

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 10 2015

S.C. Supreme Court

Certiorari to Edgefield County

R. Lawton McIntosh, Circuit Court Judge

ODOURI L. LYLES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001292

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 trial counsel ineffective for not asking for a continuance to discuss a strategy with Petitioner Lytes after it was disclosed during the Jackson v. Denno¹ for the first time that Lytes had claimed full ownership of the drugs in question?

¹ Jackson v. Denno, 378 U.S. 368 (1964).

STATEMENT

In December 2007, the Edgefield County Grand Jury indicted Odour L. Lytes on the charge of trafficking crack cocaine in an amount more than 28 grams but less than one hundred grams. On August 11-12, 2009, Lytes proceeded to trial before the Honorable William P. Keesley and a jury. Lytes was represented by James R. Snell, and the state was represented by Ervin J. Maye and H. Franklin Young, III. App. 1. The jury found Lytes guilty as indicted. Judge Keesley sentenced Lytes to twenty-five years. App. 359, ll. 9 – App. 360, ll. 17. Lytes' attorney filed a notice of appeal. An appeal was perfected by the Office of Appellate Defense in the form of an Anders² brief. The South Carolina Court of Appeals dismissed Lytes' appeal on January 25, 2012. State v. Lytes, Op. No. 12-UP-11, (Ct. App. filed January 25, 2012).

On September 10, 2012, Lytes filed an application for post-conviction relief (PCR). The state filed a return on March 22, 2013. An evidentiary hearing was held on November 15, 2013 before the Honorable R. Lawton McIntosh. Lytes was represented by Adam Nelson, and the state was represented by Walter Whitmire. App. 389. On May 19, 2014, Judge McIntosh issued an order denying Lytes' PCR application and dismissing it with prejudice. Lytes' attorney filed a notice of appeal. This petition follows.

² Anders v. California, 386 U.S. 738 (1967).

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not asking for a continuance to discuss a strategy with Petitioner Lytes after it was disclosed during the Jackson v. Denno³ for the first time that Lytes had claimed full ownership of the drugs in question.

On October 24, 2007, Odouri Lytes was arrested and charged with trafficking crack cocaine when he allegedly sold to an undercover police confidential informant (CI), Antoinette Thomas, fifty-eight grams of crack. App. 151, ll. 7 – App. 153, ll. 2. This was a drug deal arranged by Edgefield County Law Enforcement using CI Young because she had pending drug charges. She agreed to work for law enforcement in arresting drug dealers. She provided the name of Lytes to the investigators. App. 153, ll. 3 – App. 156, ll. 25.

CI Young, who was fitted with a wire, met Lytes at Bledsoe's Car lot in Edgefield. Lytes was driven to the location by a young woman named Crystal Leaphart. Lytes got into CI Young's car. She gave him \$1625 in exchange for the crack. Immediately, law enforcement swarmed in and arrested Lytes. App. 157, ll. 6 – App. 164, ll. 6; App. 395, ll. 14 – 25.

Defense counsel had been told that when Lytes was arrested, he told the investigators that Crystal Leaphart had nothing to do with it as she was just his driver. A hearing pursuant to Jackson v. Denno, *supra*, was held pretrial. During this hearing, defense counsel heard for the first time that as part of his initial statement to the investigators, Lytes also said the drugs were all his. Defense counsel told the court that was the first time he heard Lytes claim ownership of the drugs as that had not been disclosed to him. However, he did not object when the judge ruled that the statement was admissible. Defense counsel did not ask for a continuance to discuss the issue with Lytes. He told the judge he was ready for the jury immediately after the judge's ruling. App. 122, ll. 1 – App. 134,

³ Jackson v. Denno, 378 U.S. 368 (1964).

ll. 25. Counsel did object when the statement was admitted before the jury. App. 286, ll 18 – App. 287, ll. 8.

At the PCR hearing, Lytes was present but did not testify. App. 429; App. 390. Trial counsel did testify. He did not know of the second part of Lytes' statement where he claimed the drugs were his until the hearing. He admitted that he did not ask for a continuance after learning of Lytes' confession in order to discuss it with Lytes and develop a strategy for it. He thought there may have been some time after the hearing but admitted that the jury returned to the courtroom within at least five minutes after the hearing. App. 396, ll. 1 – App. 399, ll. 13.

The PCR judge found that as a matter of general impression, trial counsel exhibited competent representation on the issues of ineffective assistance of counsel that were at issue. The solicitor could have disclosed the discovery materials in a more expedient manner, but the PCR court emphasized more trial counsel's pretrial preparation. And Lytes' conviction was supported by overwhelming evidence of guilt. App. 433.

The PCR judge ruled that trial counsel testified that the undisclosed portion of Lytes' statement was not material where Lytes had already admitted that the other person, Crystal Leaphart, was not involved. This issue did not warrant a continuance. App. 435.

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).

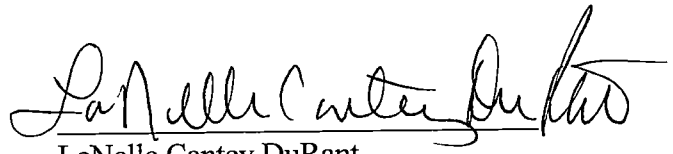
A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Trial counsel was ineffective for not objecting to the statement at the Denno hearing. Counsel should have asked for a continuance in order to discuss this new evidence with Lytes. This admission was incriminating to Lytes and prejudicial.

CONCLUSION

Based on the above, certiorari should be granted, and his case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name and title.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO EDGEFIELD COUNTY
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

ODOURI L. LYNES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

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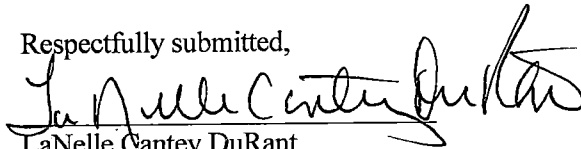
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Odouri L. Lytes 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 November 15, 2013. 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 Odouri L. Lytes.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of June, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

ODOURI L. LYLES,

PETITIONER,

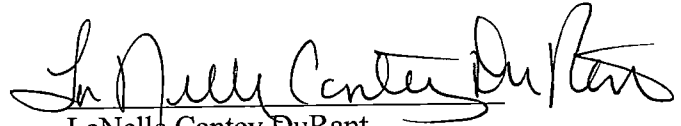
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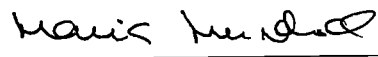
CERTIFICATE OF SERVICE

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 John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Odour L. Lytes, #282918, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 10th day of June, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of June, 2015.

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