

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Spartanburg County

S.C. Supreme Court

R. Lawton McIntosh, Circuit Court Judge

NOEL MICHAEL LYLES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000474

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ISSUE PRESENTED

Although the PCR court found trial counsel's performance was deficient in failing to conduct an adequate investigation, the PCR court erred in finding this inadequate performance, which did not meet the minimum required standard of reasonableness, was not prejudicial which was error because Petitioner Lyles was facing LWOP and because this inadequate performance allowed the additional counsel, who was appointed on the first day of trial to assist, only two days to prepare for this LWOP trial?

STATEMENT

On May 7, 2009, the Spartanburg County Grand Jury indicted Noel M. Lyles on the charges of armed robbery (AR), kidnapping, assault and battery of a high and aggravated nature (ABHAN), and grand larceny. On November 9, 2009, Lyles proceeded to trial before the Honorable J. Derham Cole and a jury. Lyles was represented initially by J. Roger Poole. At the request of Petitioner Lyles, on the first day of trial, Judge Cole appointed Attorney Kathleen J. Hodges to represent Lyles in conjunction with Attorney Poole. App. 25, ll. 1 – 13. The state was represented by Harold W. Gowdy and Barry Joe Barnette. The jury returned a verdict of not guilty on the kidnapping and guilty on the AR, ABHAN, and grand larceny. Judge Cole sentenced Lyles to the mandatory sentence of life without parole (LWOP). The state had served notice that they would be seeking LWOP based on Lyles' prior conviction of burglary first degree when he entered a guilty plea on June 11, 1998. App. 335, ll. 7 – App. 336, ll. 25.

Lyles' attorney filed a notice of appeal which was perfected by the Office of Appellate Defense with the filing of an Anders brief. The South Carolina Court of Appeals dismissed Lyles' appeal. State v. Lyles, Op. No. 2012-UP-190 (Ct. App. filed March 14, 2012).

On May 8, 2012, Lyles filed an application for post-conviction relief (PCR). The state filed a return on September 11, 2012. An evidentiary hearing was held on April 5, 2013 before the Honorable R. Lawton McIntosh. Lyles was represented by Paul C. MacPhail, and the state was represented by Suzanne H. White. App. 359. On January 6, 2014, Judge McIntosh issued an order denying Lyles' PCR application and dismissing it with prejudice. App. 474- App. 488. Lyles filed a notice of appeal. This petition follows.

ARGUMENT

Although the PCR court found trial counsel's performance was deficient in failing to conduct an adequate investigation, the PCR court erred in finding this inadequate performance, which did not meet the minimum required standard of reasonableness, was not prejudicial which was error because Petitioner Lyles was facing LWOP and because this inadequate performance allowed the additional counsel, who was appointed on the first day of trial to assist, only two days to prepare for this LWOP trial.

Noel Lyles was charged with crimes involving two incidents that occurred on the same day of March 7, 2009. Around noon that day, a young woman was at the do- it- yourself car wash in Lyman with her elderly mother. Lyles was allegedly walking around the car wash talking with this young woman and others. Then Lyles allegedly got into the young woman's Toyota Tacoma burgundy truck and drove away. App. 126, ll. 24 – App. 127, ll. 25.

About six o'clock that same evening, a woman was going for her nightly walk in the Campobello area on the roadside. A burgundy Toyota Tacoma passed her. Then the truck came back and stopped and asked for directions. Then Lyles allegedly got out of the truck with a glass bottle of beer and told the woman to give him all of her "stuff." He hit her and knocked her down. She had only her IPOD and rings. She said no and then he hit her with the beer bottle. She gave him all she had. The man then drove away. App. 128, ll. 1 – App. 129, ll. 20.

About ten o'clock that same evening, two police officers were on the lookout for the burgundy truck after a BOLO was issued. They stopped the vehicle and Lyles exited the truck. In the truck, the officers found the IPOD and rings that belonged to the second woman on the roadside. Both women identified Lyles as their perpetrator. Lyles was arrested and charged. App. 129, ll. 21 – App. 130, ll. 25.

On the first day of his trial, November 9, 2009, Lyles' trial attorney told the court that he met with Lyles on the Friday before trial for the first time, and gave Lyles the discovery. Lyles had been served with notice of LWOP by the state based on his prior record. Trial attorney relayed that Lyles wanted a different attorney to represent him on these charges. Lyles' concern was the lack of time he had spent with this trial attorney Poole. App. 10, ll. 1 – App. 11, ll. 4.

