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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Edgar W. Dickson, Circuit Court Judge

CHRISTOPHER CLEMONS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001937

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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Columbia, SC 29211-1589
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ATTORNEY FOR PETITIONER

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The PCR court erred in failing to find trial counsel ineffective for not presenting to the trial judge, during pre-sentencing mitigation, Co-defendant Jarrell Tyson’s recantation of his prior statement implicating Petitioner in other pending armed robberies which was prejudicial to Petitioner at sentencing since he received the maximum sentence after the solicitor told the judge of the pending robberies and asked for the maximum sentence 4

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not presenting to the trial judge, during pre-sentencing mitigation, Co-defendant Jarrell Tyson's recantation of his prior statement implicating Petitioner in other pending armed robberies which was prejudicial to Petitioner at sentencing since he received the maximum sentence after the solicitor told the judge of the pending robberies and asked for the maximum sentence?

STATEMENT

In March 2013, the Beaufort County Grand Jury indicted Christopher Clemons on the charge of armed robbery (AR). On April 22-23, 2013, Clemons proceeded to trial before the Honorable Carmen T. Mullen and a jury. Petitioner Clemons was represented by Arie Bax, and the state was represented by Patrick A. Hall and Mary Concannon. App. 1-3. The jury found Clemons guilty of the lesser included charge of strong armed robbery (SAR). App. 215, ll. 12 – 24. Judge Mullen sentenced Clemons to the maximum sentence of fifteen years incarceration. App. 224, ll. 17 – 24. Clemons did not appeal his conviction nor sentence. On August 27, 2013, Clemons filed an application for post-conviction relief (PCR). The state filed a return on September 8, 2014. An evidentiary hearing was held on October 27, 2014 before the Honorable Edgar W. Dickson. Clemons was represented by Tristan Shaffer, and the state was represented by Ashleigh R. Wilson. App. 241 – App. 242. On August 14, 2015, Judge Dickson issued an order denying Clemons' PCR application and dismissing it with prejudice. App. 277 – App. 282. Clemons' attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not presenting to the trial judge, during pre-sentencing mitigation, Co-defendant Jarrell Tyson's recantation of his prior statement implicating Petitioner in other pending armed robberies which was prejudicial to Petitioner at sentencing since he received the maximum sentence after the solicitor told the judge of the pending robberies and asked for the maximum sentence.

On Christmas Eve, 2011, Christopher Clemons entered the Kangaroo Pantry convenience store in Port Royal in Beaufort County. App. 108, ll. 10 – App. 109, ll. 2. He had his hand in his pocket and told the attendants that this was a robbery. He was wearing a plaid jacket and had a ski mask. John Eisenhower, one of the attendants, testified that he thought Clemons had a weapon since his hand was in his pocket. App. 143, ll. 17 – App.144, ll. 25.

Clemons told the other attendant, Robert Thomas, to give him the money. Thomas had one hundred dollars in his hand which Clemons took. Then Clemons ran over to Eisenhower's station where the money drawer was open. Clemons started taking money from the drawer with his right hand which was the one he had had in his right pocket. Eisenhower said at that point, he knew Clemons did not have a weapon. Eisenhower then grabbed Clemons and threw him to the floor. The other attendant helped hold Clemons down until the police arrived. The entire incident was all on the store video. App. 145, ll. 1 – App. 147, ll. 20; App. 109, ll. 3 – App. 110, ll. 21.

The jury found Clemons guilty of the lesser included offense of strong armed robbery (SAR). At sentencing, the solicitor told the court that Clemons had armed robbery charges pending from December 6, 2011; strong armed robbery on December 19, 2011; and armed robbery from December 23, 2011. There was also an armed robbery pending from Jasper County. App. 222, ll. 1

The solicitor explained that these robberies all involved the same group of three people. The other two were Jarrell Tyson and Ayuba Cunningham. Co-defendant Tyson had given a statement when he was arrested admitting his guilt and implicating Clemons and Cunningham. The solicitor said he had “sufficient evidence to go forward from this point on these other charges.” He asked the judge for the maximum sentence. App. 222, ll. 17 – App. 223, ll. 9. The judge sentenced Clemons to the maximum fifteen years sentence. App. 224, ll. 17 – 21.

