

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC - 2 2014

Certiorari to Greenville County

S.C. Supreme Court

G. Edward Welmaker, Circuit Court Judge

OCTAVIUS LAMAR WHITMIRE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000934

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

INDEX

INDEX.....1
ISSUE PRESENTED2
STATEMENT3
ARGUMENT4
CONCLUSION7
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's guilty plea was entered freely, voluntarily and knowingly?

STATEMENT

In June 2011, the Greenville County Grand Jury indicted Octavius L. Whitmire on the charge of trafficking cocaine 10-28 grams. On October 11, 2012, Whitmire appeared before the Honorable Steven H. John and entered a guilty plea to trafficking cocaine first offense. App. 13, ll. 16 -24. Whitmire was represented by James W. Bannister, and the state was represented by Lauren D. Price. App. 1. Judge John sentenced Whitmire to the negotiated sentence of seven years. App. 5, ll. 16 – 24; App. 16, ll. 20 – App. 17, ll. 16. Whitmire did not appeal his conviction nor sentence.

On November 14, 2012, Whitmire filed an application for post-conviction relief (PCR). The state filed a return on May 3, 2013. An evidentiary hearing was held on February 21, 2014 before the Honorable G. Edward Welmaker. Whitmire was represented by Caroline Horlbeck, and the state was represented by Karen Ratigan. App. 36. On March 25, 2014, Judge Welmaker filed an order denying Whitmire's PCR application and dismissing it with prejudice. App. 69 – App. 76. Whitmire'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's guilty plea was entered freely, voluntarily and knowingly.

On January 17, 2011, the police responded to a call about a suspicious vehicle. When the police arrived they found a car with two people who said they were waiting for their cousin who would be in a white van. One of the people called the cousin and said the police were there and they were waiting for him. Shortly after that, Whitmire appeared at the scene walking. The police allowed everyone to leave but the officers went looking for the white van which they found parked in a lot nearby. The tag was checked and found the van to be registered to Whitmire. A K-P dog was called and he alerted on the van. Whitmire showed up then. His van was searched and two bags were found that contained 20.35 grams of cocaine. App. 10, ll. 3 – App. 12, ll. 1.

At his guilty plea, during his mitigation, Whitmire said that he admitted his guilt as being involved, but thought the seven years was too much because the drugs were not his. He asked for leniency. App. 15, ll. 2 – App. 16, ll. 13. The judge sentenced him to the seven years negotiated plea. App. 17, ll.

At his PCR hearing, Whitmire testified that the drugs were not his, and he had wanted to go to trial. He chose to take the plea offer because his attorney said the plea offer for seven years was a good deal. And if Whitmire went to trial, it would cost about \$3000, and he would likely get twenty-five years. App. 40, ll. 8 – App. 48, ll. 5.

When his attorney told him that he still owed him money, Whitmire decided his plea counsel did not have his best interests at heart, so Whitmire consulted another attorney. When that attorney talked with plea counsel, he told Whitmire that there was nothing he could do to help him. Whitmire remained with his first plea counsel whom Whitmire had retained originally. App. 46, ll.

7 – App.49, ll. 5. Whitmire’s plea was not voluntary because he wanted a trial because he was innocent. The drugs were not his and he did not want to plead guilty to it. App. 49, ll. 6 – 21.

Plea counsel testified that if Whitmire had gone to trial, it would have been as a second offense for the trafficking cocaine. He pled guilty as a first offense. A second offense conviction would have meant that he had to serve 85% of his sentence, but a first offense was only 65%. App. 56, ll. 1 – App. 57, ll. 16. Plea counsel denied that he told Whitmire he would get twenty-five years. He told Whitmire, as he did all of his clients, that he could get the maximum which was twenty-five in Whitmire’s case. However, he could not remember specifically what he told Whitmire. App. 61, ll. 5 – 23.

The PCR judge ruled that Whitmire failed to meet his burden of proof that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The judge also ruled that Whitmire did not prove that his guilty plea was not knowing and voluntary. App. 74. The judge found that plea counsel conducted a thorough investigation and was prepared to go to trial. App. 73.

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).

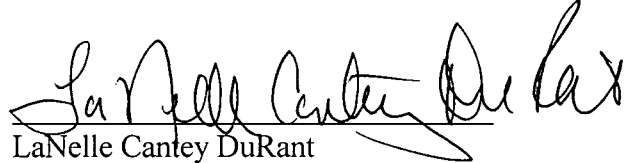
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (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 Whitmire wanted to plead guilty and was satisfied that he knew all of the evidence against him. Counsel did not insure that Whitmire was fully advised of the consequences of his plea.

CONCLUSION

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

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

OCTAVIUS LAMAR WHITMIRE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

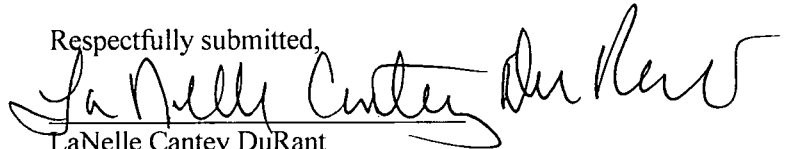
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Octavius Lamar Whitmire 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 21, 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 Octavius Lamar Whitmire.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of December, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

OCTAVIUS LAMAR WHITMIRE,

PETITIONER,

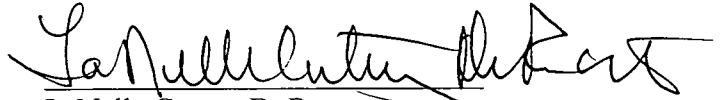
V.

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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Octavius Lamar Whitmire, #249896, at Kirkland Correctional Institution this 2nd day of December, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of December, 2014.

Wendy Jendel (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.