

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

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JUL 26 2016

SC SUPREME COURT

Certiorari to Horry County

Honorable Thomas A. Russo, Circuit Court Judge

TERMAIN COOPER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000149

PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in failing to find trial counsel ineffective for not objecting to the trial court requiring him to proceed as Petitioner’s counsel and not asking for a continuance when he knew that Petitioner Cooper had retained another attorney who had sent his letter of representation to the solicitor but which new attorney was under an order of protection on the day of trial which the trial court ignored and which was a violation of Petitioner Cooper’s Sixth Amendment right to counsel. 10

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the trial court requiring him to proceed as Petitioner's counsel and not asking for a continuance when he knew that Petitioner Cooper had retained another attorney who had sent his letter of representation to the solicitor but which new attorney was under an order of protection on the day of trial that the trial court ignored and which was a violation of Petitioner Cooper's Sixth Amendment right to counsel?

STATEMENT

On February 20, 2008, Officer Michael Guthinger of the Myrtle Beach Police, had a confidential informant (CI), make two phone calls to a male subject unknown to the police and order a quantity of crack cocaine. A meeting was arranged for that same day. The CI said that a black male driving a gold Lincoln vehicle would be the dealer with the crack. App. 81, ll. 1 – App. 84, ll. 24.

The police requested Officer Hason Tucker to make a traffic stop on the gold Lincoln which Petitioner Cooper was driving. Cooper told the officer that he did not have a driver's license. Cooper then told the officer that there were drugs in the car. App. 84, ll. 21 – App. 85, ll. 25; App. 91, ll. 1 – 25; App. 93, ll. 8 – App. 95, ll. 25. The officer then did find the drugs beneath the driver's seat. App. 96, ll. 1 – App. 97, ll. 25.

The drugs were tested and found to be 11.97 grams of crack cocaine. App. 77, ll. 1 – App. 79, ll. 25. In June 2008, the Horry County Grand Jury indicted Petitioner Cooper on the charge of trafficking cocaine base (crack) ten to twenty-eight grams. App. 50, ll. 18 – 25; App. 197 – App. 198. On March 8-9, 2010, a trial was held in Petitioner's absence before the Honorable Edward B. Cottingham and a jury. Petitioner Cooper was represented by Robert Paul Taylor, and the state was represented by Donna E. Elder. App. 1.

At the beginning of the trial, the solicitor told the trial judge that she and defense attorney Taylor needed to put something on the record before the trial of Petitioner Cooper. Solicitor Elder explained that Cooper retained Attorney Taylor in 2008 on this case. At the arraignment the previous week, the state told Cooper that the case was set for trial for this week. On Sunday, the day before trial was set, Taylor received a call from another attorney, Cezar McKnight, that Cooper had retained him to represent Cooper. Taylor told McKnight that the case was set for

trial the following day. McKnight said that he had a “pre-existing” order of protection for vacation. Solicitor Elder said they had taken up the matter with Judge Hyman that day who said that the trial was going forward regardless. App. 5, ll. 1 – App. 6, ll. 7.

The trial judge said: “We’re going to try him tomorrow.” App. 6, ll. 8 – 9. The judge continued by saying that Cooper had three choices: he could bring McKnight to court the next day; or h could have Taylor represent him; or Cooper could represent himself. App. 6, ll. 10 – 14. The solicitor said that Cooper was supposed to have returned at 2:00 that day but could not be found. The judge said to issue a bench warrant. If they could not find him, then the judge would hold a trial in his absence. App. 6, ll. 18 – App. 7, ll.

The judge told the solicitor to notify McKnight “of whatever interest he may have” that he was issuing a bench warrant for Cooper and find out if McKnight was going to be there or if Taylor was going to do it. App. 7, ll. 5 – 9.

Taylor then told the court that McKnight was on his way to Egypt as he was under an order of protection for the entire week. Taylor said he received a call from McKnight the day before on Sunday that Cooper had retained him and he was under an order of protection for the week. McKnight was already in New York when Taylor talked to him. App. 7, ll. 11 – App. 8, ll. 3.

