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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

JOHN WAYNE BRANNON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000770

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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1.

Did the PCR court err in not finding trial counsel ineffective for not conducting a thorough investigation, or having an investigator pursue a thorough investigation, into Petitioner Brannon's case in order to introduce evidence of Petitioner's defense of self-defense as he was facing LWOP?

2.

Did the PCR court err in not finding trial counsel ineffective for not presenting an expert, or at least consulting an expert, in order to dispute the diagnosis by the emergency room physician of a traumatic head injury of the victim which he said could be deadly when the victim remained in the hospital only two hours and was released with several sutures?

STATEMENT

Petitioner John Brannon and Ronnie Brannon, the victim, were first cousins. Petitioner Brannon had lived with his uncle, Ronnie's father, until the uncle died in January 2011. App. 100, ll. 1 – App. 101, ll. 5. According to Ronnie, Petitioner asked him if he could stay at the house with Ronnie until he could find a place. Ronnie agreed to a few days. App. 101, ll. 4 – 14. By April 10, 2011, Petitioner Brannon was still living with Ronnie in the father's house. On April 9, 2011, Petitioner and Ronnie and some neighbors sat around having a few drinks. Ronnie admitted that he was drunk that night as he said he was an "alcoholic." App. 103, ll. 6 – App. 104, ll. 22.

The next morning, they started drinking what was left from the night before. The two of them got into an argument over Petitioner still living there. Ronnie told Petitioner to leave and find somewhere to live. Ronnie's story was that Petitioner left and returned a few minutes later with a brick. Allegedly Petitioner hit Ronnie in his head and Ronnie fell backwards. His head was bleeding so he found a shirt and wrapped around his head. He just lay on the floor. App. 106, ll. 1 – App. 109, ll. 11.

Later that morning, Ronnie's friend, Scott Cheeks, stopped by to check on Ronnie as he frequently did. He found Ronnie walking down the hall towards Cheeks and had something wrapped around his head. When Cheeks saw Ronnie bleeding, he called 911 but finally took Ronnie to the emergency room himself. App. 46, ll. 6 – App. 50, ll. 25.

Dr. Bradley Davis was the emergency room doctor who treated Ronnie. He found that Ronnie had two lacerations: one at the front of his head that pulled the skin down, and one at the back of his head where there was very little "subcutaneous tissue." His diagnosis was "traumatic head injury and multiple scalp lacerations." App. 78, ll. 21 – App. 82, ll. 4. The front laceration

required nine stitches, and the posterior laceration required six stitches. App. 88, ll. 21 – App. 89, ll. 1; App. 178, ll. 14 – 23.

Dr. Davis reported that Ronnie was intoxicated and could not provide a reliable medical history of symptoms. Therefore, he performed a CT scan of Ronnie’s brain to determine if there was any skull fracture or injury or any injury to the brain or any bleeding in the brain. App. 82, ll. 7 – App. 83, ll. 23. The CT scan showed no skull fracture nor brain injuries. Ronnie arrived at the hospital about 12:11 PM and was discharged about 2:25 PM. He stayed at the hospital only about two hours and was released. App. 88, ll. 1 – 23.

Officer Brendall Mathis went to the hospital and talked with Ronnie about the incident. Ronnie told him that Ronnie’s cousin, John Brannon, hit him over the head with something big. The officer talked with Ronnie again two days later, and Ronnie told him the same thing. App. 69, ll. 1 – 24. Officer Mathis searched Ronnie’s home and found a rock under a table next to the front door. He believed that was the rock used to hit Ronnie Brannon. He estimated that the rock weighed between ten and fifteen pounds. App. 64, ll. 1 – App. 65, ll. 18.

Officer Mathis signed a warrant on Petitioner Brannon. App. 70, ll. 1 – 9. On July 22, 2011, the Spartanburg County grand Jury indicted Petitioner Brannon on the charge of attempted murder. App. 333 – App. 334.

On December 12, 13 and 15, 2011, Petitioner Brannon proceeded to trial before the Honorable Roger L. Couch and a jury. Petitioner was represented by Tanya Jones, and the state was represented by Wes Boyd. App. 1.

During the trial, the solicitor asked Dr. Davis, the emergency room doctor who treated Ronnie Brannon, if head traumas were ever considered deadly. The doctor said: “Absolutely.” App. 85, ll. 20 – 25. During his closing argument to the jury, the solicitor argued that this was a

case of attempted murder because the doctor had testified that head traumas can be deadly. He continued that luckily nothing was shown on the CT scan. App. 182, ll. 2 – 17.

Petitioner Brannon did not testify at his trial. Defense counsel did not present any witnesses nor any evidence. App. 159, ll. 2 – App. 160, ll. 19.

