

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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AUG 28 2014

S.C. Supreme Court

Certiorari to Pickens County

Robin B. Stilwell, Circuit Court Judge

ISRAEL COLECIO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000054

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for conceding in his closing argument that Petitioner Colecio was guilty of trafficking the methamphetamine (10-28 grams) without Petitioner Colecio's consent?

STATEMENT

In November 2009, the Pickens County Grand Jury indicted Petitioner Colecio on the charges of trafficking in methamphetamine 10-28 grams; trafficking in methamphetamine 28-100 grams; possession of a weapon during the commission of a violent crime. Colecio proceeded to trial before the Honorable G. Edward Welmaker and a jury. Colecio was represented by William Godfrey, and the state was represented by Baker Cleveland. The jury returned a verdict of guilty as indicted on the three charges. App. 256, ll. 1 – 24. Judge Welmaker sentenced Colecio to ten years on the trafficking 10-28 grams; nineteen years on the trafficking 28-100 grams; and five years on the gun charge. All sentences were to run concurrent to each other. App. 262, ll. 1 – 11. Colecio's attorney filed a notice of appeal which was perfected by the Division of Appellate Defense of the Commission on Indigent Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina court of Appeals dismissed the appeal. State v. Colecio, Op. No. 2012-UP-101 (Ct. App. filed February 22, 2010).

On February 9, 2011, Colecio filed an application for post-conviction relief (PCR). The state filed a return on July 31, 2012. An evidentiary hearing was held on August 26, 2013 before the Honorable Robin B. Stilwell. Colecio was represented by R. Mills Arial, Jr., and the state was represented by Karen C. Ratigan. On November 4, 2013, Judge Stilwell issued an order denying Colecio's PCR and dismissing it with prejudice. App. 302-App. 308. Colecio's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for conceding in his closing argument that Petitioner Colecio was guilty of trafficking the methamphetamine (10-28 grams) without Petitioner Colecio's consent.

On December 11, 2008, Antonio Davis called the Sheriff's Office in Pickens, and told Officer Chad Brooks that he had contacted a man called Willie, whom he identified in court as being Colecio, and Davis was to meet with Willie to purchase methamphetamine (meth). App. 178, ll. 16 – App. 184, ll. 7.

The Sheriff's Office wired Davis with audio and video equipment to record the drug transaction. Davis was given \$800 by the Sheriff's Office to meet with Willie and purchase one half ounce of meth from Willie. App. 180, ll. 9 – App. 183, ll. 23. . Agent Henry Campbell of the Pickens County Sheriff's Office described this process where a confidential informant (CI) was used to purchase drugs. App. 46, ll. 19 – App. 52, ll. 24.

Davis went to the trailer in Pickens where he was to meet Willie. When he arrived, he saw Kathy Powell in the living room awake, and saw Neal Powell coming from the back bedroom where Davis was to meet Willie. App. 182, ll. 1 – App. 183, ll. 24; App. 198, ll. 12 – 25; App. 199, ll. 1 – 2. In the bedroom, Davis found Willie (Colecio), Micheal Swafford whom Davis knew previously; and a guy named John. App. 183, ll. 1 – App.184, ll. 23; App. 197, ll. 22 – 25; App. 198, ll. 1 – App. 199, ll. .

Davis testified that Willie presented a hand gun and asked if Davis was wired. When Davis said no, Willie sold the drugs to him, and Davis gave him the \$800. App. 184, ll. 1 – App. 186, ll. 25. Davis claimed the video of the transaction was accurate. App. 191, ll. 1 – App. 192, ll. 8. Agent Campbell said they identified Willie as being Colecio. App. 65, ll. 19 – 24.

Agent Henry Campbell of the Sheriff's Office, described the events following Davis's purchase of the drugs. About five to seven minutes after Davis left the trailer, deputies from the Sheriff's Office went to the home. They were allowed entrance and Kathy Powell, owner of the trailer, consented to a search. App. 53, ll. 1 – App. 58, ll. 1

In the trailer, the officers found the two young children of the Powells; the small child of Colecio; Colecio; Michael Swafford; Jonathan Smith; and another Hispanic male. App.58, ll. 5 – 22. The officers also found meth throughout the trailer. App. 166, ll. 1 – 14; App. 75, ll. 19 – App. 77, ll. 20. The drug transaction took place in the children's bedroom. App. 78, ll.1 - 11. A hand gun was found in the bathroom. The gun was checked for prints but no usable prints found. App. 78, ll. 1 – 25. App. 120, ll. 1 – 10.

Angil Landrum, a forensic chemist with SLED, analyzed the drugs found. In one bag, she found 13.16 grams of meth. In another evidence bag was 94.50 grams of meth; 3.18 grams of meth; .08 grams of meth; and .23 grams of marijuana. App. 211, ll. 1 – App. 212, ll. 16.

In his closing argument, defense counsel told the jury that the drug transaction for the ten grams of meth was clear on the video. He said: "I don't think there's any doubt." App. 226, ll. 9 – 24; Again in his closing argument, defense counsel said to the jury again: "The indictment for trafficking ten to twenty-eight, that's clear I think. You saw it on the video. I think that's clear." App. 231, ll. 22 – 24. Counsel stated a third time to the jury: "You know, indictment number one, the ten to twenty-eight grams, that's clear." App. 232, ll. 1 – 21. For a fourth time, defense counsel argued to the jury: "The government has to prove Israel Colecio guilty on each of the three indictments beyond a reasonable doubt. The indictment for ten to twenty-eight is pretty clear." App. 234, ll. 4 – 6.

