

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Oconee County

S.C. Supreme Court

J. Cordell Maddox, Jr., Circuit Court Judge

ADARIUS Q. DENNIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001637

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for not adequately cross examining the co-defendant, Manley, about his telling counsel prior to trial that Petitioner Dennis did not know that guns would be involved in the robbery, and where Manley changed his story during trial and said that Dennis was present during the pistol whipping of the victim?
2. Did the PCR court err in failing to find trial counsel ineffective for not fully explaining to petitioner the approximate time he would serve on the ten year non-violent plea offer from the state?

STATEMENT

In October 2008, the Oconee County Grand Jury indicted Adarius Q. Dennis on the charge of armed robbery (AR). On June 24, 2009, Petitioner Dennis was tried in his absence before the Honorable Alexander S. Macaulay and a jury. Dennis was represented by Suzanne Earle, and the state was represented by Christina Adams and David Wagner. On August 31, 2009, Dennis appeared before the Honorable James Williams who unsealed the sentence ordered by Judge Macaulay which was twenty-three years incarceration. App. 202 – 205, ll. 24. Petitioner Dennis appealed his conviction and sentence. The Division of Appellate Defense of the South Carolina Commission on Indigent Defense perfected the appeal. The South Carolina Court of Appeals affirmed Dennis' conviction and sentence on June 29, 2011. State v. Dennis, Op. No. 2011-UP-352 (Ct. App. filed June 29, 2011).

On January 27, 2012, Dennis filed an application for post-conviction relief (PCR). The state filed a return on May 22, 2012. An evidentiary hearing was held on February 25, 2013 before the Honorable J. Cordell Maddox, Jr. Dennis was represented by Keith G. Dennis, and the state was represented by John Whitmire. On July 3, 2013, Judge Maddox issued an order denying Dennis' PCR application and dismissing it with prejudice. App. 309 – 324. Dennis filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not adequately cross examining the co-defendant, Manley, about his telling counsel prior to trial that Petitioner Dennis did not know that guns would be involved in the robbery, where Manley changed his story during trial and said that Dennis was present during the pistol whipping of the victim.

Renaldo D. Robinson supplemented his salary as manager of Taco Bell by ordering shoes online in bulk and then selling them out of the back of his Expedition vehicle around Seneca and Oconee County. App. 70 ll. 10 – App. 71, ll. 25. On June 22, 1008, a man called ‘Hawk’, who he later identified as Adarius Dennis, called him to the Clinkscale community to sell shoes to Dennis. Robinson had sold shoes to Dennis several times previously at the same location. App. 65, ll. 6 – App. 67, ll. 11; App. 83, ll. 12 – 23; App. 71, ll. 25 – App. 73, ll. 25.

When Robinson arrived at the trailer home, Dennis came out to buy shoes. A few minutes later, two other men Robinson knew as Diverio and Laney Manley approached the vehicle. Dennis stepped back and Diverio Manley then began hitting him in the head with a gun. App. 76, ll. 3 – App. 79, ll. 25. They fell into the car and were wrestling. Diverio threatened to kill him. Robinson heard the shoes being taken from his car. App. 80, ll. 1 – App. 81, ll. 25.

The other man, who was Diverio’s brother, came to help Diverio in the fight for the gun when Robinson grabbed it. Then Diverio called several times for Hawk (Dennis) to bring the other gun, but Dennis never came. Robinson never saw Dennis again after Dennis jumped back initially. App. 82, ll. 1 – 24. Robinson could not tell who was taking the shoes. Finally, when Robinson let go of he gun, the two men fled, but did fire three or four shots at Robinson as he drove away. Robinson called 911. App. 83, ll. 1 – App. 88, ll. 24. Robinson said the two Manley brothers had attempted to

rob him before, but he never had a problem with Petitioner Dennis before this. App. 107, ll. 6 – App. 108, ll. 25.

Diverio Manley testified at the trial as a witness for the state. He testified that Hawk (Dennis) was in on the planning of the robbery and was the one who called Robinson to bring the shoes. According to Manley, Dennis was present when Manley started pistol whipping Robinson, but left after just a minute. Manley also stated that Dennis helped carry the shoes from the car. All three of them were there during the robbery. App. 129, ll. 1 - App. 134, ll. 16.

On cross examination, Manley testified that Dennis ran when Manley pulled the gun. Dennis' trial counsel made no mention of the fact that Manley had talked with her earlier and then admitted to her that he lied. App. 134, ll. 20 – App. 140, ll. 13.

In her closing to the jury, trial counsel argued to the jury that Dennis did not have a weapon and was not involved in the beating. App. 171, ll. 1 – Ap. 173, ll. 10.

