

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Larry B. Hyman, Jr., Circuit Court Judge

CLARENCE J. FISHBURNE,

V.

STATE OF SOUTH CAROLINA,

ORIGINAL

RECEIVED

DEC 16 2016

S.C. SUPREME COURT

PETITIONER

RESPONDENT

APPELLATE CASE NO. 2016-001228

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court correctly find that trial counsel was “arguably” ineffective for not objecting to the interpreter not being qualified pursuant to South Carolina Code Section 17-1-50 but erred in finding that trial counsel had no reason to object because the interpreter met the statutory requirements for qualification so Petitioner Fishburne was not prejudiced by counsel not objecting?

STATEMENT

On August 6, 2010, Paulo Silva and Adao Olivera were on the porch of their apartment in Goose Creek. Silva's wife, Paulino, and their three year old daughter were inside the apartment. Paulino was the niece of Olivera. App. 285, ll. 4 – App. 286, ll. 1. Three black men approached Silva and Olivera while they were outside on the porch. One of the men pulled a gun and robbed Silva as one of the other men started choking Olivera. App. 286, ll. 1 – App. 287, ll. 14.

The man choking Olivera wanted to go inside. When he entered the apartment, Silva saw his wife who was pregnant. He told her, in Portuguese, that they were being robbed and she should go for help which she did leaving her young daughter asleep upstairs. The men forced Silva and Olivera upstairs demanding money. One threatened to kill Silva if his wife did not appear. App. 287, ll. 16 – App. 289, ll. 16.

When Paulino fled the apartment, she went to her neighbor next door and told her what was happening. App. 531, ll. 10 – App. 533, ll. 4. The neighbor, Lucineia Rodriguez, became concerned for the child and decided to enter the apartment and get the young child which she did. App. 533, ll. 2 – 11; App. 540, ll. 19 – App. 542, ll. 22.

Silva saw his next door neighbor pass by the bedroom and enter the bedroom where his daughter was sleeping. At that point, the men fled the apartment taking a laptop computer and the telephones of Silva and Olivera. When Silva went outside, he saw his neighbors one of whom had called the police. App. 289, ll. 14 – App. 291, ll. 3.

When Deputy Jason Charlton, who was the first responder, arrived, he learned that the suspects had taken the laptop computer and could be walking up Harbor Lake Road. App. 332, ll. 4 – App. 333, ll. 23; App. 334, ll. 19 – App. 336, ll. 4. Deputy Charlton drove down Harbor Lake Road and about a quarter of a mile from the apartment, he saw three black males. One of

them was carrying a laptop computer. App. 336, ll. 21 – App. 337, ll. 25. One of the men ran. The two who remained were identified as Clarence Fishburne and Douglas Thompson. App. 338, ll. 1 – App. 339, ll. 9.

When another officer arrived, Deputy Charlton returned to talk with Paul Silva and Olivera. Silva and Olivera spoke very little English. Although he spoke a little Portuguese, Deputy Charlton got a neighbor, Rubio Hilario, to be the interpreter for him. Deputy Charlton took Silva, Olivera, and the neighbor interpreter, to the road where the two suspects were being held. The deputy said that Silva and Olivera identified the two men, Fishburne and Thompson, as the men who entered their home and robbed them. App.341, ll. 1 – App. 345, ll. 25.

In November 2011, the Berkeley County Grand Jury indicted Petitioner Clarence Fishburne on two counts of armed robbery (AR), one count of burglary first degree, and two counts of kidnapping. App. 757- App. 758; App. 769-App. 783. On November 7-11, 2011, Petitioner Fishburne and his co-defendant, Douglas Thompson, proceeded to trial before the Honorable Kristi L. Harrington and a jury. Fishburne was represented by Chad Shelton and David Schwacte. The state was represented by Ashley Cornwell and Bryan Alfaro. App. 1.

