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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

MARK ELLIS BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001024

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not pursuing a hearing on the suppression motion he had filed to suppress the videotape of Petitioner having sexual intercourse with a child which was the only real evidence the state had?

STATEMENT

In October 2004, Mark E. Brown was indicted by the Richland County Grand Jury on criminal sexual conduct with a minor first degree (CSC); CSC with a minor second degree; and two counts of sexual exploitation of a minor first degree. In November 2004, Brown was indicted by the Richland County Grand Jury on eight counts of CSC with a minor first degree and three counts of sexual exploitation of a minor first degree. On February 6, 2006, Brown appeared before the Honorable James R. Barber, III, and entered a guilty plea to all charges as indicted. Brown was represented by S. Jahue Moore, and the state was represented by Kathryn Luck Campbell and Dayton Riddle. Judge Barber sentenced Brown to a total of forty-two years incarceration. App. 61, ll. 10 – App. 65, ll. 3. Brown did not appeal his convictions nor sentences.

On February 21, 2007, Brown filed an application for post-conviction relief (PCR). The state filed a return on June 5, 2007. On June 26, 2008, an evidentiary hearing was held before the Honorable William P. Keesley. Brown was represented by Bryan Jeffries, and the state was represented by Brian Petrano. On September 12, 2009, Judge Keesley issued an order denying Brown's PCR and dismissing it with prejudice.

A notice of appeal was filed with the South Carolina Supreme Court. Brown then submitted a *pro se* letter to the Supreme Court alleging a conflict of interest with his appointed appellate counsel because his wife, who was his co-defendant, had been represented by the same appellate counsel. On June 24, 2009, the Supreme Court remanded Brown's case to the circuit court for a hearing on the alleged conflict.

A hearing was held on January 14, 2010 before the Honorable L. Casey Manning who ordered that Brown be granted a *de novo* PCR hearing due to the alleged conflict. Judge Keesley

then issued an order on February 9, 2010 deferring to Judge Manning's ruling and a *de novo* hearing was granted. Supp. App. 11.

On January 18, 2013, an evidentiary PCR hearing was held before the Honorable G. Thomas Cooper, Jr. Brown was represented by Alex Postic, and the state was represented by Rob A. Corney. On March 8, 2013, Judge Cooper issued an order denying Brown's PCR and dismissing it with prejudice. App. 236 – App. 250. Brown's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not pursuing a hearing on the suppression motion he had filed to suppress the videotape of Petitioner having sexual intercourse with a child which was the only real evidence the state had.

On July 21, 2004, Jackie Brown, the wife of Mark E. Brown, called 911 from her car claiming she had been the victim of an attempted carjacking and kidnapping. At the time, there was a person out of Orangeburg wanted for killing a police officer and who had committed a carjacking in Columbia the day before. There was much media coverage about that incident. The description Jackie Brown provided was similar to that of the wanted person. Officers found her car in the middle of the road but there was no sign of anyone in the area. App. 33, ll. 9 – App. 34, ll. 21.

As the investigation progressed, some of Jackie's story did not make sense. Officers saw her pinch her cheek while in the patrol car, but she claimed the attacker had assaulted her. Officers became suspicious that she might be filing a false report. Mark Brown was at police headquarters by this time with his wife. Police asked them to search the house as they were looking for the carjacker and any evidence that had to do with the media coverage which would support her giving a false report. Jackie gave consent for the search of her home. App. 34, ll. 22 – App. 35, ll. 25.

During the search, the officers saw a VCR with a tape in it so they played the tape. What they saw on the tape was Mark brown having sex with a small child who was three years old. His wife was filming the incident. Numerous tapes and photographs were found in the house showing sexual activity between Brown and children. One was an eight year old who appeared to be incapacitated or drugged. The same three year old was involved as was Jackie's fourteen year old daughter who appeared drugged. Brown was charged with several counts of criminal sexual conduct (CSC) with a minor first degree and sexual exploitation with a minor. His wife, Jackie, was charged

with CSC with a minor and filing a false police report. App. 36, ll. 1 – App. 43, ll. 25; App. 32, ll. 1 – 24; App. 243.

