STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Carmen T. Mullen, Circuit Court Judge

NATHANIEL C. DICKSON, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2015-000439

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Dickson's guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate Petitioner's case?

STATEMENT

In May 2008, the Anderson County Grand Jury indicted Nathaniel Dickson on four counts of murder and possession of a weapon during a violent crime. On September 21, 2009, Dickson appeared before the Honorable J. Cordell Maddox, Jr. and a guilty plea to each of the four murders. App. 4, ll. 1 – 13. Dickson was represented by Kurt Tavernier and Andrew Potter. The state was represented by Christina Adams. App. 1. The judge accepted the state's plea offer and sentenced Dickson to four consecutive life sentences on the four murders and five years on the possession of a weapon during a crime of violence. In exchange the state did not seek the death penalty. App. 4, ll. 1 – 19; App. 56, ll. 5 – App. 58, ll. 23. Dickson did not appeal his convictions nor sentences.

On August 25, 2010, Dickson filed an application for post-conviction relief (PCR). The state filed a return on November 3, 2010. An evidentiary hearing was held on December 1, 2014 before the Honorable Carmen T. Mullen. Dickson was represented by Hugh Welborn, and the state was represented by John W. Whitmire. App. 74. On February 6, 2015, Judge Mullen issued an order denying Dickson's PCR application and dismissing it with prejudice. Dickson'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 Dickson's guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate Petitioner's case.

On Saturday morning of April 26, 2008, Petitioner Nathaniel Dickson was at home with his father, his stepmother, his fourteen year old brother, and his nineteen year old stepsister. An older stepsister was away at school. According to the statement Dickson allegedly gave to the police, Dickson slept in his brother T.'s room the night before. Saturday morning, Dickson went into his brother's closet looking for some of Dickson's clothes. He saw his brother's twelve gauge shotgun in the corner. Dickson grabbed the gun, loaded it, and walked to his stepmother's bedroom. His stepmother was in the bed and his stepsister was sitting at the foot of the bed talking to her mother. Dickson shot his stepmother on the right –hand side of her head. App. 10, ll. 8 – App. 12, ll. 25.

He returned to his brother's bedroom and reloaded the shotgun. He followed his stepsister into the kitchen and shot her. His brother walked in just before Dickson shot his stepsister. He punched his brother and knocked him out. He heard his father drive up. Dickson reloaded the shotgun. He went outside and saw his father near the pool. He shot at his father but thought he missed him as his father started running to the road. App.13, ll. 1 - 19.

Dickson returned to the house and reloaded the gun. He saw his brother in the walkway toward the driveway screaming. He then shot his brother. Dickson returned to the house again and reloaded. He went outside and saw his father at the edge of the road. Dickson shot at his father and hit him this time. But his father started crawling down the road. Dickson went inside again and reloaded. His brother was on the chair in the living room. His brother looked at Dickson and cried

for help. Dickson could not stand to hear the crying so he shot his brother in the head. App. 13, ll. 20 – App. 14, ll. 20.

Dickson went to the closet and loaded the gun again. He went outside to the road where his father was. His father was on the phone. When he reached his father, his father told Dickson that he loved him. Then Dickson took his last shot at his father but hit him in the hand and arm. Dickson then swung at his father using the bat like a club and hit him. Dickson then threw the gun into the woods. He felt sick at that point. He got the keys to his stepmother's car and went to the gas station and bought a can of dip. He called his friend and went to see him. They rode four wheelers the rest of the day. The detectives arrested him at Brantley's when they returned. App. 14, ll. 20 – App. 17, ll. 2.

Dickson gave a statement to law enforcement that same evening. He told them that he killed all of his family and did not know why he did. Once he shot his stepmother, he could not stop. He said: "It hurts inside and I really can't believe it is real. I am concerned how all of this may affect my enlistment in the Marine Corps. I am sorry for all the trouble I have caused. It just hurts inside." App. 17, ll. 3 – 13. Dickson was eighteen at the time. App. 11, ll. 1.

The state made a plea offer for which Dickson agreed to plead guilty. The offer was for Dickson to plead guilty to the four murders for four life sentences, and possession of a weapon during a crime of violence. In exchange, the state would not seek the death penalty. App. 4, ll. 1 – 20.

During the guilty plea, when Judge Maddox asked Dickson if he were guilty, one of Dickson's attorneys told the judge that Dickson had no independent recollection of the crime as he had been diagnosed as having dissociative amnesia. His attorneys had Dickson seen by several mental health experts and one of them, Dr. Rob Richards, was at the plea to address this amnesia

issue. The judge said that Dickson had to tell the judge he was guilty if he were pleading guilty. Dickson's attorney said that Dickson could tell the judge he was responsible for the crime. Dickson then told the judge that he was responsible. App. 8, ll. 1 – App. 9, ll. 23.

