

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Pickens County

S.C. Supreme Court

Edward W. Miller, Circuit Court Judge

ROGER EUGENE SHEPARD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002721

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not allowing Petitioner Shephard to make his own decision to testify at his trial which was prejudicial to Shephard because the full facts and circumstances of the case were not known by the jury?

STATEMENT

In July 2009, the Pickens County Grand Jury indicted Roger E. Shephard on the charges of murder, assault with intent to kill (AWIK), armed robbery (AR), and possession of a weapon during the commission of a violent crime. On November 16, 2009, Shephard proceeded to trial before the Honorable G. Edward Welmaker and a jury. Shephard was represented by John DeJong, and the state was represented by Judy Munson. The jury found Shephard guilty as indicted. App. 506, ll. 1 – App. 507, ll. 6. Judge Welmaker sentenced Shephard to life for the murder, thirty years for the AR; ten years on the AWIK, and five years on the gun charge. App. 513, ll. 8 – App. 514, ll. 14. Shephard filed an appeal which was perfected by the Office of Appellate Defense with the filing of an Anders¹ brief. The South Carolina Court of Appeals dismissed the appeal. State v. Shephard, Op. no. 2011-UP-337 (Ct. App. filed June 28, 2011).

On August 1, 2012, Shephard filed an application for post-conviction relief (PCR). The state filed a return on March 28, 2013. An evidentiary hearing was held on October 21, 2013 before the Honorable Edward W. Miller. Shephard was represented by R. Mills Arial, and the state was represented by Karen C. Ratigan. App. 534. On December 12, 2013, Judge Miller issued an order denying Shephard's PCR and dismissing it with prejudice. App. 583 – App. 591. Shephard's attorney filed a notice of appeal. This petition follows.

¹ Anders v. California, 386 U.S. 738 (1967).

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not allowing Petitioner Shephard to make his own decision to testify at his trial which was prejudicial to Shephard because the full facts and circumstances of the case were not known by the jury.

Betty and John Bruin owned the Action Pawn Shop in Easley. App. 70, ll. 1 – 25. On June 15, 2006, a man entered the pawn shop and was looking at guns. The man pulled a .40 caliber handgun and shot John Bruin in the chest. The man then began taking guns from the gun case and put them into a bag that he brought. As Betty Bruin was trying to leave, the man shot at her twice missing her. App. 63, ll. 19 – App. 64, ll. 24.

Based on the video tape from the store that was in use at the time, and Betty Bruin's description, Shephard was identified as the shooter. App. 78, ll. 1 – App. 80, ll. 22; App. 72, ll. 13 – App. 73, ll. 24; App. 462, ll. 23 – App. 463, ll. 4.

Roger Shephard was arrested and charged with the murder of John Bruin, assault with intent to kill on Betty Bruin, armed robbery, and possession of a weapon during the commission of a violent crime. Shephard proceeded to trial on November 16, 2009. App. 1.

At his jury trial, Shephard did not testify and did not put up a defense. App. 467, ll. 18 – 24; App. 468, ll. 24 – App. 471, ll. 21. The jury found him guilty on all charges as indicted. App. 506, ll. 6 – 507, ll. 13.

At his PCR hearing, Shephard testified that he wanted to testify at his trial. He discussed this with his trial attorney who told Shephard that the state would just make him look like a fool, and he would lose his chance to have the last say in the trial. If he had testified, Shephard believed that would have changed the outcome of the trial. If he had been able to explain certain circumstances of

why things “were the way they were,” the result would have been different. App. 534; App.541, ll. 1 – 11; App. 544, ll. 1 – App. 545, ll. 6.

Trial counsel testified that he discussed with Shephard his right to testify prior to trial. Counsel told Shephard the pros and cons of testifying but did not make a recommendation. Counsel did explain that he would lose last argument if Shephard did testify as they presented no other evidence. Counsel explained that the evidence against Shephard included the store video; Shephard’s confession when he was arrested in Montreal; and fingerprints from the scene. App. 560, ll. 15 – App. 565, ll. 11.

The PCR judge found trial counsel’s testimony to be credible but found Shephard’s testimony to not be credible. App. 587. The judge ruled that Shephard did not meet his burden of proving that trial counsel misadvised him on his right to testify at trial. The order provided that Shephard’s decision not to testify was both informed and voluntary. App. 588-App. 589.

The judge held that trial counsel was not deficient and Shephard was not prejudiced by counsel’s representation. App. 591.

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).

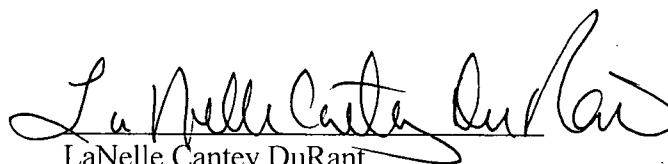
In Alvord v. Wainwright, 469 U.S. 956 (1984), the United States Supreme Court held that the defendant has the authority to make certain fundamental decisions about his case after consultation with counsel. These fundamental decisions include whether to plead guilty, to waive a jury trial, and to testify on one's own behalf.

Trial counsel was ineffective for not consulting with Shephard sufficiently to understand that testifying was significant to Shephard. Counsel should have allowed Shephard to make his own decision on whether to testify. Shephard believed that his story would have made a difference.

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,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO PICKENS COUNTY
EDWARD W. MILLER, CIRCUIT COURT JUDGE

ROGER EUGENE SHEPARD,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

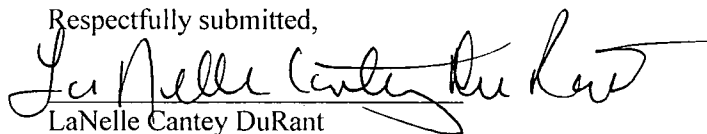
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roger Eugene Shephard 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 October 21, 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 Roger Eugene Shephard.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of August, 2014

STATE OF SOUTH CAROLINA

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Certiorari to Pickens County

Edward W. Miller, Circuit Court Judge

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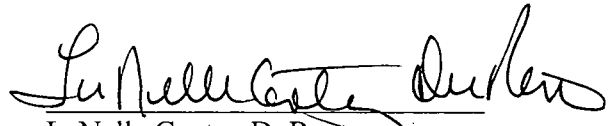
V.

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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Roger Eugene Shephard, #338072, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 12th day of August, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of August, 2014.

Heather Funder (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.