

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Charleston County

Honorable J. C. Buddy Nicholson, Circuit Court Judge

RECEIVED

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SAMUEL BROWN,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001477

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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1.

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ISSUE PRESENTED

1.

Did the PCR court correctly grant a belated direct appeal review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney failed to file the notice of appeal timely and the state consented to the belated appeal?

2.

Did the PCR court err in failing to find trial counsel ineffective for not investigating more thoroughly weeks before trial into the identity of the confidential informant and the informant's background as the informant was the only real evidence against Petitioner?

STATEMENT

In September 2009, Sean O'Shea was caught by the Mt. Pleasant police for selling marijuana. He was offered the chance of having his charges dismissed if he helped the police "set up" other drug dealers which he agreed to do. App. 122, ll. 21 – App. 123, ll. 6; App. 109, ll. 14 – App. 110, ll. 1.

On October 11, 2010, Sean O'Shea, the confidential informant (CI), contacted Detective Alexander Blake with the Mt. Pleasant Police, and told him that the CI met a "subject" named "Nama" who said he could possibly sell the CI cocaine. Detective Blake gave the CI instructions on how to proceed. The CI called Detective Blake three times that night and on the third call said that the subject, "Nama" agreed to sell him cocaine the following day. App. 144, ll. 7 – App. 145, ll. 18; App. 140, ll. 5 – 22.

The following day, October 12, 2010, the set up was complete when the CI and Brown talked by telephone. The CI was fitted with an audio recording device to record the transaction. The police searched the CI and his car extensively. The CI was provided with one thousand dollars to purchase the cocaine. App. 145, ll. 19 – App. 148, ll. 21; App. 111, ll. 1 – 3.

The CI and "Nama" agreed to meet at a bar called "Locals" in Mt. Pleasant on October 12, 2010. App. 111, ll.1 – 24. Around six thirty in the late afternoon on October 12, 2010, the CI received a call from "Nama" that he was on the way. Detective Blake turned on the audio to record the transaction. The police saw the car matching the subject's car pull into the parking lot where the CI was located. They saw "Nama" approach the driver's side of the CI's car. When Detective Blake, who was listening, heard the words from the CI: is this the "good stuff?", the police moved in because those were the "takedown" signal. App. 149, ll. 5 – App. 151, ll. 23.

The police then moved in and saw “Nama” standing at the driver’s window talking with the CI. They took “Nama” into custody and identified him as Sam Brown from the South Carolina driver’s license that was in the wallet found on Brown. App. 149, ll. 24 – App. 152, ll. 25. The money and cocaine were found in the CI’s car which, according to the CI, Brown threw into the car when the police approached. Detective Blake claimed that he saw Brown make a “throwing motion into the vehicle and lean back and put his hands in the air.” The detective thought that was when Brown threw the items back into the car. App. 153, ll. 1 – 24.

Brown was indicted by the Charleston County Grand Jury on November 13, 2012 for trafficking cocaine more than ten grams but less than twenty-eight grams. App. 364-App. 365. On September 10-12, 2013, Brown proceeded to trial before the Honorable J.C. Nicholson, Jr. and a jury. Brown was represented by James W. Smiley and Laree Hensley. The state was represented by Randell Stoney and Stephanie Linder. App. 1.

During the trial Detective Blake admitted that he did not see the actual “hand to hand drug transaction, but he listened to it. He said that “based on his training and experience, he knew what a drug transaction sounded like.” He believed that a drug transaction took place. App. 173, ll. 1- 11. Detective Blake also admitted that he did not call forensic services so no forensics were done such as fingerprints. No pictures were taken either. App. 165, ll. 10 – 23.

The CI testified during the trial that the audio account was accurate. App. 114, ll. 21 – App. 115, ll. 12. He also testified that he saw Brown throw the money back into the car when the police “rushed in.” App. 138, ll. 16 – 25.

During the solicitor’s closing argument, he stated:

You heard about how he (CI) met the defendant the night before. He and this defendant were talking, met through a friend of a friend. This defendant indicated, hey, I can get some weed.

App. 224, ll. 22 – 25.

Defense counsel objected by stating that these were facts not in evidence. The judge overruled his objection. App. 225, ll. 1 – 3.

The jury returned a verdict of guilty as indicted. App. 250, ll. 22 – App. 251, ll. 4. The solicitor told the judge that this was a trafficking second offense for Brown. App. 254, ll. 13 – 25. The judge sentenced Petitioner Brown to ten years imprisonment. App. 263, ll. 6 – 12.

Brown filed a *pro se* notice of appeal which was dismissed as untimely. App. 343- App. 350; App. 308, ll. 3 – 24.

On September 5, 2014, Petitioner Brown filed an application for post-conviction relief. (PCR). The state filed a return on November 6, 2015. An evidentiary hearing was held on April 18, 2016 before the Honorable Doyet A. Early. Petitioner Brown represented by William H. Nixon, Jr., and the state was represented by J. Rutledge Johnson. App. 276.

At the PCR hearing, trial counsel testified that he filed a notice of the intent to appeal with the circuit court and thought it was transmitted to the appellate court. However, he admitted that he “did not perfect it” as it was not timely transmitted. Therefore, the appeal was dismissed. He admitted he should have perfected the notice of appeal. App. 308, ll. 3 – App. 309, ll. 4.

Trial counsel then admitted that the only person who said that this drug transaction actually occurred was the CI. App. 312, ll. 1 – 17. The case “hinged on the CI.” App. 290, ll. 1 – 15. Trial counsel had requested the name of the CI in his Rule 5 request but the state did not give him the CI’s name until the morning of the trial. He testified that he should have asked for a continuance because he had no investigation into “who and what” the CI was. Brown had met him before but did not know the CI’s background. Counsel admitted that if a CI was involved in a case, then he needed their information in order to investigate. He thought there was a “history”

between the CI and the police narcotics department. Counsel admitted that he should have done more to be able to “find out about the CI.” App. 290, ll. 16 – App. 296, ll. 7. He said: “I would have liked to have been more prepared.” App. 301, ll. 20-21.

