

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Orangeburg County

Honorable Diane Schafer Goodstein, Circuit Court Judge

JARROD JACQUES,

RECEIVED

AUG 08 2017

PETITIONER
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000172

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 not making a motion to sever Petitioner Jacques trial from that of his co-defendants which was prejudicial to Petitioner because the video did not show clearly that Petitioner had a gun; therefore his guilty plea was unknowingly and involuntarily entered?

STATEMENT

On June 12, 2010 in the parking lot of Bojangles in Orangeburg, there was a confrontation between members of two groups of young men as there had been an “ongoing feud” between them. It was thought to be a shooting between rival gangs. App. 9, ll. 16-23; App. 36, ll. 3-7. The police investigation revealed that Petitioner Jacques drove into the parking lot with two other young men; they all got out of the car. An altercation began with two other young men which resulted in the exchange of gunfire. Witnesses identified Jacques and stated that he had a weapon. App. 10, ll. 1-12.

In the exchange of gunfire, one young woman was hit but suffered only a grazing wound. A bystander, Simmons, was shot in the head, and died as a result. App. 10, ll. 13-19. Petitioner Jacques was seen on the video from the incident and was arrested. A co-defendant, Harmon, provided information about several people involved and the gang affiliation. Petitioner Jacques was arrested. He admitted that he was a member of an “assassination gang” and had been since the age of thirteen. This led the police to believe that Jacques was the ring leader that night. App. 10, ll. 20 – App. 11, ll. 25.

On May 25, 2011, the Orangeburg County Grand Jury indicted Petitioner Jacques on the charge of murder. App. 69 – App. 70. On September 22, 2011, Jacques appeared before the Honorable Edgar W. Dickson and entered a guilty plea to the lesser included charge of attempted murder pursuant to North Carolina v. Alford , 400 U.S. 25 (1970). Jacques was represented by Ashe Chisolm, and the state was represented by Don Sorenson. App. 1 – App. 2, ll. 7.

At his guilty plea, Jacques denied shooting a gun at anyone. He told the court that he had just come home from incarceration and did not know what was going on. He knew he was not supposed to be around guns and he did not know that the other guy with him had a gun. When

the shooting started, Jacques “ducked behind a blue Mercury.” At one point he “raised up and pointed at the guy Brandon to tell him that Jacques was not with them.” App. 17, ll. 10 – App. 18, ll. 8.

Jacques’ plea counsel told the court in mitigation that the evidence from the earlier trial of a co-defendant, Arnold Smith, indicated that the shooter was Donald Harmon. App. 10, ll. 2 – 8; App. 14, ll. 18 – App. 15, ll. 12. Counsel explained that they could “probably account” for all of the actual shooters which meant that Jacques did not shoot anybody. Jacques was pleading guilty because he thought there was a real possibility “that at trial there would be sufficient evidence for the jury to find him guilty under the hand of one is the hand of all.” App. 15, ll. 13 – App. 16, ll. 6. The judge sentenced Jacques to sixteen years confinement. App. 18, ll. 14-18.

Jacques did not file an appeal. App. 63. On June 14, 2012, Jacques filed an application for post-conviction relief (PCR). The state filed a return on November 28, 2012. An evidentiary hearing was held on October 25, 2016 before the Honorable Diane Schafer Goodstein. Jacques was represented by C. Bradley Hutto, and the state was represented by Ruston Neely. App. 32.

At his PCR hearing, Jacques told the PCR court that he told his plea counsel that he did not have a gun and did not shoot a gun. But his plea counsel just “kept trying to put a gun in his hand.” App. 47, ll. 1-25. However, Jacques wanted to go forward with a trial. App. 1 – App. 49, ll. 1.

When his plea counsel told him that the state intended to try the four co-defendants together which included Jacques, Jacques told his counsel that he wanted to be tried separately. Jacques thought the jury would find him guilty under the “hand of one is the hand of all” theory. But his plea counsel never made the motion to sever or divide the trial so that Jacques could have a separate trial. App. 49, ll. 2-23. Jacques testified that the video did not show him with a gun

in his hand, and his attorney never filed a motion to argue that Jacques did not have a gun. His attorney was “not trying to help him.” His attorney would not file a motion to sever his trial. Those were the reasons Jacques decided to plead guilty. App. 52, ll. 3 – App. 54, ll. 1.

Jacques still wanted the PCR court to grant him a new trial because his plea counsel did not do everything he could have done to help Jacques. App. 54, ll. 2-25.

Plea counsel, Ash Chisolm, testified that this incident was “characterized” as a gang shooting between two rival gangs. He confirmed that there was a video that did show Petitioner Jacques at the incident. However, the video was not clear enough to show whether there was a gun in Jacques’ hand. Plea counsel explained that at one point, Jacques came up over a car and made a gesture. The state argued that he was firing a gun. Plea counsel’s argument was that Jacques was pointing and did not have a gun. App. 35, ll. 1 – App. 37, ll. 24.

Counsel testified that at trial he would have argued that the ballistic evidence would have shown that Jacques did not fire the gun that killed the person. App. 39, ll. 11-24. Counsel admitted that he never made a motion to sever Jacques’ case from that of his co-defendants although counsel said he would have requested that if they had gone to trial. App. 40, ll. 1-23.

The PCR judge found that the record “fully supported the knowing and voluntary nature” of Jacques guilty plea. The judge also found Jacques’ testimony lacked credibility concerning counsel failing to make a motion to sever his trial, and found trial counsel’s testimony to be credible. App. 65. The judge found that Petitioner Jacques failed to prove that plea counsel was ineffective regarding not making a motion to sever the trial and failed to prove that counsel was ineffective regarding Jacques’ claim that counsel did not argue that Jacques did not have a gun. App. 66; App. 67.

The judge denied Jacques PCR application and dismissed it with prejudice. App. 68.
Jacques' attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not making a motion to sever Petitioner Jacques trial from that of his co-defendants which was prejudicial to Petitioner because the video did not show clearly that Petitioner had a gun; therefore his guilty plea was unknowingly and involuntarily entered.

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 Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001), the Supreme Court ruled that a severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant’s guilt.

This was the case with Jacques. He claimed that he did not have a gun, and did not know that the other young men with him had guns. However, the jury could have found him guilty under the hand of one was the hand of all theory which would have been prejudicial to Jacques when he was innocent. Therefore a joint trial would have prevented the jury from making a reliable judgment about Jacques’ guilt.

The PCR court erred in not finding plea counsel ineffective for failing to insure that Jacques’ guilty plea was voluntarily entered. During the guilty plea, Jacques asked for more time to talk to plea counsel which indicated that he was not sure of pleading. App. 6, ll. 14 – App. 7, ll. 24. He felt he had to plead guilty if there was going to be a joint trial, and if his attorney was not going to argue that he did not have a gun.

CONCLUSION

Based on the above, certiorari should be granted, petitioner's conviction and sentence reversed, and the case remanded.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 2017.

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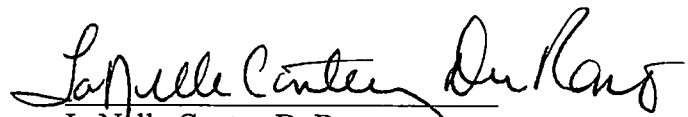
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jarrod Jacques 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 Diane Schafer Goodstein, which was held on October 25, 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 Jarrod Jacques.

Respectfully Submitted,



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 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 Ruston W. Neely, 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 Jarrod Jacques, #310037, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 8th day of August, 2017.



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of August, 2017.

Courtney Powers (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.