

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Charleston County

S.C. Supreme Court

Kristi Lea Harrington, Circuit Court Judge

BRUCE KENNY HESTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000590

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

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

STATEMENT

In May 2011, the Charleston County Grand Jury indicted Bruce Hester on the charge of forgery. In September 2011, the Charleston County Grand Jury indicted Hester on the charge of armed robbery (AR). On May 17, 2012, Hester appeared before the Honorable Thomas L. Hughston and entered a guilty plea to the lesser offense of strong armed robbery (SAR) and forgery. Hester was represented by Benjamin Lewis and the state was represented by Marian Askins. App. 1. Judge Hughston sentenced Hester to five years on the forgery and ten years on the SAR to run concurrent. The judge did not order restitution because the amount owed of \$959.15 was not practical. App. 11, ll. 1 – 10. Hester did not appeal his convictions or sentences. App. 70.

On May 15, 2013, Hester filed an application for post-conviction relief (PCR). The state filed a return on December 4, 2013. An evidentiary hearing was held on January 15, 2014 before the Honorable Kristi L. Harrington. Hester was represented by James K. Falk, and the state was represented by Ashleigh R. Wilson. App. 26. On March 3, 2014, Judge Harrington filed an order denying Hester's PCR application and dismissing it with prejudice. App. 69 – App. 79. Hester's PCR 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's guilty plea was entered freely, voluntarily and knowingly.

Hester pled guilty to two different incidents that occurred December 21, 2010 and April 14, 2011 in Charleston. The first incident occurred when Hester entered the Ameris Bank on December 21, 2010 and presented a forged check on the Urban Electric account in the amount of \$959.15. The state asked for restitution for that amount. App. 5, ll. 9 – 18.

On April 14, 2011, Hester entered the Best Buy about four o'clock in the afternoon and began talking with a sales clerk about buying a computer. The store video did show this interaction between them. When they approached the sales counter, Hester allegedly pulled up his shirt and told the clerk to look. The clerk said he saw a gun, but it was never pulled out of Hester's pants. However, the store video did not record this interaction as there was no camera pointed in that direction. Hester took the computer and left. App. 5, ll. 19 – App. 6, 20.

Hester was identified and confessed to the incident. The state was unable to prove Hester had a gun as he told Lawrence Shrewberry, who drove Hester to the store, that he did not have a gun but a hairbrush. Therefore, the state allowed Hester to plead guilty to the lesser offense of strong armed robbery. App. 6, ll. 21 – App. 7, ll. 9.

Hester told the plea court that he did not have a gun and had no intention of hurting anyone. He apologized to all. He did turn himself in to the police. App. 8, ll. 1 – App. 9, ll. 19.

At the PCR hearing, PCR counsel informed the judge that the grounds for Hester's PCR was ineffective assistance of counsel for not investigating the facts of the crime and that Hester's guilty plea was not voluntary because plea counsel did not inform him fully of the rights Hester was waiving when he pled guilty. App. 28, ll. 1 – App. 30, ll. 8.

Hester testified that his plea counsel did not fully investigate the case because counsel did not obtain the policy manual from Best Buy which would show that when a customer bought from a locked cabinet, the clerk should take him to the cashier or customer service. The clerk was only trying to save his job by claiming that Hester had a gun. Counsel should have talked to Detective Feeters who knew Hester and would have tried to get the AR charge dropped. Hester believed the charge should have been shoplifting since there was no gun. App. 36, ll. 9 – App. 39, ll. 24.

Hester wanted a trial when the charge was AR because he did not have a gun. He could not remember if plea counsel talked to him about the rights he had and was waiving. App. 40, ll. 1 – App. 49, ll. 18.

Plea counsel testified at the PCR hearing the biggest defense was the video because there was nothing incriminating in it. He did his own investigation and did obtain a copy of the Best Buy policy manual but it was not helpful. The victim would not talk to him. Counsel did discuss the consequences of pleading guilty to Hester but he did not have that in writing. Counsel did not believe that the plea judge specifically all of the constitutional rights except he did explain his right to a jury trial. Hester had a prior robbery conviction in Georgia and could have been facing life without parole in a trial. App. 50, ll. 9 – App. 63, ll. 14.

The PCR judge ruled that he found the testimony of plea counsel to be credible. App. 74. Hester failed to meet his burden of proof that plea counsel provided ineffective assistance of counsel. The judge found that plea counsel demonstrated the normal degree of skill, professional judgment, and representation expected of an attorney practicing criminal law. The judge found that counsel did fully investigate Hester's case. The PCR judge determined that Hester's guilty plea was entered freely and voluntarily as he was fully advised of the consequences of his plea and of his

constitutional rights. The PCR court did not address the prejudice issue since Hester failed to show that plea counsel's performance was deficient. App. 75- App. 78.

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).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certainty that the plea is "an intentional

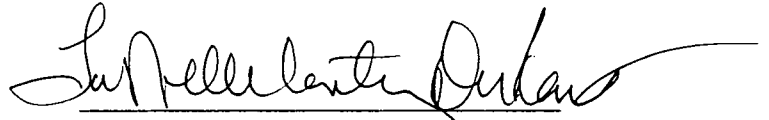
relinquishment or abandonment of a known right or privilege". State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982).

The PCR judge erred in not finding plea counsel ineffective for not insuring that Hester wanted to plead guilty and was satisfied that he knew all of the evidence against him. Counsel did not insure that Hester was fully advised of the constitutional rights he was waiving.

CONCLUSION

Based on the above, certiorari should be granted and the order of the PCR court reversed and the case remanded.

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 25th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
KRISTI LEA HARRINGTON, CIRCUIT COURT JUDGE

BRUCE KENNY HESTER,

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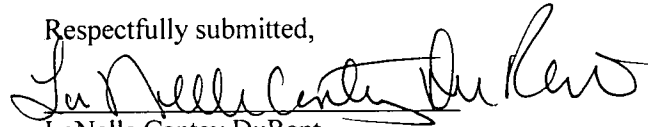
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Bruce Hester 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 January 15, 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 Bruce Hester.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of November, 2014

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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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Bruce Hester #350900, Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 25th day of November, 2014.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of November, 2014.

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