The judge charged the jury on attempted murder; assault and battery of a high and aggravated nature (ABHAN) at the request of the state; and assault and battery second degree at the request of the defense. The state requested ABHAN only after the judge granted defense counsel's request for assault and battery second degree. App.162, ll. 15; App. 168, ll. 2 – 23; App.203, ll. 4 – 15; App. 208, ll. 7 – 25. The jury sent a note to the judge during deliberations. Their question was: "Please explain the difference between assault and battery of a high and aggravated nature and assault and battery in the second degree." The judge repeated his jury charge on the two offenses as requested. App. 214, ll. 10 – App. 216, ll. 7.

The jury found Petitioner Brannon guilty of the lesser included charge of assault and battery of a high and aggravated nature. App. 217, ll. 17 – 25. Because the state had served Petitioner Brannon with notice that they would seek life without parole (LWOP), the solicitor informed the judge that ABHAN was a serious offense. The solicitor told the court that they had presented notice of three prior convictions "out of an abundance of caution." App. 220, ll. 13 – App. 224, ll. 3. The judge sentenced Petitioner Brannon to LWOP. App. 229, ll. 8 – 14.

Petitioner Brannon filed a notice of appeal which was perfected by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal on October 2, 2013. State v. Brannon, Op. No. 2013-UP-362 (Ct. App. filed October 2, 2013). App. 319.

On December 5, 2013, Petitioner Brannon filed an application for post-conviction relief (PCR). The state filed a return on August 18, 2014. An evidentiary hearing was held on June 17, 2016 before the Honorable R. Ferrell Cothran, Jr. Petitioner Brannon was represented by J. Brandt Rucker, and the state was represented by Alicia Olive. App. 250.

Petitioner Brannon testified at his PCR hearing that he told his trial attorney that he had a self-defense argument because his cousin, Ronnie, had a dagger, and came after him. He wanted her to present the dagger in court but his attorney said that they did not need the dagger. App. 258, ll. 5 – 25. At the PCR hearing, Petitioner told about the incident. He said that the victim his cousin Ronnie, had drawn the dagger on Petitioner on four or five occasions. Finally Petitioner took the dagger and hid it. Ronnie kept asking for the dagger so Petitioner finally agreed to give it to him if Ronnie promised he would not draw it on Petitioner again which Ronnie did. Petitioner returned the dagger to Ronnie. App. 261, ll. 9 – App. 262, ll. 7.

Two weeks later when this incident occurred, they were drinking. Ronnie retrieved his dagger again and pointed it at Petitioner. As Petitioner got up from the sofa and started around it to leave, Ronnie got in the way to keep him from leaving. Petitioner then picked up an aluminum chair and hit Ronnie in the head one time. Petitioner took the dagger and left. He went to his sister's house and left the dagger there. App. 262, ll. 8 – App. 263, ll. 21; App. 259, ll. 6 – 11.

The police came on his job about a month later and arrested him. App. 263, ll. 22 – 25. Petitioner declared that the rock was not involved. App. 264, ll. 12 – 25.

Petitioner Brannon testified that his trial attorney was ineffective because she failed to thoroughly investigate his case including the self-defense issue. She did not ask Ronnie about

the dagger nor the chair at trial. If his attorney had introduced the dagger, Petitioner believed that his chances of winning at trial would have improved. App. 265, ll. 1 – App. 267, ll. 25.

Petitioner also testified that his attorney could have obtained an expert to explain that the victim's injuries were not life threatening. He explained that the victim, Ronnie, was released from the hospital within two hours drinking liquor again. If his injuries were life-threatening the hospital would have kept him overnight. There was no fractured skull, no bleeding under the skull; no fractured bone. App. 268, ll. 1 – 25. Petitioner Brannon also said his trial attorney was ineffective for asking for a lesser included charge because that opened the door. It gave “them the option to seek a verdict elsewhere.” App. 267, ll. 4 – 23.

Petitioner's trial attorney, Ms. Tanya Jones, testified via telephone as she was then living in Oklahoma City. App. 253, ll. 2 – 15. She admitted that Petitioner Brannon told her that the victim had pointed a dagger at him while they had been drinking. Petitioner told her that he hit the victim, Ronnie, with a chair although the state said it was a brick. However, she stated that no blood was recovered from the scene. She claimed there was a minor inconsistency in Petitioner's story where he first said there was a fight, a dagger, and then he hit Ronnie with the chair. Then Petitioner told her that he hit Ronnie with the chair and then took the dagger. That was the reason she was concerned about putting him on the stand. App. 280, ll. 1 – 24.

