

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable William H. Seals, Circuit Court Judge

UMAR ABDUL CLEA,

V.

STATE OF SOUTH CAROLINA,

ORIGINAL

RECEIVED

PETITIONER OCT 12 2017

S.C. SUPREME COURT

RESPONDENT

APPELLATE CASE NO. 2017-000889

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent 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 following through with the suppression hearing for the drugs in Florence County which made Petitioner Clea's guilty plea unknowingly and involuntarily entered?

STATEMENT

On April 30, 2012, Petitioner Clea was stopped on I-95 in Florence County for following too closely. The deputy, Deputy Tosoni, became suspicious and ran his police dog around Petitioner's vehicle. The dog alerted twice so the officer then searched the vehicle. He found a travel bag for toiletries such as a Dopp kit that contained two clear bags of what appeared to be heroin. Also found were another bag of black tar heroin; two clear bags with a white powdery substance in them; and \$1001 in cash. The white powdery substance contained no controlled substance so was believed to be a product to cut the black tar heroin. App. 9, ll. 22 – App. 10, ll. 12.

On September 6, 2012, the Florence County Grand Jury indicted Petitioner Clea for possession of a controlled substance and trafficking heroin twenty-eight grams or more. App. 89 – App. 90. On September 4, 2013, Clea appeared before the Honorable D. Craig Brown and entered a guilty plea to the lesser charge of trafficking heroin four to fourteen grams. In exchange for the plea, the state dismissed the charge for possession of a controlled substance. Petitioner Clea was represented by Shaun Kent, and the state was represented by Matthew Ozment. App. 1; App. 4, ll. 6-12; App. 82.

At the guilty plea, defense counsel explained, during mitigation, that this guilty plea hearing was originally scheduled for a hearing on a suppression motion. Counsel said he had told Petitioner Clea that he had what counsel thought was a “decent “suppression issue. However, counsel said it would have been a “close call.” He told Clea that due to Clea's age of 52, that a he was too old to continue doing this with drugs, and that sentence of twenty-five years would be a lifetime. App. 11, ll. 11 – App. 16, ll. 16.

Petitioner Clea told the court that he did not want to die in prison and asked the court for a lenient sentence. App. 18, ll. 10-20.

The judge sentenced Clea to twelve years. App. 23, ll. 23 – App. 24, ll. 9. Petitioner Clea did not appeal his conviction nor sentence. App. 82.

On December 23, 2013, Petitioner Clea filed an application for post-conviction relief (PCR). The state filed a return on April 23, 2014. App. 81. An evidentiary hearing was held on August 8, 2016 before the Honorable William H. Seals. Petitioner Clea was represented by Tristan Shaffer, and the state was represented by Jessica Kinard. App. 46.

At the PCR hearing, Clea's PCR attorney told the court that Petitioner's Sixth Amendment right to counsel was violated when counsel gave him "misadvice" concerning the likelihood of success in a suppression motion. He said that plea counsel did file a suppression motion but told Clea that he did not think it would be successful and had substantial risk. Because of that advice, Clea decided to plead guilty and forego the suppression hearing. App. 50, ll. 8-25.

Petitioner's plea counsel testified at the PCR hearing that Petitioner Clea had drug charges pending in three different counties: Sumter, Columbia, and Florence. Counsel represented Clea on the drug charge in Sumter and was successful in having the suppression motion granted. Counsel thought he had done the same in Richland County. App. 51, ll. 10 – App. 52, ll. 24.

PCR counsel showed a video of the traffic stop at the PCR hearing to plea counsel. Counsel admitted that the officer who conducted the traffic stop on Petitioner Clea asked questions that were not related to the reason for the stop which was following too closely. Counsel said that he did file a motion to suppress, and admitted that he told Clea that they could

lose the motion. Counsel also admitted telling Clea that if they lost the motion, he would probably “get more time.” App. 52, ll. 18 – App. 56, ll. 25.

On cross-examination, counsel again admitted that he told Clea that they had “zero chance of winning a trial.” App. 60, ll. 8 – App. 61, ll. 25.

