

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

JOHN HENRY DIAL, JR.,

v.

STATE OF SOUTH CAROLINA,

PETITIONER

RECEIVED
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S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO. 2016-002431

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
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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 not insuring that Petitioner Dial's guilty plea was voluntarily and knowingly entered when Petitioner Dial testified that he always wanted a trial but pled guilty to accept the plea offer of probation and he did not want to start over with a new prosecutor?

STATEMENT

On April 22, 2014, the Sheriff's Department was called to the home of Petitioner Dial's parents in Richland County. His mother called after Dial allegedly assaulted his father. The deputies responded to the home but could not find Dial. They searched the back of the property where Dial lived and found his truck and van. App. 11, ll. 21 – App. 12, li. 13.

About one and a half hours later, Dial's mother called 911 again because Dial was at the back of the property firing a gun. When the deputies arrived, they saw Dial throw an object into the truck. The deputies arrested Dial for the assault on his father, and then searched the truck. A gun was found in the truck as well as a black container that contained materials used in making methamphetamine. The deputies had smelled the odor associated with a fresh cook of the drug. App. 12, ll. 14 – App. 13, ll. 15.

The methamphetamine investigator was called. She read dial his Miranda warnings and questioned him after he waived his rights. Dial allegedly told her that there had not been a recent cook. The field test indicated that the materials found in the truck and van tested positive for methamphetamine. App. 13, ll. 16 – App. 15, ll. 8.

On June 11, 2014, the Richland County Grand Jury indicted Petitioner Dial on the charge of manufacturing methamphetamine. App. 64-App. 65.

On September 9, 2016, Dial appeared before the Honorable Robert E. Hood, and entered a guilty plea pursuant to North Carolina v. Alford.¹ Dial was represented by Megan Eigenbrot and Lucas Hawks. The state was represented by Kathryn Cavanaugh and Foster Matthews. App. 1. During the plea, the judge announced that they had actually picked a jury the day before, and

¹ North Carolina v. Alford, 400 U.S. 25 (1970).

the judge understood this was an important decision. App. 3, ll. 1 – 25. The judge also told Dial that the judge had told Dial’s attorney that if Dial entered this plea, that the judge would give him a probationary sentence. App. 5, ll. 11 – 21.

Dial accepted the plea offer and pled guilty. The judge sentenced him to seven years suspended to two years of probation. The solicitor told the court then that two prior charges of CDV from 2013 and a harassment charge from 2013 were dismissed in exchange for the guilty plea. App. 18, ll. 3 – App. 19, ll. 4.

Dial did not appeal his conviction nor sentence. App. 58.

On July 16, 2015, Dial filed an application for post-conviction relief (PCR). The state filed a return on August 1, 2016. An evidentiary hearing was held on August 31, 2016 before the Honorable Jocelyn Newman. App. 57; App. 36. Dial was represented by Jonathan D. Waller, and the state was represented by Ruston W. Neely. App. 36.

At the PCR hearing, Petitioner Dial testified that he had wanted a trial from “day one.” They had picked a jury and had pretrial motions before he pled guilty. App. 42, ll. 1 – 24. Before that, his attorney had filed a motion to dismiss the prosecutor but the motion was never ruled on. The reason was that the judge told him if he dismissed the prosecutor, Dial would have to return to jail and start over. The judge then told his attorneys that the judge would give Dial probation if he pled guilty. Dial saw that he had two choices: to start all over again or “take the deal” and plead guilty and go home to his kids that day. App. 44, ll. 3 – App. 46, ll. 9.

Dial agreed that the reason he pled guilty was basically because the judge told him that he would get probation. Up until then, Dial wanted a trial. App. 47, ll. 16 – 22. Dial had told his attorney that he could not plead guilty because he did not do this crime. However, he could plead under Alford because he did not have to “lie to the judge.” App. 48, ll. 7 – 23.

Dial then told the PCR court that his trial attorney “did a good job.” App. 48, ll. 24 – App. 49, ll. 7.

Dial’s plea counsel did not testify at the PCR hearing. App. 37. The judge stated from the bench that Dial seemed to indicate that he was “satisfied with the representation of Ms. Eigenbrot.” She stated that the plea judge did not infuse himself into plea negotiations but “simply offered an additional alternative.” App. 54, ll. 13 – 23.

The PCR judge issued an order on November 9, 2016 denying Dial’s PCR application and dismissing it with prejudice. App. 57 – App. 63. The judge ruled that Dial failed to show that plea counsel was ineffective. She wrote that Dial testified that plea counsel’s representation was satisfactory. The judge found that plea counsel’s representation was sufficient and reasonable. The judge dismissed this allegation. App. 61. The judge found that Dial was not prejudiced by the participation of the judge in the guilty plea. App. 62.

The judge denied Dial’s PCR application. App. 63.

Dial’s attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not insuring that Petitioner Dial's guilty plea was voluntarily and knowingly entered when Petitioner Dial testified that he always wanted a trial but pled guilty to accept the plea offer of probation and he did not want to start over with a new prosecutor.

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).

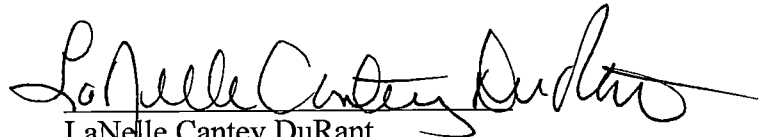
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the

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 judge erred in not finding that plea counsel was ineffective for not insuring that Dial wanted to plead guilty. He said that he had always wanted a trial from day one. The decision to plead guilty happened very quickly as Dial obviously prepared to go to trial as a jury had been selected.

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, reading "LaNelle Cantey DuRant".

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2017.

STATE OF SOUTH CAROLINA

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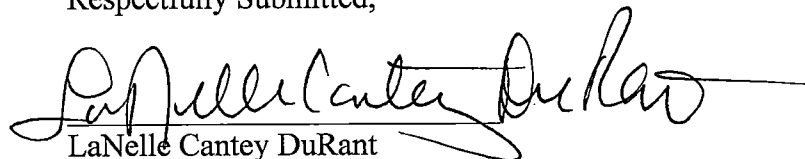
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Henry Dial, 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 Jocelyn J. Newman, which was held on August 31, 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 John Henry Dial, Jr.

Respectfully Submitted,

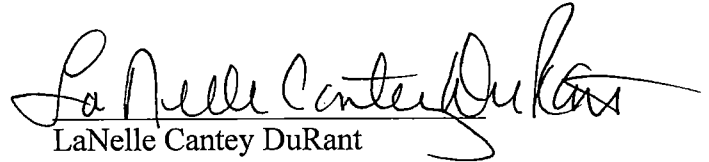


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of April, 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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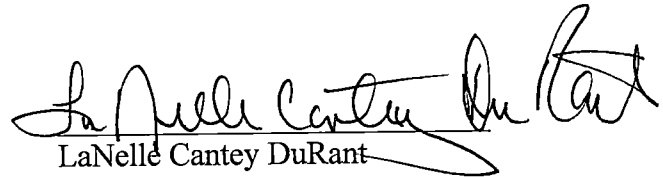
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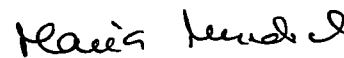
RESPONDENT

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CERTIFICATE OF SERVICE
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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 Jessica Kinard, 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 John Henry Dial, Jr., at 2100 LeGrand Road, Lot #55, Columbia, SC 29223, this 7th day of April, 2017.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

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

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