Ms. Jones indicated there was a plea offer to ABHAN for zero to twenty years but Petitioner rejected that offer. App. 280, ll. 18 – App. 281, ll. 7. She tried to get the prosecutor to allow Petitioner to plead to attempted murder and remove LWOP from the table. However, she said the prosecutor was “gung-ho” about this case for some reason. She was “shocked” by that “behavior” from the prosecutor because she had never experienced that. Usually the prosecutors

were willing to negotiate “up to trial.” She felt that attempted murder was “overkill” or an “overcharge” in this case. App. 281, ll. 15 – App. 283, ll. 19.

She described the possible defense of self-defense; however, Petitioner would have to take the stand. His prior charges could then come in. She said the other option for self-defense was to confront the victim, Ronnie, about having the dagger. However, since she did not know what he would say as she had not talked with him prior to trial, she “got bad vibes” and “just decided not to do that” although she had the dagger at trial. App. 284, ll. 2 – App. 285, ll. 6.

She explained that she had tried to locate the victim prior to trial but could not find him. The state found him and she tried to talk to him just before trial but he refused to talk with her. App. 282, ll. 24 – App. 283, ll. 4. Counsel admitted that if she could have found the victim and talked with him before trial, they may have been able to avoid a LWOP sentence. She said: “I mean, I feel really bad about it.” Self-defense was her trial strategy. App. 286, ll. 7 – 25. However, during trial, she started to “shift” and “go for” the strategy that the victim did not remember anything so “how can we convict on this?” App. 290, ll. 1 – 23.

When asked what kind of investigation she did, trial counsel responded that she “went over all of the police reports; all of the pictures; went to the crime scene; spoke with Petitioner’s mother who had the dagger; and tried to track down the victim, Ronnie Brannon.” App. 285, ll. 7 – 25. She did not know what happened to the chair although there were pictures of the chair. The house was eventually condemned so she had no idea what happened to the chair. App. 289, ll. 10 – 25. She did not use the pictures of the chair to ask the victim if a chair was involved in the altercation. She said: “I don’t believe that I ever put the chair theory out there.” She admitted that she did not have enough evidence to request a self-defense charge. The state did not introduce DNA nor blood evidence that connected Petitioner to the crime. App. 290, ll. 1 –

23. When questioned on cross-examination about why she did not ask the victim about the dagger, she said since she had not talked with him, she did not know what he would say. She said she “got cold feet.” App. 292, ll. 1 – 14.

When questioned about her conversation with Petitioner’s mother, trial counsel admitted that she did not ask his mother the history of the dagger nor when he brought it over; nor his demeanor then; if he was intoxicated; or if petitioner told her what happened. App. 292, ll. 15 – App. 293, ll. 19. She admitted that she never thought about calling Petitioner’s mother as a witness. App. 314, ll. 21 – 24.

Ms. Jones testified that she told Petitioner that it “was not in his best interest to testify.” But she said it was the “only way to get in the self-defense claim.” App. 294, ll. 21 – 24. On cross-examination trial counsel admitted that she did not talk to the emergency room doctor, Dr. Davis, before the trial. She did not ask him about the chair because she said that doctors can’t speculate about what caused the injury. She did not confer with any other expert to compare their view of the victim’s injuries. App. 302, ll. 1 – App. 303, ll. 23.

Trial counsel stated near the end of her testimony:

Again I just don’t know why the D.A. was being so unreasonable in this particular case because it really didn’t deserve LWOP.

App. 314, ll. 18-20.

The PCR judge filed an order on February 28, 2017 denying Petitioner Brannon’s PCR application and dismissing it with prejudice. App. 318 – App. 330. The judge wrote that as a matter of general impression, the court found Petitioner Brannon’s testimony to be not credible. App. 319.

The PCR judge found that trial counsel’s investigation was reasonable and proper as she “adequately conferred with Petitioner, and was competent in her representation.” App. 323. The

judge wrote that Petitioner Brannon failed to prove that trial counsel did not conduct a proper investigation. The order provided that Petitioner failed to show any prejudice to him because he did not present any evidence at the PCR hearing as to what evidence further investigation would have uncovered. App. 323.

The PCR court's order also provided that the emergency room doctor's testimony that the victim was intoxicated and a "poor medical historian" was consistent with counsel's trial strategy of discrediting the victim. App. 324. The PCR judge also wrote that Petitioner presented no evidence at the PCR hearing as to what an expert witness would have presented to contribute to the trial. The judge found that Petitioner did not prove "deficiency nor prejudice" regarding his claim that trial counsel was ineffective for not calling an expert witness. App. 325.

Petitioner Brannon filed a notice of appeal. This petition follows.

ARGUMENT

1.

