

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

RICKY D. CHEEKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

RECEIVED

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S.C. SUPREME COURT

APPELLATE CASE NO. 2016-001292

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not moving to suppress the drugs seized at the traffic stop when law enforcement did not have probable cause to search the vehicle in which Petitioner was a passenger?

STATEMENT

On June 4, 2009, Eric Elder related that he was at home and received a call from Derrick Cheeks to come to a motel in downtown Spartanburg to get him and take him to Tracy Markley's house who was a friend of both of them. Derrick did not have a driver's license and relied on other people to drive him. Derrick had a car, a black Crown Victoria, but not a license. App. 249, ll. 5 – App. 252, ll. 25. Eric received free drugs from Derrick for driving him. App. 257, ll.10 – 16.

When Eric arrived at the motel, Derrick's uncle, Ricky Cheeks, was there also. Ricky, Derrick, and Eric drove to Tracy Markley's house which was only about two and one half miles from the motel. App.251, ll. 2 – App. 253, ll. 3. According to Eric, Derrick had a "large amount of cocaine" on him when they arrived at Tracy's house. Derrick immediately started cooking the cocaine into crack cocaine. App. 254, ll. 1- 18; App. 256, ll. 1 – 23; App. 257, ll. 2 – 9.

Derrick sent Ricky to Wal-Mart to buy baking soda. Since Ricky could not drive and was not allowed to enter Wal-Mart according to Eric, Eric drove him there. App. 254, ll. 19 – App. 256, ll. 1. When they returned with the baking soda, Derrick was still cooking crack. App. 257, ll. 4 – 24.

Then Derrick told Ricky that he needed to go somewhere to "get rid of something" because someone was calling. Eric again drove Ricky who had about two ounces of crack in his possession. When they came to a stop sign, Eric said that he did not completely stop. Then Eric and Ricky were pulled over by the police for not coming to a full stop. App. 258, ll. 6 –App. 259, ll. 16.

According to Eric, the officer acted like this was a routine traffic stop. The officer came to his side, the driver's side, and asked for his driver's license and registration. Then the officer

asked Eric to step out of the car, and asked him if the officer could search the car. Eric said he had nothing on him so he had nothing to hide. The officer took Eric to the front of the police car which was right behind the car Eric was driving. App. 262, ll. 19 – App. 263, ll. 25. Eric was there when the officer called in a police dog to sniff for drugs, and a substance was found by the officers. App. 264, ll 1 – 12.

SLED agent Craig Hanning reported that on June 4, 2009, he was conducting surveillance on the Super 8 Motel in Spartanburg. He was monitoring Ricky Cheeks, Derrick Cheeks, and Eric Elder due to a phone call he received earlier from Eric Elder's mother. App. 76, ll. 7 -25.

Investigator Matt Hutchins reported that he received a call to assist in the surveillance of a black Crown Victoria where Ricky Cheeks was the passenger, and Eric Elder was the driver. He followed Eric Elder into the Wal-Mart where Eric bought the baking soda. He then followed Eric in the black Crown Victoria to the house that Investigator Norris already had under surveillance. He saw Eric and Ricky go inside the house, and then they returned to the Crown Victoria and left. App. 102, ll. 8 – App. 105, ll. 25.

He saw Eric go through the stop sign slowly as though it were a yield sign. Investigator Hutchins activated his blue light and the car stopped. When Investigator Hutchins approached the driver's side, he noticed that the driver was "visibly shaking." The passenger "seemed to be nervous." He saw that the passenger had "his hands clinched towards his pocket, and looked straight ahead." He asked the driver to step out and took him to front driver's side of the patrol vehicle. App. 107, ll. 14 – App. 108, ll. 19.

Ricky Cheeks was asked to step from the passenger side by other officers. Then Investigator Cantrell brought the drug detection K-9 dog who conducted a "free air sniff" on the

car. The dog alerted on the car. Investigator Hutchins then left to attend a briefing for a search warrant for Tracy Markley's house. App. 108, ll. 17 – App. 109, ll. 25.

