

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Roger M. Young, Circuit Court Judge

SYLVESTER SCOTT,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

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ATTORNEY FOR RESPONDENT

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QUESTION PRESENTED

1. Did the PCR court err in finding that plea counsel was ineffective for failing to contact a potential alibi witness where counsel relied on Respondent's family to provide contact information for the witness and Respondent's family failed to do so?
2. Did the PCR court err in finding that plea counsel failed to properly investigate and prepare for trial?
3. Did the PCR court err in finding that plea counsel coerced Respondent to plead guilty?
4. Did the PCR court err in finding that plea counsel was ineffective for failing to obtain the cell phone store records, which would have supported his alibi, where counsel was not appointed to represent Respondent until two months after the incident and the cell phone store only kept receipts for two months?

STATEMENT OF THE CASE

Respondent adopts petitioner's statement of the case. Respondent files this Return to petitioner's appeal.

ARGUMENT

I.

The PCR court was correct in finding that plea counsel was ineffective for failing to contact a potential alibi witness where counsel relied on Respondent's family to provide contact information for the witness and Respondent's family failed to do so.

Sylvester Scott was charged with three counts of entering a financial institution with intent to steal. The first incident occurred on March 18, 2009 at the Tidelands Bank on Orleans Road in Charleston; the second one occurred April 2, 2009 at the Heritage Trust Bank on Sam Rittenberg Boulevard in Charleston. The third one occurred on April 15, 2009 at the Ameris Bank on the Savannah Highway in Charleston. App. 141. Scott pled guilty on March 16, 2010 to the first one which occurred on March 18, 2009 at the Tidelands Bank. As a result of his guilty plea, the other two charges were dismissed after the guilty plea. App. 1; App. 2; App. 3; App. 4; App. 143.

The main evidence against Scott was DNA found on a wig and beard found behind the Tidelands Bank which matched Scott's DNA. App. 143. The witnesses reported that the robber wore a dreadlocks wig and a fake beard. App. 141. No evidence was developed connecting Scott to the Heritage bank robbery, and the only evidence against him for the Ameris Bank robbery was the uncertain identification by witnesses of a photo lineup. App. 143; App. 101, ll. 1 – 25; App. 102, ll. 1 – 25; App. 103, ll. 1 – 25; App. 104, ll. 1 – 2.

Scott testified at his PCR hearing that he had an alibi for the March 18, 2009 robbery at the Tidelands Bank, and gave his attorney the name of an alibi witness, Michael Castain.. App. 76, ll. 14 – 25; App. 77, ll. 1 – 23. Scott said it was his birthday, and he smoked “pot” with a friend in the woods near Tidelands Bank. This friend had a wig and beard that he was going to use to shoplift,

and that may have been how Scott's DNA was on those articles. App. 76, ll. Ll. 1 – 7; App. 77, ll. 12 – 18; App. 73, ll. 15 – 25; app. 74, ll. 1 – 12.

Scott then went downtown and was on Meeting Street getting a haircut and buying a cell phone at the Cricket phone store at the time of the Tideland robbery which occurred at 10:50 A. M. His friend Michael Castain, could verify this as they talked at that time. App. 76, ll. 1- 25; App. 77, ll. 1 – 25; App. 78, ll. 1 – 25; App. 141.

Mr. Grimes, plea counsel for Scott, testified at the PCR hearing that Scott did give him the name of Michael Castain as an alibi witness. However, Scott told him that Scott's brother could give counsel the contact information for Castain. App. 95, ll. 1 – 25.

Counsel said he called the brother a "couple of times" and either left a message or "wasn't able to leave a message." App. 96, ll. 1 – 4. Counsel admitted that he did not go forward on the alibi defense because he had "done no real investigation." He relied on Scott's family to provide the alibi information which they did not do. App. 99, ll. 7 – 22.

Michael Castain testified at the PCR hearing that he grew up with Scott, but that they were not close friends. They "respected" each other. App. 90, ll. 1 – 25. Castain verified that he saw and talked with Scott on the morning of March 18, 2009 at the barber shop. They then talked at the bus stop until Castain caught the bus at 11:15 to go to work. Castain said no attorney ever talked to him about this incident until Scott's PCR counsel called him. App. 90, ll. 19 – 25; App. 91, ll. 1 – 25; App. 92, ll. 1 – 25.

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); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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).

In Grier v. State, 299 S.C. 321, 384 S.E.2d 722 (1989), the Supreme Court found counsel ineffective for failing to call an alibi witness. In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court ruled that the defendant's attorney was ineffective for failing to adequately prepare for trial so as to be able to call key witnesses. The Court wrote. Citing Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 597 (2007), that a criminal defense attorney has a duty to perform a reasonable investigation, including at a minimum, the duty to interview potential witnesses, and to make an independent investigation of the facts and circumstances of the case.

