

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Perry H. Gravely, Circuit Court Judge

SHANITA CUNNINGHAM

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000786

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Cunningham's guilty plea was knowingly and voluntarily made when Petitioner believed she was pleading guilty to the aiding and abetting section of the homicide by child abuse statute for which she was arrested, and which carried a sentence of ten to twenty years, but actually pled guilty to the primary aggressor part of the statute for which she was indicted and which carried a sentence of twenty to life?

STATEMENT

Shanita Cunningham and Erica Butts had been a couple for several years at the time of this incident in 2009. On October 22, 2009, the three year old daughter of a close friend of Erica's with whom she had been lifelong friends, came from Detroit to visit Shanita and Erica who were the child's godparents. App. 6, ll. 14 – 18; App. 16, ll. 2 – 17.

Approximately two weeks after the child arrived, on November 3, 2009, a call to 911 was placed by Erica Butts' mother regarding the child who was unresponsive. When EMS arrived, the child's body was cold and "rigor had already set in." App. 6, ll. 19 -25. The child had cuts and bruises over her entire body. The solicitor told the court that the only place on the child's body that was spared were the soles of her feet. It was learned that Erica and Shanita had been beating the child continuously for the entire two weeks the child had been with them. The solicitor reported that the pathologist indicated that the child died from a "culmination of a continual beating" over a two week period. App. 19 – App. 19, ll. 6.

Shanita was originally arrested for aiding and abetting under the homicide by child abuse statute but was indicted as the principal under the statute. App. 32, ll. 10 – 17. On August 25, 2011, Shanita appeared before the Honorable Roger M. Young and entered a guilty plea to homicide by child abuse. She was represented by Cassandra Winslow, and the state was represented by Elizabeth Gordon. App. 1; App. 2, ll. 1 – App. 3, ll. 16. Judge Young postponed sentencing and mitigation to be held later when the child's family could attend from out of state. App. 7, ll. 10 – 23.

On November 3, 2011, Shanita appeared before the Honorable Deadra L. Jefferson for sentencing. Shanita was again represented by Cassandra Woosley, and the state by Elizabeth Gordon. App. 10. Shanita's plea counsel told the court that Shanita was willing to cooperate

with the state and testify against Erica as counsel believed that Shanita was less culpable. She signed an agreement with the state saying that she would testify against her co-defendant, Erica. App. 32, ll. 5 – 25. However, she was not able to do so because the co-defendant, Erica, decided to plead guilty. App. 78, ll. 3 – 22.

The solicitor told the court that the defendants had said that the child urinated on the floor and was beaten for having an accident. App. 27, ll. 16 – App. 28, ll. 3.

Petitioner Shanita Cunningham's attorney told the plea court that Cunningham was physically and sexually abused by her stepfather from the age of four until twelve. Hitting was common in her culture. Shanita never knew that the injuries to the child were life-threatening according to her plea counsel. Counsel explained that Shanita had been a babysitter her entire life. Shanita had a ten year old daughter who was there during this incident. This daughter had never experienced "any physical violence" in the home. App. 33, ll. 10 – App. 36, ll. 3. Shanita told the plea court that she "would never purposely nor maliciously hurt anyone." App. 36, ll. 4 – 23.

The plea judge stated that the child "was systemically beaten to death." The judge said she had never seen photographs in any case more "graphic" than these of this child. App. 55, ll. 1 – 25. The judge then stated before sentencing: "the court notes, for the record, irregardless of who struck the last blow, irregardless of what ultimately caused her death, what has become profoundly clear to this court, their best interest rose above that of the child and that they were equally culpable irregardless of who actually threw the last blow." App. 57, ll. 10 – 19.

The judge sentenced both Shanita and her co-defendant, Erica, to life in prison. Ap. 58, ll. 1 – 9.

Petitioner filed a notice of appeal which was dismissed by the Court of Appeals for failure to file a Rule 203(d)(1)(B)(iv) response. App. 108.

On January 8, 2013, Shanita filed a post-conviction relief (PCR) application. The state filed a return on October 17, 2013. App. 107. An evidentiary hearing was held on January 19, 2016 before the Honorable Perry H. Gravelly. Shanita Cunningham was represented by Christopher Murphy, and the state was represented by Rutledge Johnson. App. 71.