Investigator Nate Cantrell reported that the K-9 drug dog alerted on the passenger seat by jumping in the car and sitting in the passenger seat. Then the officers conducted a hand search of the vehicle. Located on the ground near the rear passenger area of the vehicle a clear plastic bag containing four blocks of an off-white substance was found. App. 176, ll. 19 – App. 181, ll. 21.

Investigator Hutchins reported that a search warrant was then executed on the home of Tracy Markley. When the officers entered the home, Derrick Cheeks was seen running from the kitchen to another room. He was taken into custody. App. 109, ll. 10 – App. 111, ll. 21; App. 124, ll. 1 – 7.

In November 2009, the Spartanburg County Grand Jury indicted Ricky Cheeks on the charges of trafficking crack cocaine 400 grams or more; trafficking crack cocaine 100 grams or more; and possession with intent to distribute crack cocaine within the proximity of a school (PWID). App. 534- App. 535. On October 4-6, 2010, Petitioner Cheeks proceeded to trial before the Honorable Roger L. Couch and a jury. Petitioner was represented by J. Roger Poole, and the state was represented by Eddie Hunter. Derrick Cheeks, nephew of Ricky Cheeks, was tried in a joint trial with Petitioner Ricky Cheeks. Derrick was represented by Jeff Wilkes. App. 1.

At trial, the forensic chemist, Ashley Harris, testified that the amount of crack in her Item One found during the vehicle stop was 111.31 grams. App. 328, ll. 14 – 23. The total found in the house was 662.4 grams of crack cocaine. App. 331, ll. 5 – App. 332, ll. 25.

Derrick Cheeks' trial counsel Wilkes, moved in a pretrial motion to suppress the search warrant for the house based on its insufficiency. App. 39, ll. 8 – App. 47, ll. 19. Ricky's trial counsel Poole joined in this motion. App. 47, ll. 24 – App. 48, ll. 6. Attorney Poole explained

that Ricky was charged with the drugs found at the traffic stop and with the drugs found in the house. App. 48, ll. 1 – 7. Attorney Poole did not make any pretrial motion to suppress the drugs found at the traffic stop nor any motion regarding the search of the car. App. 39, ll. 1 – App. 52, ll. 25.

The jury found Ricky guilty of PWID crack cocaine within one-half mile of a school; guilty of trafficking more than 400 grams of crack cocaine; and guilty of trafficking more than 100 grams of crack cocaine. The jury found Derrick guilty of PWID crack cocaine and trafficking more than 400 grams of crack. App. 457, ll. 3 – App. 458, ll. 25.

The judge sentenced Ricky to twenty-five years on each trafficking charge, and ten years on the PWID with all sentences to run concurrent. Derrick was sentenced to twenty-five years. App. 465, ll. 1 – 25.

Petitioner Ricky Cheeks filed a notice of appeal. The Court of Appeals affirmed his convictions and sentences on October 24, 2012. State v. Cheeks, 400 S.C. 329, 733 S.E.2d 611 (Ct. App. Filed October 24, 2012). The South Carolina Supreme Court granted certiorari. The Supreme Court affirmed Petitioner Cheeks' convictions and sentences on May 28, 2014. State v. Cheeks, 408 S.C. 198, 758 S.E.2d 715 (2014).

On October 6, 2014, Petitioner Cheeks filed an application for post-conviction relief (PCR). The state filed a return on March 5, 2015. An evidentiary hearing was held on March 24, 2016 before the Honorable R. Keith Kelly. Petitioner Cheeks was represented by Leah B. Moody, and the state was represented by Alicia A. Olive. App. 481.

At the PCR hearing, Petitioner Cheeks testified that his trial counsel was ineffective for several reasons. App. 489, ll. 9 – 19. One of the main reasons was that his attorney should have moved to suppress the evidence from the traffic stop because it was an illegal stop. He tried to

discuss that with his attorney but his attorney did not want to hear it. App. 492, ll. 25 – App. 493, ll. 18.

