

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Brooks P. Goldsmith, Circuit Court Judge

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MAR - 2 2016

SC SUPREME COURT

RICHARD O. HATCHELL

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001876

JOHNSON 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

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Hatchell's guilty plea was entered freely, voluntarily, and knowingly because he pled guilty in reliance on his attorney's statement that he would receive a fifteen year sentence and he received a sentence of life in prison for burglary first degree?

STATEMENT

In February 2012, the Lexington County Grand Jury indicted Petitioner Richard Hatchell for the charges of burglary first degree and failure to stop for a blue light (FTSBL). On July 9, 2012, Petitioner Hatchell appeared before the Honorable William H. Seals and entered a guilty plea to both charges as indicted. Hatchell was represented by Elizabeth Fullwood, and the state was represented by J. Angela Garrick. App. 1.

At the guilty plea, the solicitor related that on November 21, 2011, the seventeen year old daughter of the homeowners stayed home from school that day due to illness. She was home alone as her father was working and her mother was out running errands. She heard noises and ran into the laundry room and called 911 when she realized someone was breaking into the home although it was mid-afternoon. App. 8, ll. 23 – App. 10, ll. 7.

When the law enforcement officers arrived, they saw a brown van pulling out of the driveway of the home. The officers turned on their blue lights and pursued the van. They finally stopped the van with stop sticks which flattened the van's tires. When the officers got the man from the van, the driver was Petitioner Hatchell. Found in the van were the items stolen from the burglarized home of the teenager. App. 10, ll. 8 – App. 13, ll. 2.

The solicitor told the plea court that Hatchell was charged with burglary first degree based on his prior record which had several prior burglaries. The solicitor then read Hatchell's prior record to the court which did include two prior burglaries second degree. App. 13, ll. 7 – App. 15, ll. 10.

At the beginning of the plea in reviewing Petitioner's rights, the judge asked if his attorney had answered all of his questions. Hatchell responded:

“No, Sir. ...what I asked her to do, she didn’t do. See, I was going to go a different way, but she—I don’t know. I will just go on with it. I just as soon get it over with now and be done with it.”

App. 6, ll. 1 – 25.

The judge took a break for Hatchell to confer with his attorney. After the break, Hatchell said his attorney had answered his questions. App. 7, ll. 1 – 24.

The judge accepted the plea and found that Hatchell was pleading “freely and intelligently and with the advice of very competent counsel.” App. 15, ll. 7 – 13.

Plea counsel asked the plea judge for the minimal sentence of fifteen years. The state did not ask for a particular sentence nor made a recommendation. App. 15, ll. 1 – App. 21, ll. 18. The judge sentenced Hatchell to prison for a “term of life” for burglary first degree and three years for the FTSBL. App. 21, ll. 11 – 18.

Hatchell filed an appeal which was dismissed by the South Carolina Court of Appeals on September 2, 2012 pursuant to Rule 203(d)(1)(B)(iv), SCACR (failure to make a sufficient showing of an appellate issue). App. 100.

On June 17, 2013, Petitioner Hatchell filed an application for post-conviction relief (PCR). The state filed a return on May 19, 2014. An evidentiary hearing was held on April 21, 2015 before the Honorable Brooks P. Goldsmith. Petitioner Hatchell was represented by Kristy G. Goldberg, and the state was represented by Walt Whitmire. App. 41.

At the PCR hearing, the state informed the court that Hatchell was alleging three sets of ineffective assistance of counsel: (1) counsel’s failure to submit mitigation evidence for sentencing; (2) the advice counsel provided to him when he decided to plead guilty;(3) the manner in which his prior burglary second degree convictions were used to enhance his charge to a burglary first degree. App. 43, ll. 1 – App. ll. 6.

Petitioner Hatchell testified that he asked the judge at his bond hearing to have his attorney relieved, but the judge denied his request. App. 47, ll. 1 – 11; App. 70, ll. 10 – App. 71, ll. 5. He said he had wanted to plead to fifteen years non-violent. App. 47, ll. 18 – 25. The state made a plea offer of fifteen years violent. He rejected that because his original charge of burglary second degree was non-violent. The burglary was during the daytime and no guns were involved and no one was hurt. He still did not “have it straight.” When he signed the paper to go to court the day of the plea, he thought he was getting fifteen years, and the judge gave him life. His attorney did not tell him clearly that his plea offer was going to expire at a certain time. He thought the plea offer “went all the way up to the time he went to court” when he would decide if he wanted to plead or go to trial. App. 50, ll. 1 – App. 51, ll. 21.

Hatchell testified that he had a hearing problem as he could not “hear that good.” He said SCDC was getting him a hearing aid. He told his plea attorney that he could not hear. He did not understand “nothing” the plea judge said. App. 53, ll. 1 – 18; App. 62, ll. 20 – App. 63, ll. 15. He thought his plea counsel told him the day of the plea that he would get fifteen years violent if he pled guilty so he signed the paper to plead guilty. He did not know he was signing for a life sentence. If he had known he was getting a life sentence, he would not have pled guilty but would have gone to trial. App. 52, ll. 2 – App. 54, ll. 2. When asked what he wanted from the PCR hearing, Hatchell said he was guilty but he wanted the opportunity to plead guilty to the fifteen years. App. 60, ll. 18 – App. 61, ll. 8.