At the PCR hearing, Petitioner Cunningham's PCR attorney told the court that Petitioner believed her plea counsel was ineffective because Shanita was indicted under the "child neglect statute" which had two subsections. The first one had a sentence of twenty years to life and the second subsection had a ten to twenty year sentence. This was the focus of the PCR. App. 74, ll. 1 – 23.

Shanita Cunningham testified at the PCR hearing that she thought she was charged with subsection (b) or the second part of the "child neglect statute" until after sentencing when she asked her attorney how she received that life sentence. She thought she was pleading to aiding and abetting which was the second part of subsection (b) of the statute. That would have been the ten to twenty year sentence. She had offered to cooperate but never got the chance since her co-defendant pled guilty. App. 75, ll. 1 – App. 78, ll. 22.

Shanita testified that she had wanted a trial. However, she did not want to subject her daughter, who was eight years old at the time and a witness, to a trial. Shanita also thought it would be "insensitive" to subject the mother of the child to a trial. App. 78, ll. 23 – App. 80, ll. 8.

Shanita stated that she never saw the indictment where she was indicted as a primary aggressor under the statute but thought she was pleading to the aiding and abetting section. She did not know when she pled guilty that she was facing a life sentence. If she had known, she would not have pled guilty. App. 80, ll. 16 – App. 83, ll. 24.

Plea counsel testified at the PCR hearing that she was “very shocked” by the life sentence Shanita received. She had talked to the solicitor and believed that the state was going to ask the judge for “some leniency” for Shanita since she had agreed to testify against the co-defendant, Erica. App. 87, ll. 1 – App. 89, ll. 15. Counsel said that Erica Butts was the primary aggressor, and the evidence indicated that Shanita only aided and abetted. Plea counsel testified that she talked with Shanita about both parts of the statute which included the aiding and abetting section and the principal under the first section. She did think and told Shanita that if she were found guilty at a trial, that she would probably receive a life sentence. Counsel never thought that would be the sentence after a guilty plea. App. 90, ll. 4 – Ap. 92, ll. 22.

The PCR judge issued an order on March 14, 2016 denying Petitioner Cunningham’s PCR application and dismissing it with prejudice. App. 107 – App. 115. The Judge found plea counsel’s testimony to be credible, while finding that the plea transcript “refuted much of the Applicant’s argument.” App. 112. The judge wrote that Petitioner entered a knowing and voluntary guilty plea. The judge stated that if Petitioner believed that she was pleading guilty to aiding and abetting that carried a ten to twenty year sentence, then she should have told the plea judge when he stated that the sentencing range was twenty to life. App. 112.

Petitioner filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Cunningham's guilty plea was knowingly and voluntarily made when Petitioner believed she was pleading guilty to the aiding and abetting section of the homicide by child abuse statute for which she was arrested, and which carried a sentence of ten to twenty years, but actually pled guilty to the primary aggressor part of the statute for which she was indicted and which carried a sentence of twenty to life.

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).

PCR counsel should have insured that Petitioner Shanita Cunningham understood exactly what her indictment said and what she was pleading guilty to. Counsel should have understood herself that based on the facts of this case, it was very possible for Petitioner to receive a severe sentence including life. If counsel had understood that, she may have worked harder to insure that the state was going to do what they said, and asked the judge for consideration for Shanita based on her willingness to testify against her co-defendant.

CONCLUSION

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


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of August, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Honorable Perry H. Gravely, Circuit Court Judge

SHANITA CUNNINGHAM

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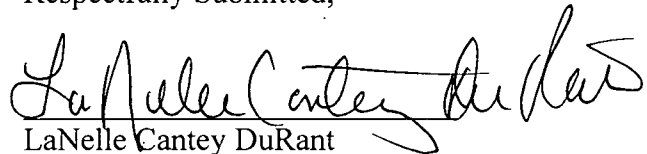
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shanita Cunningham 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 January 19, 2016 (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 Shanita Cunningham.

Respectfully Submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st 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."

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written in a cursive style.

LaNelle Cantey DuRant
Appellate Defender

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Defense
Division of Appellate Defense
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RESPONDENT

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CERTIFICATE OF SERVICE
—————

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 J. Rutledge Johnson, 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 Shanita Cunningham, #348485, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 31st day of August, 2016.

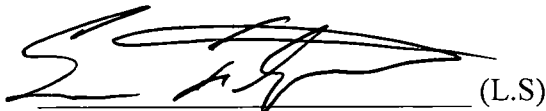


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of August, 2016.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.