

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

RECEIVED

JUL 14 2016

SC SUPREME COURT

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

ANTHONY OGDEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000139

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

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT

 The PCR court erred in failing to find plea counsel ineffective for not fully explaining to the plea court that Petitioner’s dementia was the major cause of the accident since his blood alcohol level was below the legal limit and there was no indication of the drug Xanax in his blood test.....7

CONCLUSION9

PETITION TO BE RELIEVED AS COUNSEL.....10

ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not fully explaining to the plea court that Petitioner's dementia was the major cause of the accident since his blood alcohol level was below the legal limit and there was no indication of the drug Xanax in his blood test?

STATEMENT

On January 31, 2014, Petitioner Ogden went to work around noon, but according to his co-workers, was unable to work due to his being intoxicated. His co-workers said that he was “popping Xanax pills like candy.” App. 8, ll. 9-23; App. 12, ll. 16 – 25. Some of his co-workers allowed him to stay at their hotel for a while but said that he continued to drink . App. 13, ll. 1 – 6.

Ogden left around 6:45 that evening. As he approached an intersection where the stop light was red, he slammed into the back of a vehicle driven by 74 year old Alva Terrell which caused Terrell to run into the back of the vehicle in front of him. When the highway patrol trooper, who was nearby, arrived, he had to tell Petitioner Ogden to put his car in park but Ogden was unable to do so as he thought it was in park. The trooper had to reach into the car and put the car in park. App. 8, ll. 17 – App. 10, ll. 9.

The trooper’s car camera was on as the blue light was running. Ogden told the trooper that he had seven prescriptions filled that day and was taking Xanax. Ogden also told the trooper that he drank three twenty-four ounce beers earlier in the day along with the Xanax. Ogden was charged at that point with a “regular DUI.” App. 9, ll. 6 – App. 11, ll. 16.

Ogden was taken to the hospital where blood was drawn but the sample that the nurse for law enforcement took was not large enough to test. The hospital took a blood sample for medical purposes that showed an alcohol reading of .069 which was below the legal limit but was taken three hours after the accident. Ogden was released. App. 10, ll. 16 – App. 11, ll. 16.

The victim appeared to be okay after the accident but did not feel well. At the hospital, it was determined that he had suffered a fracture of the spine that caused slow internal bleeding. Blood collected around his kidneys and cut off the blood flow to other organs. He died two days after the accident. App. 9, ll. 15 – 24; App. 11, ll. 16 – 24. The DUI charge for Ogden was withdrawn, and

he was indicted by the York County Grand Jury on June 19, 2014 for DUI felony causing death. App. 12, ll. 1 – 5; App. 144 – App. 145.

The state made a plea offer of a cap of fifteen years if Ogden pled guilty to DUI felony causing death. App. 4, ll. 1 – 19. Petitioner Ogden accepted the plea offer and appeared before the Honorable Frank Addy on July 17, 2014 and entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) because he had no memory of the accident. App.4, ll. 1 – 24; App. 13, ll. 13 – 25. In order to accommodate the plea judge’s schedule, the state asked for sentencing to be deferred until August 11, 2014 in Cherokee County. All agreed to this. App. 4, ll. 8 – App. 5, ll. 3. Ogden was represented by Harry Dest, and the state was represented by Willy Thompson. App. 1.

On August 11, 2014, Ogden again appeared before Judge Addy for sentencing. App. 24 – App. 27, ll. 25. Defense counsel presented mitigation in defense of Ogden. Counsel explained that Ogden was seen by Dr. Harold Morgan whose report was presented to the court. App. 26 – App. 27, ll. 23. Counsel presented the list of medications that Dr. Morgan reported Ogden was taking. One of the medications was Namenda which was for the treatment of dementia. Ogden was 59 years old at the time. App. 45, ll. 1 – App. 46, ll. 19. Counsel also explained that Ogden lost his fourteen year old daughter in a car accident in 2004. Ogden’s downward spiral began then. App. 44, ll. 1 – App. 45, ll. 9. Counsel said that the day of the accident, Ogden was “out of it.” App. 45, ll. 7 – 14.

Judge Addy sentenced Ogden to fifteen years incarceration. App. 52, ll. 1 – 12.

Petitioner Ogden filed an appeal which was dismissed by the South Carolina Court of Appeals for failure to provide a sufficient explanation as required by Rule 203 (d)(1)(B)(iv), SCACR. App. 135.

On December 16, 2014, Petitioner Ogden filed an application for post-conviction relief (PCR). The state filed a return on March 5, 2015. An evidentiary hearing was held on November 3, 2015 before the Honorable Brooks P. Goldsmith. Ogden was represented by Leah Moody, and the state was represented by Justin Hunter. App. 77.

