16, 2013 before the Honorable G. Edward Welmaker. Cox was represented by Caroline Horlbeck, and the state was represented by Karen Ratigan. On May 20, 2013, Judge Welmaker issued an order denying Cox's PCR application and dismissing it with prejudice. App. 87-97. Cox'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 because he pled guilty without having his discovery.

On November 2, 2009, Cox went to Haneef's Auto Parts and Accessories in Greenville to look at speakers. The deceased, who was the owner of the shop, was playing a video game on Playstation. Cox allegedly shot the deceased in the head above his right ear once killing him. Cox was apprehended at the scene. Cox provided a statement to the police admitting that he shot the deceased. However, Cox gave no reason other than he had smoked marijuana two hours previously. App. 9, ll. 15 – App. 11, ll. 10.

The judge sentenced Cox to forty years incarceration. App. 20, ll. 17 – 21.

At his PCR hearing, Cox testified that he was selling drugs for the deceased, and wanted to stop because Cox was abusing the drugs. Cox said a fight ensued, and he shot the victim when the victim started to get up from his chair and come towards him. The victim weighed almost four hundred pounds according to Cox. He did not tell the police this part of the incident. App.53, ll. 22 – App. 56, ll. 17.

Cox told his attorney who said Cox really had no defenses. Cox believed after he researched the issue that he could have had the defense of self-defense or the lesser offense of voluntary manslaughter. App. 57, ll. 1 – 25.

Cox continued to testify that his plea attorney lost interest in his case when he did not receive the remainder of the fee although Cox had already paid him one thousand dollars. Cox never received a copy of his Rule 5 Discovery before his guilty plea. His attorney did not review the

discovery with him. If he had received it, he would have gone to trial instead of pleading guilty. App. 47, ll.17 – App. 53, ll. 16.

The plea counsel testified at the PCR hearing that he did review the discovery with Cox. App. 69, ll. 24 – app. 70, ll. 2. Cox had no real defense. He explained that the deceased was found in his chair holding a Playstation controller and no gun. The bullets from Cox’s gun matched the bullet found in the deceased. App. 70, ll. 3 – 71, ll. 25.

The PCR judge found that Cox’s testimony regarding ineffective assistance of plea counsel to not be credible while finding plea counsel’s testimony to be credible. The judge found that Cox failed to meet his burden of proving plea counsel was ineffective. The judge also ruled that the discovery materials were reviewed with Cox. App. 92. The judge denied and dismissed Cox’s PCR application. App. 96-97.

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).

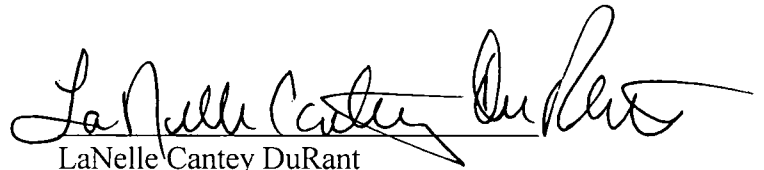
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (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 Cox understood all of the evidence against him, and that his plea was knowingly and voluntarily entered. Cox needed a copy of the Rule 5 discovery before his plea in order to assist in his defense or to have all of the evidence in order to decide whether to plead guilty or go to trial. He was prejudiced by not being able to do that.

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, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

CHAVIS L. COX,

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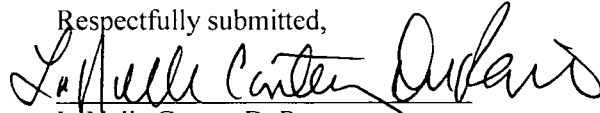
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Chavis L. Cox 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 16, 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 Chavis L. Cox.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of February, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

CHAVIS L. COX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

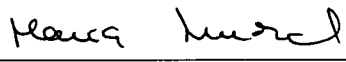
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Chavis L. Cox, #327335, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 4th day of February, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of February, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.