

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Roger L. Couch, Circuit Court Judge

RECEIVED

MAR 26 2013

S.C. Supreme Court

CLARENCE MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212783

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

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly?

STATEMENT

In March 2006, the Spartanburg County Grand Jury indicted Miller on the charges of burglary second degree and grand larceny (GL). In September 2006, the Grand Jury indicted Miller on two counts of burglary first degree and petty larceny. In April 2007, the Grand Jury indicted Miller on one count of burglary second degree. On March 27, 2008, Miller appeared before the Honorable J. Mark Hayes II and entered a guilty plea to all charges as indicted. Miller was represented by Joshua Schultz, and the state was represented by Robert Coler. On April 28, 2008, Miller appeared again before Judge Hayes for sentencing after the solicitor asked for a continuance to contact victims. Judge Hayes sentenced Miller to twenty years each on the two burglaries first degree; fifteen years on one burglary second degree; and ten years on the petty larceny. All of these sentences were to run concurrently. Judge Hayes then sentenced Miller to consecutive sentences of fifteen years on the second burglary second degree and ten years on the GL. Both of these sentences were suspended to time served and five years of probation. App.38, ll. 1 – App. 40, ll. 5.

Miller filed a notice of appeal which was perfected with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal on October 28, 2010. State v. Miller, Op. No. 2010-UP-467 (Ct. App. filed October 28, 2010).

On April 4, 2011, Miller filed an application for post-conviction relief (PCR). The state filed a return on March 6, 2012. An evidentiary hearing was held on June 13, 2012 before the Honorable Roger L. Couch. Miller was represented by Barry Bland, and the state was represented by Ashleigh R. Wilson. On July 31, 2012, Judge Hayes issued an order denying miller's PCR application, and dismissing it with prejudice. Miller's attorney filed a notice of appeal. This petition follows.

ARGUMENT

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

On March 27, 2008, Miller pled guilty to two counts of burglary first degree, two counts of burglary second degree, one count of grand larceny and one count of petty larceny. App. 5, ll 1 – 25. At the guilty plea, Miller told the court that he was taking psychotic medication. When the judge asked if Miller understood what was happening, Miller responded that he understood what the judge was saying but it sounded like the judge was echoing. Miller again said he had a mental problem. App. 9, ll. 1 – 22.

Miller's plea counsel told the court that Miller had two mental evaluations and no mental disorder was found. He was found to have learning difficulties. Plea counsel said one evaluation was completed by the Department of Mental Health and one by a private psychologist. Plea counsel said he still believed Miller had mental health issues. App. 12, ll. 17 – 25; App. 30, ll. 17 – App. 32, ll. 3.

The solicitor related the facts of each incident to the court. In the last incident, Miller allegedly broke into a home during the night while the couple was there. The husband subdued Miller and held him until the police arrived. App. 14, ll. 3 – 12.

At his PCR hearing, Miller testified that he had a history of mental health issues. App. 95, ll. 1 – App. 96, ll. 25. He had attempted suicide and took medication for bipolar symptoms. App. 97, ll. 1 – App. 98, ll. 25. He felt his plea counsel was ineffective because “the doctors should have come to evaluate him the day of the guilty plea because he was hearing voices then and his mind was twisted.” He told the plea court that he was hearing echoes and everyone should have been aware that things were not right. App. 106, ll. 5 – 23.

Miller said he did not comprehend everything and wanted to withdraw his plea. However, his counsel told him he was in front of one of the best judges.App. 105, ll. 15 – App.106, ll. 2. His plea counsel should have known from Miller’s comments at the beginning of the plea that he did not know what he was doing, and counsel should have withdrawn the plea. App.109, ll. 9 – App. 110, ll. 23.

Plea counsel testified that the main defense for Miller was mental incompetence. App. 131, ll. 8 – App. 132, ll. 13. Counsel admitted that the only thing he saw as far as any mental health issues on the day of the plea was Miller hearing echoes. App. 132, ll. 14 – 25. Counsel admitted he did not stop the plea at that point because he was not a mental health professional, and the professionals found Miller to be competent. He admitted that hearing echoes indicated that something was not right. App. 139, ll. 1 – 24.

The PCR judge ruled that Miller’s guilty plea was entered freely, voluntarily, and knowingly. Miller did not meet his burden of proof regarding ineffective assistance of counsel. App. 156. The judge ruled that plea counsel was not ineffective for not requesting a competency hearing prior to Miller’s guilty plea. Counsel had already had Miller evaluated twice, and he was found to be competent both times. App. 157.

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).

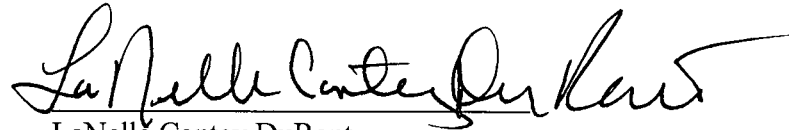
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709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

Based on Miller's comments during his guilty plea, it was clear that his plea was not knowingly and freely entered. It was clear there was a mental health concern, and plea counsel was ineffective for allowing the plea to go forward.

CONCLUSION

Based on the above, certiorari should be granted, the convictions and sentences 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 26th day of March, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
ROGER L. COUCH, CIRCUIT COURT JUDGE

CLARENCE MILLER,

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STATE OF SOUTH CAROLINA,

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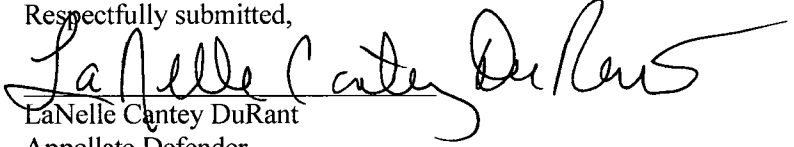
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Clarence Miller 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 June 13, 2012. 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 Clarence Miller

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of March, 2013

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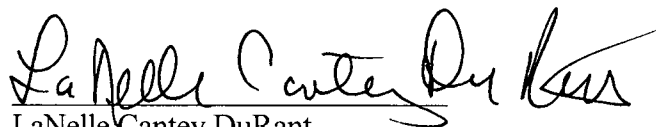
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CERTIFICATE OF SERVICE


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 Suzanne H. White, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Mr. Clarence Miller, #267397, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 26th day of March, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of March, 2013.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2013.