The state argued in his closing the credibility of the co-defendant, Manley, by focusing on Manley's testimony that Dennis participated in the planning and the robbery. The solicitor told the jury that they had the right guy because Manley said it. The state argued that Manley had nothing to lose or gain by testifying because he was already in prison. He said that Manley admitted what he did and was sorry for it. App. 165, ll. 13 – App. 167, ll. 23.

At his PCR hearing, Dennis testified that he did attend the first day of his trial for jury selection. He panicked and did not return to the trial. He called his attorney the second day of trial and told her he was scared and did not know what to do. His attorney told him that she could not tell him what to do. She did not tell him he needed to attend. App. 239, ll. 24 – App. 243, ll. 5.

Dennis believed that he did not receive fair representation by his trial attorney at his trial. His attorney came to him and said that Diverio Manley was going to testify for Dennis on Dennis'

behalf if he wanted him to. Dennis told his attorney that he did want Manley to testify if he told the truth. After the trial, Dennis was shocked to learn that Manley testified for the state. App. 239, ll. 13 –19; App.243, ll. 6 – 22.

Dennis' trial counsel testified at the PCR hearing that she talked with Diverio Manley before the trial while he was incarcerated. Manley told her that he and his brother planned the robbery. They got Dennis to make the call to Robinson but they did not tell Dennis that a gun would be involved. Manley was happy to testify for Dennis as he told counsel he did not want to see his friend get a "serious sentence over this when he did not know anything about the robbery." App. 270, ll. 10 – App. 273, ll. 24.

Then Manley changed his story when he came to court. She subpoenaed him but he told her the morning of the trial that the solicitor and investigator talked to him and warned him of what would happen if he lied on the stand. Manley said he was not going to risk getting a perjury charge. Manley told her he had lied to her at the jail when they talked about the case and he was going to tell the truth when he testified. App. 273, ll. 25 – App. 274, ll. 11; App. 284, ll. 1 – App. 285, ll. 25.

On cross examination, trial counsel admitted that she did not cross examine Manley at trial about why his story changed from what he had told her. He told her that Dennis had no knowledge of the gun being involved, and then testified that Dennis did know about the weapon. Although Manley admitted to her he had lied to her, she did not question him about being a liar. She did not question Manley because Dennis was not present to deny Manley's testimony. She admitted that the entire defense centered around the presence of the gun. If there was no gun, it was a larceny. If Dennis knew of the gun, it was armed robbery. The key to the case was whether Dennis had knowledge of the gun. App. 282, ll. 18 – App. 285, ll. 25.

PCR counsel argued to the PCR court that the whole theory of the case was whether a gun was involved. App. 295, ll. 20 – App. 296, ll. 20. PCR counsel argued that the co-defendant was the key witness for the state, and was basically threatened by the state not to say what he had told trial counsel. It was critical to Dennis' case to point out that Dennis had no idea, and there was no association between Dennis and the gun. App. 296, ll. 21 –App. 301, ll. 4.

The PCR judge ruled that Dennis failed to meet his burden of proof that trial counsel was ineffective in her cross-examination of the co-defendant, Manley. The judge found trial counsel's testimony to be credible. The order provided that trial counsel's decision not to cross-examine Manley on his inconsistent statements for impeachment purposes was a product of sound trial strategy. The judge found this trial strategy valid. App. 319- App. 320.

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).

In Ingle v. State, 348S.C. 467, 560 S.E.2d 401 (2002), the Supreme Court held that counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness

based thereon. On a claim of ineffective assistance of counsel, the validity of counsel's strategy is reviewed under an objective standard of reasonableness. Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008).

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000).

Dennis was prejudiced by trial counsel's failure to impeach Manley and show the jury that he was an admitted liar. Manley was the state's key witness so his credibility was significant. Dennis was prejudiced because if it had come out by the co-defendant that Dennis knew nothing of the gun, then there was a reasonable probability that the jury would have found him guilty of larceny. The absence of the client was not a valid reason to omit this important line of cross-examination. The trial judge charged the jury on larceny, strong armed robbery as well as armed robbery. App. 184, ll. 1 – App. 185, ll. 25; App. 187, ll. 1 – 25.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not fully explaining to petitioner the approximate time he would serve on the ten year non-violent plea offer from the state.

Renaldo D. Robinson supplemented his salary as manager of Taco Bell by ordering shoes online in bulk and then selling them out of the back of his Expedition vehicle around Seneca and Oconee County. App. 70 ll. 10 – App. 71, ll. 25. On June 22, 1008, a man called ‘Hawk’, whom Robinson later identified as Adarius Dennis, called him to the Clinkscale community to sell shoes to Dennis. Robinson had sold shoes to Dennis several times previously at the same location. App. 65, ll. 6 – App. 67, ll. 11; App. 83, ll. 12 – 23; App. 71, ll. 25 – App. 73, ll. 25.

