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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

RODNEY ALEXANDER NASH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000070

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not requesting a jury charge on alibi when the DVD from the Lil Cricket convenience store showed that Nash was there within 14 minutes of the incident and he had testified that he was at his home just prior to going to Lil Cricket.?

STATEMENT

In January 2006, the Spartanburg County Grand Jury indicted Rodney A. Nash on the charges of murder and possession of a firearm during the commission of a crime of violence. On May 5-7, 2008, Nash proceeded to trial before the Honorable Thomas Russo and a jury.¹ Nash was represented by William Godfrey, and the state was represented by Anthony C. Leibert and Ryan McCarty. App. 1. The jury found Nash guilty as charged, and the judge imposed concurrent sentences of forty years for murder and five years for possession of a firearm during the commission of a violent crime. App. 264, ll. 2 – 12; App. 275, ll. 5 – 16. Nash's attorney filed a notice of appeal which was perfected by the Office of Appellate Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Nash's appeal on March 17, 2010. State v. Nash, Op. No. 2010-UP-176 (Ct. App. filed March 1, 2010).

On July 20, 2010, Nash filed an application for post-conviction relief (PCR). The state filed a return on February 16, 2011. An evidentiary hearing was held on January 7, 2013 before the Honorable J. Derham Cole. Nash was represented by Alexandria M. Wolf, and the state was represented by Suzanne H. White. App. 314. November 30, 2014, Judge Cole issued an order denying Nash's PCR application and dismissing it with prejudice. App. 424 – 432. Nash's attorney filed a notice of appeal. This petition follows.

¹ There were two previous trials both of which ended in hung juries. App. 317, ll. 1 – 14.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not requesting a jury charge on alibi when the DVD from the Lil Cricket convenience store showed that Nash was there within 14 minutes of the incident, and he had testified that he was at his home just prior to going to Lil Cricket.

On June 30, 2005, Terrell Farr and Michael Wiggins were leaving the Linville Hills Subdivision after taking Wiggins' sister and her friend to Wiggins' house. As they were driving down the street, they saw Nash standing by a car allegedly holding a gun. Wiggins testified that as they rode by, he looked back and saw Nash with the gun. Wiggins ducked down. His friend Terrell, who was driving, said he was hit. Wiggins had to stop the car because Terrell passed out. App. 94, ll. 1 – App. 101, ll. 18. Wiggins had no doubt that Nash was the person who killed Terrell. App. 103, ll. 18 -24. Dr. David Wren, the forensic pathologist, testified that Terrell died from bleeding to death from the gunshot wound to his left armpit and through his heart. App. 166, ll. 10 – App. 167, ll. 17.

Nash testified at his trial that he had gone to his brother's house on June 30, 2005, which was in the Linville Hills Subdivision. He left between 5:00 and 5:30 because he wanted to go see his sister's newborn baby. He wanted his wife to go with him so he went home. His wife had to go to Bible Study and choir practice that night but he did not know that until she called as she was leaving work. Nash went home and cooked himself a pizza, and watched television. He had no cigarettes so he went to the nearby store, and then returned home. His wife came home and they went to visit his sister but the doors were locked as it was too late. They went to bed. The next morning, a detective from the sheriff's department came and took him in. Nash gave a statement , and then was

arrested and charged with murder. He testified that he did not kill Terrell Farr. App. 204, ll. 12 – App. 213, ll. 6.

Detective Thomas Smith took a statement from Nash on July 1, 2005. Nash was at the Lil Cricket convenience store, which was the nearest one to his house, at approximately 8:30 or 8:45 p.m.. on June 30, 2005. Detective Smith obtained the DVD from Lil Cricket which showed Nash in the store at 8:46 p.m. He was wearing a white tank top and jean shorts. Sergeant Piggins was dispatched to the crime scene at 8:29 p.m. The DVD was admitted into evidence and published for the jury. App. 118, ll. 13 – App. 126, ll. 25; App. 69, ll. 10 – App. 70, ll. 19. Detective Smith explained that he drove to the Lil Cricket from the crime scene and it took him fifteen minutes. App. 127, ll. 1 – App. 128, ll. 10.

Defense counsel did not request a jury charge on the defense of alibi and the trial judge did not give one. Following the jury charges, the judge asked if there were any exceptions. Defense counsel said no exceptions. App. 217, ll. 18 – App. 220, ll. 20; App. 243, ll. 2 – App. 258, ll. 25.