Pretrial, defense counsel told the court that he had an issue with the interpreter the state planned to use who was Theodore Wright.¹ App. 52, ll. 8 – 13. The state explained that they had a different interpreter that they planned to substitute for Mr. Wright. Defense counsel said that he had talked with the new interpreter and had received his information. Counsel said that he had no objection to the new interpreter. Counsel said: “He is unbiased.” App. 65, ll. 13 – App. 66, ll. 9. At the beginning of the pretrial hearings just prior to the first victim, Olivera, testifying, the state called for the new interpreter, Mr. Rock, to come into the courtroom. The clerk administered the

¹ The victims were of Portuguese descent from Brazil. App. 715, ll. 2-4.

oath to the interpreter, Mr. Rock. There was no objection or motion by defense counsel concerning the qualifications of the interpreter. App. 157, ll. 17 – App. 158, ll. 3. The second victim, Paulo Silva, testified in the pretrial hearing immediately following Olivera. App. 181, ll. 7 – 15.

During the pretrial testimony of Olivera, the judge stopped the testimony and asked the interpreter what was Olivera's response to the question if he said in his statement that one of the suspects spoke Portuguese. The interpreter answered that Olivera said that his statement was not a lie. The judge said that she heard the word "annoy." The interpreter had to ask Olivera again and he responded that he did not say that in his statement. App. 166, ll. 8 – App. 167, ll. 5. After the trial began and during the trial testimony of Paulo Silva, during the afternoon break, the judge told the interpreter:

I can tell that you are getting tired. It is important that you understand that you can't change the questions and I, unfortunately, don't speak Portuguese. So I don't –I have no idea what you were saying back. But you must, whatever the attorney's question is, you must say that word for word. And then, hold on, we have got to make a record and that's why this is all so difficult. But you must say word-for-word the question and repeat it to Mr. Silva. If he does not understand, then Mr. Silva needs to say to you, I don't understand. And then you need to tell the attorney, I don't understand.

App. 306, ll. 8 – 23.

The judge then said that there were a few times when there was not a question before the interpreter, so what was the interpreter saying. The judge said that she assumed the interpreter was rephrasing some of the questions for Mr. Silva. The interpreter responded that he was. And he was rephrasing some of Mr. Silva's answers to the attorney. App. 307, ll. 1 – 18.

The judge told the interpreter:

I cannot allow you to do that. So we need ...if you feel that we are erring or that you are erring on the side of accuracy, you are not. Your purpose simply is to be the converter of language.

App. 307, ll. 19 – 23.

There was no objection by defense counsel nor any kind of motion such as a mistrial.

App. 307, ll. 1 – App. 308, ll. 15.

The jury found Petitioner Fishburne guilty of all charges as indicted. App. 657, ll. 1 – App. 658, ll. 2. The trial judge sentenced Fishburne to twenty years on each of the charges all to run concurrent. App. 673, ll. 16 - App. 674, ll. 13.

Fishburne filed an appeal which was perfected by the Division of Appellate Defense of the Commission of Indigent Defense. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences on April 2, 2014. State v. Fishburne, 2014-UP-133 (Ct. App. April 2, 2014.) App. 758; App. 784 - App. 798.

On April 14, 2014, Petitioner Fishburne filed an application for post-conviction relief (PCR). The state filed a return on April 20, 2015. An evidentiary hearing was held on September 9, 2015, before the Honorable Larry B. Hyman, Jr. Petitioner Fishburne was represented by Rodney Davis, and the state was represented by J. Rutledge Johnson. App. 700 – App. 701.

At the PCR hearing, PCR counsel argued to the court that trial counsel was ineffective for not objecting to the process for the interpreter because the process was “inherently unreliable.” Counsel argued that trial counsel knew ahead of time that there would be an issue about finding a proper interpreter. PCR counsel explained that there was no question asked by the court of the interpreter, and trial counsel made no objection to the “handling of the interpreter” for a witness. App. 707, ll. 18 – App. 708, ll. 12.

Petitioner Fishburne testified at the hearing that he believed that his trial counsel did not represent him adequately at trial. He relied on trial counsel's experience, but his representation was not adequate. App. 713, ll. 1 – 23. On cross examination, Fishburne agreed that the victims

were of Portuguese descent from Brazil. Fishburne agreed that he had an issue with the interpreter. Fishburne did not speak Portuguese so he did not know exactly what was said to the victims. App. 714, ll. 1 – App.715, ll. 20.

