

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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ORIGINAL

Certiorari to Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

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RECEIVED

AUG 22 2016

CHRISTOPHER LEE JOHNSON,

SC SUPREME COURT  
PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000240

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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The PCR court erred in not finding trial counsel ineffective for failing to object to the admission of the “faulty illegal evidence” of the video of Petitioner Johnson during a field sobriety test which was taken with the personal camera of Officer Donnie Ng because the police cars were not equipped with video cameras but the personal camera was not a state issued camera, and was the primary evidence against Petitioner as he did not take the breath analyzer. ....6

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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to object to the admission of the “faulty illegal evidence” of the video of Petitioner Johnson during a field sobriety test which was taken with the personal camera of Officer Donnie Ng because the police cars were not equipped with video cameras but the personal camera was not a state issued camera, and was the primary evidence against Petitioner as he did not take the breath analyzer?

## STATEMENT

On March 18, 2010, following a St. Patrick's Day celebration, Officer Jesse Lowe observed Petitioner Johnson back out of a parking space on Main Street in Greenville with no car lights nor tail lights. The officer followed Johnson and saw him stop at a red light. Then Johnson proceeded into the intersection before the light turned green, and stopped again in the middle of the intersection. App. 36, ll. 10 – App. 38, ll. 13; App. 154, ll. 1 – 20.

Officer Lowe activated his blue lights and Johnson stopped his car. Officer Lowe's car was not equipped with a video camera at the time of this incident. App. 37, ll. 1 – 20; App. 38, ll. 18. When Officer Lowe got Johnson out of his car, Officer Donnie Ng arrived. Officer Lowe learned from Officer Ng that Ng's patrol car was not equipped with a video camera either. App. 38, ll. 17 – App. 39, ll. 7; App. 154, ll. 21 – App. 155, ll. 11.

Officer Lowe noticed that Johnson's eyes appeared glassy, and he had a wristband from a local bar. When the officer asked Johnson if he had anything to drink, Johnson allegedly responded: "too much." When asked, Johnson said he had six or seven beers. Officer Lowe said Johnson smelled of alcohol. App. 155, ll. 12 – App. 156, ll. 11.

Officer Lowe then proceeded with the three field sobriety tests for Johnson. App. 39, ll. 8 – 15; App. 156, ll. 23 – App. 157, ll. 8. Officer Ng had his own personal camera which he used to record the field sobriety tests of Johnson. App. 144, ll. 1 – App. 145, ll. 17.

Officer Lowe described the three field sobriety tests as the "horizontal gaze nystagmus" test where the eye twitches involuntarily along with some other movements of the eyes. The second was the walk and turn test, and the third was the one-leg stand test. The results of the three tests indicated to Officer Lowe that Johnson was impaired and under the influence of alcohol along with the strong odor of alcohol. App. 157, ll. 1 – App. 161, ll. 25.

Officer Ng testified that after he observed Johnson during the taping of the field tests with his camera. He believed that Johnson appeared to be impaired because he did not do well on the three sobriety tests. App. 145, ll 1 – App. 146, ll. 25. App. 155, ll. 12 – App. 156, ll. 11. Johnson had refused to provide a breath sample. App. 166, ll. 1.

Johnson was arrested for driving under the influence (DUI), and taken to the Greenville County Detention Center. App. 162, ll. 25.

In April 2011, the Greenville County Grand Jury indicted Johnson for driving under the influence (DUI) and driving under suspension without a driver's license (DUS). App. 275. On October 11, 2011, Petitioner Johnson proceeded to trial before the Honorable G. Edward Welmaker and a jury. Johnson was represented by Daniel J. Farnsworth, and the state was represented by Sara Lee Drawdy. App. 1.

At trial, when the video from Officer Ng's personal camera of the field sobriety tests of Johnson, was admitted into evidence, defense counsel had no objection. He stated: "Without objection." The video was then published to the jury. App. 145, ll. 5 – App. 147, ll. 16. Officer Ng had testified that his car did not have a camera so he had his own personal camera. It was not issued by the police department. App. 145, ll. 1 – 17.

The jury returned verdicts of guilty on both charges. App. 226, ll. 3 – 24. On the DUI, the judge sentenced Johnson to one year suspended to nine months and fifteen months probation and eleven hundred fine. The sentence on the DUS was thirty days concurrent. App. 234, ll 1 – 23.

Johnson filed an appeal which was perfected by the Division of Appellate Defense of the Commission on Indigent Defense. The Court of Appeals affirmed Johnson's convictions and sentences on May 14, 2014. State v. Johnson, 408 S.C. 544, 758 S.E.2d 911 (Ct. App. 2014).

The South Carolina Supreme Court denied Johnson's petition for a writ of certiorari to the Court of Appeals on January 23, 2015. App. 276.

On March 19, 2015, Johnson filed an application for post-conviction relief (PCR). The state filed a return on September 2, 2015. An evidentiary hearing was held on December 16, 2015 before the Honorable Perry H. Gravely. Petitioner Johnson was represented by Mills Arial, and the state was represented by Karen Ratigan. App. 251.

Petitioner Johnson testified at the PCR hearing.<sup>1</sup> He stated that trial counsel was ineffective because he did not provide true representation for Johnson. Trial counsel "just agreed with everything the prosecutor was saying." He testified that trial counsel allowed certain "faulty or illegal" evidence be entered into evidence. It was a device not issued by the state or government. Counsel had told him that he was not going to allow that evidence to be entered. App. 254, ll. 14 – App. 260, ll. 25.

On cross examination when asked if the "faulty evidence" was the camera that one of the officers had purchased himself, Johnson responded that it was. He was saying that anything that camera recorded was illegal and should not have been entered. App. 263, ll. 25- App. 264, ll. 8. Johnson told the PCR court that he had "some traumatic brain problems." App. 262, ll. 7 – 16.