The PCR court erred in not finding trial counsel ineffective for not conducting a thorough investigation, or having an investigator pursue a thorough investigation, into Petitioner Brannon's case in order to introduce evidence of Petitioner's defense of self-defense as he was facing LWOP.

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, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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 a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). In Ard v. Cato, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court found that trial counsel was ineffective and that defendant was prejudiced by counsel's ineffectiveness. The Court held that a criminal defense attorney has a

duty to investigate but this was limited to a reasonable investigation. The Court continued to hold that for the purposes of the claim of ineffective assistance, while the scope of a reasonable investigation depended upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

Trial counsel was ineffective because she did not interview the significant witnesses which could have made a difference. She did not find the victim but the state found him. There was no evidence that she used an investigator to search for the victim as an investigator would likely have had more time and likely would have known how to locate a person. Not being able to talk with the victim was the reason trial counsel said she did not introduce the dagger which very likely would have affected the result of the case. The jury had a question about the charges and did find Petitioner guilty of a lesser included. If counsel had introduced evidence of self-defense which included the dagger and the chair, there would have been a reasonable probability the judge would have given the self-defense charge. Therefore, Petitioner was prejudiced by counsel not talking with the victim.

It would be pointless to call the victim as a witness to the PCR hearing because he was not likely to admit to any wrongdoing or change his story from his trial testimony.

Trial counsel was ineffective for not talking to Petitioner's mother with more in-depth questions about the case. Counsel admitted that she did not think of calling the mother who could have corroborated Petitioner's story that there was a dagger as the mother had the dagger.

Trial counsel was ineffective for not talking to the emergency room doctor, Dr. Davis. Dr. Davis did not directly testify that victim's head injury was deadly as he was asked the question in general terms. Trial counsel only speculated that Dr. Davis could not tell her if a

chair or what could have caused victim's injuries. She should have asked the question because Petitioner was facing life in prison. She would likely have had more evidence to dispute the attempted murder charge as she stated she believed that was an over charge or "overkill."

Petitioner Brannon was prejudiced by trial counsel's failure to conduct a more thorough investigation. Based on her description of the investigation she conducted, she did the least that she had to do for a trial which was not sufficient in Petitioner Brannon's case because he was facing life incarceration.

ARGUMENT

2.

The PCR court erred in not finding trial counsel ineffective for not presenting an expert, or at least consulting an expert, in order to dispute the diagnosis by the emergency room physician of a traumatic head injury of the victim which the doctor said could be deadly when the victim remained in the hospital only two hours and was released with several sutures.

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, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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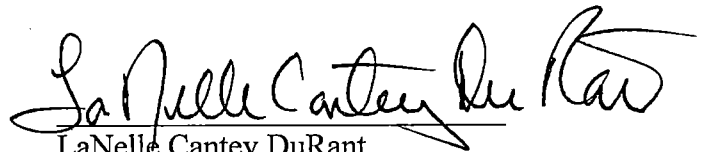
In Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994), the Supreme Court found that the failure to present evidence that alters the probable outcome of the trial was ineffective assistance of counsel.

Trial counsel was ineffective for not calling a medical expert to testify or at least consulting one regarding the victim's injuries. The ER doctor said that head injuries can be deadly but the victim in this case only had sutures, and stayed in the hospital a total of approximately two hours. His treatment consisted of fifteen sutures. The CT scan was required only because the victim was too intoxicated to tell what happened. Then the CT scan showed no injury to the brain nor skull. Counsel should have explored the medical possibilities to determine if there was more evidence she could obtain to dispute the serious charge of attempted murder. This charge planted the idea in the minds of the jurors that this was a very serious case. If the original charge had been ABHAN, there is a reasonable probability the jury would have found him guilty of the lesser A& B second degree. The jury already had the question of the difference between ABHAN and A&B second degree as they sent a note to the trial judge during deliberations asking this difference. App. 214, ll. 1-25.

Therefore, Petitioner was prejudiced.

CONCLUSION

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

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of September, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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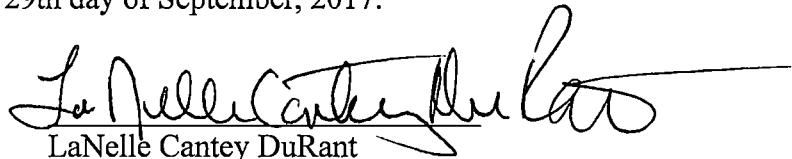
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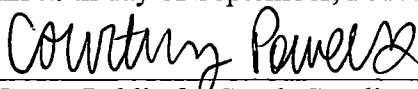
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Valerie Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on John Wayne Brannon, #209650, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 29th day of September, 2017.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of September, 2017.

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