Petitioner Brown testified at his PCR hearing that they had discussed a five year plea agreement the week before trial. App. 313, ll. 1 – App. 314, ll. 8. If he had known more about the CI and what his testimony was going to be and that he was not likely going to be impeached, then Brown would have pled guilty “because of the evidence.” If he had known whether the charge was a first or second offense, then he would have taken the five year plea offer. App. 316, ll. 1 - 25.

Brown told the court that he definitely had wanted an appeal. At that point, the state conceded that the appeal filed was untimely, and he had “had no problem” with belated direct appeal. App.322, ll. 24 – App. 323, ll. 20. Brown also told the court:

I just want to say I feel if I had all the evidence ay hand and Jim had all the evidence at hand, I could have made a better decision of making a plea.

App. 324, ll. 1 – 12.

On June 21, 2016, the PCR judge issued an order denying Brown’s PCR application and dismissing it with prejudice. In his order, the judge found that Brown was entitled to a belated review of his direct appeal issues as the appeal was untimely, and the state conceded to it. App. 361.

The judge wrote concerning ineffective assistance of trial counsel, that Brown’s “main contention” was that trial counsel was ineffective for failing to obtain information on the confidential informant prior to the beginning of trial. Trial counsel and Brown testified that they received the information on the CI the day of trial. The PCR judge held that although trial counsel admitted that he should have done a “more thorough” investigation into the CI,

Petitioner Brown presented no “credible” evidence at the PCR hearing that further investigation would have changed the outcome of the trial. App. 360. The PCR judge denied Brown’s allegation that trial counsel was ineffective for failing to “further investigate and interview the CI.”

This appeal follows. An Anders brief pursuant to White v. State, *supra*, is filed simultaneously with this petition for a writ of certiorari.

ARGUMENT

1.

The PCR court correctly granted a belated direct appeal review pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) because the applicant did not knowingly and voluntarily waive his appellate rights because his trial attorney failed to file the notice of appeal timely and the state consented to the belated appeal.

Brown's attorney filed a notice of appeal with the circuit court but failed to timely transmit to the appellate court. Counsel testified that the appellate court dismissed Brown's appeal. App. 308, ll. 3 – 24. Petitioner Brown filed a *pro se* appeal on November 15, 2013. App. 343-App. 344. The Court of Appeals dismissed the appeal as untimely. App. 308, ll. 9 – 15; App. 323, ll. 9 – 15.

At the PCR hearing, the state conceded that the direct appeal notice was untimely so the state consented to the belated review pursuant to *White v. State*, 263 S.C. 110, 108, S.E.2d 35 (1974). App. 323, ll. 9 – 15.

The PCR judge granted Brown a belated review of his direct appeal pursuant to *White v. State*, *id.* as the state conceded that Brown was entitled to his "full bite of the apple." App. 361; App. 358.

On review, a PCR judge's findings will be upheld if there is any evidence of probative value to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. *White v. State*, *supra*.

The order of the PCR court granting the belated appeal should be affirmed.

ARGUMENT

2.

The PCR court erred in failing to find trial counsel ineffective for not investigating more thoroughly weeks before trial into the identity of the confidential informant and the informant's background as the informant was the only real evidence against Petitioner.

Trial counsel testified that the only person who said that this drug transaction actually occurred was the CI. App. 312, ll. 1 – 17. The case “hinged on the CI.” App. 290, ll. 1 – 15. Trial counsel had requested the name of the CI in his Rule 5 request but the state did not give him the CI's name until the morning of the trial. App. 290, ll. 16 – 25.

Counsel admitted that he should have asked for a continuance because he had no investigation into “who and what” the CI was. Brown had met him before but did not know the CI's background. Counsel admitted that if a CI was involved in a case, then he needed their information in order to investigate. He thought there was a “history” between the CI and the police narcotics department. Counsel admitted that he should have done more to be able to “find out about the CI.” App. 291, ll. 1 – App. 296, ll. 7. He said: “I would have liked to have been more prepared.” App. 301, ll. 20-21.

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*.

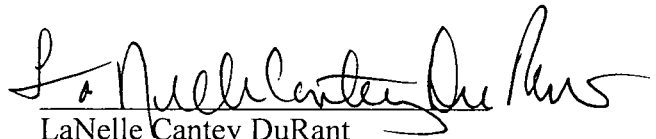
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would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

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court found that trial counsel was ineffective because a criminal defense attorney has a duty to investigate, but this duty was limited to reasonable investigation. The Court defined a reasonable investigation at a minimum has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

The PCR court erred in denying Petitioner Brown's PCR application because he was prejudiced by trial counsel not investigating more intensely to learn more about the CI. The case hinged on the CI according to trial counsel so the CI's credibility was the issue. Brown was prejudiced because if he had known more about the CI and his credibility, he said he would have taken the five year plea offer. His time of imprisonment would have been greatly reduced.

CONCLUSION

Based on the above, certiorari should be granted, and the order of the PCR court granting a belated appeal should be affirmed on Issue 1. The order of the PCR court on Issue 2 should be reversed and the case remanded for a new trial.

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of November, 2016.

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V.

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RESPONDENT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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 Petition for Writ of Certiorari and a copy of the Appendix have been served on Samuel Brown, #118629, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 23rd day of November, 2016.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 23rd day of November, 2016.

 (L.S)

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