

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Edgar W. Dickson, Circuit Court Judge

RECEIVED

JAN 27 2016

SC SUPREME COURT

DAVID DALE SHERIFF,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001012

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 trial counsel ineffective for not conducting his own investigation of Petitioner Sheriff's case instead of relying on the investigation done by Petitioner's former attorney who had been relieved by the court at Petitioner's request because Petitioner felt his former attorney was not working in Petitioner's best interests?

STATEMENT

On December 15, 2009, the Anderson County Grand Jury indicted David Dale Sheriff on the charge of burglary first degree based on two prior convictions for burglary. The state served Sheriff with a Notice of Intent to Seek a Sentence of Life Without Parole (LWOP) based on a prior conviction of burglary first degree. On July 19 – 20, 2010, Sheriff proceeded to trial before the Honorable R. Lawton McIntosh and a jury. Sheriff was represented by Kurt Tavernier, and the state was represented by Assistant Solicitor T. Matthew Bradley. App. 1. The jury returned a verdict of guilty as indicted. Judge McIntosh sentenced Sheriff to the mandatory life without parole. App. 150, ll. 13 – 25. An appeal was perfected with the filing of an appellate brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Petitioner Sheriff's conviction and sentence on July 18, 2012. State v. Sheriff, Op. No. 2012-UP-453 (Ct. App. filed July 18, 2012).

On June 12, 2013, Sheriff filed an application for post-conviction relief (PCR). The state filed a return on January 7, 2014. An evidentiary hearing was held on July 30, 2014 before the Honorable Edgar W. Dickson. Petitioner Sheriff was represented by Hugh Welborn, and the state was represented by John W. Whitmire. App. 168. On May 1, 2015, Judge Dickson issued an order denying Sheriff's PCR application and dismissing it with prejudice. App. 225 – App. 235. Sheriff's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not conducting his own investigation of Petitioner Sheriff's case instead of relying on the investigation done by Petitioner's former attorney who had been relieved by the court at Petitioner's request because Petitioner felt his former attorney was not working in Petitioner's best interests.

David Sheriff was charged with entering the home of John Blume during the day time on April 19, 2005, while Blume was at work. App. 43 ll. 1 – App. 45, ll. 25. The burglar gained entry to the home by breaking the glass in the back door. App. 45, ll. 19 – 21. Money was missing from Blume's dresser in the amount of \$1300. Also missing were binoculars and a range finder. App. 46, ll. 1 – 5. Blood found on the keypad of the alarm system and on a door in the house was a match to the buccal swab taken from Sheriff. R. 44, ll. 11 – App. 45, ll. 21; App. 62, ll. 1-24; App. 72, ll. 20 – App. 73, ll. 7; App. 75, ll. 1 – 24.

Sheriff was arrested in 2009, and charged with burglary in the first degree based on two prior convictions for burglary or housebreaking. App. 236 – App. 237, Indictment 2009-GS-04-02990; App. 73, ll. 2 – 24; App. 58, ll. 2 – 21; App. 5, ll. 20 – 25; App. 119, ll. 1 – 25. Sheriff was convicted by the jury of burglary first and the trial court sentenced him to the required life without parole sentence (LWOP). App. 146, ll. 1 – 6; App. 150, ll. 13 – 25.

At his PCR hearing, Sheriff testified that his trial counsel was ineffective for failing to investigate his case. He said that trial counsel was his attorney for only two weeks before the trial. His attorney did no investigation of Sheriff's case on his own but relied only on the investigation done by his previous attorney. App. 175, ll. 20 – App. 176, ll. 10. Sheriff said he was not satisfied with trial counsel Tavernier. App. 184, ll. 8 – 13. Sheriff explained why:

Because I felt like that, yes, sir, I am guilty. I did commit my crime. But I felt like with him being my lawyer for a couple of weeks, he could have went in there and done his own investigation. Maybe we could have come to some kind of different finding that I could have pled guilty to a straight sentence before this trial took place. A lot of different things.

App. 184, ll. 15 – 22.

Sheriff testified that he had his first attorney, who was with the Public Defender's Office, relieved because of a problem with the indictments. The day after he pointed the mistake out to his attorney, the solicitor had his case re-indicted. App. 178, ll. 1 – App. 179, ll. 6. The transcript from the march 8, 2010 hearing to relieve Sheriff's first attorney was made Joint Exhibit Number 1. App. 177, ll. 3 – 16.