Scott's plea counsel was ineffective by his own words. He needed to make his own independent investigation of the facts, and not rely on Scott's family. Scott's family was not acting

as Scott's attorney and there was no evidence they were trained in the law. It was the attorney's responsibility to defend Scott and develop defenses.¹ App. 96, ll. 1 – 4.

¹ The transcript did not indicate that Scott's brother "failed" to return the call because there was no clear evidence that the brother ever received any message from counsel. App. 96, ll. 1 -4.

ARGUMENT

II.

The PCR court was correct in finding that plea counsel failed to properly investigate and prepare for trial.

Scott testified at the PCR hearing that his plea counsel was ineffective for not investigating his case and being prepared for trial. Scott wrote to the chief Public Defender, Ashley Pennington, and asked for a new attorney as his assigned counsel was not investigating his case and he had no confidence in his counsel. Scott wrote that his position had always been to not plead guilty, however, his attorney was trying to get him to plead guilty. App.77, ll. 12 – 25; App. 78, ll. 1 – 25; App. 79, ll. 1 – 25; App. 80, ll. 1 – 25. His request for new counsel was not granted. App. 80, ll. 1 – 3.

Plea counsel testified that he did not any real investigation into Scott's case because he thought the case was "going federal." App. 99, ll. 13 – 19; app. 95, ll. 13 – 25; App. 96, ll. 1 – 25; App. 97, ll. 1 – 25. He did go to the wooded area where the wig and beard were found, and he "thinks" he talked to one witness, Lorraine Wilson, who was not a strong witness for Scott. He also subpoenaed bank customers who gave varying descriptions. App. 96, ll. 1 – 25; App. 97, ll. 1 – 13. App. 98, ll. 1 - 25 ; App. 99, ll. 1 – 25.

Plea counsel testified that he asked his investigator to go to the cell phone store to check if Scott was there and purchased a cell phone during the time of the Tideland robbery. His investigator emailed counsel that the store had boxes of records, and "it would be hard for him to go through those records." Counsel admitted this investigation was probably not performed in a timely manner. App. 97, ll. 1 – 13.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court ruled that the defendant's attorney was ineffective for failing to adequately prepare for trial so as to be able to call key witnesses. The Court wrote. Citing Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 597 (2007), that a criminal defense attorney has a duty to perform a reasonable investigation, including at a minimum, the duty to interview potential witnesses, and to make an independent investigation of the facts and circumstances of the case.

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Counsel by his own admission did not investigate Scott's case, and therefore provided ineffective assistance of counsel.

ARGUMENT

III.

The PCR court was correct in finding that plea counsel coerced Respondent to plead guilty.

Scott testified at his PCR hearing that he did not want to plead guilty and told the Chief Public Defender Pennington that in his letter to him asking for a new attorney. App. 79, ll. 1 – 25; App. 125. He said he pled guilty because he felt trapped and that he had no way out. He felt he was forced to plead guilty because his attorney told him he had no defenses. His attorney advised him to plead guilty. App. 80, ll. 4 – 14; App. 83, ll. 1 – 25; App. 81, ll. 21 – 25.

When he went to court, he thought he was coming to pick a jury trial. App. 81, ll. 1 – 20; App. 80, ll. 12 – 14. He would not have pled guilty if he had known that the witness statements did not positively identify him, or if he had known that his attorney was not going to ask for the five to seven year sentence as he had told Scott he would do. He said he wanted a new trial. App. 83, ll. 22 – 25; App. 84, ll. 1 – 25.

Scott said he apologized to his family at the plea hearing because he had let them down due to his heroin addiction. He apologized to the court because his attorney told him it would help with sentencing if he were accountable. App. 86, ll. 10 – 20; App. 87, ll. 10 – 19. Scott pled guilty involuntarily because he was not aware of evidence and due to the lack of investigation. App. 88, ll. 1 – 25.

Plea counsel testified that Scott was reluctant to plead guilty. App. 109, ll. 18 – 25; App. 110, ll. 1 – 21.

The Petitioner relied on the guilty plea transcript to show that Scott's plea was voluntary. Petition for Writ of Certiorari, p. 7. However, this reliance is in error and does not address the

issues of Scott feeling trapped and the fact that his admittedly unprepared attorney told him there were no defenses.

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); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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).

The defendant has the authority to make certain fundamental decisions about his case after thorough consultation and advisement with counsel. Alvord v. Wainwright, 469 U.S. 956 (1984).

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).

Scott did not have sufficient information concerning the evidence against him due to the lack of investigation to enter a guilty plea; therefore his guilty plea was not voluntarily and knowingly made.

