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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

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JUL 17 2014

G. Edward Welmaker, Circuit Court Judge **S.C. Supreme Court**

CURTIS RANDALL SWEATT, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002629

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 10

PETITION TO BE RELIEVED AS COUNSEL 11

ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not presenting evidence in mitigation of Petitioner Sweatt's mental health problems when he pled guilty to involuntary manslaughter and inflicting great bodily injury upon a child in the death of his three month old infant daughter?

STATEMENT

Curtis Sweatt Jr., was originally indicted for homicide by child abuse (2010-GS-01685) by York County Grand Jury, but this charge was dismissed as part of his plea agreement with the state. App. 3, ll. 22 – App. 4, ll. 2. On May 20, 2011, Sweatt appeared before the Honorable Paul Burch and entered guilty pleas to the charges of involuntary manslaughter and the infliction of great bodily injury to a child. Sweatt waived presentment to the grand jury on these charges. App. 3, ll. 1 – 21. Sweatt was represented by Leland Greeley, and the state was represented by Willie Thompson. App. 1. Judge Burch sentenced Petitioner Sweatt on the infliction of great bodily injury to a child charge to twenty years suspended to the service of sixteen years and four years probation. Judge Burch sentenced him to five years on the involuntary manslaughter charge to run concurrently with the twenty years. App. 212; App. 56, ll. 1 – 15.

On March 16, 2012, Sweatt filed an application for post-conviction relief (PCR). The state filed a return on July 6, 2012. An evidentiary hearing was held on August 15, 2013 before the Honorable G. Edward Welmaker. Sweatt was represented by Tricia A. Blanchette, and the state was represented by J. Rutledge Johnson. On October 3, 2013, Judge Welmaker issued an order denying Sweatt's PCR application and dismissing it with prejudice. App. 211 – App. 225. Sweatt's PCR attorney filed a motion for rehearing pursuant to Rule 59(a), SCRCPP, and/or a motion to alter or amend pursuant to Rule 59(e), SCRCPP on October 30, 2013. App. 226-228. Judge Welmaker issued an order on November 23, 2013, denying Sweatt's motions pursuant to Rule 59, SCRCPP. Sweatt's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not presenting evidence in mitigation of Petitioner Sweatt's mental health problems when he pled guilty to involuntary manslaughter and inflicting great bodily injury upon a child in the death of his three month old infant daughter.

Curtis Sweatt, Jr., his fiancé Danielle Tucker, their toddler son, and their three month old infant daughter lived together. Danielle worked the early shift at her job and returned home about five. Sweatt worked the afternoon shift leaving after lunch so he kept the two children in the mornings. App. 10, ll. 1 – 15.

On January 7, 2010, Sweatt woke up and fixed breakfast for his son. He told the police that he then he checked on the baby girl and found she had a messy diaper. He gave her a bath. While he was drying her as he held her in his arms, as he pulled the towel out, her neck snapped back and then her eyes began to roll back and she developed problems breathing. He then called 911. App. 10, ll. 16 – App. 20.

The doctors at the hospital determined that the infant had severe head injuries, and that it was unlikely she would live. The doctors also decided it was likely that the injuries were non-accidental so they called law enforcement. The infant girl died the next morning on January 8, 2010. The autopsy determined that it was a violent intervening act such as the acceleration/deceleration that occurred in a car accident that caused the injuries. The time of the injuries was within hours of the time Sweatt called 911. App. 11, ll. 1 – 10; App. 12, ll. 4 – 20.

At his guilty plea, Sweatt's attorney stated that Sweatt could plead only to charges that did not require intentional harm because Sweatt never intended to harm his daughter. App. 13, ll. 1 – 6; App. 18, ll. 6 – 23. In mitigation, Sweatt's attorney told the court that Sweatt's story was that after

the infant's bath, he took her to the nursery to dress her. The child slipped from his hands, and hit her head on the wooden changing table. She screamed so he then held her close to him and rocked her back and forth. He heard a pop sound come from her and then her eyes rolled back. App. 15, ll. 16 – App. 16, ll. 25.

At the beginning of the PCR hearing, Sweatt's PCR counsel told the court that they were asking for the specific relief of resentencing or belated motion to reconsider the sentence. App. 78, ll. 2 – 19.

