2010-178807

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

BRAXTON J. BELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

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ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR Court err in failing to find counsel ineffective for not investigating Petitioner's case by talking to witnesses who knew that the victim Gambrell, had been the aggressor in previous altercations with petitioner where petitioner was claiming self-defense and was facing a possible life sentence if convicted?

STATEMENT

In April 2005, the Anderson County Grand Jury indicted Braxton Bell on the charges of murder and possession of a firearm during the commission of a violent crime. On July 18, 2005, Bell proceeded to trial before the Honorable James C. Williams, Jr., and a jury. Bell was represented by Charles W. Whiten, Jr., and the state was represented by Assistant Solicitor Scott McElhannon. The jury returned a verdict of guilty on the lesser included charge of voluntary manslaughter and guilty on the gun charge. Judge Williams sentenced Bell to the maximum of thirty years on the voluntary manslaughter, and five years on the gun charge to run consecutively to the thirty year sentence. App. 541. Bell's attorney filed a notice of appeal, and an appeal was perfected for Bell. The South Carolina Court of Appeals affirmed Bell's convictions and sentences on June 4, 2007. State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. filed June 4, 2007).

On December 2, 2008, Bell filed an application for post-conviction relief (PCR). The state filed a return on December 30, 2008. An evidentiary hearing was held on June 16, 2010 before the Honorable R. Lawton McIntosh. Bell was represented by Charles L. Anderson, and the state was represented by Assistant Attorney General A. West Lee. On November 10, 2010, Judge McIntosh issued an order denying Bell's PCR application and dismissing it with prejudice. Bell's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR Court erred in failing to find counsel ineffective for not investigating Petitioner's case by talking to witnesses who knew that the victim Gambrell, had been the aggressor in previous altercations with petitioner where petitioner was claiming self-defense and was facing a possible life sentence if convicted.

Petitioner Bell and Jonathan Gambrell were friends when they were growing up in the same neighborhood. App. 611; App. 612, ll. 1 – 6. Bell's mother testified at the PCR hearing that the relationship changed when Gambrell became upset over a book bag that he had given to Bell with marijuana in it. Bell's mother got rid of the bag, but Gambrell blamed Bell. App. 612, ll. 7 – 25. Gambrell, who was bigger than bell, would harass Bell and became aggressive towards him. App. 613.

Bell testified at the PCR hearing that he and Gambrell had fought in the past. App. 625, ll. 1 – 8. Bell said he was afraid of Gambrell. App. 630. Although Bell had moved from that neighborhood, he returned on the night of the incident to attend a party. App. 619; App. 620. He was walking down the street when he saw Gambrell who told Bell he was "going to get him." Bell told Gambrell that he was not looking for any trouble. App. 620, ll. 16 – 24.

When Bell started to leave, Gambrell pushed him and the altercation started. App. 620. According to Bell, the two of them "got wrapped up" as they were fighting and Bell could not breathe. Bell pulled a gun, which he was carrying for protection, out of his pocket and shot Gambrell in the back to make Gambrell let him go. Gambrell was reaching for his pocket so Bell shot him again. App. 629, ll. 18 – 25; App. 619.

Bell admitted that he shot Gambrell but said it was in self-defense as he felt threatened. App. 618; App. 619, ll. 15 – 20.

Bell said his trial attorney was ineffective because he did not properly investigate his case because the attorney did not talk to the witnesses Bell had given him who could testify about the prior bad relationship. App. 622; App. 623.; App. 624. He did not call them as witnesses although most of them were at the trial. App. 625. The attorney did not call a prime witness, Adrian, who was present at a fight between Gambrell and Bell. App. 624, ll. 19 – 25; App. 625, ll. 1 – 14.

Bell confirmed that he wanted a new trial because he believed that his trial attorney did not present sufficient evidence for self- defense. App. 629; App. 625.

Charles Whiten, the trial attorney, testified that he did his own investigation in murder cases so he did not hire an investigator for Bell's case. App. 568. He confirmed there was a history of fighting between Gambrell and Bell which was initiated by Gambrell. Bell tried to avoid Gambrell. App. 569. On the night of the incident, there were no other witnesses to the actual shooting other than Bell. He believed this was a case of self-defense. App. 570; App. 571; App. 577.

Mr. Whiten admitted that Bell did give him the names of people who knew about this ongoing feud between Gambrell and Bell. App. 573. He was not sure whether he talked to them or not. He was not sure all of the witnesses would say that Gambrell brought on the fights. App. 574; App. 575. He could not remember if he called any witnesses to testify about the prior bad relationship. App. 578. The PCR attorney reminded Mr. Whiten that he had a list of witnesses for the defense, but did not call any of them. Mr. Whiten said he did not call them to testify but he could not remember why he did not. App. 579; App. 580; App. 581; App. 596; App. 17.

On re-direct examination, Mr. Whiten claimed he then remembered that he asked all of the witnesses on his list to be at the trial. He talked to them briefly before trial. He would not have called them to testify because they were not clear about the past relationship between Gambrell and Bell. He did not want to "water down' Bell's testimony about the prior relationship, and he felt that Bell did a good job testifying about Gambrell being the aggressor. App. 633, ll. 13 – 25; App. 634, ll. 1 – 19.

Levon Gray testified at the PCR hearing that he was a neighbor of Bell's when for most of his life. App. 602. He remembered that Bell and Gambrell used to "hang together a little bit."They would be friends, and then fight. He saw one of the fights. App. 603. He remembered that Gambrell was a "good bit bigger" than Bell, and that Bell was a little scared of Gambrell. App. 604. He said the trial attorney never spoke with him, and he was downstairs in the court house during the trial as he was being incarcerated also. App. 604; App. 605.

D'Sean Bell testified at the PCR hearing that he was close cousin to Bell as they lived in the same complex. App. 607. He knew that Gambrell and Bell used to "get into it." Gambrell was the aggressor in most of them. App. 607; App. 608.

He said that Bell's trial attorney never interviewed him, and he was at the trial. App. 610.

The judge ruled that the trial attorney interviewed some witnesses, and did not call them to testify as part of a valid trial strategy. App. 649. The judge ruled that counsel did some pretrial investigation as he did interview some witnesses. App. 648; App. 649. He found that Bell did not meet his burden of proof nor resulting prejudice. App. 649.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104

S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992). Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court ruled that a criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation. The Court held that for purposes of ineffective assistance of counsel, a reasonable investigation, at a minimum, consists of interviewing potential witnesses, and making an independent investigation of the facts and circumstances of the case. Defense counsel was found ineffective in that case.

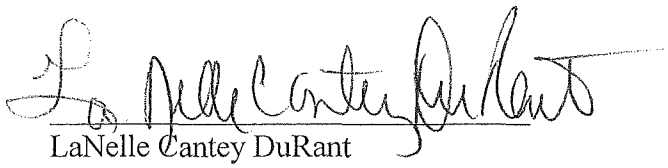
In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court found Lounds' trial attorney ineffective for not adequately preparing for trial, and not completing a reasonable investigation. Lounds' attorney spoke briefly with two witnesses who could testify about the prior relationship between Lounds and the victim, but did not call them to testify. Bell's defense counsel was ineffective for not completing a reasonable investigation.

Bell was prejudiced by counsel failing to investigate because the three witnesses would have presented testimony providing a defense to Bell and corroborating Bell's testimony. The day of trial was too late to plan.

CONCLUSION

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

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2011.

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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 Kaelon E. May, and Braxton J. Bell, Esquire this 31st day of May, 2011.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 31st day of May, 2011.

(L.S.)

Notary Public for South Carolina
My Commission Expires: December 4, 2017.