Sheriff went on to testify that the plea offer of forty years was a life sentence to him since he was already in his forties. This was before he realized that the life sentence he received was really a death sentence. "It's life to the death which gives me no opportunity for anything." App. 185, ll. 10 – 20.

Trial counsel Tavernier testified that he was appointed to represent Sheriff because a dispute arose between Sheriff and his first attorney. The court relieved the first attorney and appointed Tavernier. App. 186, ll. 9 – App. 187, ll. 24. He said that after the blood smear at the scene on the light switch matched Sheriff, Sheriff gave a complete confession to the police. App. 188, ll. 21 – App. 189, ll. 6.

When asked if he had an investigator on staff that he used, Tavernier said that he usually did his own investigation of cases due to his background as a law enforcement officer. App. 189, ll. 7 – 14. He said:

As a law enforcement officer, and criminal defense is my primary area of concentration. And I know what I need. I know what to look for. And very seldom do I rely on anybody else to prepare a case for me.

App. 189, ll. 15 – 18.

Trial counsel Tavernier stated that the state's case "came as close to being what would be considered a slam dunk as you could get because of the fingerprint evidence and the confession by Sheriff." App. 192, ll. 15 – 22.

The PCR judge ruled that Sheriff was not deprived of the effective assistance of counsel. App. 229. The judge wrote that Sheriff's allegation that trial counsel failed to "adequately" investigate his case was without merit. The order provided that Sheriff presented no evidence as Sheriff failed to make a "sufficient prima facie" showing that counsel's conduct fell below an objective standard of reasonableness. The judge found counsel's testimony concerning his investigation procedures to be credible and sound. The judge denied this allegation. App. 232. The judge denied Sheriff's PCR application and dismissed it with prejudice. App. 234.

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)

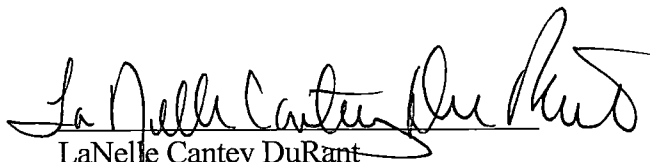
In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that for purposes of the claim of ineffective assistance of counsel, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make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

Sheriff wanted trial counsel Tavernier to do his own investigation as Sheriff did not trust what his first attorney did according to the Joint Exhibit Transcript of the March 8, 2010 hearing to relieve his first counsel. Sheriff felt that his first attorney did not work on behalf of Sheriff's best interests. App. 202 – App. 204, ll. 25. Sheriff told the March 8, 2010 hearing court that he needed a “good lawyer that was going to fight for him because he was on trial for his life.” App. 207, ll. 18 – 22. Attorney Tavernier presented no evidence of the investigation that he did on Sheriff's case. Sheriff was prejudiced by the lack of investigation because something may have been discovered that would have enabled him to take the plea offer.

CONCLUSION

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

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ANDERSON COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

DAVID DALE SHERIFF,

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V.

STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-001012

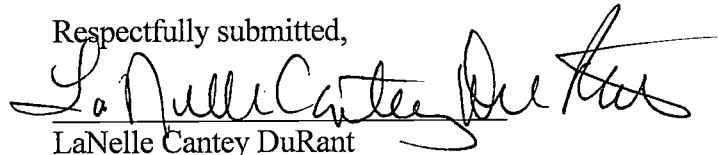
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Dale Sheriff 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 July 30, 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 David Dale Sheriff.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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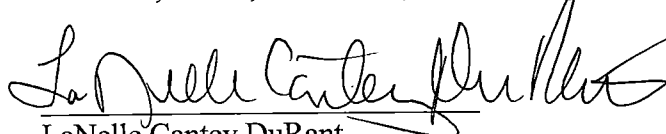
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-001012

CERTIFICATE OF SERVICE

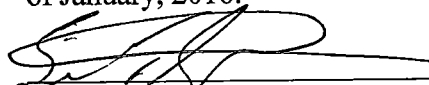
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Patrick Schmeckpeper, Esquire, and David Dale Sheriff, #171192, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 27th day of January, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of January, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.