At his PCR hearing, Brown testified that his trial attorney filed two motions to suppress the evidence of the videotape seized at his home because the search exceeded the scope of the consent. The search was related to the carjacking, and not to the charges Brown had. However, the motion was never argued. App. 161, ll. 1 – 23; App. 166, ll. 1 – App. 168, ll. 3. When Brown came to court that day of the plea, he was expecting to go to trial. However, his attorney told him his best bet was to plead guilty because the suppression motion was dead because the judge was going to admit the tape. Everything hinged on the suppression motion. App. 168, ll. 2 – App. 173, ll. 25.

Brown's grounds for ineffective assistance of his trial counsel included his attorney not using his wife's mental illness to build on his grounds for the suppression motion and her competency to consent to the search. Another ground was his attorney not challenging the seizure of the tape evidence during the search which was outside the scope App. 176, ll. 4 – App. 183, ll. 8.

Brown's trial attorney testified that when he saw the video, he knew there was no way to win this case if that video was admitted as evidence. The state had no other real evidence but the video. There were no plea offers from the state. App. 196, ll. 1 – 24; App. 198, ll. 1 – App. 202, ll. 3.

The video was "incredibly graphic." Trial attorney met with the trial judge in chambers with the solicitor as the judge wanted to discuss the suppression motion. The judge made it clear he was not granting the suppression motion. Trial counsel admitted that he could have made the suppression hearing motion, but he believed he would have lost. App. 203, ll. 1 – App. 214, ll. 14.

PCR counsel argued to the court that trial counsel was ineffective for his failure to pursue a suppression hearing and put that on the record and the conversation in the judge's chambers. App. 229, ll. 1 – 25.

The PCR judge ruled that trial counsel was not ineffective in his representation. The judge found counsel's testimony to be credible while finding Brown's testimony to not be credible. The judge wrote that trial counsel meticulously reviewed the facts concerning the search. Brown failed to present any evidence as to "why trial counsel's conclusion about their being 'zero chance' of suppression was in error." App. 245. The judge held that Brown failed to prove any resulting prejudice. App. 247. He denied the PCR. App. 250.

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

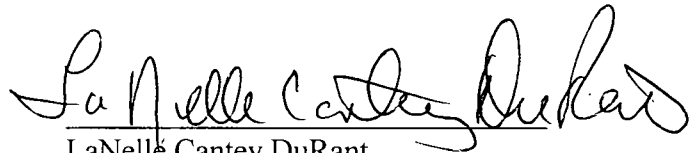
right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (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).

Trial counsel was ineffective for pursuing a suppression hearing in light of the fact that this was the only real evidence the state had. The children were drugged and did not remember the incidents. Brown could have appealed the denial of the suppression motion if there had been a hearing and a trial and then held to preserve the issue. Brown was prejudiced by not having had the suppression motion heard. The police were not looking for any evidence related to the sexual activity when they began the search.

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, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

MARK ELLIS BROWN,

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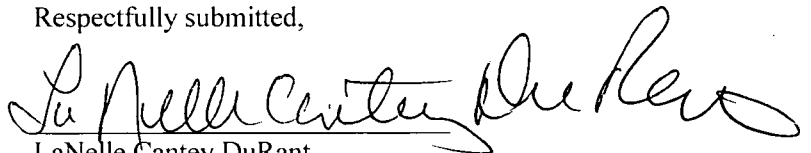
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Ellis Brown 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 January 14, 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 Mark Ellis Brown.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of April, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
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MARK ELLIS BROWN,

PETITIONER,

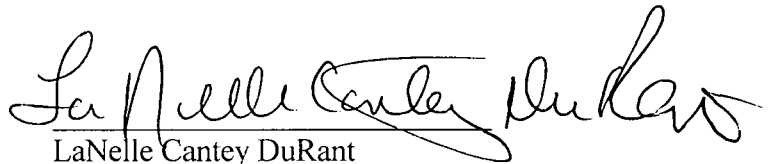
V.

STATE OF SOUTH CAROLINA,

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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 Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mark Ellis Brown, #313740, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 1st day of April, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of April, 2014.

Marie Hudson (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.