At his PCR hearing, Sweatt testified that his plea counsel was ineffective because things were not done the way they should have been during his guilty plea. He wanted a resentencing hearing so the sentencing judge could hear all of the facts, or a new trial. He was indicted on the charge of homicide by child abuse but pled guilty to involuntary manslaughter and infliction of great bodily injury to a child. App. 112, ll. 8 – App. 113, ll. 1; App. 77, ll. 1 – 16.

Sweatt had no intent to hurt his baby and stated it was an accident. App. 116, ll. 1 – 25. Sweatt had been treated for mental health problems but his attorney did not present any of that to the plea court in mitigation. Sweatt's claim was that his attorney should have presented this information. App. 122, ll. 16 – App. 123, ll. 25.

Sweatt explained that he had been seeing Dr. Eric Johnson for mental health issues prior to this incident and had been on medication for severe anxiety and major depressive episodes. He stopped the medication because he thought it was not helping, and to see if he felt better. App. 118, ll. 1 – App. 123, ll. 7.

Sweatt also saw Dr. Gaye Allan-Cooke in preparation for his PCR hearing. App. 81, ll. 1 – 25. She diagnosed him as suffering from post-traumatic stress disorder. Sweatt believed that was exactly what he was experiencing. His plea counsel made no efforts to talk with Dr. Allan-Cooke

before his plea. App. 123, ll. 8 – 25. His attorney told him that he was likely to get a lenient sentence because there was no intent in the two charges he was pleading to, and that he was a good qualifier for probation. App. 124, ll. 8 – App. 126, ll. 9.

In Sweatt's opinion, if his plea counsel had objected to some of the things the prosecutor said related to the autopsy such as the child suffered pain, and if his attorney had presented the Sweatt's mental health issues, the judge would have given him a lighter sentence. App. 141, ll. 1 – App. 143, ll. 11.

Dr. Gaye Allan-Cooke testified on Sweatt's behalf at the PCR hearing. She was qualified as an expert specializing in trauma and abuse. Dr. Allan-Cooke testified that she saw Sweatt in preparation for his PCR hearing. App. 78, ll. 21 – App. 81, ll. 16. In her opinion, Sweatt suffered from anxiety, and was overzealous. His memory regarding the death of his child was sketchy. She would diagnose him as suffering from PTSD based on what he had been through. She described him as extremely saddened and remorseful concerning the death of his child. App. 82, ll. 24 – App. 84, ll. 23.

Dr. Eric Johnson testified at the PCR hearing that he started treating Sweatt in 2005. At first, he diagnosed him as having anxiety, depression, and focus problems. By 2009, Dr. Johnson diagnosed Sweatt as having a form of bi-polar disorder. In November 2009, shortly before this incident in January 2010, Sweatt was doing well and wanted to reduce his medication which Dr. Johnson thought was okay. Dr. Johnson did not advise Sweatt to stop his medicine. He would have been willing to come to Sweatt's guilty plea to explain his treatment of Sweatt, but Sweatt's attorney never contacted him. App. 154, ll. 11 – App. 158, ll. 25.

Danielle Tucker, Sweatt's fiancé and the mother of the deceased baby and Sweatt's young son, testified at the PCR hearing stating that she was there in support of Sweatt. She presented a

letter from the baby's pediatrician where the doctor wrote that he had seen the baby several times since her birth and saw nothing of concern. He wrote that Sweatt and Ms. Tucker were caring parents. App. 87, ll. 2 – App. 92, ll. 19.

Both Sweatt's mother and father testified at his PCR hearing. His mother, Lynn Sweatt, was a registered nurse who had worked as a delivery nurse and as a grief counselor for parents who had lost a child. App. 96, ll. 20 – App. 97, ll. 25. She testified that Sweatt was a good father, and she believed this tragic incident was the result of something accidental. App. 102, ll. 4 – App. 103, ll. 4. The plea sentence was not what they expected because plea counsel told them Sweatt would probably get the five years on the involuntary manslaughter because counsel did not think the court would pursue the charge of inflicting great bodily injury . App. 101, ll. 3 – 21; App. 102, ll. 4 – App. 104, ll. 7.