Lyles then told the trial court that he had been in the Department of Corrections (DOC) since his arrest in March 2009. He was serving time on a probation violation. He had just received the indictments for these charges on the Friday before trial. He had not had time to prepare a defense after seeing the discovery. Lyles asked for a continuance to obtain another attorney. Lyles did not know that the solicitor had upgraded the charges on grand larceny; the strong armed robbery to AR; and the kidnapping charge. He did not know the evidence against him until he just received the discovery. App. 11, ll. 5 – App. 12, ll. 14.

Trial attorney Poole received discovery on an ongoing basis during the time since Lyles' arrest. The judge asked Attorney Poole if had had conducted his own independent investigation into the facts and evidence. Attorney Poole replied that he had looked at the facts and evidence through the discovery. He had not taken any trips to the alleged sites because he thought he had enough information to "work this case." He did not see any witnesses to be called. App. 12, ll. 15 – App. 13, ll. 13.

Lyles explained that there were witnesses in the discovery that Lyles wanted to present. The judge took a recess and told Attorney Poole for him and Lyles to meet and discuss any witnesses. App. 13, ll. 14 – App. App. 14, ll. 25.

Lyles argued:

But like I told him just now, just giving me an indictment on Friday and then think you're going to rush me into trial on Monday, I am, I'm not, I'm not prepared for that. What I'm saying I'm letting that be known. I'm not mentally prepared for that right now.

App. 15, ll. 8 – 12.

After the recess, Attorney Poole told the court that Lyles did not want Attorney Poole to represent him, and he was not prepared to go forward. App. 16, ll. 2 – 25. Lyles said he would like for attorney Kathy Hodges to be his attorney. She also worked in the public defender's office. The trial judge and Lyles continued to argue about an attorney. Lyles was insistent that he was not going forward with Attorney Poole. App. 18, ll. 4 – App. 24, ll. 10.

On Thursday, November 12, 2009, two days later, the trial resumed. The judge put on the record that attorney Hodges had consented to assist Lyles in his trial. The judge ruled that attorney Hodges would be representing Lyles along with attorney Poole. App. 25, ll. 1 – 13.

Attorney Hodges expressed her concerns to the court that she was just appointed on Monday and had met with Lyles. She would prefer more time to prepare but felt she was capable of going forward with the trial that day. When the judge asked her if there were anything she had been hampered in doing because of the amount of time she had to become familiar with Lyles' case, she responded:

The only thing that additional time would provide me was just to provide me with the ability to be more concrete in terms of my understanding of the facts of the case.

App27, ll. 3 - App. 28, ll. 4.

The jury found Lyles guilty of the AR, ABHAN, and grand larceny but found him not guilty of the kidnapping. He was sentenced to life in prison. App. 331, ll. 6 – App. 332, ll. 10; App. 334, ll. 16 – App. 339, ll. 16.

At his PCR hearing, Lyles testified that he did not know that he had an attorney from March until October when he received the notice of LWOP. He met with attorney Poole for the first time on the Friday before the trial started on Monday. Lyles never received a letter from attorney Poole nor a visit. Attorney Poole did not file a motion to change venue due to pretrial media coverage involving Lyles in another incident. App. 364, ll. 24 – App. 369, ll. 17.

One of the victims was the wife of a law enforcement officer in the county. Attorney Poole did not ask for a SLED investigation based on that fact that would have been more objective. Attorney Poole never made any contact with the solicitor to ask about a plea bargain, and never asked for a continuance for more time to prepare. App. 369, ll. 21 – App. 374, ll. 24.

Lyles desperately tried to have attorney Poole relieved as his counsel. App. 370, ll. 16 – App. 371, ll. 24. Lyles felt that he did not get a fair trial based on “multiple facts” relating to both of his attorneys. Attorney Poole did nothing on his case until two days before trial. Attorney Hodges told the judge that more time would help her be more firmly grounded in the facts of the case but she never asked for a continuance. Lyles did not know about the kidnapping charge until he received the indictments because it was presented directly to the grand jury without an arrest warrant. App. 378, ll. 6 – App. 380, ll. 20.

Attorney Poole testified that he was appointed to Lyles’ case in March 2009 and did not communicate with Lyles until November 2009 the Friday before trial on Monday. App. 415, ll. 1 – 8; App. 410, ll. 1 – 23. He took the discovery to Lyles on the Friday when he met with him. Attorney Poole left after they discussed the discovery and did not see Lyles again until the following

Monday morning just before trial. When Attorney Hodges was appointed to assist, she handled everything. Attorney Poole did not ask any questions during the trial. App. 411, ll. 1 – App. 413, ll. 15.

