

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

Certiorari to York County

Honorable Paul M. Burch, Circuit Court Judge

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FEB 02 2017

S.C. SUPREME COURT

DENNIS RODGER DAVIS, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001447

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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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err in not finding plea counsel ineffective for failing to challenge the use of Petitioner Davis' prior conviction for simple possession of marijuana second offense, which was a misdemeanor, to enhance the offense of distribution of marijuana to a third offense?

## STATEMENT

On March 8, 2013, a confidential informant (CI) told an officer with the York County Drug Enforcement Unit that he could buy marijuana from a person named Mack who lived near Winthrop University. A deal was set up and the CI met with Mack and bought 6.8 grams of marijuana from him. This was within a half mile of Winthrop University. The CI identified Mack as Dennis Davis when shown a photo lineup. App. 6, ll. 20 – App. 7, ll. 24.

On April 5, 2013, the CI made another buy for the York County Drug Unit from Mack who had been identified as Dennis Davis. This time the CI bought 6.8 grams, or a quarter of an ounce, again for twenty-five dollars. This deal occurred within one half mile of Clinton College. App. 7, ll. 25 – App. 8, ll. 13.

On April 16, 2013, Petitioner Davis was arrested on those two incidents and taken to jail. When he was searched at the jail, marijuana in a grey baggy was found in Davis' underwear. That marijuana weighed 13.9 grams. He was charged with simple possession of marijuana for that offense. App. 8, ll. 14 – App. 9, ll. 1. Davis was charged for the March 8, 2013 incident with distribution of marijuana and distribution of marijuana within a half mile of a school. For the April 5, 2013 incident, he was charged with another distribution of marijuana and distribution of marijuana within a half mile of a school. App. 5, ll. 18 – App. 6, ll. 19.

On August 22, 2013, the York County Grand Jury indicted Petitioner Davis on the charges of possession of marijuana; two counts of distribution of marijuana third offense; two counts of distribution of marijuana within the proximity of a school. On May 21, 2014, Davis appeared before the Honorable G. Edward Welmaker and entered a guilty plea to the charges as indicted. He was represented by Creighton Hayes, and the state was represented by Jenny Desch. App. 111; App. 92. The judge sentenced Davis to 125 months on each of the distribution of

marijuana third offense charges; to five years each of the proximity charges; and one year on the possession of marijuana second offense. All charges were to run concurrent with each other. App. 111- App.115; App. 23, ll. 12 – 21.

At the guilty plea, the solicitor explained to the judge that the reason the distribution charges were third offenses. She explained that Davis had a conviction for trafficking crack cocaine ten to twenty-eight grams in October 2002, and in February 2009 a conviction for simple possession of marijuana second which made the marijuana charge a second and the distribution of marijuana third offenses. App. 9, ll. 1 – 17.

Davis filed a notice of appeal. On February 11, 2014 by order, the Court of Appeals dismissed Davis' appeal for failure to file a sufficient explanation pursuant to Rule 203(d)(I)(B)(iv), SCACR. App. 92.

On March 12, 2015, Petitioner Davis filed an application for post-conviction relief (PCR). The state filed a return on August 7, 2015. An evidentiary hearing was held on January 20, 2016 before the Honorable Paul M. Burch. Davis was represented by Leah B. Moody, and the state was represented by Justin Hunter. App. 37.

At the PCR hearing, Petitioner Davis testified that his plea attorney advised him to plead guilty but Davis wanted to go to trial. App. 47, ll. 1 – App. 48, ll. 22. Davis felt that he should have been charged with second offenses and not third distribution. App. 46, ll. 1 – 25. Davis argued that he had done research and learned that the simple possession of marijuana could not be used to enhance to a third offense because it was a misdemeanor charge. He said: "The misdemeanors that I have are not classified in the same classification of felony." Because he did not know the law, he had no choice but to plead guilty. App. 50, ll. 3 – 20. He was represented by counsel on his prior simple possession of marijuana conviction. App. 49, ll. 9 – App. 51, ll 2.

Davis argued that his plea counsel was ineffective because he did not object to the 2009 simple possession of marijuana charge second offense being used to enhance the distribution of marijuana charges to a third offense. The distribution should have been second offenses. Because he served time on the prior simple possession of marijuana, it could not be used for enhancement which made it an “invalid” conviction. App. 52, ll. 1 – 24.