At his PCR hearing, Petitioner Ogden told the court that he had had dementia for years and that was the reason he was disoriented on the trooper's video. He did not remember all that happened. App. 91, ll. 1 – App. 92, ll. 21; App. 84, ll. 1 – 96, ll. 8. He filed this PCR because his plea counsel did not explain Ogden's dementia sufficiently, and because he was sentenced in a different county. If he had known the judge was going to give him fifteen years, he would have gone to trial. His plea counsel told him that he would get a "single digit sentence." Ogden had finally studied dementia and finally understood the seriousness of it and his plea counsel did not. His plea counsel did not provide him with the level of legal assistance that he needed. App. 96, ll. 1 – App. 100, ll. 20. Ogden felt he was prejudiced because he received erroneous advice from his plea counsel as his attorney told him to just say yes to whatever the judge asked him. App. 100, ll. 21 – App. 101, ll. 20.

At first, Ogden said he wanted a time reduction in his sentence and alcohol treatment. Then he said he wanted a jury trial. App. 103, ll. 13 – App. 104, ll. 23.

Plea counsel testified that Ogden told him about his dementia, depression, and anxiety. Counsel then hired Dr. Harold Morgan, a forensic scientist, for his opinion on how these problems "may have affected this case" and for any mitigating factors. App. 112, ll. 1 – 16. Counsel did present Dr. Morgan's report to the plea court. Dr. Morgan reported that Ogden was on the medication, Namenda, which was for dementia and the beginning stages of Alzheimer's. App. 115, ll. 13 – 25.

On December 28, 2015, the PCR judge issued an order denying Ogden's PCR application and dismissing it with prejudice. App. 134 – App. 143. He found Ogden's testimony to not be credible but found plea counsel's testimony to be "credible and persuasive on all matters." App. 139. The PCR judge ruled that Ogden's allegation that plea counsel failed to adequately present evidence of Ogden's dementia to the plea court to be without merit. The judge wrote that counsel testified at length at the sentencing hearing about Ogden's mental ailments including dementia. Counsel also presented the forensic psychologist's report to the plea court. The judge wrote that counsel thoroughly understood Ogden's dementia. He ruled that Ogden failed to meet his burden of proof that counsel was deficient in this regard. App. 140- App. 141.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not fully explaining to the plea court that Petitioner's dementia was the major cause of the accident since his blood alcohol level was below the legal limit and there was no indication of the drug Xanax in his blood test.

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

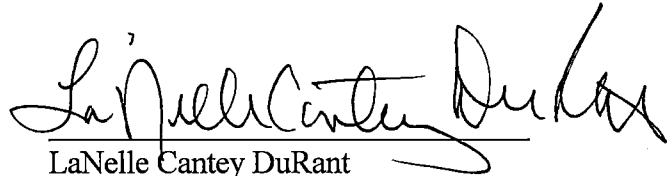
show with certain certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege”. State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

The PCR court erred in not finding plea counsel ineffective for not fully explaining the dementia that Petitioner Ogden suffered, and how the dementia impacted the accident. Counsel should have called the expert to testify on behalf of Ogden. Ogden had no memory of the accident. Therefore, counsel should have used every resource to mitigate Ogden’s sentence. The state offered a cap of fifteen which means they would have approved less.

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 a horizontal line.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

ANTHONY OGDEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

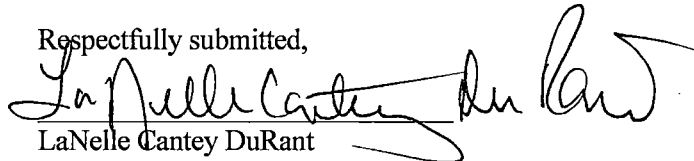
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Ogden 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 November 3, 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 Anthony Ogden.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of July, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Brooks P. Goldsmith, Circuit Court Judge

ANTHONY OGDEN,

PETITIONER,

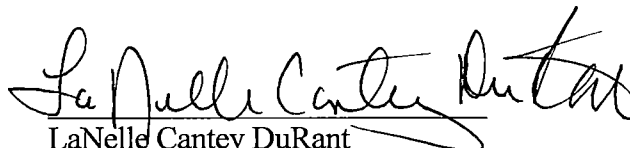
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

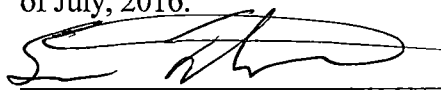
CERTIFICATE OF SERVICE

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 Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Anthony Ogden, #361018, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 14th day of July, 2016.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of July, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.