

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

RECEIVED

FEB 16 2017

CHARLES EDWARD MOORE,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001413

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in not finding plea counsel ineffective for not insuring that Petitioner Moore's guilty plea was voluntarily and knowingly entered when Petitioner Moore testified that he felt forced to plead guilty because his attorneys told him he would get more time if he went to trial?

STATEMENT

On June 1, 2013, Petitioner Moore was seen by a store employee at the Old Navy Store in Spartanburg County putting selected clothing items into a bag in a dressing room. Moore denied that he was trying to steal anything. When the police arrived, Moore allegedly tried to run and so was charged with resisting arrest as well as shoplifting. App. 18, ll. 18 – App. 19, ll. 11.

On January 9, 2014, Moore was caught on video at T.J. Maxx putting clothing in a plastic bag. He left the store without paying. App. 20, ll. 3 – 6.

On January 10, 2014, Moore was seen by an employee of the T.J. Maxx store putting clothing items in a bag along with a drill kit. He threw this at the loss prevention officer when he was approached. This was also caught on video. App. 19, ll. 22 – App. 20, ll. 2.

On January 12, 2014, deputies were called to the Dollar General Store where Moore was with a loss prevention officer. When Moore agreed to a search of his person, women's articles of clothing were found on him. App. 19, ll. 12 – 21.

On February 23, 2014, Moore was stopped outside the Belk's store by a Belk's employee. He was found to have pants, underwear, and t-shirts from Belk's on him. There was \$116.00 worth of damage to jeans where the electronic tags were removed. App. 20, ll. 7 – 13.

On March 18, 2014, Moore was caught trying to throw packages containing marijuana and cell phones over the fence at the Tyger River Correctional Institute to the prisoners. He was prosecuted in Magistrate's Court for attempting to provide the cell phones and tobacco. Attempting to provide the marijuana to prisoners was brought to circuit court. App. 20, ll. 14 – App. 21, ll. 14.

In December 2013, the Spartanburg County Grand Jury indicted Petitioner Moore on the charges of resisting arrest and shoplifting third or subsequent offense. In June 2014, the

Spartanburg County Grand Jury indicted Moore on five counts of shoplifting third or subsequent offense. App. 90; App. 13, ll. 11 – App. 14, ll. 10.

On August 27, 2014, Moore appeared before the Honorable Roger L. Couch and entered a guilty plea to all of the charges as indicted. He waived presentment to the Grand Jury on the attempting to provide contraband to prisoners. Moore was represented by James Cheek, and the state was represented by Scott Spivey. App. 1; App. 13, ll. 11 – App. 17, ll. 8.

During the guilty plea, defense counsel informed the court that Moore had a history of being “afoul” of the law over a period of time. Defense counsel voluntarily told the court that Moore had twelve prior shopliftings and twenty-two other property crimes on his record. App. 23, ll. 2 – 25. The judge told Moore that he had “quite a record.” App. 27, ll. 19 – ll. 25. The judge sentenced Moore to ten years on each of the shoplifting charges with all to run concurrent, and one year on the resisting arrest to run concurrent. He sentenced Moore to three years on the attempting to furnish contraband to prisoners to run consecutively to the other charges. App. 28, ll. 25 – App. 29, ll. 9.

Petitioner Moore did not appeal his convictions nor sentences. App. 91.

On April 9, 2015, Petitioner Moore filed an application for post-conviction relief (PCR). The state filed a return on December 18, 2015. An evidentiary hearing was held on March 22, 2016 before the Honorable R. Keith Kelly. App. 43; App. 90. Moore was represented by J. Brandt Rucker, and the state was represented by Alicia A. Olive. App. 43.

At the PCR hearing, the state told the court that Moore was alleging in his PCR application that his plea counsel was ineffective because counsel “forced” him to plead or he would take him to trial. App. 47, ll. 7 – 13.

Petitioner Moore testified that his plea counsel kept telling him to plead guilty and he was not ready to plead guilty. He was on the trial docket when his first attorney had his case. That was Mary Dassel. However, he asked for another attorney because he had been sitting in jail for a long time and he wanted to get out. That was when Attorney James Cheek became his attorney. App. 50, ll. 1 – 25. He felt forced to plead guilty because his attorneys came to see him at the detention center and told him if he did not plead guilty, he would receive more time. App. 56, ll. 1 – 7. His back “was up against the wall” because he knew he could be facing sixty years. App. 66, ll. 1 – 23.

Moore also claimed that his plea counsel did not talk for him at the plea but talked against him. According to Moore, counsel misadvised the court about Moore’s prior criminal history by telling the judge that Moore had served a five year sentence previously which Moore said was not true. Moore felt this hurt him because that caused the plea judge to sentence him to more time. App. 53, ll. 1 – 23.

Plea counsel testified at the PCR hearing that Mary Dassel, the first attorney, asked him to handle the actual plea. He said that trial was “imminent” in Moore’s case. App. 73, ll. 1 – 23. Counsel said there had been a prior plea offer but Moore declined it because he wanted to go to trial. App. 75, ll. 14 – 22. Plea counsel did not view the video tapes from the stores, but he did talk with Moore in preparation for the plea. App. 80, ll. 13 – App. 81, ll. 21. Plea counsel said Moore asked him to “put the plea up.” Counsel then talked to Moore and had him sign the sentencing sheets. App. 84, ll. 5 – 23.

The PCR judge issued an order on May 9, 2016 denying Moore’s PCR application and dismissing it with prejudice. App. 90 – App. 97. The PCR judge ruled that Moore did not prove either “deficiency nor prejudice” on his ineffective assistance of counsel claims. The PCR court

found that Moore's attorneys demonstrated "the normal degree of skill, knowledge, professional judgment and representation expected of an attorney who practices criminal law in South Carolina." App. 94. The PCR judge found that Moore's guilty plea was entered freely and voluntarily. App. 94. The judge dismissed Moore's allegation that his guilty plea was involuntary. App.96. The judge dismissed Moore's PCR application with prejudice. App. 97.

This appeal follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not insuring that Petitioner Moore's guilty plea was voluntarily and knowingly entered when Petitioner Moore testified that he felt forced to plead guilty because his attorneys told him he would get more time if he went to trial.

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).

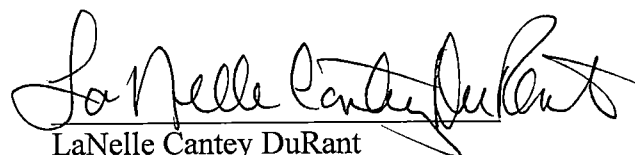
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the

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).

The PCR court erred in failing to find plea counsel ineffective. Moore testified strongly at his PCR hearing that he did not want to plead guilty but wanted a trial. He became scared by his plea counsel’s forcing him to plead guilty in fear that he would get a longer sentence if he did not plead.

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 black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a large, sweeping flourish at the end.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of February, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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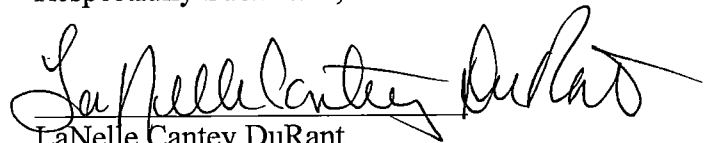
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charles Edward Moore 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. Keith Kelly, which was held on March 22, 2016, 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 Charles Edward Moore.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 16th 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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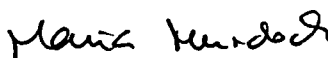
RESPONDENT

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 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 Charles Edward Moore, #244412, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of February, 2017.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of February, 2017.

 (L.S)

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