ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Tanya A. Gee, Circuit Court Judge

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JUN - 9 2016

SC SUPREME COURT

MATTHEW ATKINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001731

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 Atkinson's guilty plea was entered freely, voluntarily, and knowingly because plea counsel failed to investigate Petitioner's case where petitioner's girlfriend suffered injuries from her family prior to this incident, and counsel failed to investigate Petitioner's mental health history?

STATEMENT

Petitioner Atkinson and his girlfriend, Crystal, had a tumultuous relationship for several years. App. 21, ll. 7 – 20. On December 30, 2011, deputies with the Barnwell County Sheriff's Office responded to a 911 call received by a person who called himself Bob who reported that Petitioner Atkinson was in the process of beating his girlfriend, Crystal Jackson. App. 18, ll. 4 – 13.

When the deputies arrived at Atkinson's home, they saw the girlfriend's car in the yard with extensive damage. The tires were slashed, the windows knocked out and the windshield. When the deputies knocked on the door, there was no response. The deputies left. App. 18, ll. 14 – App. 19, ll. 7.

A short time later, the same 911 caller called again and gave his name as Merit Huff. He was in the home with Atkinson and the girlfriend Crystal. The caller said that the beating continued and Atkinson had threatened the girlfriend with a knife. The deputies returned to the scene. Atkinson came to the door and said no one was at home. He closed the door but Deputy Johnson tried to block the door to keep it open. It was then that Atkinson kicked the deputy from the door down the steps. The Emergency Response Team was called as well as a negotiator. App. 19, ll. 8 – 25.

The Team did remove Crystal and Merit Huff from the home. The girlfriend Crystal was transported to the hospital with multiple injuries and Atkinson was taken to another hospital and shortly released. Atkinson was charged with resisting arrest; attempted murder as he threatened to kill Crystal and he had a shotgun in his possession; and kidnapping for holding Crystal and Huff. App. 20, ll. 1 – 25.

On April 2, 2012, the Barnwell County Grand Jury indicted Petitioner Atkinson on the charge of resisting arrest. App. 147-App. 148. On April 3, 2012, Atkinson appeared before the

Honorable Doyet A. Early, III and entered a guilty plea to resisting arrest, and the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). He waived presentment to the grand jury on the ABHAN. Atkinson was represented by Laura McCann, and the state was represented by Jeffrey Alan Slocum. The state made a recommendation of twelve years on both charge concurrent. App. 1 – App. 3, ll. 25.

At the guilty plea, when the plea judge asked him if he understood that he had a right to have the ABHAN presented to the grand jury, Atkinson responded: "I don't know what that means." The judge told plea counsel to spend some time with Atkinson and insure he understood. Counsel responded: "He understands it." At that point a woman, later identified as Atkinson's mother, yelled out: "No, he doesn't …he doesn't understand it." The judge instructed her to leave. Plea counsel informed the court that the woman was Atkinson's mother. The judge instructed plea counsel to "answer all questions", Atkinson had and to make sure he understood everything. App. 6, ll.1 – App. 7, ll. 25.

At one point during the plea, the judge told Atkinson that he needed to pay attention to the judge. App. 10, ll. 1 – 4. When the judge asked Atkinson if he had any "mental, nervous, or emotional condition which would keep him from understanding what was going on," Atkinson said no. He did tell the judge that he was on an anti-depressant and sleep medicine. App. 15, ll. 11 – App. 16, ll. 9.

During the mitigation phase of the plea, Atkinson's counsel told the judge that Atkinson went through only the eighth grade and left school to work. Counsel said:

> It takes him a little longer to grasp things. It's not that he's stupid but it's almost like he's ADD. His attention span isn't quite there all the time and you have to reiterate it.

App. 25, ll. 3 – 10.

The plea judge sentenced Atkinson to twelve years on the ABHAN charge and ten years on the resisting arrest with the sentences to run concurrently. App. 26, ll. 14 – 22.

Plea counsel filed a motion to reconsider the sentence on the basis of Atkinson "securing residential drug and alcohol treatment." App. 28. The judge denied this motion. App. 29.

Petitioner Atkinson did not appeal his convictions nor sentences. App. 128. On June 9, 2014, Atkinson filed an application for post-conviction relief (PCR). The state filed a return on September 25, 2014. An evidentiary hearing was held on May 20, 2015 before the Honorable Tanya A. Gee. Atkinson was represented by Aimee Zmroczek, and the state was represented by Daniel F. Gourley, II. App. 39.

At the PCR hearing, the state informed the court that Petitioner Atkinson was claiming ineffective assistance of plea counsel on several grounds and one of them was a failure to investigate viable defenses and the veracity of the victim. App. 42, ll. 25 – App. 43, ll. 10. Petitioner Atkinson testified regarding potential defense that he did slap his girlfriend but she received her injuries including her black eyes from her family in Tennessee. He explained that her aunt had the girlfriend's daughter in Tennessee. When his girlfriend, Crystal, went to Tennessee to get her daughter for Christmas, the aunt and the aunt's son jumped on Crystal and beat her and blackened her eyes. App. 51, ll. 25 – App. 52, ll. 24.

According to Atkinson, his attorney never asked him if he wanted to go to trial, and he wanted a trial. His attorney made him take the guilty plea. App. 51, ll. 1 – 24. She told him that if did not take the plea, he would get the "maximum on all of his sentences." App. 49, ll. 1 – 4. He did not feel that he was entering this plea willingly. He said: "They made me do it." App. 50, ll. 1 – 15.

