

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Georgetown County
Honorable Brooks P. Goldsmith, Circuit Court Judge

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AUG 17 2017

DWAINE L. JOHNSON, JR.

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000492

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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The PCR court erred in not finding plea counsel ineffective for not having a mental health expert evaluate Petitioner Johnson when plea counsel admitted to the plea court that Petitioner had been evaluated for “anger issues” as a young teenager but the source of the anger remained unknown which made Petitioner’s guilty plea unknowingly and involuntarily entered6

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ISSUE PRESENTED

Did the PCR court err in not finding plea counsel ineffective for not having a mental health expert evaluate Petitioner Johnson when plea counsel admitted to the plea court that Petitioner had been evaluated for “anger issues” as a young teenager but the source of the anger remained unknown which made Petitioner’s guilty plea unknowingly and involuntarily entered?

STATEMENT

On August 24, 2011, Petitioner Dwaine Johnson, who was seventeen at the time, and his friend, Isiah Green, walked into the Szechuan Restaurant in Georgetown around 10:00 in the evening. According to Isiah Green, Johnson pointed a gun at the woman proprietor and an argument followed. The male proprietor came from the back and Petitioner Johnson shot him. When the woman went to the man who was her husband to help him, Petitioner Johnson then shot her. Johnson grabbed the cash drawer and took about \$350. Johnson and Green then left the restaurant on foot. App. 82, ll. 2 – App. 83, ll. 16.

Johnson and Green went to Green's house nearby where Johnson changed clothes into some Green provided. Green then told Johnson to leave which he did. App. 82, ll. 19 – 25.

DNA from a cup found at the scene of the incident, was entered into CODIS. It matched Isiah Green. When Green was arrested, he gave a statement to law enforcement implicating Johnson. The victims, who suffered severe injuries and were hospitalized for a while, had told law enforcement that Green was the one drinking from the glass and the other man had the gun. App. 84, ll. 21 – App. 85, ll. 25.

Petitioner Johnson was arrested September 9, 2011. App. 95, ll. 9 – 24. On November 16, 2011, the Georgetown County Grand Jury indicted Petitioner Johnson on the charges of two counts of attempted murder and armed robbery (AR). App. 181 – App. 192. On April 14 – 15, 2014, Johnson proceeded to trial before the Honorable Edward B. Cottingham and a jury. Petitioner Johnson was represented by Ronald Hazzard, and the state was represented by Erin Bailey. App. 1.

Following jury selection and the motions hearing, Johnson decided to plead guilty. App. 3 ll. 1 – App. 82, ll. 1. During the plea, the state told the court that Petitioner Johnson had no

adult record as he was seventeen at the time of the incident. However, he had a “significant” juvenile record which began when Johnson was only thirteen. The solicitor said that Johnson had “multiple” assaults and had a disciplinary file at the detention center where he had two counts of throwing bodily fluids on the correctional officers. He was sentenced and sent to prison and then returned to the jail where he then stabbed another inmate. That charge was pending but would be dismissed with this guilty plea. App. 83, ll. 15 – App. 84, ll. 20.

During mitigation at the plea hearing, plea counsel told the court that Petitioner Johnson was a “very bright young man” with apparent anger issues. Counsel said that Johnson was evaluated in 2008 for anger issues due to multiple assaults, and they wanted to figure out what the anger “stemmed from.” Counsel said that he did not know. App. 94, ll. 13 – App. 95, ll. 8.

The judge sentenced Johnson to fifteen years on each charge with all to run concurrent. App. 97, ll. 1 – App. 98, ll. 6.

Petitioner Johnson did not file an appeal. App. 168.

On December 9, 2014, Petitioner Johnson filed an application for post-conviction relief (PCR). The state filed a return on February 2, 2016. App. 167. An evidentiary hearing was held on November 16, 2016 before the Honorable Brooks Goldsmith. Petitioner Johnson was represented by Steven Fowler, and the state was represented by Valerie Giovanoli. App. 119. Petitioner Johnson testified at the hearing that his plea counsel was ineffective because he did several things incorrectly. App. 124, ll. 1 – 4. Johnson said he had mental health problems as he had autism. He described it as his “mind goes all over the place, this way, that way, up that way.” He said that he may need Zoloft and help talking to his attorney. App. 128, ll. 1 – 15. He did not tell his attorney of his mental health problem because it was his attorney’s job to find out by

checking Johnson's background. His attorney did not check Petitioner Johnson's mental health history. App. 133, ll. 16 – App. 134, ll. 14.

Johnson said that he wanted to go to trial but his attorney "coerced" him to plead guilty. Johnson felt that "he had no win in the courtroom so no need to go to trial." He described it as a "lose-lose situation." App. 137, ll. 1 – 25.

Plea counsel also testified at the PCR hearing that Petitioner Johnson never brought up any mental health issues with the attorney. Plea counsel also met with Petitioner Johnson's parents, and they never mentioned any mental health problems. Plea counsel indicated that he had no problems communicating with Johnson as Johnson did not appear to have any mental health problems to him. App. 139, ll. 13 – App. 143, ll. 3.