When asked if there were anything he would have done differently, Attorney Poole responded that he wished he had spent more time with Lyles. App. 418, ll. 1 – 15. The PCR judge asked him if he had done any type of independent investigation of the facts and circumstances of the case. Attorney Poole responded that he looked at the discovery, but he did not go to the scene and did not talk to any state’s witnesses. App.419, ll. 23 – App. 420, ll. 3.

Attorney Hodges testified the trial judge gave her from Monday afternoon until Thursday morning to prepare for Lyles’ trial. She met with Lyles three times during that period. App. 420, ll. 14 – App. 422, ll. 13. She admitted that she probably had a chance to talk to witnesses but her opportunity was limited by her just trying to “pore through the discovery.” App. 425, ll. 14 – 25. she did not ask for a continuance even with the late notice of the kidnapping charge. App. 437, ll. 9 – 18.

The PCR judge stated at the hearing:

Let me just tell y’all, I haven’t read this transcript, I will---I am concerned as I believe counsel was that the , uh, that the first meeting between trial counsel and defendant took place two days before the trial. I just don’t know how you can meet the minimum standards and that’s what I’m asking at this point. I’m gonna ask for a brief from the parties. I know you don’t, you got, wanted to say grace over so I’ll give you plenty of time for it.

App. 438, ll. 3 – 11.

After the briefs were submitted, the PCR judge issued his order denying Lyles’ PCR application. The judge ruled that Lyles failed to establish that the outcome of his trial would have been any different if his trial attorneys had had more time to prepare or had taken different actions. Lyles offered no witnesses at his PCR hearing that should have been called. The judge did write:

By his own admission, Poole's late entry into the case, failure to independently investigate the case and failure to question witnesses is deficient.

App. 481.

The judge then ruled that although there was deficient conduct on behalf of counsel, there was no evidence of prejudice to Lyles. Lyles offered no witnesses nor testimony to show how additional preparation would have resulted in a different outcome. App. 481. the PCR judge further held that Lyles suffered no prejudice due to the overwhelming evidence of guilt. App. 482. The judge cited Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) to show the minimum required. App. 438, ll. 13 – 17.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992). Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Counsel representing a criminal defendant has a duty to conduct a reasonable investigation, which encompasses the defendant's right to interview potential witnesses against him. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000).

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 Ard v. Catoe, the Supreme Court held that a criminal defense attorney has a duty to perform a reasonable investigation. "While the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Id.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court held that Lounds' counsel was ineffective for failing to adequately prepare for trial so as to be able to call key witnesses. The Court reversed the denial of Lounds PCR and remanded for a new trial.

In Lounds, the Supreme Court held that trial counsel had ample notice that the state was seeking LWOP; trial counsel learned the names of the defendant's witnesses on the morning of trial; trial counsel failed to interview or subpoena any of Lounds' witnesses prior to trial; and counsel met with Lounds only once on the morning of trial. The Court wrote that because the jury found Lounds not guilty on the armed robbery charge, the jury "necessarily rejected several aspects of Garrett's (state's witness), account, and accepted as true certain parts of petitioner's testimony."

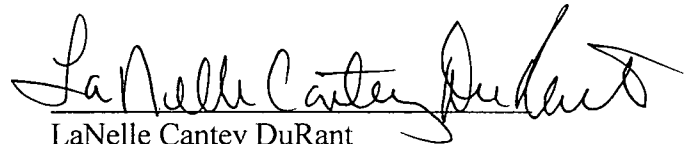
Lyles' case is very similar to Lounds' case in several ways. Lyles' attorney met with him once- the day before his trial basically, and provided Lyles with the discovery at that time. Lyles' attorney Poole had the case for several months before trial and never communicated with Lyles. Trial counsel was served the notice of LWOP timely. Lyles' trial counsel did no independent investigation. Without that investigation, there was no way for him to know if there were other witnesses or other issues for him to use.

Lyles was prejudiced by this lack of independent investigation because there was no way to know what other witnesses might exist other than the state's witnesses. Lyles was denied the opportunity to participate in his own defense fully because he just learned of the kidnapping charge. He was prejudiced because co-counsel Hodges had only two full days to become familiar with the case although she said she could go forward. Lyles was facing life in prison. His attorneys should have sought a continuance in order to present the best case and defense for Lyles.

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, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a large, stylized initial "L".

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of October, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

NOEL MICHAEL LYLES,

PETITIONER,

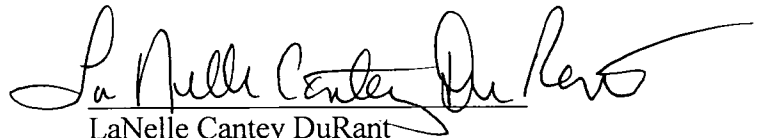
V.

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 Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Noel Michael Lyles, #174105, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 30th day of October, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

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

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