However, counsel argued to the jury that the evidence was not clear as to who had the gun and the 94 grams of meth. App. 231, ll. 22 – 25; App. 232, ll. 1 – 25. Counsel argued that the video did not show clearly who had the gun, and no prints were found on the gun. Officers did not try to get prints from the bag of drugs. App. 232, ll. 1 – App. 233, ll. 21.

The jury asked to view the video in the jury room where they could discuss it which the judge granted. App. 247, ll. 8 – App. 248, ll. 24; App. 251, ll. 1- 25.

At his PCR hearing, Colecio testified that his trial counsel was ineffective because counsel admitted Colecio's guilt to the jury. Counsel told the jury that Colecio made a transaction of 14 grams of methamphetamine by selling to a confidential informant (CI). The issue was that the other drugs found in the house did not belong to Colecio. Colecio denied ever having any drugs. App. 279, ll. 1 – 25; App. 283, ll. 1 – 23.

Trial counsel's trial strategy was to accept guilt for the 14 grams of methamphetamine that Colecio sold to the CI which was seen on the video tape, and then argue that the other drugs found in the house and the gun belonged to the Powells who owned the trailer and lived there. Trial counsel said it was clear that it was Colecio on the video tape because there was a full facial front view of Colecio. App. 292, ll. 1 – 17; App. 297, ll. 1 – App. 298, ll. 2.

The PCR judge found Colecio's testimony to not be credible but found trial counsel's testimony to be credible. App. 305. The judge wrote that Colecio failed to meet his burden of proof that trial counsel erred in admitting Colecio was guilty of one of the drug trafficking charges. The judge found that trial counsel's strategy of accepting guilt for the 14 grams of methamphetamine which was on the video and disputing the other drugs and gun was a valid trial strategy. App. 307.

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 Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court found that comments defense counsel made during closing argument created ineffective assistance of counsel on the kidnapping charge. Defense counsel during closing argument gave a description of the alleged kidnapping that did not match the defendant’s version, and due to counsel pounding his fist while stating the defendant brought another person as “muscle” when going to ask the victim for money indicated that defendant used force which was an element of kidnapping. The Supreme Court reversed the case.

Colecio’s case is similar in that defense counsel in his closing argument admitted Colecio’s guilt to the trafficking methamphetamine ten to twenty-eight grams. There were no fingerprints; the state had only the word of a CI; and the video was not clear.

In State v. Maready, 205 N.C. App.1, 695 S.E.2d 771 (Ct. App. filed July 6, 2010), the North Carolina Court of Appeals held that trial counsel was per se ineffective for admitting the

defendant's guilt without obtaining the defendant's express consent first. During closing argument, Maready's trial counsel conceded that the state had met its burden with respect to the charges of DWI, reckless driving, DWLR, and misdemeanor larceny and possession of stolen property. Maready was also charged with involuntary manslaughter. The Court cited State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985), which ruled that this violation was per se ineffective assistance of counsel and this violation required that the defendant receive a new trial.

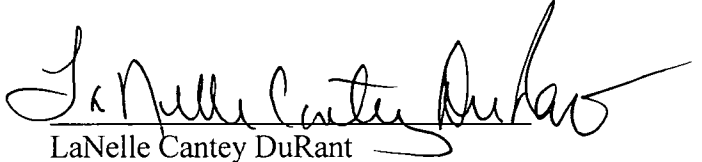
In Wiley v. Sowders, 647 F.2d 642 (CA 6, 1981), Wiley pled not guilty to burglary, theft and being a persistent felony offender. At his trial, his attorney in closing argument, told the jury that Wiley was guilty as charged. He continued to state that the prosecutor had proved beyond a reasonable doubt that Wiley and his co-defendant were guilty of the crimes. The Sixth Circuit reversed Wiley's convictions on the basis that defense counsel rendered ineffective assistance of counsel by arguing that Wiley was guilty because it was the defendant's decision to plead guilty or not guilty. The court held that a defendant is deprived of the effective assistance of counsel when his lawyer admits the client's guilt without first obtaining the client's consent to this strategy.

There is no evidence in Colecio's record that he consented to his trial attorney using this strategy of conceding Colecio's guilt on the trafficking the 14 grams of methamphetamine. Colecio argued that his trial counsel hurt him by conceding his guilt. Trial counsel's admission of Colecio's guilt to this one charge was prejudicial because it told the jury that he possessed the crack which made it more likely that the jury would find him guilty on the second trafficking charge.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences 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 28th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County
Robin B. Stilwell, Circuit Court Judge

ISRAEL COLECIO,

PETITIONER,

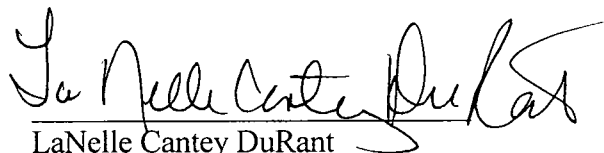
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the 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. Israel Colecio, #340535, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 28th day of August, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of August, 2014.

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