

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable J. Mark Hayes, Circuit Court Judge

JERRY LEE DICKEY,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001153

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT
PETITIONER

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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for not objecting to the double jeopardy issue that Petitioner was convicted of shoplifting in South Carolina and was convicted of possession of stolen goods in North Carolina based on the same act and same goods?

STATEMENT

On August 28, 2014, Officer Charles Neelands of the Clover Police Department received a dispatch report of a shoplifting in progress. App. p. 47, ll. 3-24. Neelands was told that a green Dodge driven by a black male had just left the Clover Family Dollar and that the store manager believed the man had stolen a number of items. App. p. 58, ll. 1 – App. 60, ll. 3.

Shortly thereafter Neelands, while driving south towards the store on U.S. 321, passed the green Dodge as it headed north on U.S. 321 towards the North Carolina border. App. p. 48, ll. 4 – App. 51, ll. 24. Neelands turned around and activated his blue-lights and siren. The green Dodge sped up as Neelands began his pursuit. Once the green Dodge crossed into North Carolina, Neelands stopped his pursuit. App. p. 51, ll. 10 – App. 52, ll. 24.

Neelands' supervisor, Officer David Dover, decided to continue into North Carolina to look for the Dodge. Dover eventually located a green Dodge parked on the side of U.S. 321 in Gastonia, North Carolina. App. p. 68, ll. 7 – App. 70, ll. 25.

When the car stopped at a house, Dover decided to “make casual contact” with Petitioner because Dover did not want to risk him getting away. App. p. 72, ll. 8 – App. 79, ll. 20. Dover explained that they were there to question him about a potential shoplifting incident at the Clover Family Dollar. Petitioner at first denied having been in Clover that day. As the interrogation continued, Petitioner admitted that he had been in Clover, but denied having shoplifted anything from the Family Dollar. App. p. 6, ll. 2 – App. 7, ll. 18. Socks, undershirts, and detergent were found in Petitioner's car. App. p. 78, l. 12 – App. 79, ll. 20.

Shortly thereafter, Petitioner Dickey was arrested by the Gastonia Police Department and taken into custody. Dover interrogated Dickey again at the Gastonia Police station. According to

Dover, Petitioner Dickey confessed to shoplifting from the Family Dollar and then trying to evade police. App. p. 81, ll. 2 – App. 86, ll. 4.

On October 27, 2014, Dickey pled guilty and was sentenced to sixty one days in jail on misdemeanor possession of stolen goods in the Gaston County District Court in North Carolina for being in possession of the items shoplifted from the Clover Family Dollar in South Carolina worth less than fifty dollars. App. p. 196 – App. 197; App. 163, ll. 1 – 22.

On March 26, 2015, Petitioner Dickey was indicted by the York County Grand Jury on the charges of shoplifting enhancement and failure to stop for a blue light (FTSBL). App. p. 163, ll. 13 – 22; App. p. 200 – App. 206. On May 20, 2015, a trial was held in Petitioner Dickey’s absence in York, South Carolina before the Honorable Robin Stilwell and a jury for shoplifting the same items that he pled guilty to in North Carolina of possessing. Dickey was represented by Phillip Smith, and the state was represented by Matthew Hogge. App. p. 1 – App. 4, ll. 15; App. 169, ll. 1 - 21.

The jury returned a verdict of guilty. App. p. 123, ll. 7 – 24. On August 11, 2015, Dickey appeared before the Honorable Paul Burch for sentencing. Judge Burch opened the sealed sentence from the trial judge. Judge Burch sentenced Dickey to the sentence from Judge Stilwell which was three years on the FTSBL, and ten years on the enhanced shoplifting charge. App. p. 131- App. 135, ll. 9.

Petitioner Dickey filed a notice of appeal which he later moved to withdraw. On May 20, 2016, the Court of Appeals issued an order dismissing his appeal. App. p. 193.

On June 16, 2016, Petitioner Dickey filed an application for post-conviction relief (PCR). The state filed a return on December 29, 2016. App. 192. An evidentiary hearing was held on January 31, 2017 before the Honorable Mark Hayes. Petitioner Dickey was represented by Nathan James Sheldon, and the state was represented by Justin James Hunter. App. p. 160.