Ricky testified that his attorney should have made an argument to “attack” the traffic stop instead of arguing to suppress the search warrant of the house. He explained that the police did have a reason to stop the car because Eric did run the stop sign. However, the police were supposed to just check Eric’s driver’s license but they turned it into a “Terry” stop. He said the police were not supposed to “mess” with him at all as the passenger. The police got him out of the car and then claimed that he dropped 111 grams of crack on the ground. He said that the police reported that they did not see Ricky drop any drugs. App. 504, ll. 1 – App. 505, ll. 23.

Ricky wanted to testify at trial and explain he did not have any drugs. However, his attorney told him it would only hurt him. App. 506, ll. 25 – App. 507, ll. 25.

Trial counsel testified that he and Co-defendant Derrick’s attorney coordinated their objections and motions since Ricky and Derrick were being tried together. App. 518, ll. 1 – 10. Counsel testified that Ricky maintained his innocence “all the way through.” App. 518, ll. 11 – 25. Counsel said that Eric and Tracy Markley were charged also but they testified for the state at trial against Ricky. App. 519, ll. 1 – 20.

Trial Counsel stated that he did move to suppress the evidence found in the house as a result of the search warrant. . However, he admitted that he did not move to challenge the traffic stop because he “did not think that there was any basis for a suppression there.” App. 521, ll. 4 – 7. Counsel stated that the trial testimony said that Ricky was “acting in a furtive manner.” App. 521, ll. 15 – 16. The crack was found near him. Counsel said that law enforcement was “keen” on what was going on in the house prior to the traffic stop. App. 521, ll. 12 – 14.

According to counsel, Ricky always wanted to go to trial because he said he was innocent. App. 230, ll.10 – 23. Counsel said his defense at trial was mere presence. App. 527, ll. 2 – 25.

The PCR judge issued an order on May 27, 2016 denying Petitioner Cheeks' PCR application and dismissing it with prejudice. App. 534 – App. 548. In his order, the PCR judge held that trial counsel “conducted a proper investigation, adequately conferred with Petitioner cheeks, and was thoroughly competent in his representation.” App. 536.

Regarding the traffic stop, the PCR judge found that Petitioner Cheeks failed to show any deficiency in trial counsel's performance concerning the traffic stop. The judge held that Cheeks failed to show there was any reasonable probability that the outcome of the trial could have been any different if trial counsel had made the motion to suppress the drugs found at the traffic stop. The judge denied this allegation. App. 544.

The judge denied Cheeks' PCR application and dismissed it with prejudice. App. 548.

Petitioner Cheeks filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not moving to suppress the drugs seized at the traffic stop when law enforcement did not have probable cause to search the vehicle in which Petitioner was a passenger.

Trial counsel was ineffective for not moving to suppress the drugs found at the car during the traffic stop of Petitioner, who was the passenger, and Eric who was driving and who failed to stop completely at a stop sign. Petitioner conceded that law enforcement had probable cause to stop the car but did not have probable cause to search the car.

The Fourth Amendment to the United States Constitution grants citizens the right to be secure against unreasonable search and seizure. U.S.Const.amend.IV; State v. Tindal, 388 S.C. 518, 698 S.E.2d 203 (2010).

In State v. Tindal, Id., the Supreme Court held that in carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation; any further detention for questioning was beyond the scope of the stop and therefore illegal unless the officer had reasonable suspicion of a serious crime. Tindal was stopped for speeding, following too closely, and failure to maintain his lane. The officer asked Tindal to sit in the patrol car where the officer questioned Tindal. After about fifteen to twenty minutes into the stop, the officer asked Tindall if he could search his vehicle to which Tindal responded: "I don't care." The officer searched the car and found a large quantity of cocaine beneath the rear bumper. The Supreme Court ruled that this continued detention exceeded the scope of the traffic stop and that the officer lacked reasonable suspicion of a serious crime. Therefore, the Court held that the consent to search was invalid because it was the product of the unlawful detention.