At his PCR hearing, Clemons admitted he was guilty of the strong arm robbery. He did not want to go to trial but he wanted a resentencing hearing. He believed that the trial judge gave him the maximum sentence based on the pending charges. App. 269, ll. 14 – App. 270, ll. 13; App. 272, ll. 4 – 11.

Clemons was shown a letter containing a statement of one of his co-defendants. He said he did show his trial counsel that letter before his trial in April. Then his attorney informed him in June that the pending charges had been dismissed. App. 270, ll. 14 – App. 272, ll. 11.

Trial counsel testified at the PCR hearing that the defense at trial was that the state had overcharged Clemons with armed robbery which was validated by the jury finding him guilty of the lesser charge of strong arm robbery. The defense was correct. App. 248, ll. 3 – 25. Clemons was suspected of being part of a group that was committing robberies at various gas stations in the area. He was already charged with some of those when trial counsel was appointed. App. 250, ll. 6 – App. 251, ll. 2.

This case was only one with a clear identification of Clemons from the store video. App. 252, ll. 1 – App. 253, ll. 9. The other charges were eventually dismissed because of the questionable credibility of the co-defendant Tyson. Tyson lied in his statement that the third co-defendant,

Cunningham was involved in a robbery when Cunningham was in jail at that time according to Cunningham's attorney. App. 254, ll. 1 – 14.

PCR counsel then showed trial counsel a letter from co-defendant Tyson to Clemons which indicated that Clemons was not involved in the other robberies. Trial counsel said he may have seen that letter but was not sure. When asked if he presented that letter to the trial judge at sentencing after the solicitor raised the other pending robberies, trial counsel admitted that he did not raise that "on the record." He told the judge in chambers that Clemons had a defense to the other charges but he did not explain the details of that defense. App. 255, ll. 4 – App. 260, ll. 25.

On cross-examination, trial counsel admitted he did not inform the trial court that there was a question of the co-defendant Tyson's credibility on Clemons' involvement in the other pending charges. App. 267, ll. 1 – App. 268, ll. 12.

The PCR judge ruled that Petitioner Clemons failed to meet his burden to show that trial counsel was ineffective in failing to investigate the testimony of the co-defendant. The judge found trial counsel's testimony "very credible" that he had no strategic reason to raise the credibility of the co-defendants in this trial. App. 279. The judge ruled that Petitioner Clemons failed to show that he was prejudiced by trial counsel's performance. In a footnote, the PCR judge wrote that he could not grant Clemons the relief he wanted which was just resentencing as he said he did not want a new trial. App. 280.

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)

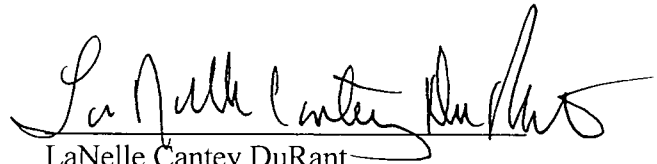
In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that for purposes of the claim of ineffective assistance of counsel, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make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

The PCR court erred in not finding trial counsel ineffective for not making the trial court aware of the letter from co-defendant Tyson recanting his statement alleging Clemons' guilt in the pending robberies. Trial counsel was ineffective for not telling the trial judge of the questionable credibility of Tyson and how he lied on the third co-defendant. There was a strong reasonable probability that the judge would not have sentenced Clemons to the maximum sentence. The solicitor asked for the maximum sentence after telling the judge of the pending charges but made no mention of Tyson's questionable credibility.

CONCLUSION

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

Respectfully submitted,

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

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of February, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

CHRISTOPHER CLEMONS,

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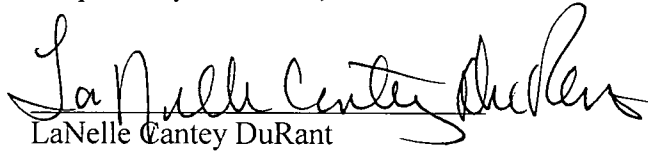
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Clemons 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 August 19, 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 Christopher Clemons.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a large initial "L" and a long, sweeping tail.

LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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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. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Christopher Clemons, #35221, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, on this 17th day of February, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of February, 2016.

Mark Justice (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.