

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

NOV 12 2015

Certiorari to Cherokee County
Deadra L. Jefferson, Circuit Court Judge

S.C. Supreme Court

JAMES RAY BYERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001077

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 9

ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not challenging the affidavits and indictments which described the drug as crack cocaine when no field test was performed and the SLED report was not completed?

STATEMENT

In October 2009, the Cherokee County Grand Jury indicted Petitioner Byers on the charges of distribution of crack cocaine third or subsequent offense, and distribution of crack cocaine within a half mile of a school or park. On April 19 – 20, 2011, Petitioner Byers proceed to trial before the Honorable J. Derham Cole and a jury. He was represented by William Rhoden, and the state was represented by Kimberly L. Leskanic and Matthew Kendall. App. 1. The jury returned verdicts of guilty as indicted. App. 273, ll. 14 – 24. The trial judge sentenced Byers to life without parole (LWOP) based on two prior convictions for serious offenses. App. 276, ll. 16 – App. 277, ll. 24.

Petitioner Byers filed a notice of appeal which was perfected by The Division of Appellate Defense of the South Carolina Commission on Indigent Defense. The South Carolina court of Appeals affirmed Petitioner's conviction and sentence on March 27, 2013. State v. Byers, Op. No. 2013-UP-121 (Ct. App. filed March 27, 2013). App. 392-App. 392.

On May 13, 2013, Byers filed an application for post-conviction relief (PCR). The state filed a return on March 17, 2014. An evidentiary hearing was held on January 14, 2015 before the Honorable Deadra L. Jefferson. Byers was represented by Leah B. Moody, and the state was represented by Suzanne H. White. App. 304. On April 29, 2015, Judge Jefferson issued an order denying Petitioner Byers' PCR application and dismissing it with prejudice. App. 390 – App. 416. Byers' attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not challenging the affidavits and indictments which described the drug as crack cocaine when no field test was performed and the SLED report was not completed.

Felicia Jackson had been charged with criminal domestic violence (CDV), and agreed to work with the Cherokee County Sheriff's Office as a confidential informant (CI) in narcotics to make a small amount of money—thirty dollars. App. 104, ll. 12 – App. 107, ll. 24. On August 26, 2009, she met with Officers Jason Burgess and Todd Parker of the Cherokee County Sheriff's Department to prepare for a drug buy. The officers fitted her with a camera to record the transaction, and money to make the purchase. Her boyfriend, Michael Owensby, went with her. App. 105, ll. 1 – App. 106, ll. 24.

She and her boyfriend were taken to the Sixth Street Store in Gaffney where she made a purchase of drugs for ten dollars from a man she knew only as 1-9. They left and met with the two officers again. Ms. Jackson gave the drugs she had just purchased to Officer Jason Burgess. App. 108, ll. 1 – App. 111, ll. 18.

Officer Jason Burgess confirmed the testimony of the CI, Felicia Jackson. He sent the CI out to purchase crack cocaine with twenty dollars. App. 145, ll. 14 – App. 146, ll. 25. When the CI returned with the substance, Officer Burgess testified:

- A. It was a white colored rock-like substance believed to be crack cocaine.
- Q. And what did you do with that white rock-like substance believed to be crack cocaine?
- A. I had a vanilla envelope and when they got back, they---or Felicia dropped it into the bag for me.

App. 147, ll. 11 – 23.

Officer Burgess testified that once the substance was put into the manila envelope, he never took it out. When he returned to the office, he put the envelope into a best bag that was sealed. He put the best bag in the evidence drop box. App. 149, ll. 1 - App. 151, ll. 24.

Chris Wyatt was evidence clerk for the Cherokee Sheriff's Office in August 2009. App. 182, ll. 15 – App. 183, ll. 25. He delivered the best bag with the substance to SLED when his next scheduled time to go to SLED occurred. App. 184, ll. 1 – App. 187, ll. 25.

Carmen Tucker was the forensic chemist in the toxicology department at SLED. App. 197, ll. 6 – 25. She received the substance in the best bag for the first time on October 12, 2009. App. 208, ll. 18 – App. 209, ll. 1. she tested the substance and determined that it was .08 grams of crack cocaine. After testing, she returned the drug to the bag and sent it to a secure facility at SLED until someone from the agency picked it up. App. 202, ll. 1 – App. 203, ll. 25.

At his PCR hearing, Petitioner Byers testified that his trial counsel was ineffective for not acting diligently on his behalf. Trial counsel did not investigate the indictments and warrants. App. 309, ll. 1 – App. 311, ll.24. Byers claimed that the video of the alleged transaction did not show him selling anything. Nothing can be seen being passed between the people. His attorney failed to challenge the indictments and affidavits because the affidavits and warrant were false and they were used to get the indictment. His attorney never questioned the sufficiency of the indictments. App. 318, ll. 1 – App. 320, ll. 25.

