

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Union County

Edgar W. Dickson, Circuit Court Judge

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AUG 19 2014

S.C. Supreme Court

TIJUAN PEAKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001271

BRIEF OF PETITIONER

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not making a motion for Petitioner's prior drug convictions to not be used for impeachment purposes because they were more prejudicial than probative since Petitioner was on trial for a drug offense of distribution and Petitioner would have testified but for the prior convictions being allowed to come in?

STATEMENT

In March 2008, the Union County Grand Jury indicted Tijuan Peake on the charges of distribution of crack cocaine and distribution of crack cocaine within the proximity of a school. On October 15, 2008, Peake proceeded to trial before the Honorable John C. Hayes, III, and a jury. Peake was represented by Ross Burton, and the state was represented by John Anthony. App. 1. The jury returned a verdict of guilty on both charges as indicted. Judge Hayes sentenced Peake to twenty years on the distribution of crack cocaine second offense, and fifteen years on the proximity charge to run concurrently. App. 143, ll. 22 – App. 144, ll. 8. Peake's attorney filed a notice of appeal which was perfected by the Division of Appellate Defense of the Commission on Indigent Defense. The South Carolina Court of Appeals affirmed Peake's convictions and sentences. State v. Peake, 2011-UP-297 (Ct. App. filed June 14, 2011).

On December 9, 2011, Peake filed an application for post-conviction relief (PCR). The state filed a return on March 23, 2012. An evidentiary hearing was held on October 9, 2012 before the Honorable Edgar W. Dickson. Peake was represented by Carolina Horlbeck, and the state was represented by J. Rutledge Johnson. On April 18, 2013, Judge Dickson issued an order denying Peake's PCR application and dismissing it with prejudice. App. 217 – 229. Peake's attorney filed a notice of appeal. Peake's appellate counsel filed a petition for a writ of certiorari on December 10, 2013. The Supreme Court granted the petition on July 24, 2014. This brief of petitioner follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not making a motion for Petitioner's prior drug convictions to not be used for impeachment purposes because they were more prejudicial than probative since Petitioner was on trial for a drug offense of distribution and Petitioner would have testified but for the prior convictions being allowed to come in.

Kevin Lindsey worked as a confidential informant (CI) for the Union County Public Safety Department Narcotics Team where he would make controlled drug buys from individuals and was compensated with money by The Public Safety Department. On November 9, 2007, Lindsey called Investigator Mickey Parker with the Public Safety Department and asked to make a drug buy that night. He was wired with video and audio equipment and money. App.26 , ll. 8 – App. 29, ll. 25; App. 38, ll. 20 – App. 39, ll. 18.

Lindsey called Tijuan Peake to allegedly purchase crack cocaine from Peake. They agreed to meet at the Dixie Curb Market. After completing the transaction in Peake's car, Lindsey left and met with Investigator Parker and gave the drugs to him. The drugs turned out to be .12 grams of crack. App. 39, ll. 19 – App. 43, ll. 25; App. 71, ll. 1 – 25.

After viewing the video, Investigator Parker recognized Peake because he knew him from his work of several years. He then issued arrest warrants for Peake. App. 31, ll. 1 – App. 32, ll. 25.

Peake proceeded to trial on the two charges on October 15, 2008. At the close of the state's case, and after the judge denied defense counsel's directed verdict motion, the judge told Peake that this was the point where Peake had a right to present a defense if he desired to do so. Judge Hayes told Peake that he could testify if he wanted to. The solicitor read to the judge Peake's prior record which consisted of a 2002 conviction for failure to stop for a blue light; a 2005 conviction for

distribution of crack and a conviction for distribution within the proximity of a school; and a second 2005 conviction for distribution of crack and a proximity conviction. The solicitor asked the court that he be allowed to question Peake about his felony convictions that carried more than a year if Peake testified. Defense counsel then said to the court: "I agree with that impeachment, the extent of his record, Your Honor." App. 98, ll. 9 – App.99, ll. 23.

The judge then said to Peake:

Mr. Peake, the state would be able to ask you questions concerning those offenses were you to take the stand. If you choose to remain silent, I would tell the jury that you have exercised your constitutional right to remain silent. They could not use that against you, and that they could not in the jury room discuss or use in their own mind your exercising your right to remain silent against you in anyway. Do you understand that?

Yes, Sir.

App. 99, ll. 24 – App. 100, ll. 9.

Peake then told the judge that he would exercise his right to remain silent. Defense counsel made no objection but asked to have a moment to talk to Peake. App. 100, ll. 10 – 25.

Later, defense counsel told the court that Peake elected to remain silent and not testify. App. 101, ll. 15 – 25.

