

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

James R. Barber, III, Circuit Court Judge

 ORIGINAL
RECEIVED

MAY - 3 2012

S.C. Supreme Court

MARK A. BROWN, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 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 counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly?

STATEMENT

On April 8, 2009, Mark Brown appeared before the Honorable Doyet A. Early, III, and entered a guilty plea to murder after waiving presentment to the Grand Jury. He was represented by De Grant Gibbons, and the state was represented by Carol J. Summers. Judge Early accepted the recommendation from the state and sentenced Brown to forty years. App. 24, ll. 10 – 14. Brown did not appeal the conviction or sentence.

On March 12, 2010, Brown filed an application for post-conviction relief (PCR). The state filed a return on August 9, 2010. An evidentiary hearing was held on July 11, 2011 before the Honorable James R. Barber, III. Brown was represented by Kelsey Kirkland, and the state was represented by Robert D. Corney, Assistant Attorney General. On August 2, 2011, Judge Barber issued an order denying Brown's PCR application, and dismissing it with prejudice. Brown's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly.

On August 28, 2008, Brown and a friend, Jason Wilson, entered the candy store in Denmark, South Carolina owned by Alfred Myers, an eighty-eight year old man. Brown was eighteen at the time. App. 18, ll. 7 – 20; App. 12, ll. 25; App. 13, ll. 1 – 2. Brown gave a statement to police saying that they planned only to rob Mr. Myers, but knew Mr. Myers had a gun. Brown thought Mr. Myers was going for his gun so Brown shot him in the back. App.13. ll. 4 – 25; App. 14, ll. 1 – 13. The victim died from cardiac arrest as a result of the gunshot. App. 14, ll. 12 – 16.

The state recommended a cap of forty years as the sentence. Judge Early sentenced him to the forty years. App. 15, ll. 14 – 25.

At his PCR hearing, Brown testified that his plea counsel was ineffective because he did not challenge the solicitor when the solicitor misstated what Brown's sister said in her statement. The solicitor told the plea court that Brown's sister told the police she saw Brown and Wilson near the crime scene on the day of the incident. Brown said he read her statement, and she said the last time she saw Brown, he was on the front porch of the house. App. 41, ll. 1 – 25; App. 13, ll. 11 – 18.

Brown said his plea was not entered into voluntarily or knowingly because his counsel told Brown he thought they had no chance of winning at trial. Brown felt then he had no choice but to plead guilty because his plea counsel was not going to work for him, and therefore was ineffective. App. 42, ll. 1 – 21.

Brown's plea counsel testified at the PCR hearing that he knew the evidence against Brown was "overwhelming." The case was death penalty eligible so he started plea negotiations. App. 49, 1 – 24.

Counsel admitted that he did not catch the solicitor's mistake about the sister's statement at the plea, but felt that was a "minor" point. App. 51, ll. 3 – 13.

The PCR judge ruled that Brown failed to carry his burden of proof as he did not prove by a preponderance of the evidence that plea counsel was ineffective, and did not prove that Brown suffered any prejudice. The judge held that Brown's guilty plea was entered knowingly and voluntarily. App. 62.

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).

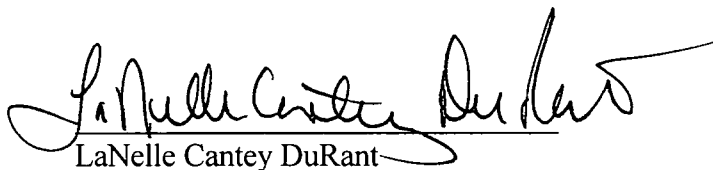
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709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

Brown's attorney did not insure that Brown understood all of the issues of pleading guilty. Therefore, Brown's plea was not entered into knowingly and voluntarily.

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 3rd day of May, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BAMBERG COUNTY
JAMES R. BARBER, III, CIRCUIT COURT JUDGE

MARK A. BROWN, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

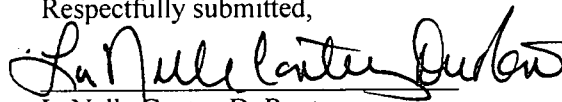
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark A. Brown, Jr. 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 July 11, 2011. 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 Mark A. Brown, Jr..

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 3rd day of May, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

James R. Barber, III, Circuit Court Judge

MARK A. BROWN, JR.,

PETITIONER,

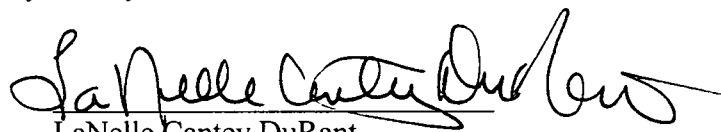
V.

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 Mary S. Williams, Esquire and Mark A. Brown, Jr., #334066, at Lee Correctional Institution, this 3rd day of May, 2012.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of May, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.