

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable John C. Hayes, Circuit Court Judge

ORIGINAL

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DEC 30 2016

S.C. SUPREME COURT

PHILLIP LEON SHULER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001816

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to pursue strong negotiations with the state to reduce Petitioner Shuler's armed robbery charge to the lesser included charge of strong arm robbery when no weapon was involved and the victim had said she did not know if the robber had a gun?

STATEMENT

On March 30, 2009, Lenore Lipsius was working at the Scotchman on Coleman Boulevard in Mt. Pleasant. App. 113, ll. 1 – App. 114, ll. 6. She was standing next to the cash register when a man who had a shirt with a hole in it covering his face suddenly appeared and demanded that she give him all of her money. His arm went up and there was a sock over his arm and she realized it was not a joke. She gave him the money which was mostly 5's and 1's because she had just "made a drop." The man took the money and ran. App. 114, ll. 5 – App. 115, ll. 5.

Lipsius believed the robber was a man because he was stocky and had a "beer belly." She described the robber as a stocky black male. She thought he might have a weapon under the sock. App. 135, ll. 1 – Ap. 136, ll. 1. However, she told the police in her statement to them that she really did not know whether the robber "had a gun or not." App. 146, ll. 11 – 23.

Police Officer Thomas Plyer testified that he watched the video when he arrived at the scene of the robbery that night. He decided that the robber was a white male who was about six feet tall and weighed about two hundred and seventy pounds. The video showed that the robber had a gray white shirt over his face and white tube socks over his arms up to his elbows. App. 330, ll. 1 – 25.

Later around 1:30 in the early morning of March 31, 2009, Officer Plyer saw Petitioner Shuler leaving a convenience store, and thought Shuler matched the robber's description. Because Shuler matched the description of the suspect on the video, and his clothes matched the clothes of the suspect, which were blue jeans and white tennis shoes, the officer arrested him. App. 333, ll. 1 – App. 334, ll. 6; App. 340, ll. 1 – 17.

A gray shirt was found in the parking lot near the Scotchman with DNA that matched Petitioner Shuler's DNA. The state argued that this shirt matched the shirt worn by the robber in the video. App. 157, ll. 2 – 7; App. 366, ll. 13 – 25; App. 180, ll. 13 – 25; App. 340, ll. 6 – App. 341, ll. 2.

On August 3, 2009, the Charleston County Grand Jury indicted Petitioner Shuler on the charge of armed robbery (AR). App. 511- App. 512. On September 19-21, 2011, Shuler proceeded to trial before the Honorable Deadra L. Jefferson and a jury. Petitioner Shuler was represented by Mary Ford and Jason King. The state was represented by Culver Kidd and Natasha Chisolm. App. 1.

At trial, defense counsel asked for a directed verdict based on the statement of Lipsius that she thought it may have been a gun but she was not sure. The judge denied the directed verdict motion. App. 348, ll. 1 – App. 353, ll. 8.

Defense counsel asked the trial court for a jury instruction on the lesser included charge. Counsel argued that there was no way to know what was in the sock. The victim said she thought it was a gun but she was not sure. Counsel said it was a factual determination for the jury. The trial judge agreed to charge the lesser included charge of robbery. App. 359, ll. 17 – App. 362, ll. 22; App. 363, ll. 24 – App. 364, ll. 17; App. 403, ll. 21 – App. 405, ll. 1.

The jury found Petitioner Shuler guilty of armed robbery. App. 411, ll. 1 – 16. The judge sentenced Shuler to eleven years incarceration. App. 429, ll. 1 – 13.

Shuler filed a notice of appeal which was perfected by the Division of Appellant Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal. State v. Shuler, 3013-UP-455 (filed December 11, 2013).

On December 8, 2014, Shuler filed an application for post-conviction relief (PCR). The state filed a return on June 2, 2015. App. 506. An evidentiary hearing was held on August 1, 2016 before the Honorable John C. Hayes. Petitioner Shuler was represented by Rodney D. Davis, and the state was represented by J. Rutledge Johnson. App. 449.

At the hearing, Petitioner Shuler testified that his trial counsel told him there was a “good chance of winning at trial.” App. 456, ll. 2 – App. 457, ll. 22. He related that he met with trial counsel two times in the two years between his arrest on March 31, 2009 and his trial on September 19, 2011. He did make bond after being in jail thirty days. App. 458, ll. 17 – App. 459, ll. 25.

Shuler testified that a weapon such as a gun or knife was never found. He said there was never “an allegation that an actual gun or knife was used.” He agreed that the state’s theory was that the robber suggested that he was armed. App. 466, ll. 11 – 24. Shuler insisted that the victim said she did not think it was a gun. When shown her testimony, he agreed that she did testify that the robber’s sock over his arm looked like a gun. Shuler continued to say that she said other places she did not think it was a gun. App. 473, ll. 1 – App. 474, ll. 10.

Trial counsel testified that she did not tell Shuler that he should go to trial nor did she remember telling him he had a good chance to win at trial. She did think they had “a lot of issues to work with.” She admitted that she had issues as to whether it was an armed robbery or not. And she had issues as to whether the identification was accurate. App. 481, ll. 1 – 25.

