

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 25 2015

Certiorari to Horry County

S.C. Supreme Court

John C. Hayes, III, Circuit Court Judge

JOHN ELVIS BOSTIC,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000025

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not fully investigating
Petitioner Bostic's case?

STATEMENT

In March 2011, the Horry County Grand Jury indicted John Elvis Bostic on the charge of burglary first degree. On October 4-5, 2011, Bostic proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. Bostic was represented by W. Edward Chrisco, and the state was represented by George H. DeBusk. App. 1. The jury returned a verdict of guilty as indicted. App. 217, ll. 8 – App. 218, ll. 5. Judge Culbertson sentenced Bostic to fifteen years. App. 224, ll. 7 – 12. Bostic's attorney filed an appeal which was completed by the Office of Appellate Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Bostic filed a motion to withdraw his appeal which the South Carolina Court of Appeals granted by order on October 3, 2012, and then dismissed the appeal with prejudice.

On October 12, 2012, Bostic filed an application for post-conviction relief (PCR). On November 6, 2012, he filed an amended PCR application. The state filed a return on February 6, 2013. On October 29, 2014, an evidentiary hearing was held before the Honorable John C. Hayes. Bostic was represented by Daniel Selwa, and the state was represented by Joshua Thomas. App. 265. On November 17, 2014, Judge Hayes issued an order denying Bostic's PCR application and dismissing it with prejudice. App. 290- App. 294. Bostic's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not fully investigating Petitioner Bostic's case.

On February 25, 2010, Catina Hood and her family returned to their home and found that there had been a burglary. Numerous items were missing including DVD's, bottles of liquor, and beer. Ms. Hood had seen two men walking down the street near her house when they first arrived home. She ran after them when she learned of the burglary hoping they knew something. She soon found the men one of whom was carrying a pillow case with DVD's and a bottle of liquor. When Ms. Hood said she was calling the police, the men ran into the woods. The police came with a tracking dog and found the two men. Ms. Hood identified them as the ones with her things. App. 59, ll. 7 – App. 60, ll. 19; App. 81, ll. 17 – App. 82, ll. 16; App. 282, ll. 16 – App. 283, ll. 12.

At Bostic's trial, the state revealed near the close of their case that they had learned there were several pieces of evidence that had not been disclosed to the defense. These included twenty photos of footprints and footwear; fourteen photos taken at the scene; thirty-nine taken at the lab; and the beer can that was processed for prints and a latent print was found that did not match anyone. App. 137, ll 18 – App. 147, ll. 7.

The trial judge told defense counsel that he would grant a mistrial if counsel requested one. Counsel responded that he had discussed a mistrial with Bostic who did not want the mistrial. Counsel said the solicitor had made a plea offer for Bostic to plead to a lesser offense. However, Bostic did not want to plead guilty and did not want the mistrial. He wanted to proceed with the trial. App. 147, ll. 8 – App. 149, ll. 18.

The trial judge then examined Bostic under oath and explained the mistrial. When the judge asked if he understood, Bostic replied that he did not understand. After more explanation and

explanation of his rights and what he was waiving, Bostic said he understood but wanted to proceed with the trial. App. 149, ll. 19 – App. 156, ll. 5.

At his PCR hearing, Bostic testified that his trial attorney was ineffective because he “should have done his homework” on Bostic’s case. Counsel should have “made sure that the evidence that the DA’s office said they had on him would be in court on his trial date.” Bostic explained to the PCR court that the state had withheld evidence that could have helped him. There was a beer can not turned over initially that had a fingerprint on it that was not his. His lawyer’s job was to know the evidence the state had or did not have by staying in contact with the solicitor’s office. Because of that, his attorney should have asked for the mistrial based on the missing evidence because Bostic did not understand what the mistrial meant. App. 267, ll. 12 – App. 269, ll. 22.

Bostic felt he did not have enough information to make an informed decision. He just wanted to get it over with. He would have taken the plea offer for five years if he had understood. App. 270, ll. 1 – App. 271, ll. 6.

Bostic’s trial counsel testified that there were many problems at the trial. During the trial, the state started to present evidence that the defense never received. Counsel was going to make a motion for a mistrial but Bostic believed the police were lying. Bostic did not want to give them another chance to get their story straight. Even though the state offered for Bostic to plead guilty to burglary third degree second offense for ten to twelve years, he wanted to go forward with the trial. App. 280, ll. 2 – App. 284, ll. 16.

The PCR judge ruled that Bostic had not carried his burden of proof that trial counsel was ineffective for failing to investigate. The judge wrote that trial counsel did a thorough investigation based on the discovery he received from the state. The discoverable evidence that was not provided

to counsel “cannot not be laid at his doorstep.” App. 292. The judge found that trial counsel’s representation of Bostic was effective. App. 294.

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).

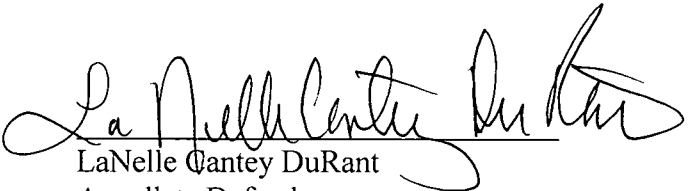
A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Failure to investigate possible defenses constitutes ineffective assistance of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

Trial counsel was ineffective for not conducting a more thorough investigation of Bostic’s case. If he had talked to witnesses, there was a very reasonable probability that he would have learned of the fingerprint on the beer can and of the photos.

CONCLUSION

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

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO Horry COUNTY
JOHN C. HAYES, III, CIRCUIT COURT JUDGE

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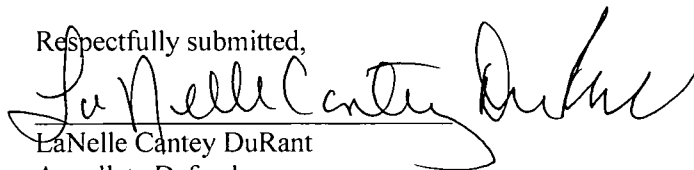
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Elvis Bostic 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 October 29, 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 John Elvis Bostic.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 25th day of June, 2015

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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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. John Elvis Bostic, #348144, Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29335-9308, this 25th day of June, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day
of June, 2015.

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