The PCR judge wrote that the testimony of Castine, the alibi witness, at the PCR hearing was credible and corroborated Scott’s testimony that he was purchasing a cell phone at the Cricket Store when the Tidelands Bank was being robbed. And the judge wrote that the cell phone records obtained by Scott’s PCR counsel indicated that Scott’s cell phone service started the date of the Tidelands robbery which further corroborated Scott’s alibi defense. App. 149.

In Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984), the Supreme Court held that it was error for the trial judge to consider that he was bound by the extent of the inquiries made by the judge at the time of the guilty plea. The Court’s review is limited to the “any evidence” rule to support the PCR judge’s ruling. Cherry v. State, 300 S.C. 117, 386 S.E.2d 624 (1989).

ARGUMENT

IV.

The PCR court was correct in finding that plea counsel was ineffective for failing to obtain the cell phone store records where counsel was not appointed to represent Respondent until two months after the incident and the cell phone store only kept receipts for two months.

Plea counsel admitted that if there were a cell phone contract showing a phone activated by Scott on March 18, 2009 around 10:50 when the Tideland Bank was being robbed, that would be important evidence for Scott. App. 106, ll. 24 – 25; App. 107, ll. 1 – 12.

The Petitioner argued that the cell phone store only kept receipts for two months and therefore could not be obtained. The Petitioner mischaracterized the transcript. The email plea counsel's investigator sent to him regarding the investigation to obtain the cell phone records indicated that the person at the Cricket Communications said he was "doubtful" he could obtain the records if dated over a year. App. 140. Plea counsel admitted that it was over a year before he even considered the issue of obtaining the Cricket cell phone receipts. App. 107, ll. 7 – 25. Counsel admitted that he made no effort to follow up and try to obtain the records after learning it would be difficult after a year. App. 12 – 23.

When asked if it would have been difficult for him to obtain the cell phone records if he were appointed two months after the robbery, and the store only kept the records two months, counsel replied:

I think they keep them (records) more than two months. In fact, if I started right on May 17th, I probably should have been able to get them, no problem.

App. 113, ll. 18 – 24.

In his order, the PCR judge wrote that Scott's PCR counsel stated at the PCR hearing that he had issued subpoenas to Cricket Communication for copies of Scott's cell phone records, but the store manager said they were not available due to change in ownership. However, three days after the PCR hearing on January 27, 2011, PCR counsel filed an affidavit with the court with the cell phone document entitled "MDN Search Results" attached which indicated that Scott's cell phone service was activated on March 18, 2009. The PCR judge held that this information tended to corroborate Scott's alibi and Castine's testimony. App. 147.

Plea counsel could have obtained the same documents if he had tried to document Scott's alibi.

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); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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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).

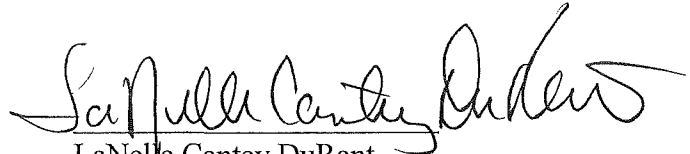
In Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994), the Supreme Court held that trial counsel was ineffective if his failure to present evidence alters the probable outcome of the trial.

Scott was prejudiced by his plea counsel not trying to obtain Scott's cell phone records. There is a reasonable probability that Scott would have gone to trial on the evidence supporting his alibi defense.

CONCLUSION

The Court is asked to deny the writ of certiorari and affirm the order of the PCR court granting Respondent's PCR application and the case should be remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT

This 19th day of September, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Roger M. Young, Circuit Court Judge

SYLVESTER SCOTT,

RESPONDENT,

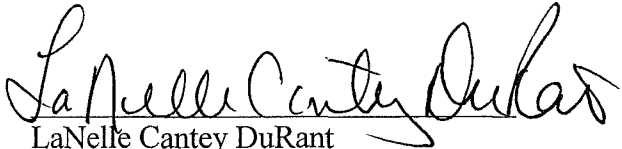
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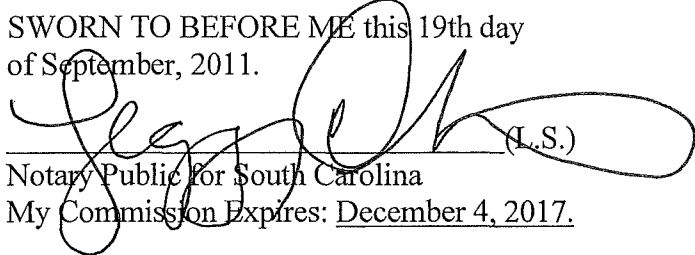
CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Matthew J. Friedman, Esquire, and Sylvester Scott, this 19th day of September, 2011.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 19th day
of September, 2011.


(L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017.