

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Deadra L. Jefferson, Circuit Court Judge

RECEIVED

JUN - 9 2014

S.C. Supreme Court

MICHAEL MAXWELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002544

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 PRESENTED2
STATEMENT3
ARGUMENT4
CONCLUSION7
PETITION TO BE RELIEVED AS COUNSEL.....8

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 because he pled guilty without having all of the discovery pursuant to Brady v. Maryland¹?

¹ Brady v. Maryland, 373 U.S. 83 (1963).

STATEMENT

In May 2008, the Berkeley County Grand Jury indicted Maxwell on the charges of murder and burglary first degree. On April 28, 2010, Maxwell appeared before the Honorable Kristi Lea Harrington to begin a jury trial. After the trial began, Maxwell entered a guilty plea to the charges as indicted. App. 1-3. He was represented by Leigh Hunter and Michele Forsythe. The state was represented by Dorie Biagianti and Ann Williams. Judge Harrington sentenced Maxwell to sixty years for the murder, and twenty-five years for the burglary first charge to run consecutively. App. 33. Maxwell's attorney filed a motion to reconsider the sentence. On July 8, 2010, Judge Harrington amended the sentences to run concurrently. App. 39-40. Maxwell did not appeal his convictions or sentences.

On September 14, 2010, Maxwell filed an application for post-conviction relief (PCR). The state filed a return on June 23, 2011. Maxwell filed an amended PCR application on January 9, 2012. On July 24, 2013, an evidentiary hearing was held before the Honorable Deadra L. Jefferson. Maxwell was represented by William L. Runyon, and the state was represented by Ashleigh R. Wilson. App. 56. On October 25, 2013, Judge Jefferson issued an order denying Maxwell's PCR application and dismissing it with prejudice. App. 102 – 115. Maxwell'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 because he pled guilty without having all of the discovery pursuant to Brady v. Maryland.

On November 11, 2007, Maxwell and a co-defendant, Adam Tarpley, entered the home of Christopher Teseniar who was sleeping in his bed. The time was about four-forty –five in the early morning. According to the co-defendant, who was going to testify for the state at Maxwell's trial, Maxwell shot Teseniar repeatedly in the face and body with a sawed off shotgun at close range. They discussed killing Teseniar in the weeks before the incident because Maxwell believed that Teseniar had stolen jewelry that belonged to Maxwell's mother who was deceased. App. 88, ll. 1 – 17; App. 91, ll. 1 – App. 92, ll. 20; App. 12, ll. 16 – App. 19, ll. 9.

At his guilty plea, Maxwell testified that he did not shoot the deceased, but that he was present when his –co-defendant, Adam Tarpley, shot Teseniar. Maxwell admitted to the plea judge that he knew Adam was going to kill Teseniar, but he did not stop him. App. 20, ll. 2 – App. 22, ll. 9.

At his PCR hearing, Maxwell testified that he had started a jury trial but terminated the trial when the solicitor gave new evidence to his trial attorney on the second day of trial after jury selection. The new evidence consisted of more statements accusing him of the crime. His attorney told him she had talked to the judge who said she would give him thirty years instead of two life sentences if he stopped the trial and pled guilty. He did plead guilty at that point thinking he would get thirty years. Instead, he received sixty years and twenty-five years to run consecutively. App. 59, ll. 24 – App. 65, ll. 14.

His attorney filed a motion asking the judge to reconsider the sentences. The judge then ran the sentences concurrently. App. 63, ll. 12 – 23.

Trial counsel, Ms. Forsythe, testified at the PCR hearing that she assisted Leigh Hunter as co-counsel in the trial of Maxwell because of her experience with murder trials. She confirmed that Ms. Hunter was now deceased. App. 69, ll. 14 – Ap. 70, ll. 24. To her knowledge, the state did not provide additional discovery to the defense after the trial began. After Maxwell understood the evidence the state had against him, he decided to plead guilty. There had been a plea offer of twenty years at one time but Maxwell rejected that offer . App. 71, ll. 3 – App. 73, ll. 23.

The solicitor who prosecuted the case testified at the PCR hearing that there were two proffer statements that were given to the defense about one month before trial. These were statements from the two co-defendants, Adam Tarpley and Thomas Knox. Tarpley was going to testify at the trial and say that Maxwell was the shooter. App. 88, ll. 6 – App. 92, ll. 20.

The PCR judge ruled that he found the testimony of trial counsel credible but found Maxwell's testimony to lack credibility. App. 111. The judge ruled that the state did not violate the discovery rule nor Brady. The judge found this allegation to be "wholly without merit." App. 113. The judge also wrote that that he found Maxwell's guilty plea to have been entered freely, voluntarily, knowingly, and intelligently. App. 111. The judge denied Maxwell's PCR application. App. 115.

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).

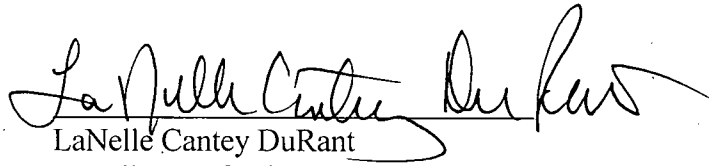
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (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/Plea counsel was ineffective for not insuring that Maxwell understood all of the evidence against him, and that his plea was knowingly and voluntarily entered. Maxwell needed to have all of the evidence against him prior to trial in order to decide whether to plead guilty or go to trial. He was prejudiced by not being able to do that. Therefore, his plea was not knowingly entered.

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 cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name and title.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 9h day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BERKELEY COUNTY
DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

MICHAEL MAXWELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

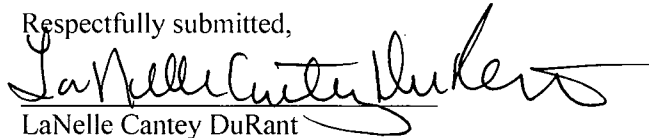
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Maxwell 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 July 24, 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 Michael Maxwell.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of June, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County
Deadra L. Jefferson, Circuit Court Judge

MICHAEL MAXWELL,

PETITIONER,

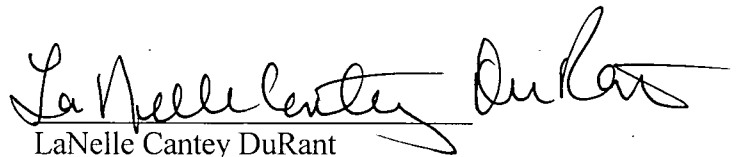
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

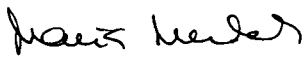
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Michael Maxwell, #340524, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 9th day of June, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of June, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.