

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Florence County

S.C. Supreme Court

Michael G. Nettles, Circuit Court Judge

CARMICHAEL FLOWERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000926

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 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 investigating and presenting a defense of common-law marriage which would have provided Petitioner with ownership to the damaged property and thus reduce the extent of damages for which he was responsible and thus reduce his sentence?

STATEMENT

In March 2009, the Florence County Grand Jury indicted Carmichael T. Flowers on the charges of kidnapping, criminal domestic violence of a high and aggravated nature (CDVHAN), malicious injury to real property, and malicious injury to personal property. On July 20, 2009, Flowers proceeded to trial before the Honorable Ralph King Anderson, Jr. and a jury. Flowers was represented by Scott P. Floyd, and the state was represented by Patricia Singleton Parr. App. 1. The jury found Flowers not guilty of kidnapping and guilty of the lesser included charge of criminal domestic violence (CDV). The jury found Flowers guilty of malicious injury to real property in the amount of \$24,703.49; and guilty of malicious injury to personal property in the amount of \$11,346.00. App. 511, ll. 21 – App. 512, ll.11. Judge Anderson sentenced Flowers to ten years on the malicious injury to real property, to a consecutive sentence of five years on the malicious injury to personal property, and thirty days on the CDV. The CDV sentence was to run consecutively to the other two sentences. App. 528, ll. 11 – 21.

Flowers' attorney filed a notice of appeal which was perfected by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967) by the Office of Appellate Defense. The South Carolina Court of Appeals dismissed Flowers' appeal on August 25, 2011. State v. Flowers, Op. No. 2011-UP-404 (Ct. App. filed August 25, 2011). App. 730-App. 731.

On June 17, 2011, Flowers filed an application for post-conviction relief (PCR). The state filed a return on August 22, 2012. An evidentiary hearing was held on February 10, 2014 before the Honorable Michael G. Nettles. Flowers was represented by Tristan M. Shaffer, and the state was represented by Joshua L. Thomas. App. 552. On March 10, 2014, Judge Nettles filed an order denying Flowers' PCR application and dismissing it with prejudice. App. 721-App. 728. Flowers' attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not investigating and presenting a defense of common-law marriage which would have provided Petitioner with ownership to the damaged property and thus reduce the extent of damages for which he was responsible and thus reduce his sentence.

Carmichael Flowers and Janel Namias met while they both were working at UPS in New Jersey. Although she was married at the time, they became romantically involved. Ms. Namias did move with Flowers to Virginia Beach around 2006 and eventually to South Carolina. Ms. Namias lived with her parents in Florence while Flowers stayed at a local motel until she bought a house in Florence. Then they began living together until the incident on October 2, 2008. App. 393, ll. 1 – App. 396, ll. 21.

According to Ms. Namias' trial testimony, Flowers began changing his behavior towards her in September 2008. He became aggressive and paranoid. On September 29, 2008, the neighbor from across the street came into their yard and Flowers went outside to talk to her. This was not a person they would normally associate with. Ms. Namias became upset and questioned Flowers. According to Ms. Namias, Flowers threatened to kill her, and pushed her around. She did not call the police then because she was scared. App. 99, ll. 17 – App. 105, ll. 25.

On October 2, 2008, Flowers accused her of lying to him. He pushed her into the bedroom, and much pushing and some hitting followed. He finally displayed a gun and some knives and placed them on the bed where she was. Around 6:30 in the morning, he agreed for her to go see the realtor about selling the house. Instead, she went to the police and filed a report. She moved some of her clothing and items from the house and went to another location. App. 106, ll. 17 – App. 112, ll. 24.

Later that day, she received several calls from Flowers. In one call, he allegedly told her he had damaged the house because she would not come home nor answer his calls. She had the police officers check on the property. They reported to her that there was extensive damage to the house. App. 113, ll. 1 – 25. Ms. Namias testified that she bought the house and paid taxes on it. App. 126, ll. 1 – App. 127, ll. 8.

Flowers testimony was that it was his understanding from his agreement with Ms. Namias that the house was his also. They had a joint checking account then as well. App. 425, ll. 1 – 22. When he and Ms. Namias bought the house, she asked him to put his name on the deed. He said no because he owed the IRS money then. However, he did most of the repair work on the home himself. App.396, ll. 22 – App. 398, ll. 24.

The fight between them started when Ms. Namias became jealous over his friendship with the neighbor across the street, who was named Vonne. On October 2, 2008, Flowers said she got the baseball bat and was coming towards him. He took it and threw it and broke some items. He left the next morning to go see a friend. He denied displaying the gun and knives. App. 408, ll. 10 – 25. He told a neighbor to call him if his wife returned. The neighbor called later to tell him that the police were taking items from his home. App. 399, ll. 4 – App. 405, ll. 24.

Flowers returned home later and saw people in his house. He called the police. Flowers was arrested that night. App. 409, ll. 1 – App. 411, ll. 25.

The jury found Flowers guilty of doing \$24,703.49 worth of damage to the real property and \$11,346 worth of damage to personal property. App. 511, ll. 21 – App. 512, ll. 11.