At his PCR hearing, Peake testified that his trial counsel did not effectively represent him at trial. Peake had wanted to testify, and would have but for the fact that his prior drug convictions would come in before the jury. His attorney failed to object to the state wanting to impeach him with those prior convictions. His attorney failed to ask the court to conduct a balancing and weighing of the probative value of the convictions versus the prejudicial value. Peake argued that the convictions did not relate to the credibility issue. When he asked his attorney, his attorney told him that if he took the stand, the jury would hear that he had prior drug convictions. Peake believed

that his taking the stand would have made a difference because he could explain that the CI had a motive to lie because he and the CI had an altercation a month earlier. App. 164, ll. 1 – App. 166, ll. 20; App. 181, ll. 19 – App. 185, ll. 15.

Peake's trial counsel testified that the video was very "weak" and he had questioned the credibility of the CI. Trial counsel said one of the problems with a defendant testifying was that his prior conviction less than ten years old came into evidence. App. 191, ll. 22 – App. 198, ll. 23.

On cross examination, trial counsel admitted that he did not make any motion to ask the trial court to weigh the prejudice against the probative value of bringing in Peake's prior convictions because he said "it was very clearly set out in the rule." He admitted that it would have been prejudicial for the jury to know that Peake had two prior convictions for selling crack when he was on trial for selling crack. When asked if that would have been a basis for a motion to keep out the prior convictions, he admitted that it would have been a basis. However, he had never known a judge to exclude prior convictions in his twenty years of practicing law. App. 202, ll. 5 – 24.

The PCR judge found trial counsel's testimony to be "very credible", and found Peake's testimony to not be credible. App. 221. The judge ruled that Peake's allegation that trial counsel was ineffective for not objecting to Peake's prior convictions coming in to be "wholly without merit." In the order, the judge wrote that Peake presented no evidence at his PCR hearing to support how the outcome of his trial would have been different had his priors not come in as Peake made an informed decision not to testify. The order provided that Peake could prove no prejudice. App. 226.

Rule 609(a), SCRE, provides that for the purpose of attacking the credibility of a witness:

- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, **subject to Rule 403**, if the crime was punishable by death or imprisonment in excess of one year under the law under which the accused was convicted, and evidence that an accused has been convicted of such crime shall be admitted **if the court determines that**

the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and [Emphasis added]

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

In State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), which was in effect at the time of trial, the Supreme Court held that if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because, prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect.

The Bryant Court then wrote that a “conviction for robbery, theft, and **drug possession**, [Emphasis added] beyond the basic crime itself, was not probative of truthfulness.” The Supreme Court in State v. Bryant, Id. ruled that evidence of the defendant’s prior convictions for unlawful possession of a weapon by a convicted felon and pointing and presenting a firearm in the defendant’s current trial for murder and unlawful possession of a weapon by a convicted felon were inadmissible for impeachment purposes; and the error in admission of these prior convictions was not harmless.

The Court wrote that the prior convictions had nothing to do with the defendant’s credibility, and were more prejudicial than probative. The Court also wrote that after the trial court conducts a balancing test in determining whether the probative value outweighed the prejudicial effect, the trial court must then decide and articulate on the record why the probative value outweighs the prejudicial effect.

The Court cited State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) which listed five factors a trial judge should consider in deciding whether to admit prior convictions:

(1) The impeachment value of the prior crime;

- (2) The point in time of the past crime and the charged crime;
- (3) The similarity of the past crime and the charged crime
- (4) The importance of the defendant's testimony;
- (5) The centrality of the credibility issue.

The Supreme Court also wrote in State v. Bryant, *supra*, that when the prior offense was similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission. The Court stated:

Furthermore, a conviction for robbery, burglary, theft, and **drug possession** [Emphasis added] beyond the basic crime itself, is not probative of truthfulness.

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, *supra*; Butler v. State, *supra*.

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).

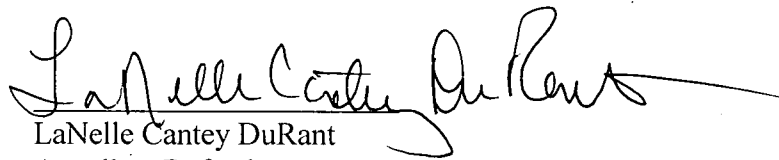
Trial counsel was ineffective for not objecting to the judge allowing the prior drug convictions to be admitted in Peake's trial for trafficking a drug if Peake testified. This was

prejudicial to Peake as the judge's decision kept Peake from testifying and trial counsel was ineffective for not objecting to this ruling.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

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 19th day of August, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Edgar W. Dickson, Circuit Court Judge

TIJUAN PEAKE,

PETITIONER,

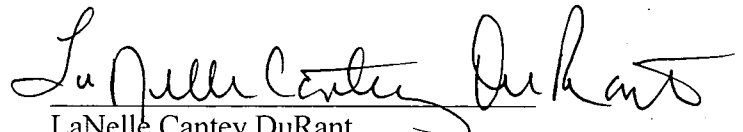
V.

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RESPONDENT


CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on J. Rutledge Johnson, Sr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Tijuan Peake #307699, Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 19th day of August, 2014.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of August, 2014.


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