When Robinson arrived at the trailer home, Dennis came out to buy shoes. A few minutes later, two other men Robinson knew as Diverio and Laney Manley approached the vehicle. Dennis stepped back and Diverio Manley then began hitting him in the head with a gun. App. 76, ll. 3 – App. 79, ll. 25. They fell into the car and were wrestling. Diverio threatened to kill him. Robinson heard the shoes being taken from his car. App. 80, ll. 1 – App. 81, ll. 25.

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Diverio Manley testified at the trial as a witness for the state. He testified that Hawk (Dennis) was in on the planning of the robbery and was the one who called Robinson to bring the shoes. According to Manley, Dennis was present when Manley started pistol whipping Robinson, but left after just a minute. Manley also stated that Dennis helped carry the shoes from the car. All three of them were there during the robbery. App. 129, ll. 1 - App. 134, ll. 16.

The jury found Dennis guilty of armed robbery. App. 195, ll. 19 – App. 196, ll. 12. The judge sentenced Dennis to twenty-three years and to pay restitution in the amount of \$3742 to Robinson. App.204, ll. 14 – App. 205, ll. 5.

At his PCR hearing, Dennis testified that he did not receive fair representation by his trial counsel. App. 239, ll. 13 – 19. The state gave him a plea offer of ten years non-violent, but he did not know what that meant. When he asked his attorney, she told him it was ten years. He later learned after his trial that he would have served only about four and one-half years on the ten years non-violent , but his attorney did not explain that to him although he asked the questions. His attorney did not want to explain any of it. If he had known that he would have served only about half of the ten years, he would have taken the plea offer. App. 235, ll. 16 – App. 236, ll. 11.

Trial counsel testified at the PCR hearing that Dennis had a trafficking crack charge as well as distribution of marijuana charge and an accompanying proximity charge. The plea offer was to plead to common-law robbery and the two marijuana charges for a recommended ten year sentence and a dismissal of the trafficking charge. App. 278, ll. 1 – 11.

Counsel conveyed the offer to Dennis. Then she stated:

I do not tell my clients how much time they will have to serve on a charge because I don't work for the Department of Corrections and I don't calculate time. I can only tell them what the sentence that is being recommended is.

App. 278, ll. 14 – App. 279, ll. 1.

Renaldo Deon Robinson, the victim of the armed robbery, testified at the PCR hearing on behalf of Dennis. He Dennis did not get a fair shake because the twenty-three years was too harsh. App. 266, ll. 19 – App. 267, ll. 24.

On cross-examination, Robinson admitted that he did not know who stole the shoes from the back of his car. He knew that Dennis was one of the co-defendants but he just believed his sentence was too heavy. App. 268, ll. 1 – App. 269, ll. 25.

The PCR judge asked what the sentence of the co-defendants was, and was told they each received ten years on guilty pleas. The judge stated that he understood the concern with the sentence. He also was concerned about Dennis' phone call where he called in and said he was scared, but was not told to be at the trial. App. 303, ll. 9 – App. 305, ll. 20.

The PCR judge ruled that he found trial counsel's testimony to be credible, but found Dennis' testimony to not be credible concerning this issue. The judge held that Dennis failed to meet his burden of proof that counsel failed to advise him of the plea offer. The order provided that trial counsel advised Dennis on the terms and applicable punishment of the guilty plea offer. App. 318.

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 conveying to Dennis the approximate percentage he was estimated to serve but explaining this was just an estimate as there were many variables. Whether a sentence requires 85% incarceration or 60% incarceration is a variable that can be a deciding factor in whether a person should plead guilty or go to trial. This is part of the sentence that needed to be explained along with the number of years. The PCR judge erred in holding that trial counsel advised Dennis on the applicable punishment because he was not appropriately advised. This was prejudicial to Dennis because he said he would have taken the plea offer if he had known it would not be ten years. There is a significant difference in serving 85% of twenty-three years and half of ten years.

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,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County
J. Cordell Maddox, Jr., Circuit Court Judge

ADARIUS Q. DENNIS,

PETITIONER,

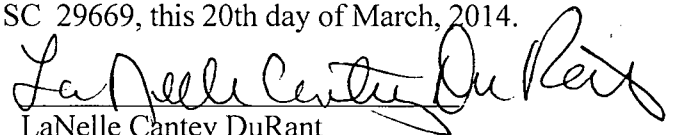
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


CERTIFICATE OF SERVICE

I certify that a true copy of the 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 Mr. Adarius Q. Dennis #336620, Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 20th day of March, 2014.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of March, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2013.