

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Pickens County

Honorable R. Knox McMahon, Circuit Court Judge

RECEIVED

FEB 07 2017

TRENTON JAMES BLACK,

PETITIONER

S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001724

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 failing to find plea counsel ineffective for not objecting when the state recommended a sentence of forty years which was a violation of the oral agreement between the state and Petitioner Black's attorney that this would be a straight up plea?

STATEMENT

On September 10, 2012, Deputy Scott Ticknor was at a gas station in Pickens County where he saw Petitioner Black who was on a motorcycle that the deputy had heard was stolen. Deputy Ticknor knew Petitioner Black as a child and also knew that Black had pending warrants against him as Deputy Ticknor had arrested Black previously. App. 9, ll. 3 – App. 10, ll. 7.

When the deputy approached Black, Black tried to get on the bike to leave. Deputy Ticknor then knocked the bike over to prevent Black from leaving. The two ended up on the ground and a struggle began. Black pulled a gun trying to force the deputy to let him go. The gun discharged just north of the deputy's head. Black fired again but it did not hit the deputy. Deputy Ticknor finally got the gun from Black, and a bystander subdued Black by putting him in a choke hold. Other law enforcement came and detained Black. App.9, ll. 22 – App. 10, ll. 21.

In June 2013, the Pickens County Grand Jury indicted Petitioner Black on the charges of resisting arrest; resisting arrest with a deadly weapon; possession of a weapon during the commission of a violent crime; unlawful carrying of a pistol; and attempted murder. App. 107; App. 117 – App. 134.

On May 22, 2014, Petitioner Black appeared before the Honorable Edward W. Miller and entered a guilty plea to all of the charges as indicted. Black was represented by Steven Alexander, and the state was represented by Samuel Tooker. App. 1. During the plea, the solicitor told the judge that the state was "requesting forty years." The solicitor said that was twenty years for each time Black fired the gun. The solicitor also said that this would have been a murder and death penalty case if the deputy had not put up a fight. There was no objection from defense counsel. App. 12, ll. 17 – App. 13, ll. 12.

Deputy Ticknor then told the court that Black had sent a few letters to the deputy asking for the deputy's forgiveness. App. 13, ll. 13 – 25. Defense counsel in mitigation explained that Black was high on drugs at the time. Counsel said that black had psychological problems “for a while” but his mental evaluation showed that he was competent and responsible. Black told counsel he was trying to kill himself when he fired the gun during the incident. Counsel asked for a sentence in the range of ten to twenty years. App. 5, ll. 19 – 24; App. 15, ll. 22 – App. 16, ll. 19.

Petitioner Black apologized in court to Deputy Ticknor for the incident. App. 17, ll. 15 – 25.

When the judge announced that he was sentencing Black to thirty years on the attempted murder, Black fainted in the court room. After a break, the judge announced the sentence again. He sentenced Black to thirty years on the attempted murder; ten years each on the two resisting arrest charges; five years on the possession of a weapon during a crime of violence; five years on the receiving stolen goods; and time served on the unlawful carrying charge. All sentences were concurrent. App. 21, ll. 4 – App. 22, ll. 16.

Black did not file an appeal. App. 108.

On January 27, 2015, Black filed an application for post-conviction relief (PCR). The state filed a return on June 2, 2015. An evidentiary hearing was held on April 18, 2016 before the Honorable R. Knox McMahon. Black was represented by R. Mills Arial, and the state was represented by Patrick Schmeckpeper. App. 79.

At the PCR hearing, Petitioner Black testified that he had made the decision that he did not want a trial. App. 86, ll. However, his plea counsel was ineffective because he did not object when the solicitor asked the judge for a sentence of forty years for Black. Black understood from

his attorney that it would be an “open plea” and the solicitor was not going to make a recommendation for a sentence. That was the reason that he took the plea bargain. App. 87, ll. 1 – App. 88, ll. 25; App. 90, ll. 1 – 25.