In responding to the question if Johnson's parents mentioned any mental health issues, plea counsel said that during his representation of Johnson while his charges were pending, there was a hearing before Judge Steven John regarding whether Petitioner Johnson needed a mental health evaluation. Judge John questioned petitioner Johnson and concluded that he was fine and no evaluation was necessary. App. 149, ll. 22 – App. 150, ll. 9. Counsel admitted that he did not "enlist" a mental health professional to review Johnson's mental health. App. 160, ll. 3 – 12.

Plea counsel admitted that Johnson had always indicated that he did not want to plead guilty. However, based on the evidence against him, counsel met with Johnson's parents in the hopes they could speak with him. App. 143, ll. 1 – 18. The only evidence against Petitioner Johnson was the statement of Isiah Green. App. 145, ll. 16 – 22. However, Johnson decided to plead guilty after he and plea counsel listened to the recorded interview law enforcement had with the female victim at the hospital shortly after the incident. App. 150, ll. 16 – App. 151, ll. 19.

The PCR judge ruled at the hearing that he denied Petitioner Johnson's PCR application. App. 165, ll. 17 – 25. On December 14, 2016, the PCR judge filed an order denying Johnson's PCR application and dismissing it with prejudice. App. 167 – App. 178. In his order, the judge found that Petitioner Johnson failed to prove that he was incompetent at the time of his guilty plea or that plea counsel Hazzard was ineffective for not addressing any competency issues. App. 176. The judge ruled that Petitioner Johnson was competent to enter his guilty plea. App. 175. Although the judge wrote that he observed that Johnson had "difficulty understanding and answering questions" during the PCR hearing, plea counsel Hazzard testified that he had never had an indication that Johnson had any mental health issues. The judge cited Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) for the finding that counsel may reasonably rely on his own perceptions in deciding a client is competent to stand trial. App. 176.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not having a mental health expert evaluate Petitioner Johnson when plea counsel admitted to the plea court that Petitioner had been evaluated for “anger issues” as a young teenager but the source of the anger remained unknown which made Petitioner’s guilty plea 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

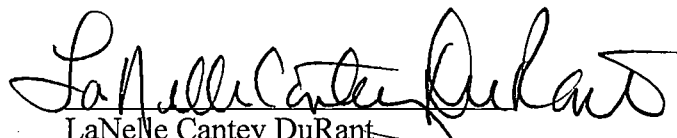
right to trial by jury Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certain certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege”. State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give 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).

Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

The PCR court erred in not finding plea counsel ineffective for not investigating Petitioner Johnson’s mental health history. Johnson had an evaluation for anger issues when he was fifteen. His history of multiple assaults when only thirteen was a sign of some kind of problem. Plea counsel admitted that the source of Johnson’s anger was unknown. The fact that he stabbed another inmate was a signal for him to have a mental evaluation when he was in jail on a murder charge. If counsel felt strongly enough that there may be a problem regarding Johnson’s competency to have a hearing before the judge, counsel should have had a mental health expert make the decision and not leave it to the judge.

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 17th day of August, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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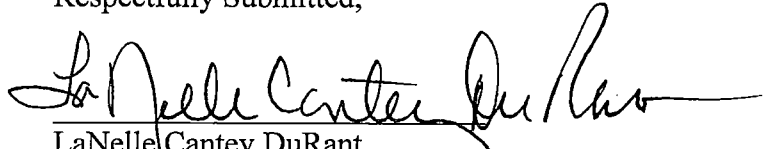
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dwaine L. Johnson, 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 Brooks P. Goldsmith, which was held on November 16, 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 Dwaine L. Johnson, Jr.

Respectfully Submitted,



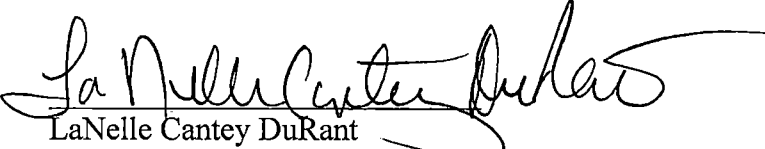
LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th 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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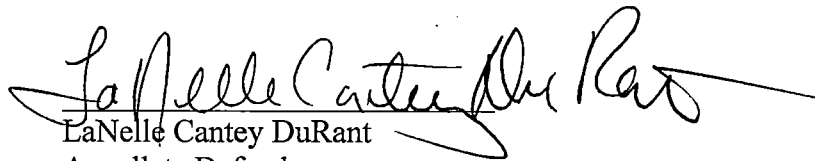
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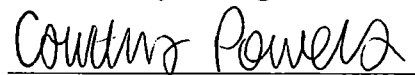
RESPONDENT

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 Johnny Ellis James, Jr., 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 Dwaine L. Johnson, Jr., #343186, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 14th day of August, 2017.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of August, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.