Davis’ plea counsel testified at the PCR hearing that he believed that the state was “not acting inappropriately” by using the prior drug convictions of Davis to enhance the distribution of marijuana charges to third offenses.. He admitted that ‘it was a complicated issue.’ Counsel explained that Davis had a conviction for trafficking cocaine proximity charge from 2002 and 2009. He also “pled guilty to simple possession of marijuana second offense.” Counsel thought both of those charges could be used to enhance the current charges. App. 77, ll. 5 – App. 78, ll. 1.

Counsel testified that Davis had a plea offer of six years but he refused to take it. Davis was “adamant” about going to trial. App. 74, ll. 1 – 25.

The PCR judge issued an order on June 6, 2016 denying Davis’ PCR application and dismissing it with prejudice. App. 91 – App. 99. In his order, the judge found Davis’ testimony to be not credible, but found Counsel’s testimony to be credible and persuasive “on all matters.” App. 96. The order also provided that Davis failed to prove that plea counsel was ineffective for not challenging the use of Davis’ prior convictions to enhance the distribution of marijuana to third offenses. App. 96. The judge wrote that Davis failed to show that he was prejudiced as he did not show that he would not have pled guilty but would have gone to trial. App. 97.

The judge dismissed the PCR application. App. 99.

This appeal follows.

## ARGUMENT

The PCR court erred in not finding plea counsel ineffective for failing to challenge the use of Petitioner Davis' prior conviction for simple possession of marijuana second offense, which was a misdemeanor, to enhance the offense of distribution of marijuana to a third offense.

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

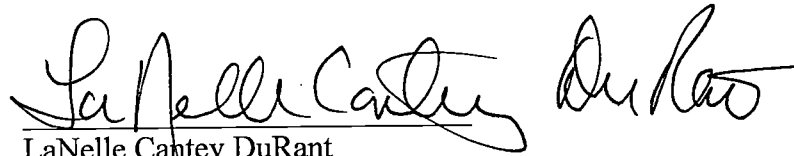
show with certain certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege”. State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

South Carolina Code Section 44-53-370(d)(2) provides that any person who possesses a controlled substance classified in Schedules I through V for a second offense is guilty of a misdemeanor and must imprisoned not more than one year or fined more than two thousand dollars.

The PCR court erred in finding that plea counsel was not ineffective in his representation of Petitioner Davis. Counsel should have investigated Davis’ prior convictions to insure that they could be used for enhancement purposes as counsel admitted that the issue was “complicated.” App. 77, ll. 5 – 17. The statute provides that a second offense for possession of marijuana is a misdemeanor. Counsel did not investigate to determine if a misdemeanor could be used for sentence enhancement for a felony.

CONCLUSION

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

A handwritten signature in cursive script that reads "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

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PETITION TO BE RELIEVED AS COUNSEL

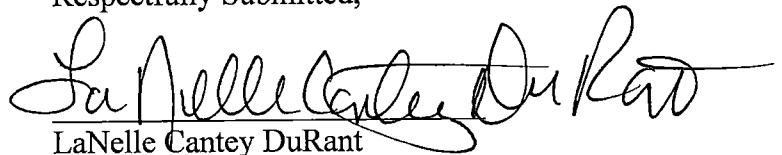
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Counsel for Dennis Davis, Jr. states:

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 Paul M. Burch, which was held on January 20, 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 Dennis Davis, Jr..

Respectfully Submitted,

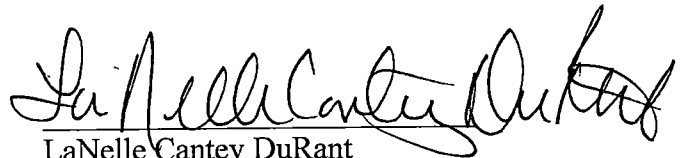


LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 2nd day of February, 2017.

**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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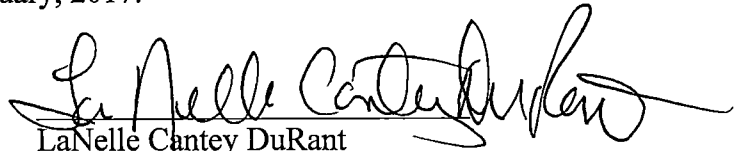
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RESPONDENT

—————  
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 Justin Hunter, 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 Dennis Davis, Jr., #288558, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 2nd day of February, 2017.



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 2nd day of February, 2017.

Paul J. Hendon (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.