Dr. Rob Richards told the plea court that he had seen Dickson twenty-one times over the course of eighteen months. He diagnosed him as having dissociative amnesia which was a loss of memory of personal information that was emotionally traumatic. Dickson was not malingering. App. 20, ll. 1 – App. 23, ll. 11. Dr. Richards then told of the experts that had seen Dickson during the past eighteen months and of the evaluations he had. Dickson was competent and always appeared to understand what was going on. Dickson told the judge that he believed the statement was his although he did not remember giving it. App. 23, ll. 12 – App. 28, ll. 25.

The judge accepted Dickson's plea after a lengthy colloquy to address the judge's concerns. He sentenced Dickson to four consecutive life sentences and five years on the gun charge to run consecutive. App. 57, ll. 11 – App. 59, ll. 11.

At his PCR hearing, Dickson testified that his guilty plea was not voluntarily made. He took the plea offer to avoid the death penalty. His two attorneys told him that he would get the death penalty if he went to trial. If Dickson had known the evidence then that he knew by the PCR hearing, he would not have pled guilty but would have gone to trial. No gun residue was found on him when he was arrested, and the statement the police said he made was not his. His attorneys did not fully investigate his case and did not review the evidence with him the evidence against him. App. 78, ll. 1 – App. 89, ll. 23.

Dickson believed he was prejudiced by his attorneys not doing the proper preparation. He asked the PCR court to grant his PCR because his plea was involuntarily given. App. 97, ll. 1 – 21.

Both trial attorneys testified at the PCR hearing. Attorney Potter testified first that he was assigned Dickson's case the Monday after the incident happened on the previous Saturday. He explained that Attorney Tavernier became involved as the lead attorney because, in the beginning, they believed this would be a death penalty case. Attorney Potter's role was to supplement Attorney Tavernier. Because of the evidence against Dickson and his statement, the defense put together a defense mitigation team. They had Dickson seen by a psychologist, and a psychiatrist on a regular basis based on his mental health issues. If Dickson had gone to trial, he would be facing the death penalty. He reviewed some discovery with Dickson. When told that Dickson alleged that he did not fully investigate his case, Attorney Potter said there was nothing else that could have been done on this case because it was a death penalty case and juries in Anderson County sent people to death. App. 101, ll. 1 –App. 109, ll. 2.

Attorney Tavernier, the second trial attorney, reviewed Dickson's statement to police in his first meeting with Dickson. Dickson admitted giving the statement to police. Attorney Tavernier's primary concern was avoiding the death penalty. There was evidence in the medical records that Dickson had been hit in the head with a baseball bat and suffered a concussion. Also his father had hit him and dislocated an orbital socket. Dickson had offered an alibi later during the case where he said an intruder did the murders and Dickson got a shot in him before the assailant ran. When Attorney Tavernier was asked if he investigated this, he said he did not call any hospitals to find information about such a person. He said there was nothing they could determine. App. 109, ll. 15 – App. 120, ll. 23.

The PCR judge ruled that he found Dickson's testimony to not be credible regarding his attorneys' failure to investigate his case. The judge found Attorney Tavernier's testimony to be credible that he and Attorney Potter did an extensive investigation of the state's evidence. The judge

held that Dickson failed to meet his burden of proof that his attorneys were ineffective for failing to investigate. App. 127. The judge denied Dickson's PCR. App. 128-App. 129.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

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).

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).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that for purposes of the claim of ineffective assistance of counsel, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

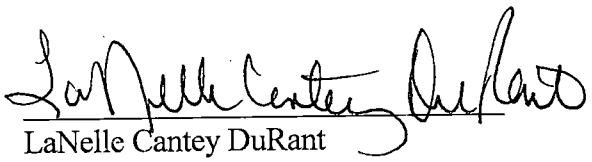
In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court reversed the PCR court and remanded Lounds' case because his defense counsel was ineffective for failing to adequately prepare for trial so as to be able to call key witnesses. Counsel failed to make an independent investigation of the facts and circumstances.

The PCR judge erred in not finding plea counsels ineffective for not insuring that Dickson wanted to plead guilty and was satisfied that he knew all of the evidence against him. Counsel did not conduct an independent investigation. If counsel had conducted an investigation, there was a reasonable probability that they may have seen something that the state missed. Dickson was facing the death penalty. He needed true advocates—not just mitigators.

CONCLUSION

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

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2015.

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CERTIORARI TO ANDERSON COUNTY
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Nathaniel Dickson states:

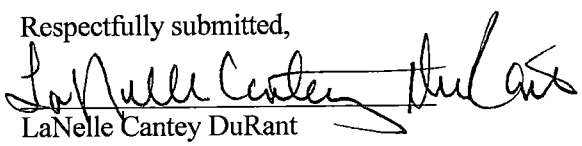
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on December 1, 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 Nathaniel Dickson.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
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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 and Nathaniel Dickson, #336982, at Lee Correctional Institution this 16th day of September, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of September, 2015.

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