Trial counsel testified that in the beginning the solicitor had difficulty finding an interpreter for Portuguese. Trial counsel had a problem with the first choice so the solicitor found another interpreter, Mr. Rock. Trial counsel admitted that there were a few times when the interpreter did not repeat exactly what the witness had said. The interpreter also would ask a question and the witness would not respond. Counsel also admitted that there was no questioning of the interpreter or qualification purposes. He admitted that he did not ask to question the interpreter or ask for the process. App. 717, ll. 1 – App. 718, ll. 25.

Trial counsel testified that he did not object to the use or continued use of the interpreter even after the problems. He said he did not ask for a mistrial or make any motion concerning the use of the interpreter even after the judge's concerns. App. 718, ll. 25 – App. 719, ll. 4.

In his motion for a directed verdict, PCR counsel argued citing partly from State v. Rogers, 361 S.C. 178, 603 S.E. 910 (Ct. App. 2004):

“The court must make a determination that the action is in the best interest of the individual and in the best interest of justice.” This was not....there is no testimony he was a qualified interpreter. There is nothing in the record that the court went through the process of ensuring that this was an independent, unbiased, either qualified or while not qualified okay to use in the best interest of justice.

App. 741, ll. 23 – App. 742, ll. 22.

PCR counsel also argued that it was prejudicial to Fishburne for the trial court to use the interpreter without going through the qualification process. Trial counsel failed to object even after the trial judge had concerns about the adequacy of the interpreter. By not objecting, he failed to preserve the issue for appellate review. App. 740, ll. 11 – App. 741, ll. 1.

The PCR judge issued an order on April 19, 2016 denying Petitioner Fishburne's PCR application and dismissing it with prejudice. App. 757 – App. 768. In his order, the PCR judge found trial counsel's testimony and appellate counsel's testimony to be credible while he found Fishburne's testimony to not be credible. App. 758 – App. 759.

The judge ruled that Fishburne's claim that trial counsel was ineffective for not objecting to the interpreter not being qualified prior to translating the victim's testimony was without merit. App. 763. The judge then wrote that "this court finds counsel was arguably ineffective for not objecting to the interpreter not being qualified prior to the victim's testimony." The judge found that the interpreter met the qualifications of the statute, South Carolina Code. Ann. Section 17-1-50. Therefore, the judge wrote, trial counsel had "no good faith basis" to object to the interpreter's translation of the victim's testimony. Trial counsel said he did not see a problem with the interpreter. App. 764.

The PCR judge then found that Petitioner Fishburne did not prove that he suffered any prejudice from trial counsel's failure to object to the interpreter because Fishburne could not prove that the interpreter incorrectly translated the victim's testimony. The judge said that Fishburne did not introduce any other Portuguese speaking interpreter to show that the interpreter translated inaccurately. App. 764.

Fishburne filed an appeal. This petition follows.

ARGUMENT

The PCR court correctly found that trial counsel was “arguably” ineffective for not objecting to the interpreter not being qualified pursuant to South Carolina Code Section 17-1-50 but erred in finding that trial counsel had no reason to object because the interpreter met the statutory requirements for qualification so Petitioner Fishburne was not prejudiced by counsel not objecting.

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).

S.C. Code Ann. § 17-1-50 provides for interpreters in criminal proceedings:

(A) As used in this section:

(1) “Certified interpreter” means an interpreter who meets the standards contained in sub-item (A)(4) and is certified by the administrative office of the United States

courts, by the office of the administrator for the state courts, or by a nationally recognized professional organization.

(2) “Legal proceeding” means a proceeding in which a non-English speaking person is a party or a witness.

(3) “NonEnglish speaking person” means a party or a witness participating in a legal proceeding who has limited ability to speak or understand the English language.

(4) “Qualified interpreter” means a person who:

(a) is eighteen years of age or older;

(b) is not a family member of a party or a witness;

(c) is not a person confined to an institution; and

(d) has education, training, or experience that enables him to speak English and a foreign language fluently, and is readily able to interpret simultaneously and consecutively and to sight-translate documents from English into the language of a nonEnglish speaking person, or from the language of that person into spoken English.

The case of State v. Rogers, 361 S.C. 178, 184, 603 S.E.2d 910, 913 (Ct. App. 2004), concerned the use of an interpreter for a deaf witness. The Court of Appeals cited the statute, S.C. Code Section 15-27-15, for interpreters for the deaf. However, the Court made a ruling that would be proper for all interpreters when the Court wrote citing the statute that “If a person elects to use an interpreter other than a qualified interpreter provided for in this section, the Court must first make a determination that this action is in the best interest of the individual and in the best interest of justice.”

