

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

G. Edward Welmaker, Circuit Court Judge

RECEIVED

JUL - 8 2014

S.C. Supreme Court

TIMOTHY MICHAEL HOLLIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002335

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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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 because he pled guilty to felony DUI with death and leaving the scene of an accident although his blood alcohol was below the legal limit for DUI?

STATEMENT

In December 2011, the York County indicted Timothy Hollis on the charges of DUI felony causing death and leaving the scene of an accident with death. On February 27, 2012, Hollis appeared before the Honorable Robin B. Stilwell and entered a guilty plea to both charges as indicted. Hollis was represented by Michael Brown, and the state was represented by Kevin Brackett. App. 1-2. Judge Stilwell accepted the negotiated sentence and sentenced Hollis to fifteen years on each charge to run concurrently. App. 19, ll. 17 – 25. Hollis did not appeal his convictions or sentences.

On January 28, 2013, Hollis filed an application for post-conviction relief (PCR). The state filed a return on April 17, 2013. An evidentiary hearing was held on August 12, 2013 before the Honorable Edward G. Welmaker. Hollis was represented by Tommy A. Thomas, and the state was represented by J. Rutledge Johnson. App. 36. On September 30, 2013, Judge Welmaker filed an order denying Hollis' PCR application and dismissing it with prejudice. App. 79 – 85. Hollis' 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 to felony DUI with death and leaving the scene of an accident although his blood alcohol was below the legal limit for DUI.

On July 29, 2011, Hollis was on his way home about 6:30 in the evening in the city of Rock Hill. A man, Joe Lee McCullough, was riding a bicycle in the same lane with Hollis. Hollis's vehicle hit the bicycle from behind striking Mr. McCullough and throwing him from the bicycle. Hollis continued driving without stopping. A BOLO went out for Hollis based on descriptions from witnesses. Hollis was stopped approximately five miles from the scene of the incident. App. 7, ll. 12 – App. 8, ll. 25; App. 67, ll. 1 – 2.

Hollis acknowledged at the scene that he thought he had hit an animal, but then admitted that he hit a person. His vehicle suffered extensive damage as well. A blood alcohol test, administered about two hours after the incident, indicated Hollis had a blood alcohol of .06. A toxicology test showed that his blood also had the presence of Benadryl, Clonipin, and Valium. Joe Lee McCullough did not survive his injuries. App. 9, ll. 9 – App. 10, ll. 10; App. 76; App. 77.

At his guilty plea, he solicitor told the court that at the time of this incident, Hollis was on probation for various drug related offenses involving the distribution of controlled substances. App. 12, ll. 1 – 14. Hollis expressed his regrets to the family explaining that it was an accident. App. 18, ll. 15 – 21.

At his PCR hearing, Hollis testified that he was asking for a new trial because he made a mistake by pleading guilty. App. 39, ll. 1- App. 12; 53, ll. 7-19. He did not understand everything that was going on at his guilty plea as he was confused. His plea was voluntary but not knowing and

intelligently made. He was depressed after being in jail so he was put on the three medications of Xanax, Ambien, and Zoloft. He did stop the medications two days before the plea but still felt confused. He felt more clearheaded so wanted a new trial. App. 52, ll. 4 – App. 56, ll. 18. He felt rushed into taking the plea but his attorney said take the plea or they were going to trial. App. 47, ll. 1 – 18. Hollis said he was not guilty of the felony DUI and believed it could have been shown at trial that he was not guilty of that. Leaving the scene was a problem. App. 48, ll. 1 – 14; App. 56, ll. 4 – 16.

Plea counsel testified that he felt confident they could have won the felony DUI case as Hollis' blood alcohol was below the inference level for DUI since it was .06. However, the problem was that Hollis was located five miles from the scene of the accident. Each charge carried twenty-five years. App. 65, ll. 16 - App. 67, ll. 25. When asked if Hollis was nervous the day of the plea and if he understood what was going on, counsel replied: "I can't answer that... Maybe I should have paid closer attention." App. 68, ll.25 – App. 69, ll. 5. Counsel admitted that he strongly encouraged Hollis to plead guilty. App. 70, 12 – 15.

The PCR judge ruled that he found Hollis' testimony regarding plea counsel's ineffectiveness to be not credible while finding plea counsel's testimony to be credible. App. 83. The judge found that Hollis' guilty plea was knowingly, voluntarily and freely entered. The judge ruled that Hollis failed to demonstrate that he would have chosen to go to trial. App. 83. The judge found plea counsel was competent and diligent in his representation of Hollis. App. 82. The PCR judge ruled that Hollis failed to prove that plea counsel was ineffective, and failed to prove that he was prejudiced by counsel's performance. The judge denied the PCR application. App. 84.

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).

South Carolina Code Section 56-5-2933 provides that it is unlawful for a person to drive a motor vehicle in this state while his alcohol concentration is eight one-hundredths of one percent or more.

Hollis' alcohol concentration was below this amount at .06. Plea counsel was ineffective for not encouraging Hollis to go to trial. Although he left the scene of the accident, the jury could have believed Hollis when he said he thought he hit an animal. There was a reasonable probability that he would have been found not guilty of the felony DUI since his alcohol level was below the statutory requirement. Leaving the scene carried twenty-five years so his position would have been approximately the same as far as potential sentencing.

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, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a long, sweeping flourish extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

TIMOTHY MICHAEL HOLLIS,

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STATE OF SOUTH CAROLINA,

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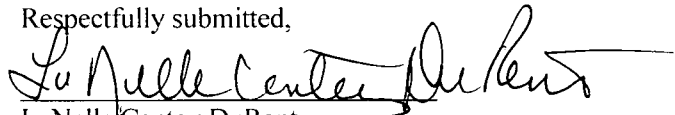
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Timothy Michael Hollis 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 August 12, 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 Timothy Michael Hollis.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of July, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

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TIMOTHY MICHAEL HOLLIS,

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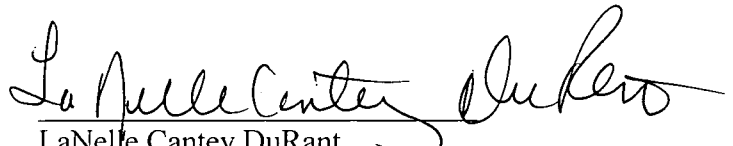
V.

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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Timothy Michael Hollis, #349955, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of July, 2014.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of July, 2014.

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