Trial counsel testified that he viewed the officer's tape that was admitted into evidence. He knew all along this was going to be a trial because the police car was not equipped with a camera, and the officer used his personal camera. Counsel said the facts on the DUI "weren't all that bad." Counsel thought the video was not so bad. App. 265, ll. 1- App. 268, ll. 19.

However, counsel admitted that he did not object to the video being admitted into evidence because he "didn't think that there was any basis." App. 268, ll. 23 – App. 269, ll. 5.

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<sup>1</sup> The state informed the PCR court that Petitioner Johnson was not incarcerated at that time. App. 254, ll. 2 -6.

On January 14, 2016, Judge Gravely issued an order denying Johnson's PCR application and dismissing it with prejudice. App.275- App. 279. The PCR judge found trial counsel's testimony to be credible, and that Johnson failed to meet his burden of proof that trial counsel was ineffective. The judge wrote that Johnson did not "articulate what specific argument trial counsel should have made in order to suppress the video evidence." App. 277 – App. 278. The judge denied Johnson's PCR application and dismissed it with prejudice. App. 279.

Johnson's PCR counsel filed a notice of appeal, This petition follows.

## ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to object to the admission of the “faulty illegal evidence” of the video of Petitioner Johnson during a field sobriety test which was taken with the personal camera of Officer Donnie Ng because the police cars were not equipped with video cameras but the personal camera was not a state issued camera, and was the primary evidence against Petitioner as he did not take the breath analyzer.

On March 18, 2010, following a St. Patrick’s Day celebration, Officer Jesse Lowe observed Petitioner Johnson back out of a parking space on Main Street in Greenville with no car lights nor tail lights. The officer followed Johnson and saw him stop at a red light. Then Johnson proceeded into the intersection before the light turned green, and stopped again in the middle of the intersection. App. 36, ll. 10 – App. 38, ll. 13; App. 154, ll. 1 – 20.

Officer Lowe then stopped Johnson who admitted that he had been drinking. The officer then proceeded with the three field sobriety tests for Johnson which indicated that Johnson was impaired and under the influence. App. 39, ll. 8 – 15; App. 156, ll. 23 – App. 157, ll. 8; App. 155, ll. 12 – App. 156, ll. 11. Officer Ng had his own personal camera which he used to record the field sobriety tests of Johnson because neither officer’s car was equipped with a camera. App. 144, ll. 1 – App. 145, ll. 17. Johnson refused to provide a breath sample. App. 166, ll. 1.

Officer Jesse Lowe arrested Johnson for driving under the influence (DUI) and DUS, and took him to the Greenville County Detention Center. App. 162, ll. 25.

At trial, when officer Ng’s video was entered into evidence, trial counsel did not object. The video was then published to the jury. App. 145, ll. 5 – App. 147, ll. 16. .

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); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

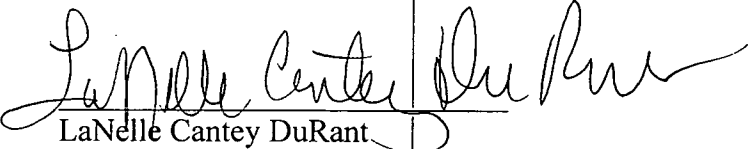
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would 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. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge; issues not raised and ruled upon in the trial court will not be considered on appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003).

Petitioner Johnson’s trial counsel was ineffective for not objecting to the video of the field sobriety tests taken with Officer Ng’s personal camera. The camera was not issued by the state so its reliability had not been determined. This video was the primary evidence against Johnson as he refused to provide a breath sample. The only other evidence was the smell of alcohol and his admission that he drank a few beers. The PCR court erred in finding trial counsel was not ineffective and therefore erred in denying Johnson’s PCR application.

CONCLUSION

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



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

CHRISTOPHER LEE JOHNSON,

PETITIONER,

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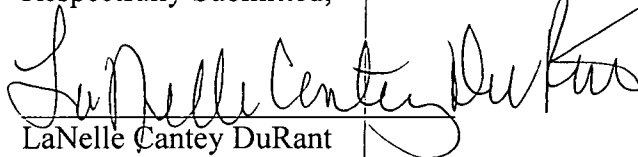
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Lee Johnson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Perry H. Gravely, which was held on December 16, 2015 (Evidentiary Hearing), and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve her as counsel for Christopher Lee Johnson.

Respectfully Submitted,



LaNelle Cantey DuRant

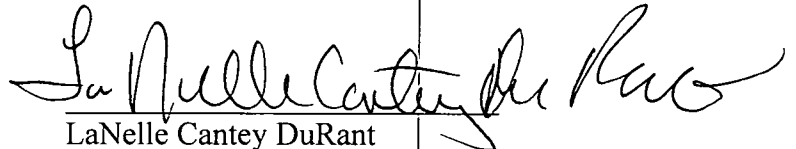
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of August, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

This 22nd day of August, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

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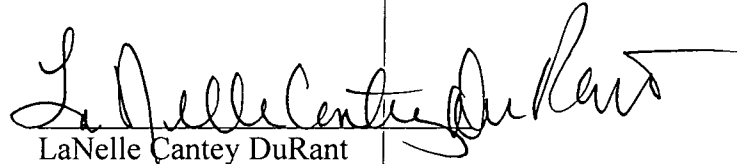
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STATE OF SOUTH CAROLINA,

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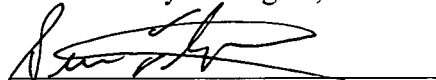
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Christopher Lee Johnson, at 203 Dovie Drive, Greer, SC 29651, this 22nd day of August, 2016.



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 22nd day of August, 2016.

 (L.S)

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