At his PCR hearing, Flowers testified that he did some damage to the house but not to the extent that the insurance company estimated. App. 602, ll. 1 – App. 608, ll. 24.

Flowers' PCR attorney told the court at the beginning of the PCR hearing, that Flowers contended that he and the victim, Ms. Namias, had a common-law marriage. However, this was not litigated at trial as Ms. Namias was presented more as a girlfriend that he lived with. App. 554, ll. 14 – App. 555, ll. 5.

Flowers' testimony at the PCR hearing was that he and Ms. Namias lived together, had a joint checking account, had a vehicle in both their names, and attended church together. She went by the name of Ms. Flowers, and referred to Flowers as her husband. App. 596, ll. 1 – App. 598, ll. 22. He believed his trial attorney was ineffective because he was going to use equity as a defense and never mentioned equity at trial. App. 598, ll. 25 – App. 599, ll. 18. Flowers became very frustrated with his trial attorney when the attorney did not show Flowers the pictures of the damage to the house, and did not show him the property evaluation of the damage. App. 600, ll. 1 – App. 601, ll. 3. Flowers claimed that his trial attorney was ineffective for not investigating the witnesses that Flowers gave him to interview. App. 615, ll. 23 – App. 616, ll. 7.

Flowers made a motion to the trial court before trial to have his trial attorney relieved from his case. However, Flowers withdrew that motion when the trial judge told him he was not getting another attorney and would have to represent himself. App. 614, ll. 5 – App. 615, ll. 8.

Trial counsel testified that Flowers told him that Flowers and the victim had a common-law marriage, and that the house was partially his. Trial counsel told Flowers that if he had an interest in the property, then it could affect the value of what he destroyed because he could not be liable for destruction of his own property. However, Ms. Namias, the purported common-law wife, at trial denied being Flowers' wife. App. 558, ll. 1 – 21; App. 563, ll. 14 – App. 565, ll. 16.

Trial counsel admitted that he did not argue at trial that Flowers owned the property. He did not request a jury instruction on common-law marriage. Trial counsel could not find any proof other

than Flowers' word that he and the victim had a common-law marriage. In addition, the victim denied it. App. 571, ll. 1 – App. 572, ll. 22.

PCR counsel argued to the court that trial counsel was ineffective for not adequately investigating Flowers' case. Trial attorney was ineffective for not investigating the actual extent of damages caused by Flowers. App. 624, ll. 5 – App. 627, ll. 9.

PCR counsel argued that if the jury had been given the tools to make the decision as to whether Flowers had an ownership interest in the property, it could have made a difference in the outcome of the trial. The jury was not given a charge on the definition of common-law marriage. If Flowers had owned the property, then he could have destroyed at least his share without having a judgment against him for that amount. The definition of marital property could have made a difference in the jury finding him guilty. The jury was not given the law on distinguishing merely from working on the property to having an ownership interest in the property. App. 629, ll. 16 – App. 634, ll. 16.

After the lunch break, the state reported to the PCR judge that he and the PCR attorney had checked the clerk's records and found that Flowers had filed for a divorce after the trial. The Family Court judge, The Honorable Arthur E. Morehead, III, had found there was no common-law marriage between Flowers and Ms. Namias. Therefore, no divorce nor equitable distribution could be ordered by the court. App. 667-App. 669; App. 636, ll. 22 – App. 639, ll. 12.

The PCR judge ruled that although Flowers argued that his attorney was ineffective for failing to raise the common-law marriage defense which could have made him not guilty of malicious injury to property, trial counsel testified that he did investigate this claim but could find no viable proof nor a witness to corroborate Flowers' claim of common-law marriage. App. 723; App. 728.

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.”

Trial counsel was ineffective for not conducting a more thorough investigation to find evidence of a common-law marriage between Flowers and Ms. Ms. Namias. Trial counsel was ineffective for not presenting any evidence through trial testimony or closing argument that there was a common-law marriage and the property was marital property. There was a reasonable probability that the jury would have found Flowers not guilty of the malicious injury to property. The jury obviously found Flowers to be credible since they found him not guilty of the kidnapping and guilty only of the lesser charge of CDV.

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 20th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
MICHAEL G. NETTLES, CIRCUIT COURT JUDGE

CARMICHAEL FLOWERS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

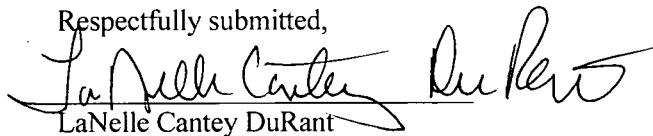
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Carmichael Flowers 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 February 10, 2014. 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 Carmichael Flowers.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of November, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Michael G. Nettles, Circuit Court Judge

CARMICHAEL FLOWERS,

PETITIONER,

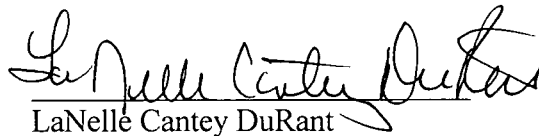
V.

STATE OF SOUTH CAROLINA,

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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 J. Croom Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Carmichael Flowers, #335945, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 20th day of November, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of November, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.