At his PCR hearing, Petitioner Dickey testified that he had wanted a plea but the solicitor would not offer one due to his record in North Carolina. App. p. 168, ll. 7 – 23. About seven months prior to the trial in South Carolina on the shoplifting charges, Dickey was convicted in North Carolina of possession of stolen goods. The goods were the same goods from the Clover Family Dollar Store that he was convicted at trial of shoplifting. The North Carolina charge was a misdemeanor. App. p. 169, ll. 2 – 21.

Dickey's trial counsel testified at the PCR hearing that he never raised the double jeopardy issue although he knew about the North Carolina charge. He assumed the North Carolina charge of possession of stolen goods may have included items from South Carolina and North Carolina. However, he did not call North Carolina to find out. He said that he did ask the solicitor to dismiss the South Carolina charge, but the solicitor would not due to Dickey's prior record. App. p. 173, ll.13 – App. 175, ll. 1.

Trial counsel testified that he did not see any need to raise a double jeopardy issue. He knew that if both charges were in South Carolina there would be a double jeopardy problem. However, because South Carolina and North Carolina were two different sovereigns, he did not believe double jeopardy would apply. He admitted that the issue was not preserved for appeal because he made no objections concerning the two charges. App. p. 175, ll. 2 – App. 176, ll. 10.

PCR counsel argued that although Heath v. Alabama, 474 U.S. 82 (1985), was recognized as the “controlling law” on the dual sovereignty doctrine, he “could raise a statutory scheme argument that would distinguish Dickey's case from Heath v. Alabama, id.” The attorney cited S.C. Code Section 17-23-20 which provided that a conviction or acquittal in magistrate or municipal court was a bar to a trial in another court for the same unlawful act. Counsel argued that the statute

was ambiguous because it did not define whether it applied only to South Carolina or if it extended to other states. App. 183, ll. 10 – App. 184, ll. 24.

PCR counsel also cited Section 44-53-410 which provided that even with existence of the dual sovereign doctrine, the Legislature stated that if a person was convicted in another state of a drug offense, the person was barred from being prosecuted in South Carolina for the same drugs. App. p. 185, ll. 15 – App. 186, ll. 6. Counsel argued that he believed that the legislature created protection from double jeopardy for the shoplifting offense in Section 17-23-20. He asked the court to remand Petitioner Dickey’s case for a new trial on the double jeopardy issue. App. p. 186, ll 17 – App. 187, ll. 2.

The state cited Heath v. Alabama, *supra*, as the correct law that applied to Dickey’s case. The state argued that he believed that the dual sovereign doctrine applied whether it was federal versus state or state versus state, as two sovereigns “could still enforce their own laws and punish those who violate them.” App. p. 187, ll. 4 – App. 188, ll. 11.

On April 26, 2017, the PCR judge issued an order denying Petitioner Dickey’s PCR application and dismissing it with prejudice. App. p. 192 – App. 199. The judge found trial counsel’s testimony to be “credible and persuasive on all matters.” App. p. 196. The judge found, after reviewing Heath v. Alabama, *id.*, and State v. Rice, 348 S.C. 417, 559 S.E.2d 360 (Ct. App. 2001), and the statutes cited, that Dickey’s PCR application “must be dismissed.” App. 197. The PCR judge wrote the language contained in Section 44-53-410 of “another state” was not found in Section 17-23-20. Therefore, the judge concluded that “the South Carolina Legislature has waived its right under Heath v. Alabama, to forego the prosecution of the shoplifting charge as a sovereign state.” App. 198.

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

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for not objecting to the double jeopardy issue that Petitioner was convicted of shoplifting in South Carolina and was convicted of possession of stolen goods in North Carolina based on the same act and same goods.

The United States Supreme Court held in Heath v. Alabama, *supra*, that the dual sovereignty doctrine was founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violated the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct offenses.

In State v. Rice, *supra*, the Court of Appeals held that under the dual sovereignty doctrine, successive prosecution of the same conduct by separate sovereigns was not a violation of the federal constitutional prohibition against double jeopardy.

South Carolina Code Section 44-53-410 provides that “if a violation of this article is a violation of a Federal law or the law of another state, the conviction or acquittal under Federal law or the law of another state for the same act is a bar to prosecution in this state.”

South Carolina Code Section 17-23-20 provides that whenever a municipal court or a magistrates court shall have acquired jurisdiction by reason of a person committing an act which is alleged to be in violation of the criminal law of this State, a conviction or an acquittal by the first court acquiring jurisdiction shall be a complete bar to a trial by another court for the same alleged unlawful act or acts.