In State v. Moore, 415 S.C. 245, 781 S.E. 2d 897 (2016), the Supreme Court held that the deputy did have reasonable suspicion to detain Moore for questioning unrelated to the initial traffic stop for speeding. Moore had a large sum of money in his pocket; the rental agreement for the car indicated that the car was rented to a third party in North Carolina the day before the stop; and Moore exhibited excessive nervousness. Two large containers filled with crack cocaine and a loaded handgun were found in Moore's car.

Moore's case is distinguished from Petitioner Cheeks' case because there was no money found on the driver, Eric nor on Cheeks. The car belonged to Derrick, Ricky's brother. Eric and Ricky did exhibit some nervousness according to the officer, but the Court in Moore's case wrote that some general nervousness was normal in a traffic stop.

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).

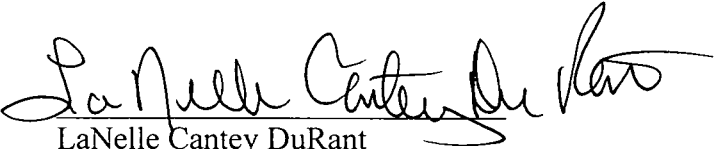
The officer lacked reasonable suspicion to search the car in which Ricky Cheeks was a passenger. All law enforcement had was the call from Eric's mother to put him under surveillance. The officer saw Eric pick up Ricky and Derrick and take them to Markley's house. They left and bought baking soda at Walmart which the officer said was used in cooking crack cocaine. The officers saw Eric and Ricky return to Markley's house and then leave again. None of this activity was indicative of drug activity. The officers did not mention any drug traffic to the house as though people were purchasing drugs. The house had not been searched at the time of the traffic stop so the officers did not know if drugs were in the house.

The car belonged to Ricky's brother. Eric and Ricky exhibited some nervousness. There was not sufficient evidence for probable cause to search the vehicle.

The PCR court should have found trial counsel ineffective for not arguing to suppress the drugs found during the traffic stop. Counsel's failure to argue for suppression of the drugs from the car was prejudicial to Petitioner Cheeks. If those drugs had been suppressed, there was a reasonable probability that the jury would have found him not guilty of the drugs found in the house because Ricky did not participate in the actual cooking of crack cocaine. Derrick had the cocaine on him when they arrived at Tracy Markley's house.

CONCLUSION

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


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of November, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

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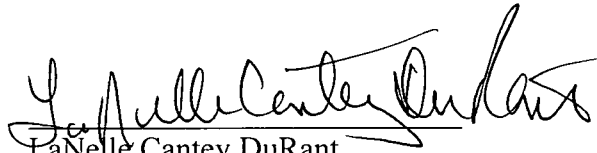
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ricky D. Cheeks 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 record of petitioner's trial before the Honorable R. Keith Kelly, which was held on March 24, 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 Ricky D. Cheeks.

Respectfully Submitted,

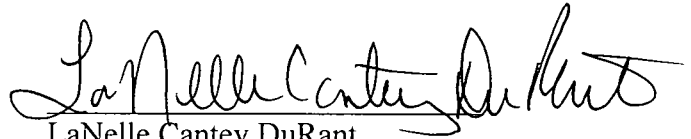


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 10th day of November, 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
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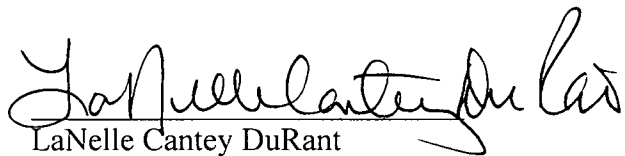
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RESPONDENT

—————
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 Alicia Olive, 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 Ricky D. Cheeks, #343107, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 10th day of November, 2016.

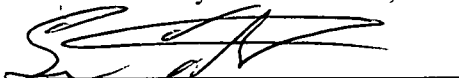


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 10th day of November, 2016.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.