

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

 ORIGINAL

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APR 23 2012

S.C. Supreme Court

PHILLIP ANTONIO BYRD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

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 counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly?

STATEMENT

In October 2006, the Greenville County Grand Jury indicted Phillip Antonio Byrd on the charges of trafficking crack cocaine, assault with intent to kill (AWIK), and assault and battery with intent to kill (ABWIK). In September 2007, the Greenville County Grand Jury indicted Byrd for the unlawful carrying of a pistol. In December 2007, the Greenville County Grand Jury indicted Byrd for the possession of a pistol by a person convicted of a violent crime. In February 2009, the Greenville County Grand Jury indicted Byrd for ABIK, possession of a weapon during the commission of a violent crime, and the possession of a pistol by a person convicted of a violent crime. He was represented by E.P. "Bill" Godfrey, and the state was represented by Alex R. Stalvey. On June 18, 2009, Byrd appeared before the Honorable W. Jeffrey Young and entered a guilty plea to trafficking crack cocaine second offense for which he received a twenty-five year sentence; AWIK for which he received ten years; two counts of ABWIK for which he received twenty years for each; unlawful carrying of a pistol for which he received one year, and two counts of possession of a pistol by a person convicted of a violent crime.¹ All sentences ran concurrently. App. 94; App. 27, ll. 13 – 25; App. 28, ll. 1 – 21. Byrd did not appeal his convictions or sentences.

On April 13, 2010, Byrd filed an application for post-conviction relief (PCR). The state filed a return on August 20, 2010. an evidentiary hearing was held on May 11, 2011 before the Honorable Edward Welmaker. Byrd was represented by Elizabeth Wiygul, and the state was represented by Karen C. Ratigan. On July 8, 2011, Judge Welmaker issued an order denying Byrd's PCR and dismissing it with prejudice. Byrd's attorney filed a notice of appeal. This petition follows.

¹ The possession of a weapon during the commission of a violent crime was *nol prossed* as well as approximately twenty other indictments.

ARGUMENT

The PCR court erred in failing to find counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly.

Phillip Byrd was charged with crimes from five different incidents. App. 9, ll. 8 – 25. On July 21, 2008, a shooting occurred at Club Rolex in Greenville. Two people were shot. One of them identified Byrd as the shooter. Byrd was arrested two weeks later and was carrying a pistol unlawfully at the time. He was also charged with ABWIK. App. 9, ll. 8 – 21.

The second incident occurred at Club Laroka in Greenville on June 12, 2006. Byrd and two co-defendants fired shots from a car as they were leaving due to a dispute inside the club earlier. Two people were shot. One of the co-defendants identified Byrd as a shooter. Byrd was charged with AWIK, and ABWIK. App. 9, ll. 22 – 25; App. 10, ll. 1 – 9.

On August 10, 2006, Byrd was stopped for a traffic violation, and fled from the scene. He threw items down as he ran. The items were recovered and proved to be 17.28 grams of crack cocaine and 10.86 grams of marijuana. He was charged trafficking crack cocaine. App. 10, ll. 10 – 24.

The fourth incident occurred on September 22, 2007 where Byrd was charged with the unlawful possession of a pistol by a person convicted of a violent crime after a gun was found inside his car when he was stopped for a noise violation. App. 10, ll. 25; App. 11, ll. 1 – 8.

The fifth incident occurred on January 28, 2007, when Byrd was charged with the unlawful carrying of a pistol after a security guard became suspicious when he saw Byrd and two co-defendants sitting in a car outside of Club Matrix. A gun was found under Byrd's seat. App. 11, ll. 9 – 17.

The state recommended a sentence of fifteen years with all sentences running concurrently. The judge told Byrd and his counsel that he probably would not accept the recommendation. The judge said he told them that in a pre-trial conference. App. 17, ll. 1 – 14.

When the judge asked Byrd if he needed more time to speak to his attorney, Byrd was silent. Then when the judge asked him if wanted to talk to his attorney a little longer, Byrd said yes. The court took a break while Byrd and his defense counsel talked. When they returned on the record, Byrd's counsel said he wanted to proceed with the guilty plea. App. 18, ll. 1 – 25.

The judge did not accept the state's recommendation and sentenced Byrd to twenty-five years. App. 19, ll 1 – 8.; App. 27, ll. 13 – 25; App. 28, ll. 1 – 21.

At his PCR hearing, Byrd said his plea counsel, whom he retained, was ineffective because he had wanted to go to trial, and his attorney was not ready for trial. If his attorney had been ready , Byrd would not have pled guilty. App. 47, ll. 5 – 25; App.51,ll. 15 – 25. His attorney did not look for the alibi witnesses that Byrd gave him early on. App. 47, ll. 22 – 25; App. 48, 1 – 13.

Byrd said his plea counsel did not investigate the case thoroughly because a witness from the ABWIK incident identified a light skinned black male. His co-defendant, Stephen Ladson did not mention Byrd in his two statements. App. 54, ll. 7 – 25; App. 48, ll. 14 – 25; App. 80 – 82.

Plea counsel testified at the PCR hearing that he did not look for the alibi witnesses because the state did not want to try that case but wanted only to try the drug trafficking case which Byrd admitted he did. App. 63, ll. 16 – 25; App. 64, ll. 1 – 6, App. 66, ll. 1 – 17. He admitted that Byrd told him he wanted to appeal these convictions. However, he told Byrd that Rule 203, SCACR required that he have an appealable issue and plea counsel did not believe there was one. App. 86; App. 68, ll. 1 – 21.

The PCR judge ruled that plea counsel's testimony was credible while he found Byrd's testimony not credible. App. 97. The judge ruled that Byrd did not meet his burden of proof in proving that plea counsel did not investigate his case. App. 97. The judge ruled that Byrd did not meet his burden of proof that he needed an appeal. App. 99. The judge ruled that Byrd was not prejudiced by counsel's representation. App. 100.

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).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), 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).

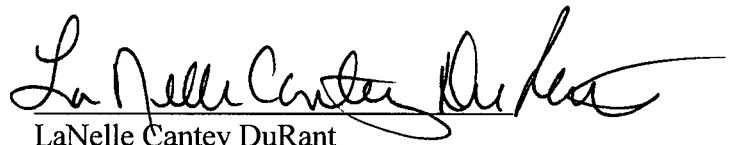
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709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

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that a criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. For purposes of the claim of ineffective assistance, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

CONCLUSION

Based on the above, certiorari should be granted and the order of the PCR court reversed and the case remanded

Respectfully submitted

A handwritten signature in black ink, reading "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 23rd day of April, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

PHILLIP ANTONIO BYRD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Phillip Antonio Byrd states.

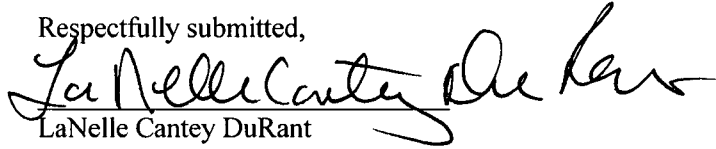
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner

2 She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 11, 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 Phillip Antonio Byrd.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 23rd day of April, 2012

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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 and Phillip Antonio Byrd, #281812, at Lee Correctional Institution this 23rd day of April, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of April, 2012


Notary Public for South Carolina

(L.S.)

My Commission Expires: December 4, 2017.