

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

D. Craig Brown, Circuit Court Judge

RECEIVED
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S.C. Supreme Court

KENDALL M. BACCUS

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE #2015-001280

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 counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly?

STATEMENT

In September 2012, the Florence County Grand Jury indicted Kendall M. Baccus on the charge of attempted murder. On April 19, 2013, Petitioner Baccus appeared before the Honorable William Seals and entered a guilty plea to attempted murder. Baccus was represented by William Grove, and the state was represented by Patricia Parr. App. 1. Judge Seals sentenced Baccus to the recommended cap of twenty years. App. 15, ll. 9 – 13. Baccus appealed his conviction but his appeal was dismissed by the South Carolina Court of Appeals because Baccus failed to file a sufficient explanation pursuant to Rule 203(d)(1)(B)(iv), SCACR. App. 85.

On January 15, 2014, Baccus filed an application for post-conviction relief (PCR). The state filed a return on November 5, 2014. An evidentiary hearing was held on April 16, 2015 before the Honorable D. Craig Brown. App. 32. On May 26, 2015, Judge Brown issued an order denying Baccus' PCR application and dismissing it with prejudice. App. 73 – App. 81. Baccus' attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly.

On April 3, 2012, Baccus and his brother approached another young man at his home about an earlier incident when he had been talking to the girlfriend of Baccus' brother. There was a confrontation, and then the other young man walked away into his residence where his girlfriend and child were. Baccus had a gun. He shot into the front door striking the other man in his arm. The other man required medical attention and was taken to the hospital. The solicitor told the trial court that Baccus had confessed. App. 8, ll. 6 – App. 9, ll. 11; App. 56, ll. 9 – 23.

The state recommended a cap of twenty years on the attempted murder charge. The judge sentenced Baccus to the full twenty years. App. 15, ll. 9-12.

At his PCR hearing, Baccus said the main issue was that he had wanted a trial. His attorney did not understand that Baccus wanted a trial. His attorney focused on mainly trying to get a lesser charge for Baccus. App. 40, ll. 1 – Ap. 41, ll. 24. His plea attorney told him that the best thing for him was to take the plea offer of a cap of twenty years. Baccus did not give a statement confessing to the crime. His brother gave a statement claiming that Baccus committed this crime. App. 42, ll. 2 – App. 43, ll. 22.

Baccus said he had a learning disability and was ADHD. He did not read very well and could not remember very well. App. 39, ll. 1 – 24. If he had known then what he knew at the PCR hearing, he would not have pled guilty but would have gone to trial. His attorney told him again that the plea offer was in his best interest. App.46, ll.17 – App. 48, ll. 9. Baccus decided to plead guilty to avoid getting a longer sentence at trial. App. 52, ll. 3 – 19.

Baccus' plea counsel testified at the PCR hearing that the best defense they had was to try to get the attempted murder charge reduced to ABHAN. App. 54, ll. 1 – 25; App. 56, ll 9 – App. 58, ll. 14. Baccus asked to have a mental evaluation because of his ADHD and learning disability. However, counsel did not see a need for a mental evaluation. Baccus seemed to understand the process and what was happening. App. 59, ll. 10 – App. 60, ll. 25.

The PCR judge ruled at the hearing that he found that Baccus' plea was entered freely, voluntarily, knowingly and intelligently. He continued to rule on the record that Baccus failed to prove that plea counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases. The judge found that Baccus failed to show that but for counsel's errors, he would not have pled guilty but would have gone to trial. He denied Baccus' PCR application. App. 70, ll. 15 – App. 71, ll. 14.

In his order, the judge included the rulings he made on the record. He added to the order that he found counsel's testimony credible and found Baccus' testimony not credible. App. 74. The PCR judge included in his order again that Baccus knowingly, intelligently, and voluntarily entered his guilty plea. App. 80.

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, 466 U.S. 668, 104 S.Ct. 2052 (1984).

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 one 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. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

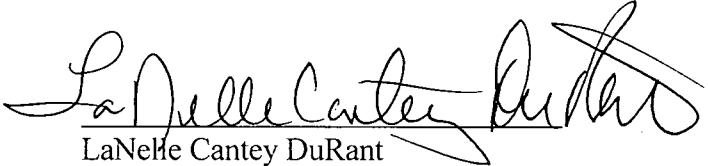
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certainty 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). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

The PCR judge erred in not finding plea counsel ineffective for not insuring that Baccus wanted to plead guilty. Baccus had learning problems as well as ADHD. This meant that plea counsel had to make special efforts to insure that Baccus understood the evidence and the process. Baccus said he had not idea what he was up against. He did not know the evidence against him. App. 42, ll. 1 – 25.

CONCLUSION

Based on the above, certiorari should be granted, the order of the PCR court reversed, and the 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.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
D. CRAIG BROWN, CIRCUIT COURT JUDGE

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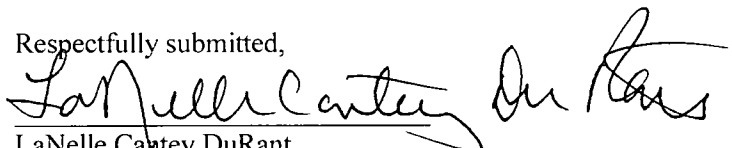
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kendall M. Baccus 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 April 16, 2015. 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 Kendall M. Baccus.

Respectfully submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of November, 2015

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IN THE SUPREME COURT

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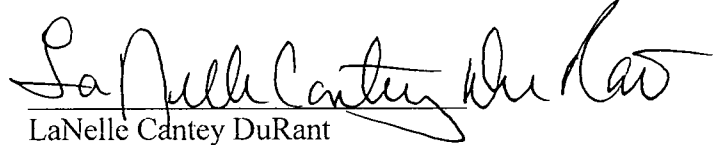
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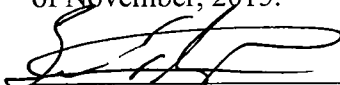
CERTIFICATE OF SERVICE

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 J. Croom Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Kendall M. Baccus, #355137, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of November, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of November, 2015.

 (L.S.)

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