At his PCR hearing, the state, in explaining the history of Nash's case, that there were three trials. The first two ended in a hung jury. The PCR hearing was about the third trial when Nash was found guilty of murder and possession of a weapon during a violent crime. App. 317, ll. 1 – 22.

Nash testified that his trial counsel was ineffective because he did not request a jury charge on the defense of alibi. He explained that the evidence was not overwhelming and was circumstantial. His alibi defense was that he was not at the scene when the crime occurred. He was at home alone and then went to the Lil Cricket convenience store to buy cigarettes. App. 318, ll. 1 – App. 324, ll. 10.

His PCR attorney pointed out that he was alone during the time of the crime. Nash responded that he had the DVD of the store which was an alibi. But, his PCR attorney explained

that the evidence did not necessarily give him an alibi because he was seen on the tape within 10 to 15 minutes of the crime, and it was 14 minutes from the crime scene to the Lil Cricket. Nash continued that he was at home except when he went to the store which was the nearest one to his home. App. 324, ll. 11 – App. 329, ll. 25.

Trial counsel testified that the only evidence the state had was the testimony of Michael Wiggins. The question was whether Wiggins could actually see what he claimed he saw. What Nash claimed to be an alibi was not really an alibi. There was bad blood in the neighborhood as Nash's parent's home had been shot at in a drive by shooting. App. 361, ll. 1 – App. 365, ll. 24. Trial counsel said he did not ask for a jury instruction on alibi because it was not necessary. He wanted the jury to focus on the fact that this was a shoddy police investigation, and not that Nash did not have a "classic" alibi with someone claiming he was with then at the time of the crime. App. 373, ll. 21 – App. 375, ll. 12.

The PCR judge ruled that he found trial counsel's testimony to be more credible than the testimony of Nash. The judge found that trial counsel was "thoroughly competent" in his representation. Nash failed to prove that trial counsel was ineffective nor that Nash was prejudiced by counsel's performance. App. 431- App. 432. The judge wrote that in order to establish an alibi defense, the defendant must present evidence that he was at another place at the time of the crime and could not have committed the crime. Nash could not do this as he was seen on the store DVD within the 15 minute drive from the crime scene 15 minutes following the shooting. App. 428.

Failure to request a proper jury instruction constitutes ineffective assistance of counsel. Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991). A charge on alibi should be given "when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission." State v. Robbins, 275 S.C. 373, 271 S.E.2d 319, 320 (1980). The State bears the burden of disproving alibi. State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959).

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).

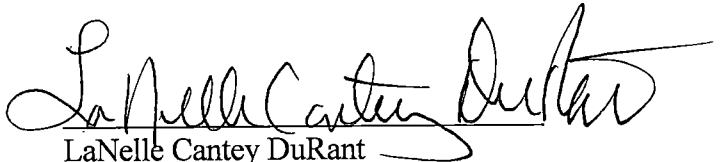
Nash’s testimony at trial supported a jury instruction on alibi. The judge did not give this charge as defense counsel did not request it. “It is well-settled that counsel’s rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness.” Ford v. State, 314 S.C. 245, 442 S.E.2d 604, 606 (1994). Since Nash’s defense was alibi, there could have been no strategic reason for waiving an instruction on that defense. Compare State v. Pagan, 369 S.C. 202, 631 S.E.2d 262 (2006).

Defense counsel was ineffective for not requesting a jury charge on alibi. Nash did not receive effective assistance of counsel for this reason. See, for example, Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992).

CONCLUSION

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

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

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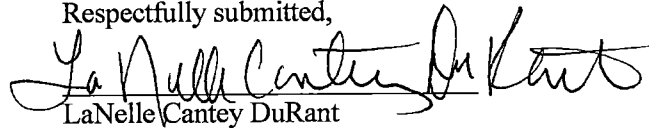
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Rodney Alexander Nash 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 7, 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 Rodney Alexander Nash.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of July, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

RODNEY ALEXANDER NASH,

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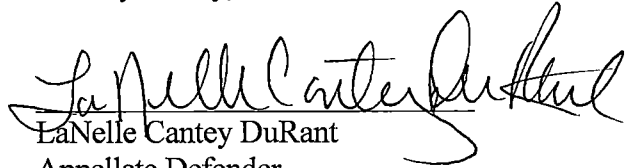
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CERTIFICATE OF SERVICE

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 Karen C. Ratigan, Esquire and Rodney Alexander Nash, #292870, at McCormick Correctional Institution this 28th day of July, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.