Section 17-1-50, which provides for interpreters in criminal proceedings, also provides:

(B)(1) Notwithstanding any other provision of law, whenever a party, witness, or victim in a criminal legal proceeding does not sufficiently understand or speak the English language to comprehend the proceeding or to testify, the court must appoint

a certified or otherwise qualified interpreter to interpret the proceedings to the party or victim or to interpret the testimony of the witness.

(2) However, the court may waive the use of a certified or otherwise qualified interpreter if the court finds that it is not necessary for the fulfillment of justice. The court must first make a finding on the record that the waiver of a certified or otherwise qualified interpreter is requested by a nonEnglish speaking party, witness, or victim in a legal proceeding; that the waiver has been made knowingly, voluntarily, and intelligently; and that granting the waiver is in the best interest of justice.

(C) The selection, use, and reimbursement of interpreters must be determined under such guidelines as may be established by the Chief Justice of the Supreme Court. All fees for interpreting services must be paid out of the general fund of the State from funds appropriated to the Judicial Department for this purpose by the General Assembly.

(D) The Division of Court Administration must maintain a centralized list of certified or otherwise qualified interpreters to interpret the proceedings to a party and testimony of a witness. A party or a witness is not precluded from using a qualified interpreter who is not on the centralized list as long as the interpreter meets the requirements of sub-item (A)(4) and submits a sworn affidavit to the court specifying his qualifications or submits to a voir dire by the court.

There was nothing in the record indicating that the trial judge followed the standards set forth in Section 17-1-50. There was no questioning by the judge of the interpreter; there was no interrogation related to the requirements for a qualified interpreter as cited in (A)(4). There was no affidavit from the interpreter specifying his qualifications as described in (D) or that he was on the centralized list from Court Administration of qualified interpreters.

Trial counsel should have objected and asked for the court to adhere to the qualification process. The PCR judge erred by finding that the interpreter met the qualifications of 17-1-50. App. 764.

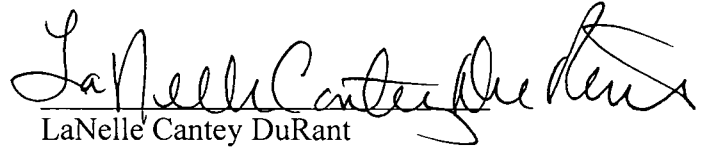
The PCR judge incorrectly relied on Footnote 2 from the case of State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999) which provided that the accuracy of the interpreter's translation was a fact for the jury and that no constitutional provision is violated when unsworn testimony is

received. This is distinguished from Petitioner Fishburne's case because the interpreter was administered the oath, but was never qualified. App. 157, ll. 17-App. 158, ll. 3. If the trial court had gone through the qualification process, there was a reasonable probability that the interpreter would have known not to change the translation.

Trial counsel should have asked for a mistrial when the interpreter told the trial judge that he was rephrasing the questions and answers for the witness. At that point, there was no way to know what the questions and answers were for the witnesses.

CONCLUSION

Based on the above, certiorari should be granted, the convictions and sentences reversed, and the case remanded for a new trial with a qualified interpreter.

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

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of December, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Berkeley County

Honorable Kristi Lea Harrington, Circuit Court Judge

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CLARENCE J. FISHBURNE,

PETITIONER

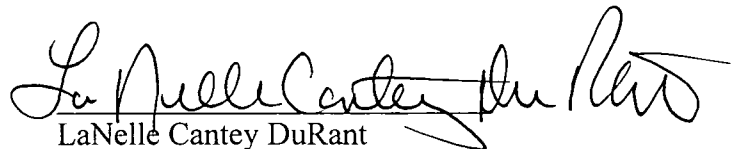
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STATE OF SOUTH CAROLINA,

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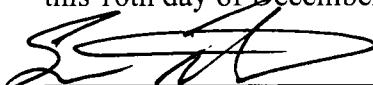
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CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia 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 Clarence J. Fishburne, #264287, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of December, 2016.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of December, 2016.

 (L.S)

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