

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Beaufort County

Deadra L. Jefferson, Circuit Court Judge

RAMON ATIENZO-PEREZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000307

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

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ATTORNEY FOR PETITIONER

INDEX

INDEX.....	1
ISSUE PRESENTED	2
STATEMENT	3
ARGUMENT	4
CONCLUSION	7
PETITION TO BE RELIEVED AS COUNSEL.....	8

ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Atienzo-Perez's guilty plea was entered freely, voluntarily, and knowingly?

STATEMENT

In November 2009, the Beaufort County Grand Jury indicted Ramon Atienzo-Perez on the charge of trafficking cocaine greater than 400 grams. On January 24, 2011, Perez appeared before the Honorable Craig D. Brown along with his co-defendant, Ignacio Sandoval-Costa, and entered a guilty plea pursuant to a negotiated plea agreement to the lesser included offense of trafficking cocaine 28 – 100 grams first offense. App. 135; App. 12, ll. 1 – 24. Perez was represented by Michael Dirnbauer, and Costa was represented by Christopher Lempesis. The state was represented by the assistant solicitor. App. 2. An interpreter was present for the guilty plea and did translate for Perez. App. 2; App. 5, ll. 1 – App. 6, ll. 22. Judge Brown sentenced Perez to the negotiated sentence of twenty years. App. 31, ll. 6 – 21. Perez did not appeal his conviction nor his sentence. App. 135.

On November 28, 2011, Perez filed an application for post-conviction relief (PCR). The state filed a return on August 6, 2012. An evidentiary hearing was held on August 26, 2013 before the Honorable Deadra L. Jefferson. Perez was represented by Carol A. Miller and the state was represented by Ashleigh R. Wilson. App. 46-App. 47. On February 5, 2014, Judge Jefferson issued an order denying Perez's PCR application, and dismissing it with prejudice. App. 134-App. 149. Perez's 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 Atienzo-Perez's guilty plea was entered freely, voluntarily, and knowingly.

On October 19, 2001, the drug task force in Beaufort received an anonymous tip that there were drugs in a certain trailer. The police investigated with a consensual search. A kilogram of cocaine (997 grams) was located under the trailer. Perez and the co-defendant gave confessions to the police. Perez told that a friend of his in North Carolina gave him the cocaine to bring to Beaufort. The friend packed the drug in the engine of the truck and covered it with grease. App. 25, ll. 1 – App. 27, ll. 5.

At his PCR hearing, which was translated by an interpreter Alfrado Ayala, Perez's plea counsel explained that Perez had worked in construction but lost his job when the economy was very low. He had a friend in construction in Raleigh, North Carolina who had a job for Perez. When Perez arrived in Raleigh, he learned that the job would not be available for several weeks. Some men from Beaufort were staying in the same place where Perez and asked if he wanted to make money. Perez agreed to transport the kilogram of cocaine to Beaufort for \$1000. App. 49, ll. 1 – 25; App. 62, ll. 1 – App. 63, ll. 25.

Perez testified at his PCR hearing that his plea counsel was ineffective because counsel did nothing for him. App. 81, ll. 1 – 25. All his plea counsel did was try to get Perez sign the plea agreement which was in English. Counsel just wanted Perez to plead guilty. App. 83, ll. 10 – App. 86, ll. 5. Perez wanted to go to trial. App. 93, ll. 5 – 18. His attorney gave him no options but to plead guilty. App. 91, ll. 1 – 18. Perez's PCR counsel told the PCR court at the beginning of the hearing that Perez was seeking a new trial. App. 50, ll. 13 – 19.

Perez claimed he had newly discovered evidence. When asked about it, he said that he learned that his constitutional rights had been violated. App. 88, ll. 4 – 11.

Plea counsel testified that he had been a civil lawyer, and Perez was only his second criminal case. He left the practice of law after this case and went to work for Gulfstream Aerospace. App. 100, ll. 1 – 22; App. 112, ll. 1 – App. 113, ll. 19. The only real evidence against Perez was his confession. Plea counsel could not find a way to suppress the statement so he tried to educate Perez that a plea deal was in his best interest considering the facts behind the confession. App. 108, ll. 17 – App. 109, ll. 10. Counsel admitted that he recommended to Perez that he take the plea deal. App. 104, ll. 2 – 16.

Greg Collins who was the assistant solicitor for Perez's case at the time of the plea, testified that the state had a very strong case. App. 121, ll. 1 – App. 122, ll. 23. He was able to offer the lesser included as a plea deal because he realized Perez and his co-defendant were not big drug dealers and not involved in any gang activity. He also wanted to avoid a lengthy trial with interpreters. App. 123, ll. 1 – 19.

The PCR judge ruled that she found plea counsel's testimony to be credible but found Perez's testimony to not be credible. App. 143. The judge held that Perez did not meet his burden of proving plea counsel was ineffective. The judge ruled that plea counsel's representation did not fall below an objective standard of reasonableness. App. 143.

The order provided that Perez's guilty plea was entered freely and voluntarily, and that Perez had a full understanding of the consequences. App. 145. The judge wrote that Perez presented no newly discovered evidence at the PCR hearing. App. 147. The judge denied Perez's PCR application. App. 149.

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 United States Supreme Court held that counsel for the accused need not defer to his client’s wishes regarding incidental matters of trial strategy, but the defendant has the authority to make certain fundamental decisions about his case after thorough advisement with counsel. These fundamental decisions include whether to plead guilty, to waive the right to a jury trial, to testify on one’s own behalf, or to take an appeal. See also Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the above, certiorari should be granted, and the order of the PCR court should be 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" and a long horizontal flourish at the end.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
DEADRA L. JEFFERSON, CIRCUIT COURT JUDGE

RAMON ATIENZO-PEREZ,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

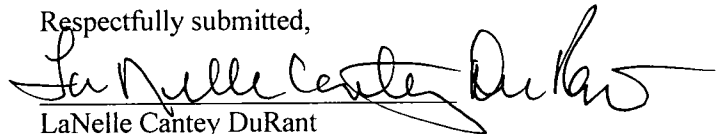
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ramon Atienzo-Perez 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 26, 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 Ramon Atienzo-Perez.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of September, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
Deadra L. Jefferson, Circuit Court Judge

RAMON ATIENZO-PEREZ,

PETITIONER,

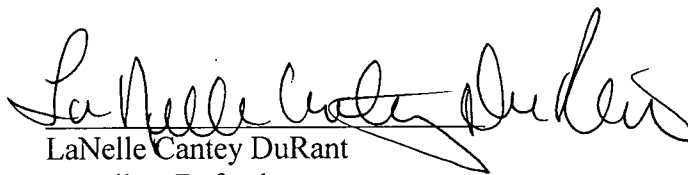
V.

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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Ramon Atienzo-Perez, #344636, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, at Lieber Correctional Institution, this 30th day of September, 2014.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of September, 2014.

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