When asked if she ever discussed with the solicitor an offer of strong-arm robbery, trial counsel said she discussed the case with the first solicitor, Ms. Shealy. Trial counsel told Ms. Shealy that “I wanted us to try to be able to work this out.” Counsel told Ms. Shealy that Shuler would not plead to armed robbery, but she thought they “could work this out.” Trial counsel told

the second solicitor, Ms. Chisolm when she asked if it were a trial, trial counsel responded “not necessarily.” Counsel told Ms. Chisolm that she had hoped to work it out for something less than armed robbery because she knew he would not plead to armed robbery. App. 482, ll. 17 – App. 483, ll. 13. Trial counsel then said:

So, obviously, I was suggesting we were looking for an offer of something below armed robbery.

App. 483, ll. 14 – 15.

Trial counsel testified to the DNA found on a shirt that matched Shuler’s DNA. She explained that the DNA was not good news for them. She explained that to Shuler but also told him that she had an argument that he had been in and out of the store that day. App. 484, ll. 5 – App. 485, ll. 25.

PCR counsel at closing argued to the PCR court that Shuler did ask in his PCR application for a new trial or for his armed robbery charge to be reduced to strong arm robbery. He referenced page 5, question 19 of the application (See App. Page 435). App. 488, ll. 1 – 20.

PCR counsel argued that trial counsel was ineffective because there were “insufficient meetings with Shuler”. There were two letters sent by trial counsel, two meetings and one call. App. 495, ll. 1 – 25. If trial counsel had taken more time to discuss the DNA with Shuler, there could have been a different outcome. If Shuler had understood the impact of the DNA, he likely would have been more open to a plea. App. 496, ll. 18 – App. 497, ll. 12.

PCR counsel said:

Our whole point is, if there had been continuous meetings, communications about this, especially once the DNA comes in, then that’s when the rubber meets the road, and there could have been better discussions---should have been better discussions about negotiating a better deal.

App. 498, ll. 13 – 18.

Counsel argued that trial counsel made no attempt to go back to the solicitor for a better deal. There was no evidence that trial counsel even attempted to try and that “was failing.” App. 499, ll. 2 – 24.

The PCR judge issued an order on August 3, 2016 denying Shuler’s PCR application and dismissing it with prejudice. App. 506 – App. 510. The judge found that there “was nothing to support the conclusion that trial counsel did not act with reasonable professional judgment, and there is no prejudice to the Applicant to suggest that his trial would result in a different conclusion.” App. 509.

The judge found trial counsel’s testimony to be credible. App. 509. The judge wrote that although Shuler claimed trial counsel was ineffective for not having the AR charge dismissed pretrial, the judge found that the indictments for AR were not insufficient so trial counsel was not ineffective. Trial counsel argued for a directed verdict on the insufficiency of proof for the AR during the trial. The judge found that Shuler failed to prove trial counsel was ineffective in her representation. App. 508.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to pursue strong negotiations with the state to reduce Petitioner Shuler's armed robbery charge to the lesser included charge of strong arm robbery when no weapon was involved and the victim had said she did not know if the robber had a gun.

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 Alford v. Wainwright, the United States Supreme Court ruled that the defendant has the authority to make certain fundamental decisions about his case after consultation with counsel. These decisions include whether to plead guilty, to waive the right to a jury trial, to testify on one's own behalf, or to take appeal.

In Shuler's case, he was denied the opportunity to plead to the lesser charge of strong arm robbery because trial counsel did not ask the state for a plea offer on this lesser included charge. Trial counsel said he would not plead to AR but maybe to something less but she did not ask. Shuler's sentence would likely have been less and the required time to serve in prison would have been less if he had pled to the lesser charge.

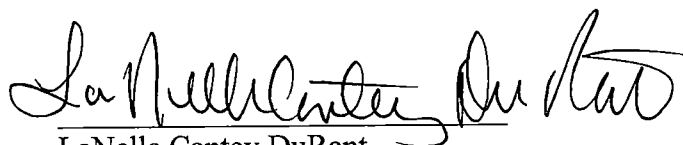
In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the South Carolina Supreme Court ruled that when evaluating the reasonableness of counsel's assistance, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Trial counsel in Shuler's case was ineffective for not making the adversarial process work for Shuler because she did not negotiate for a plea offer on the lesser charge of strong arm robbery which would have been proper in Shuler's case since there was serious doubt as to whether the victim believed the robber was armed.

The PCR court should have found trial counsel ineffective for not making the process work for Shuler.

CONCLUSION

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



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of December, 2016.

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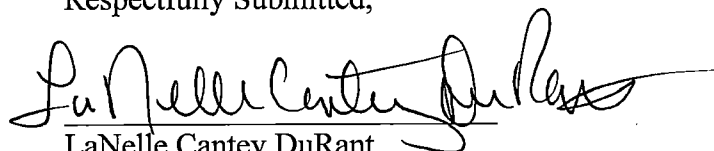
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Phillip Leon Shuler 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 Judge John C. Hayes, which was held on August 1, 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 Phillip Leon Shuler.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of December, 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."



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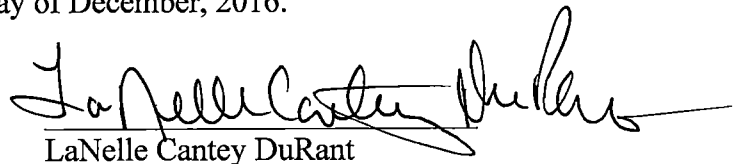
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CERTIFICATE OF SERVICE
—————

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 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 Phillip Leon Shuler, #196792, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 30th day of December, 2016.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of December, 2016.

Paula Mendenhall (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.