Randy Sweatt, father of Petitioner Curtis Sweatt, testified that plea counsel did not properly represent his son. Plea counsel told him that his son would be out of prison in three years based on the manslaughter charge. Mr. Sweatt said his son was always very gentle with the baby and there was no way he would ever believe that his son hurt his baby girl. App. 106, ll. 19 – App. 111, ll. 14.

Plea counsel testified that if Sweatt had gone to trial, it would have been on the charge of homicide by child abuse, and he believed Sweatt would have received a life sentence. App. 160, ll. 14 – App. 164, ll. 24. Counsel negotiated with the solicitor for charges that did not have an intent element because counsel did not believe there was intent by Sweatt. App. 166, ll. 7 – App. 167, ll. 18.

Counsel admitted that he had family members speak in mitigation at the plea but he did not present any medical mitigation. He did not speak with any medical person on behalf of Sweatt. Counsel knew Sweatt had been taking medications for anxiety and depression but did not think that

was relevant for sentencing or mitigation. He did not think he could get a doctor to come in and say Sweatt did not intend to harm his child. App. 168, ll. 3 – App. 170, ll. 25.

The PCR judge held that he found plea counsel's testimony to be credible but found testimony of Sweatt to not be credible. App. 220. The PCR court found that plea counsel was competent and diligent in his representation and counsel's advice that Sweatt accept the plea offer was a reasonable professional decision. Therefore, Sweatt could show no prejudice. App. 221.

The Court found that Sweatt did not meet his burden of proof that plea counsel was ineffective for not investigating his mental health history because it was not relevant to the defense theory of accident. Sweatt stopped taking his medication on his own, and Sweatt could not show the result would have been different if Dr. Johnson had been called. App. 221-222.

The PCR order provided that plea counsel's decision not to call an expert in mitigation met the norm of prevailing professional judgment. App. 222. In sum, the PCR judge found that plea counsel's representation did not fall below the reasonable professional standard. Sweatt had not proved that the outcome of the proceeding would have been different but for counsel's errors. App. 224.

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).

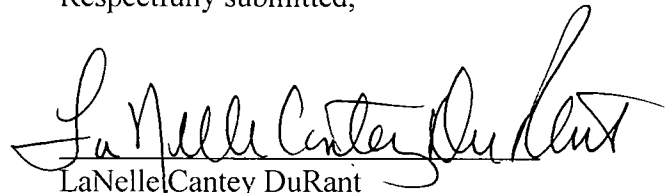
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709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

Plea counsel was ineffective for not presenting evidence of Sweatt's mental health history of problems. Counsel knew Sweatt had been on medication for mental health problems. The least he could have done, and the norm for professionalism of legal representation would have been to at least talk to Sweatt's previous mental health provider who had prescribed the medications.

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 large initial "L".

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

CURTIS RANDALL SWEATT, JR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

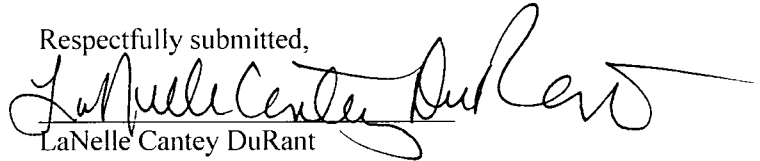
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Curtis R. Sweatt 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 15, 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 Curtis R. Sweatt.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 17th day of July, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

G. Edward Welmaker, Circuit Court Judge

CURTIS RANDALL SWEATT, JR.,

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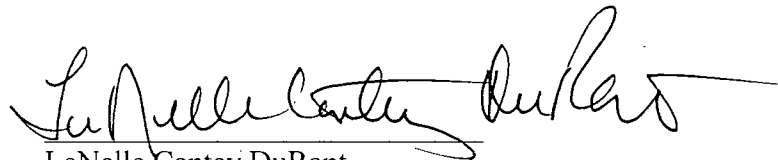
V.

STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

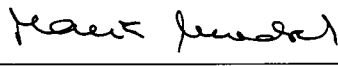
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Curtis R. Sweatt #346121, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 17th day of July, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of June, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.