The judge stated: “Well, obviously, Cooper can’t hire him if he is under an order of protection.” App. 8, ll. 4 – 5.

Taylor explained that McKnight told him that his client wanted to discharge Taylor and hire McKnight. McKnight told him that “it was a violation of his client’s rights by not having his client be able to pick which lawyer he wanted.” App. 7 – 12. Taylor told McKnight that he had had the case since 2008. App. 8, ll. 13 – 16.

The judge then ordered:

Well, here's what I am going to do. I'm going to order that you proceed as the attorney if Mr. McKnight is under an order of protection whether he says he's representing him or not but he cannot represent if he's under an order of protection and doesn't want to show up.

App. 8, ll. 17 – 21.

The judge said that he was ordering Taylor to represent Cooper. App. 8, ll. 23.

Taylor said that Cooper had been at the courthouse all morning but Taylor could not reach him then. Taylor told the court that Cooper said that he did not want to go to trial on this matter so Taylor had negotiated a good plea offer but he could not get in touch with Cooper.

Taylor said he had McKnight's number. App. 9, ll. 2 – 17.

The judge said:

Judge: He cannot take the representation.

Taylor: Yes, sir.

Judge: The trial is going forward. He's under an order. So, either you're going to represent him or he can represent himself, and we're going to start the suppression hearing at 9:30 in the morning, and go forward with the trial. If we can't find the defendant, I'm going to try him in his absence.

App. 9, ll. 18 – 25.

The following day, March 9, 2010, the trial proceeded without Petitioner Cooper. The solicitor informed the court that when the deputy went to Cooper's house, he found Cooper's GPS bracelet cut. App. 11, ll. 1 -25.

Taylor then told the court:

He (McKnight) was actually retained, and had sent a letter over to the Solicitor's Office saying that he'd been retained but was under, apparently, under an order of protection, and the Court deemed to go forward even though he had been retained. My client told me yesterday that he did not want me to represent him in this matter at all, that he wanted Cezar McKnight and he wanted to put on the record with the Court that he felt that

he was being forced to use me because, ah, the Court was not allowing him to use the attorney that he wanted which was Cezar McKnight.

App. 12, ll. 21 – App. 13, ll. 5.

The court replied that the defendant could not at the last minute try to substitute an attorney because that would be a basis for a continuance. That attorney would have to say that he needed a continuance as he was not prepared to try the case. The judge said they would go forward with the trial in absence that day. App. 13, ll. 20 – App. 14, ll. 11.

The jury returned a verdict of guilty as charged. App. 126, ll. 1 – 3. The sentence was sealed by Judge Cottingham. App. 131.

On September 9, 2010, Cooper appeared before the Honorable Larry B. Hyman for sentencing. Cooper was again represented by Robert Paul Taylor, and the state by Donna E. Elder. App. 135. Judge Hyman opened the sealed sentence. Judge Cottingham sentenced Cooper to thirty years for trafficking in cocaine base ten to twenty-eight grams third offense. Taylor told the court that at the time of trial, Cooper had retained Cezar McKnight the Sunday afternoon before the trial on Monday. McKnight was unable to appear so Taylor handled Cooper's trial. App. 236, ll. 1 – App. 139, ll. 12.

Cooper filed a notice of appeal which was perfected by the Division of Appellate Defense of the Commission on Indigent Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal on July 18, 2012. State v. Cooper, Op. No. 2012-UP-454 (Ct. Appeals filed July 18, 2012). App. 191.

Cooper filed an application for post-conviction relief (PCR) on March 27, 2014. The state filed a return on January 16, 2015. An evidentiary hearing was held before the Honorable

Thomas A. Russo on November 9, 2015. Petitioner Cooper was represented by Daniel Selwa, and the state was represented by Jessica Kinard. App. 153.