Plea counsel, Elizabeth Fullwood, testified that the state made an offer at the first appearance of Hatchell of a negotiated fifteen years violent. App. 72, ll. 15 – App. 73, ll. 21; App. 74, ll. 1 – 12. On March 13, 2012, Hatchell was brought to court to plead to the negotiated fifteen years if he agreed. However, he would not plead to the fifteen years violent. Counsel said she

explained to him that this was the only offer the state was going to make. Counsel told him the offer would be withdrawn that day if he did not accept it. There would not be another chance for the offer. Counsel testified that he “acknowledged to her that he understood that.” Counsel said that Hatchell told her that he did not want a trial, but he just wanted a better plea offer. App. 75, ll. 17 – App. 76, ll. 7. Counsel admitted that Hatchell told her in the beginning of her representation of him that he had a hearing problem. App. 80, ll. 1 – 3.

PCR counsel argued to the judge that plea counsel was ineffective for not asking the plea judge to give Hatchell special instructions since he was hard of hearing. Hatchell was not properly advised especially since he was facing a life sentence. Hatchell was not planning to plead guilty that day. He was not sophisticated in the law which changed frequently. Hatchell said his plea counsel did not tell him the plea offer would expire as he would have taken it if he had known. He decided to plead guilty because he relied on his attorney’s statement that he would get the fifteen year sentence. App. 85, ll. 3 – App. 88, ll. 17.

The PCR judge issued an order on June 3, 2015 denying Petitioner Hatchell’s PCR and dismissing it with prejudice. App. 99 – App. 112. The judge ruled that as a “matter of general impression,” Petitioner Hatchell failed to produce credible evidence to support his allegations. App. 104. The judge found Hatchell’s claim of ineffective assistance of counsel that his guilty plea was involuntary because he relied on counsel’s statement that he would receive a fifteen year sentence to be without merit. The PCR order provide that counsel’s testimony regarding this claim to be convincing. The judge wrote that Hatchell’s testimony was “suspect, incredible, and dubious on the matter.” The order provided that Hatchell had decades of long experience with General Session plea court, and he signed a sentencing sheet before the plea that made the “straight up” structure of his plea very clear. The judge denied this allegation. App. 109. Petitioner Hatcher filed an appeal.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Hatchell's guilty plea was entered freely, voluntarily, and knowingly because he pled guilty in reliance on his attorney's statement that he would receive a fifteen year sentence and he received a sentence of life in prison for burglary first degree.

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.

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 certain 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).

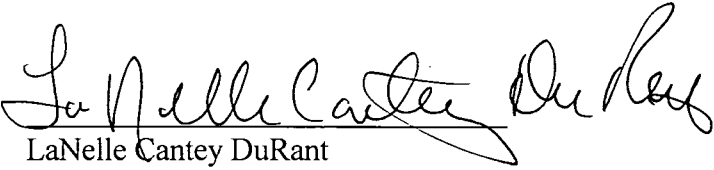
In Craddock v. State, 327 S.C. 303, 491 S.E.2d 251 (1997), the Supreme Court ruled that where a defendant pleads guilty in exchange for trial counsel’s promise of a certain sentence, and does not receive that sentence, his guilty plea is invalid.

The PCR court erred in failing to find plea counsel ineffective. Hatchell made it clear that had he understood, he would have taken the plea offer. Counsel was ineffective for not making amends to insure that Hatchell clearly heard and understood all the matters and ramifications of the plea offer and sentence. She admitted that she knew he had a hearing problem which must have been significant of the Department of Corrections was obtaining a hearing aid for him as he said. At his guilty plea, Hatchell told the court he had wanted to go in a different direction than his attorney was taking him. Hatchell’s statement to the plea court that he would go ahead with the plea because he “just wanted to get it over with,” made it clear that his plea was not being entered freely and voluntarily.

CONCLUSION

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

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
BROOKS P. GOLDSMITH, CIRCUIT COURT JUDGE

RICHARD O. HATCHELL

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-001876

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Richard O. Hatchell 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 21, 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 Richard O. Hatchell.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of March, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

Brooks P. Goldsmith, Circuit Court Judge

RICHARD O. HATCHELL

PETITIONER,

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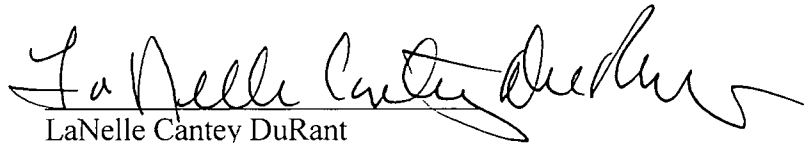
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001876

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, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Richard O. Hatchell, #114745, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210 this 3rd day of March, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of March, 2016.

Maica Hunter (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.