Byers claimed that Officer Burgess signed the affidavit and obtained the indictments before he received the SLED lab report that the drugs were crack cocaine. Byers had the SLED drug lab results that showed that Carmen Tucker with SLED did not send the lab report back to Cherokee County until December 31, 2009. The indictment was obtained in October 2009. Byers had Officer Burgess's case file checklist signed October 5, 2009 which indicated the things Officer Burgess

needed to get in order to get the indictment. One of the items listed was the drug lab results. His lawyer should have questioned the indictment as to how the indictment was obtained when they were still waiting on the drug results. His attorney should have objected to the affidavits and warrant as well on the same basis. App. 331, ll. 25 – App. 335, ll. 25.

Trial counsel testified that he was retained by Byers to represent him at trial. He saw no legal reason to object to the indictments. Byers had already been indicted by the time trial counsel was retained to represent him. Counsel felt the indictments were correct. Counsel said this was not a case to try, and he advised Byers not to go to trial. He played the videos for Byers to see. Counsel tried to get Byers to take the plea offer because he thought that was in his best interest. App. 353, ll. 1- App. 358, ll. 9.

The PCR judge stated on the record that in the Grand Jury proceeding, the “fact that a CI or that the officer observed a CI buy would have been sufficient to have sustained an indictment. You don’t have to wait for the SLED report to come back.” The judge said that she could find no rule or statute that required that. App. 370, ll. 9 – App. 371, ll. 3.

In her order, the judge ruled that she found the testimony of trial counsel to be more credible than the testimony of Petitioner Byers as to all allegations raised in the PCR application and the hearing. App. 398. Regarding the indictments and affidavits being invalid, the judge held that she found no basis for trial counsel to challenge the indictments. App. 401. The judge included in her order that the state presented the “eyewitness testimony of Officer Burgess who was present during the controlled buy.” App. 404. The judge also provided in her order:

Additionally, this Court notes that law enforcement’s sound practice to field-test substances, which then return presumptive positive or negative results affirming or negating narcotic or drug properties, supports the personal knowledge requirement of swearing an affidavit.

App. 405.

The order provided that Byers failed to meet his burden of proof that trial counsel failed to render reasonably effective legal assistance under prevailing professional norms. Byers failed to demonstrate any prejudice he suffered based on trial counsel's actions. App. 414. The judge denied Byers' PCR application. App. 415.

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 PCR court erred in not finding trial counsel ineffective for not challenging the validity of the affidavits and the indictments because there was no proof that the drug was crack cocaine. The solicitor stated in his opening to the jury that the crack was sent to SLED where it was tested by a chemist to "insure that it was, in fact, crack cocaine." App. 69, ll. 6 – 18. Based on the record, the SLED chemist received the drugs on October 12, 2009. The drugs were returned to the Cherokee

County Sheriff's Office on December 31, 2009. Byers' case was indicted well before then on October 29, 2009. App. 417 – App. 425. According to the opening statement of the solicitor, the grand jury was not sure it was crack at the time of the indictment.

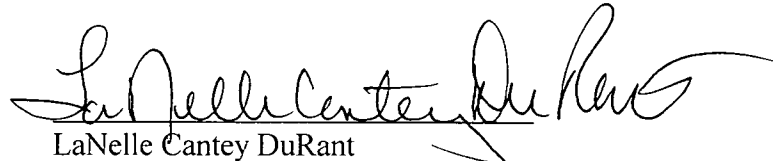
The PCR judge wrote in her order that law enforcement's sound practice to field test substances supported the personal knowledge requirement of swearing an affidavit. App. 405. However, nothing in the record indicated that a field-test was conducted on these drugs. Officer Burgess had the CI immediately drop the substance into the evidence bag. It was sealed and sent to SLED. App. 147, ll. 11-23. Officer Burgess never removed the drugs from the bag. App. 149, ll. 1 – App. 151, ll. 24.

Byers was prejudiced because the trial could not proceed without an indictment. Although the state could re-indict the case, this additional time could reasonably have allowed Byers time to reconsider the plea offer and avoid a life sentence.

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 12th day of November, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

Deadra L. Jefferson, Circuit Court Judge

JAMES RAY BYERS,

PETITIONER,

V.

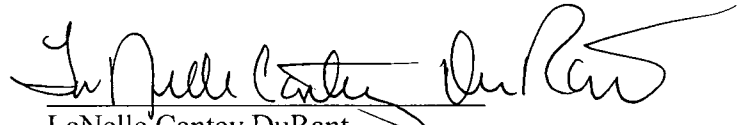
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001077

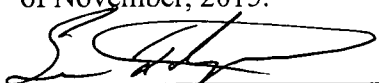
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and James Ray Byers, #293715, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of November, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of November, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.