Plea counsel testified that he and the solicitor “did have some kind of verbal dealbut I guess there’s a matter of perspective.” App. 97, ll. 1 – 25. Counsel said that they talked about it being a straight up plea and that counsel could ask for whatever sentence he thought was appropriate. Counsel admitted that he and Black talked about the plea being a straight up plea, and counsel probably did say that “they” were not going to make a recommendation. But he meant that the solicitor was not going to make the recommendation that he and Black would want. Counsel said: “It may have been bad communication on my part.” Counsel said that he did not communicate that well to Black that both parties could ask for what they wanted. App. 98, ll. 1 – 25.

Plea counsel also stated on cross-examination that he and Black had agreed that this was not a case they wanted to take to trial. The only possible defense they had was that he was not intending to harm Deputy Ticknor but was trying to kill himself. App. 102, ll. 25 – App. 103, ll. 9. Counsel said there were numerous eyewitnesses as this occurred at a gas station. App. 103, ll. 10 – 25.

The PCR judge issued an order on July 29, 2016 denying Black’s PCR application and dismissing it with prejudice. App. 107 – App. 115. The judge wrote that he found plea counsel’s testimony to be credible, but found Black’s testimony to not be credible. App. 111. The order provided that Black failed to meet his burden that plea counsel was ineffective for not objecting when the solicitor “allegedly” violated the plea agreement when he recommended a forty year sentence. App. 110. The judge found that Black had the opportunity to speak up to the judge or

his counsel during the plea. App. 111. The order provided that Black failed to show prejudice because he did not testify that but for counsel's performance, he would have refused to plead guilty and go to trial. The judge found that Black never indicated that he wanted a trial. App. 112.

Black's PCR attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not objecting when the state recommended a sentence of forty years which was a violation of the oral agreement between the state and Petitioner Black's attorney that this would be a straight up plea.

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).

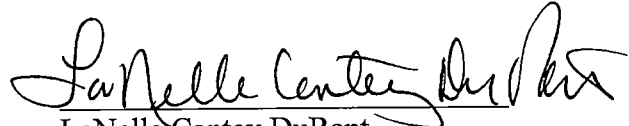
In Thompson v. State, 340 S.C. 112, 331 S.E.2d 294 (2000), the Supreme Court reversed Thompson’s case and granted him post-conviction relief because his plea counsel was ineffective for failing to object when the state recommended the maximum sentence in violation of the negotiated plea agreement where the solicitor was not to make a sentencing request.

In Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014), the Court of Appeals reversed Smith’s sentencing and remanded the case for resentencing because plea counsel was ineffective for failing to object to the solicitor’s recommendation at sentencing that Smith receive the maximum sentence for voluntary manslaughter which was in violation of the plea agreement. The solicitor had agreed to reduce the charge from murder to voluntary manslaughter and not recommend a sentence. Smith gave up his original plan to go to trial if there were no sentence recommendation. The Court found that Smith would not have pled guilty if he had known the solicitor was going to recommend a sentence.

Plea counsel was ineffective for not objecting when the solicitor requested a forty year sentence when the solicitor and plea counsel had “some kind of verbal deal.” App. 97, ll. 12 – 25. Although Petitioner Black had basically decided that he did not want a trial as he had sent a letter of apology to the officer/victim, he agreed to plead guilty only because the solicitor was to make no recommendation. He was pleading straight up to 0-30. App. 86, ll. 1 – App. 87, ll. 25; App. 90, ll. 1 – 25.

CONCLUSION

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


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of February, 2017.

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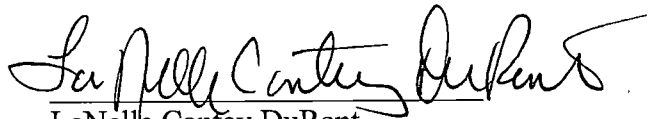
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Trenton James Black 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 R. Knox McMahon, which was held on April 18, 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 Trenton James Black.

Respectfully Submitted,



LaNelle Cantey DuRant

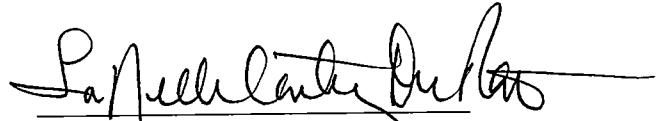
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th 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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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 Trenton James Black, #282569, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of February, 2017.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of February, 2017.

Marie J. [Signature] (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.