Atkinson told the judge that he had received mental health counseling and medication before he was arrested. He had been treated at the Barnwell Mental Health facility and others. The PCR

attorney had his medical records admitted into evidence as Applicant's Exhibit 1. [1] App. 46, ll. 1 – App. 47, ll. 25; App. 63, ll. 1 – 21.

Carol Atkinson, mother of Petitioner Atkinson, testified at the PCR hearing that Petitioner had not been able to live on his own as he did not comprehend paying bills before he spent his money. He was treated at the mental health center for children when he was younger. App. 65, ll. 10 - App. 66, ll. 25. According to her, Atkinson attended a school for the mentally handicapped as he suffered from ADD and hyperactivity. App. 77, ll. 1 – 21. His mother believed that he did not enter his guilty plea freely and voluntarily as he was easily manipulated with fear and misunderstanding. App. 72, ll. 24 – App. 73, ll. 12.

Plea counsel, Laura McCann, testified that Petitioner Atkinson's mental health background was "never brought up." Atkinson's mother never told the attorney anything about it even though the attorney met with her several times. Counsel knew that Atkinson had used drugs excessively for over ten years and had a couple of drug overdoses. She did try to get him into a drug rehabilitation program called "Overcomers." App. 79, ll. 7 – App. 82, ll. 3. She did not pursue a Blair [2] hearing because "he never appeared that he did not understand things." App. 93, ll. 11 – 25. When asked if counsel would have liked the opportunity to investigate this case more since the case was brought to court less than four months from the charges, counsel responded no. She said that Petitioner Atkinson never denied the charges. App. 86, ll. 1 – 25.

Plea counsel also admitted that she did not know about the girlfriend, Crystal, receiving two black eyes at Christmas just prior to this incident. The PCR hearing was the first time she had heard

[1] Applicant's four exhibits were sealed by the PCR judge. They are on file with this Court.
[2] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

this information. Counsel also admitted that if she known that fact, it would have been mitigation at Atkinson's plea. App. 110, ll. 1 – 23.

The PCR judge ruled at the PCR hearing that Petitioner Atkinson's PCR application was denied. App. 121, ll. 4-5. The judge ruled on each issue on the record. On the claim of ineffective assistance of counsel for failing to investigate viable defenses, the judge ruled that defense counsel's investigation was appropriate. The judge stated that counsel was fully prepared, and there was no evidence that further investigation would have changed the result in Petitioner's case. The judge said that Atkinson admitted the charges against him. App. 122, ll. 13 – 23.

The PCR judge's order reflected her rulings at the hearing. The judge wrote that Atkinson failed to present sufficient evidence to meet his burden of proof that counsel was ineffective in her failure to investigate viable defenses. He also failed to present evidence that he was prejudiced by counsel's performance. App. 136 – App. 137. The judge denied Atkinson's PCR application and dismissed it with prejudice. App. 140.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Atkinson's guilty plea was entered freely, voluntarily, and knowingly because plea counsel failed to investigate Petitioner's case where petitioner's girlfriend suffered injuries from her family prior to this incident, and failed to investigate Petitioner's mental health history.

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).

Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Counsel representing a criminal defendant has a duty to conduct a reasonable investigation, which encompasses the defendant's right to interview potential witnesses against him. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000).

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.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court reversed the PCR court and remanded Lounds' case because his defense counsel was ineffective for failing to adequately prepare for trial so as to be able to call key witnesses. Counsel failed to make an independent investigation of the facts and circumstances.

Plea counsel failed to adequately investigate Atkinson's case as shown by the fact that she knew nothing about the girlfriend's black eyes inflicted by her own family in Tennessee. Atkinson was prejudiced by counsel's lack of investigation because by counsel's own admission, that information would have been helpful mitigation at his plea. Counsel heard about it for the first time

at the PCR hearing. If she had investigated by talking to the girlfriend and the 911 caller, she would have known this information. She suspected Atkinson had ADD and knew of his excessive drug use and overdose which should have been sufficient for her to, at a minimum, ask questions about his education and abilities. This would have been helpful mitigation information as well.

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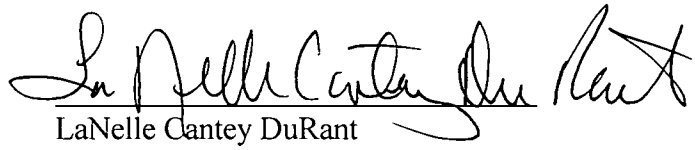
CONCLUSION

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,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of June, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BARNWELL COUNTY
TANYA A. GEE, CIRCUIT COURT JUDGE

MATTHEW ATKINSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001731

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Matthew Atkinson states:

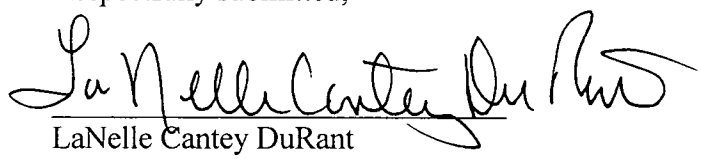
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 20, 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 Matthew Atkinson.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
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This 9th day of June, 2016

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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 Daniel Gourley, Esquire, and Matthew Atkinson, #350329, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 9th day of June, 2016.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of June, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.