At his PCR hearing, when Petitioner Cooper testified regarding the ineffectiveness of his trial counsel Taylor, the state objected that he had no alleged ineffective assistance of counsel in his PCR application. App. 162, ll. 1 – 14. The judge responded:

Well, in C he alleges that the attorney neglected to raise the issues of the violation of his Sixth Amendment right to counsel and due process of Fifth, Sixth, and Fourteenth---or violation of his rights under the fifth, Sixth, and Fourteenth Amendments. So to the extent he—I mean, he can address those issues as far as his application. I guess you could say that’s ineffective assistance, but it needs to be relegated to those issues that he states here.

App. 162, ll. 15 – 24.

Petitioner Cooper testified that he had had Taylor as his attorney since 2008. He told Taylor that he did not want to go to trial, but Taylor said he could beat it. He did not agree with certain things Taylor told him. Taylor told him he could get seven years if he told on other people which Cooper would not do. With the trial date approaching, Cooper hired Cezar McKnight because he “was not in agreement with the things that Taylor was telling him.” So he fired Taylor and hired McKnight. App. 158, ll. 1 – App. 159, ll. 25.

He fired Taylor on March 6, 2010. At the arraignment, there was a ten year offer. However, he had other charges pending, and said he would take it if the state ran all charges concurrent. Cooper was at the pretrial on March 8th, and Taylor told him the plea offer was twenty-five years. Then Taylor told him that McKnight was out of town and was on some kind of order. Cooper had fired Taylor. Cooper panicked. App. 160, ll. 1 – 25.

Cooper told the court that Taylor was not doing his job so he fired him and hired McKnight on March 7th, 2010. He paid McKnight cash when they met in the mall. He said that McKnight gave him a receipt and sent a copy to the solicitor’s office. Cooper never received his

money back from McKnight. Cooper admitted that he did not show up for trial. He learned that Taylor represented him from the transcript, and he had fired Taylor. He did not understand why Taylor represented him at trial when he had fired Taylor. App. 161, ll. 1 – App. 163, ll. 19.

Cooper testified that he knew nothing about McKnight's order of protection until the day trial was to begin. App. 163, ll. 20 – App. 164, ll. 6. When he hired McKnight, Cooper believed that he had withdrawn from Taylor and Taylor should not have been preparing his case. If he had had McKnight represent him, he thought "it would have played out different." He did not want a trial; he just wanted a "good" sentence. Taylor had promised him that. When it did not happen, he fired Taylor. App. 164, ll. 1 – 25. He did not understand why Taylor was even in the court room when Cooper went to pretrial on March 8th. App. 168, ll. 4. When McKnight was not in court, and Cooper heard the twenty-five years, he panicked. He admitted that he cut his ankle bracelet and did not come to trial. App. 168, ll. 4 – 25.

Trial counsel Taylor testified at the PCR hearing that he had represented Cooper on this charge for two years. App. 170, ll. 1 – App. 171, ll. 25. He admitted that he had negotiated with the solicitor for a reduced sentence if Cooper cooperated but Cooper would not agree to that. They met the Saturday before his trial was to begin on Monday, and were to meet Sunday. Cooper did not show up on Sunday, but Taylor received a call from Cooper's uncle who paid the fee to McKnight. Then Cezar McKnight called Taylor on Sunday saying he had been retained but was under an order of protection. McKnight asked Taylor to send him Cooper's file. According to Taylor, McKnight told him that a client was entitled to "pick his lawyer." App. 172, ll. 1 – App. 175, ll. 7.

Taylor testified on cross examination that he did not make a motion to be relieved. The trial court told him he was not relieved so he "was stuck trying the case." App. 174, ll. 1 – 17;

App. 178, ll. 1 – App. 179, ll. 2. Taylor stated that although he had not talked directly with Cooper on Sunday, after McKnight called Taylor, Taylor gathered that Cooper wanted McKnight to represent him. App. 177, ll. 4 – 21.

The PCR attorney argued that Cooper was “trapped up in the system” caught between two lawyers. He argued that Cooper was a “victim of the system.” Cooper wanted to start over with the attorney that he wanted. Counsel asked the court for a new trial for Cooper with attorney McKnight to face the charges the way that he wanted to do. App. 183, ll. 1 - App. 184, ll. 3.