South Carolina Code Section 17-21-10 provides that where a person causes injury within the limits of the state and death occurs elsewhere, venue shall be in the county in which the injury was committed as if the death had occurred in such county.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature. State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007), State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002). The Supreme Court will not construe a statute to do that which is unconstitutional. Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000).

Penal statutes are to be construed strictly against the State and in favor of the defendant. Id., State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991), State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002). The reason for the statute-that is, the motives which led to the making of it, the object in contemplation at the time the Act was passed- is another criterion by which to ascertain the true meaning of the Act. State v. Shaw, 9 S.C. 94 (1878).

In Section 44-53-410, the Legislature used the words “article” and “act” to define how prosecution was barred for the “same act.” Shop lifting and possession of stolen goods are found in the same article in the statutory code. Shop lifting is found at Section 16-13-0110(A), and possession of or receiving stolen goods is found at 16-13-180. This use of similar language is just as significant as the absence of the words “another state” as stated by the PCR judge in his order as a reason. The judge’s reasoning as to the intent of the legislature was pure speculation.

Because the Legislature prohibits prosecution of the same drugs prosecuted in another state from being prosecuted in South Carolina, it would be only reasonable to reason that the Legislature would have the same intent for a misdemeanor as found in magistrate’s court. The intent would reasonably be judicial economy especially when the Legislature did not specifically allow for prosecution in another state.

Dickey’s case is distinguished from Heath v. Alabama because Heath involved extremely serious crimes of murder and kidnapping.

Appellant appears to have suffered a double jeopardy violation. Possession of stolen goods in North Carolina is defined as:

If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, . . . and such possessor shall be punished as one convicted of larceny.

N.C.G.S.A. § 14-71.1. The elements of crime of possession of stolen property are: (1) possession of personal property; (2) personal property has been stolen; (3) possessor knew or had reasonable grounds to believe that property was stolen; and (4) possessor acted with dishonest purpose. *State v. Wilson*, 1992, 416 S.E.2d 603 (NC Ct. App. 1992).

South Carolina's shoplifting statute holds that:

A person is guilty of shoplifting if he takes possession of, carries away, transfers from one person to another or from one area of a store or other retail mercantile establishment to another area, or causes to be carried away or transferred any merchandise displayed, held, stored, or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use, or benefit of the merchandise without paying the full retail value. . .

S.C. Code Ann. § 16-13-110(A)(1); *see State v. Shaw*, 328 S.C. 454, 456, 492 S.E.2d 402, 403-404. "Larceny is implicit within the crime of shoplifting." *State v. Moore*, 374 S.C. 468, 649 S.E.2d 84 (Ct. App. 2007). Larceny is the trespassory taking and carrying away of goods of another against the owner's will and without the owner's consent. *State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003)

Under the "same elements" test for a double jeopardy violation, North Carolina's possession of stolen goods statute does not require proof of "an additional fact" beyond the

elements necessary to prove the offense of shoplifting under South Carolina law. *Blockburger v. U.S.*, 248 U.S. 299; *see also State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997). Thus, Appellant's North Carolina conviction for possession of stolen goods and later his conviction in our state for shoplifting constituted successive prosecutions and multiple punishments for the same offense in violation of double jeopardy protections.

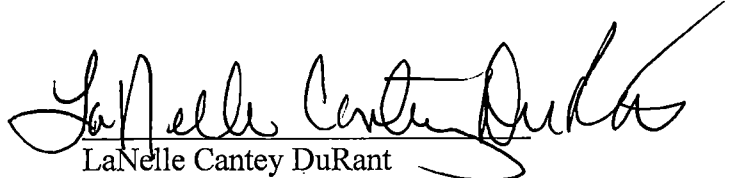
Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". *Strickland v. Washington*, 466 U.S. 668, 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).

Petitioner Dickey was prejudiced by his trial counsel's failure to object to the double jeopardy issues. If he had objected, the appellate court would have had the opportunity to consider this problem as a double jeopardy issue. Dickey would not have been incarcerated for the length of sentence that he received.

CONCLUSION

Based on the above, certiorari should be granted, petitioner's conviction and sentence reversed, and the case remanded for a dismissal of the charges.

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a long, sweeping flourish at the end.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of December, 2017.

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V.

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RESPONDENT

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 Justin J. Hunter, 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 Jerry Lee Dickey, #365050, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 6th day of December, 2017.


LaNelle Cantey DuRant
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 6th day of December, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.