Petitioner Clea testified at his PCR hearing that his plea counsel, Attorney Kent, did a good job on his case in Sumter when the motion to suppress was granted there in January 2013. App. 63, ll. 6 – App. 64, ll. 15. The next day, they went to Florence for that charge. Attorney Kent told Clea that he thought they had a good case as the audio/video showed “clearly that it would rule in Clea’s favor.” However, when Clea’s son did not take the remaining \$3500 to plea counsel that Clea still owed his attorney, Clea said that things changed. Clea never saw the video. App. 64, ll. 16 – App. 65, ll. 8.

Clea testified that after his first meeting with Attorney Kent, he believed that he would be successful on the suppression motion. Clea had “no entertainment of taking a plea.” App. 67, ll. 3 – 25. Then later, plea counsel never talked about a defense but talked about Clea’s age in his fifties, and how the sentence if they lost the suppression motion would likely be twenty-five to forty years. Clea then decided to plead guilty after his attorney told him he did not think they would win. App. 68, ll. 1 – App. 71, ll. 4.

Clea said he would not have pled guilty if his attorney had shown that he had his “best interest” in mind. It seemed that his attorney just did not care about his case. If his attorney had said he felt they could win the motion, Clea “would have gone all the way with it.” App. 71, ll. 1 – App. 72, ll. 4. Clea said that he “took” the plea because he did not have any “options’ at the time. He felt that if he “rolled the dice” he would get the mandatory 25 to 40 years. If he did not, then he would get a lesser sentence. App.76, ll. 1-25. If his attorney had gone through with

the suppression hearing as he had done in Sumter, then Clea would have gone to trial. App. 77, ll. 4-25.

The PCR judge issued an order on March 2, 2017 denying Petitioner Clea's PCR application and dismissing it with prejudice. App. 81 – App. 88. The judge found that Petitioner Clea's testimony regarding the ineffectiveness of his plea counsel to be not credible while the judge found plea counsel's testimony to be credible. App. 86. The judge also found that the record "fully supported the knowing and voluntary nature of Petitioner Clea's guilty plea." App. 85. The order also provided that Clea did not meet his burden of proving that plea counsel failed to render reasonably effective assistance. App. 87.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not following through with the suppression hearing for the drugs in Florence County which made Petitioner Clea'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).

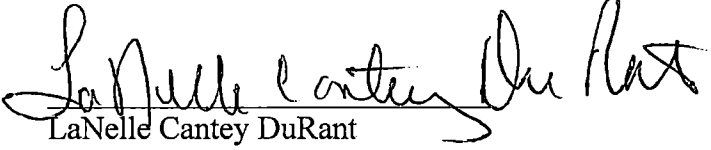
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must

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).

The PCR court erred in not finding plea counsel ineffective for failing to ensure that Petitioner Clea wanted to plead guilty. Clea was misled by counsel when counsel filed the suppression motion as counsel led him to believe they had a good case in Florence. Counsel never shared the video of the stop with Clea which was prejudicial to Clea because he then did not have all of the information he needed to make an informed decision about pleading guilty or going to trial. Clea made it clear at his PCR hearing that he did not want to plead guilty. He only did so when he felt he had no other option.

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 12th day of October, 2017.

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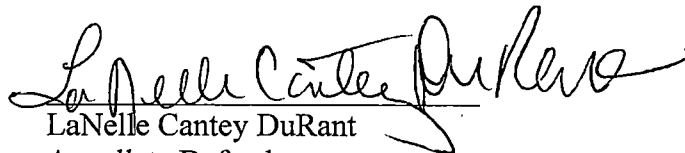
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Umar Abdul Clea 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 William H. Seals, which was held on August 8, 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 Umar Abdul Clea.

Respectfully Submitted,



LaNelle Cantey DuRant

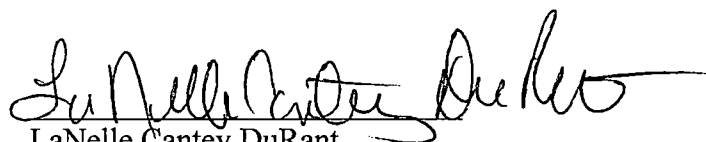
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of October, 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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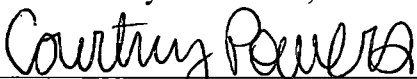
RESPONDENT

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 Lindsey McCallister, 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 Umar Abdul Clea, #272806, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 12th day of October, 2017.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 12th day of October, 2017.

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