The state argued that Cooper failed to meet his burden to show that Taylor was ineffective in any way. App. 184, ll. 6 – 25.

Before his argument, PCR counsel asked the PCR court to take “judicial notice of Taylor’s ethical issues with the bar.” App. 182, ll. 13 – 25.

The PCR judge at the PCR hearing denied Cooper’s motion for a new trial. The judge ruled at the hearing that it was “absolutely correct” that a person had a Sixth Amendment right to counsel. Then he stated that it was not a “correct expression of the law” that a person was entitled to counsel of their choice as with public defenders. Then the judge said but a person did have the right to retain whoever they would like to retain. The judge said there was nothing in the record to indicate that Taylor was “anything but prepared to go forward.” App. 185, ll. 2 – 25.

The PCR judge continued to state that McKnight’s name did not appear on any record from the clerk’s file. Then he said maybe that was because McKnight did not have the opportunity since he was hired over the weekend. App. 186, ll. 1 – 20. Then the judge stated:

But my point being is that no one on behalf of Mr. Cooper, and that would have been either Mr. Cooper himself or Mr. McKnight, appeared before the court seeking a continuance.

App. 186, ll. 20 – 24.

The judge said that Taylor did exactly what he was required to do. The judge then ruled that there was nothing in the record that would support any violation of Cooper's Sixth Amendment right to trial. He said that Cooper had an "extremely competent and excellent attorney there on his behalf and represented his interest." The judge also ruled there was nothing that indicated to the court that Cooper's rights were violated under the Fifth, Sixth and Fourteenth Amendments. App. 187, ll. 7 – App. 188, ll. 2.

In his order, the PCR judge wrote that Judge Cottingham ordered Taylor to proceed as Cooper's attorney and that the trial would go forward the next day. App. 193. The PCR judge also found that Cooper failed to demonstrate that he was prejudiced by Taylor's representation or by not having counsel of his choice. Cooper presented no evidence that "another attorney would have performed any differently." App. 194.

The judge denied Cooper's PCR application and dismissed it with prejudice. App. 196. Cooper filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to the trial court requiring him to proceed as Petitioner's counsel and not asking for a continuance when he knew that Petitioner Cooper had retained another attorney who had sent his letter of representation to the solicitor but which new attorney was under an order of protection on the day of trial which the trial court ignored and which was a violation of Petitioner Cooper's Sixth Amendment right to counsel.

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*; Butler v. State, *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 a probability 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 State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), the South Carolina Supreme Court wrote that most trial errors that violate a defendant's constitutional rights are subject to

harmless error analysis. Citing Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991). But there were certain constitutional rights which were “so basic to a fair trial that their infraction could never be treated as harmless error.” These were “structural defects in the constitution of the trial process.” The Court defined a “structural defect” as the type of error which transcends the criminal process. A structural error was subject to automatic reversal in a very limited class of cases. One of these class of cases was “the erroneous disqualification of counsel of choice.” Citing United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

United States v. Gonzalez-Lopez, *id.* held that where the right to be assisted by counsel of one’s choice is wrongly denied, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation, since the right to select counsel of one’s choice is not derived from the Sixth Amendment’s purpose of ensuring a fair trial. Thus deprivation of the right is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. The Supreme Court held that this error qualified as a “structural error” not subject to harmless error review.

In Gonzalez-Lopez, *id.*, the respondent had hired attorney Low to represent him on federal drug charges. The District Court denied the attorney’s application for admission *pro hac vice* because he had violated a professional conduct rule. The Eighth Circuit found that the District Court mistakenly interpreted the professional conduct rule so denied the respondent his Sixth Amendment right to “paid counsel of his choosing.” The Supreme Court affirmed the Eighth Circuit.

In Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), the Supreme Court(Justice White) held that the statute, which authorized forfeiture to the government of

property acquired as a result of drug-law violations, provided no exception for property used to pay attorney fees, and so did not impermissibly burden the defendant's Sixth Amendment right to retain counsel of his choice.

The dissent in Caplin & Drysdale, Chartered v. U.S., *id.* written by Justice Blackmun in which Justices Brennan, Marshall and Stevens joined, wrote that the majority decision indicated that it had "lost track" of the right to counsel of choice in protecting the integrity of the judicial process, a role that made the "right to be represented by privately retained counsel the primary, preferred component of the basic right protected by the Sixth Amendment."

The dissent cited Powell v. Alabama, 287 U.S. 45 (1932) when the Supreme Court held: "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." The Dissent then wrote that the Court's decisions following that made it clear that indigent defendants have the right to appointed counsel. Citing Gideon v. Wainwright, 372 U.S. 335 (1963). The Dissent then wrote:

When the Government insists upon the right to choose the defendant's counsel for him, that relationship of trust is undermined; counsel is too readily perceived as the Government's agent rather than his own. Indeed, when the court in Faretta¹ held that the Sixth Amendment prohibited a court from imposing appointed counsel on a defendant who preferred to represent himself, its decision was predicated on the insight that to force a lawyer on a defendant can only lead him to believe that the law contrives against him.

Rule 1.16 (a)(3), Rules of Professional Conduct of Rule 407, SCACR, provides that except as stated in paragraph (c), a lawyer shall withdraw from the representation of a client if the lawyer is discharged. Paragraph (c) provides that when a lawyer is ordered to do so by a

¹ Faretta v. California, 95 S.Ct. 2525 (1975).

tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

The PCR court erred in failing to find trial counsel ineffective for not objecting, or in the alternative asking for a continuance, in order to accomplish what his client wanted and what would have been in his client's best interests. If the court had ordered trial counsel to proceed as Cooper's attorney, then trial counsel had an obligation to do what was in Cooper's best interest. Cooper had panicked and left the courthouse before his trial when trial counsel told him the offer was twenty-five years and Cooper's newly retained attorney McKnight was not present. Cooper had told trial counsel that he did not want him to represent him.

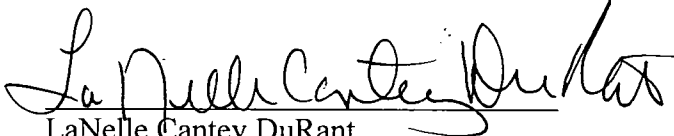
Trial counsel violated the Rules of Professional Conduct by continuing when he had been discharged. The trial court violated the rule because there was just cause for terminating Taylor's representation: Cooper had retained another lawyer. Cooper had already paid the second lawyer who had sent a letter to the solicitor according to Taylor. Trial counsel was ineffective for not objecting when the trial court ignored the order of protection that McKnight was under because this was an order of the court.

As the United States Supreme Court and South Carolina Supreme Court held, the erroneous deprivation of the right to counsel of choice is a violation of the Sixth Amendment does not require a showing of prejudice for reversal. The trial court erroneously ignored McKnight's order of protection and erroneously ignored that Cooper had discharged Taylor and retained another attorney. This was an erroneous discharge of Cooper's second retained attorney, McKnight, and hence, a violation of his Sixth Amendment right to counsel.

CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's conviction and sentence vacated, and the case remanded for a new trial

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of July, 2016.

STATE OF SOUTH CAROLINA
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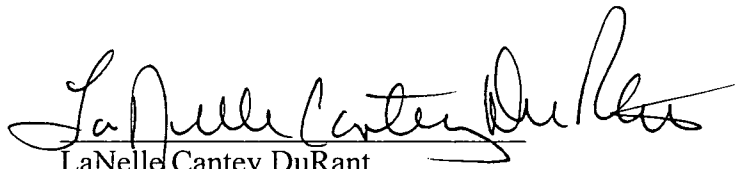
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Johanna C. Valenzuela, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Termain Cooper, #286396, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 26th day of July, 2016.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day of July, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.