

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
Honorable J. Mark Hayes, Circuit Court Judge

ORIGINAL

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S.C. SUPREME COURT

DANTONYO ANDROPULIS HEATH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001145

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 trial counsel ineffective for not presenting an expert to clarify at trial the difference between a DNA finding that a person “cannot be excluded” and a person who was a “match” to the DNA because Petitioner Heath was determined to not be excluded?

STATEMENT

On the evening of June 8, 2011, Ernest Jordan and Jared Crane were working late at Five Star Customs in Rock Hill. App. 232, line 17 – App. 233, line 19; App. 440, line 19 – App. 441, line 5. After hearing a door slam, Jordan was confronted by Marquis Robinson pointing a gun at him. Jordan saw another individual, whom he later identified as Appellant, running through the business. App. 234, lines 6 – 21; App. 239, lines 20-25; App. 266, line 16 – App. 270, line 5. While Jordan and Robinson fought over the gun, two shots were fired, one of which grazed Jordan's face. App. 235, line 7 – App. 236, line 4. During the struggle, Jordan told Robinson that he had money in his truck ending the physical confrontation. App. 238, lines 4 – 13. After that Robinson and Appellant allegedly tied up Crane, and the two escorted Jordan to his truck. When the trio arrived outside, Crane's wife, Amanda Crane, was sitting in her car. Appellant approached Crane's wife asking for her phone. App. 238, line 23 – App. 239, line 7. Jordan claimed the perpetrators also took a sum of money from his truck. Initially, Jordan claimed \$5000 in cash was stolen. App. 250, lines 2 – 4. Later, Jordan insisted that over \$10,000 was stolen. App. 295, line 2 – App. 298, line 25.

Jared Crane claimed he saw Robinson run by with his face partially covered. Shortly thereafter, Crane was hit in the back of the head by an unknown individual. Crane and the unknown individual then fought with Crane pulling a knife. App. 441, line 20 – App. 443, line 15; App. 480, line 19 – App. 481, line 8. Eventually, when Crane stopped fighting, the perpetrators tied him up and left him in the bathroom. App. 444, line 12 – App. 445, line 3. Crane claimed the perpetrators took \$1150 and marijuana from his pocket. App. 446, lines 17 – 19; App. 466, line 25.

Jordan then returned to the shop. Neal, the owner, returned and called the police. App. 220, ll. 1 – 8. Petitioner Heath's co-defendant was identified by the victims as Marquis Robinson because Jordan claimed that he knew Robinson who had been in the shop several times. App. 239, lines 8-13; App. 590, ll. 14 – 23. Robinson was arrested on June 14, 2011. App. 597, ll. 12 – 25. Petitioner Heath was arrested shortly after when Mr. Jordan identified a man with the nickname Yodi. Mr. Jordan identified a vehicle that one of Yodi's family members drove. The officers found the vehicle and identified Heath as the owner. Both of the victims identified Heath as the second robber from a photo lineup. App. 598, ll. 13 – App. 602, ll. 22.

In September 2011, the York County Grand jury indicted Petitioner Heath on the charges of armed robbery (AR), attempted murder, criminal conspiracy, and kidnapping. App. 909 – App. 916. On July 22 – 25, 2013, Petitioner Heath proceeded to trial, along with his co-defendant Marquis Robinson, before the Honorable John C. Hayes, III, and a jury. App. 1. Heath was represented by Philip Smith; Robinson was represented by Twana N. Burris; and the state was represented by Misti Horton-Shelton. App. 1.

During the trial, the state called as a witness Lilly Gallman, who was qualified by the court as an expert in forensic DNA analysis. App. 510, ll. 13 – App. 513, ll. 7. Ms. Gallman testified that she received for testing a swab from a white tee shirt from the crime scene along with other swabs. She also received buccal swabs from the two victims and from Heath. App. 520, ll. 7 –25.

She had a cutting from the tee shirt which was Item 1.2. That swab from Item 1.2 had blood so she developed a DNA profile from that. That profile was a match for Jared Crane, one of the victims. App. 525, ll. 1 – 18. She also had a scraping from the tee shirt which was item 1.1. She developed a DNA profile from that scraping which matched Jared Crane as the major

contributor. Petitioner Heath could not be excluded as a minor contributor to that DNA profile. App. 525, ll. 19 – App. 526, ll. 3. The probability that it was Heath’s DNA was 1 in 111. App. 526, ll. 1 – 5.

Ms. Gallman explained that if a person cannot be excluded from the DNA evidence, that means “there is information that says that could possibly belong to them.” She could not exclude that person’s DNA from the DNA mixture. However, she explained, that if she examined each of the DNA loci, and the person’s DNA was not there, then that person was excluded. App. 519, ll. 4 – App. 520, ll. 6.

The jury found Petitioner Heath guilty of the lesser included charge of strong armed robbery; of kidnapping; of the lesser included charge of assault and battery in the second degree; criminal conspiracy; and possession of a firearm during the commission of a violent crime. App. 816, ll. 22 – App. 817, ll. 20. The judge sentenced Heath to thirty years on the kidnapping, fifteen years on the strong armed robbery, five years on criminal conspiracy, and three years on assault and battery second degree. All were to run concurrent. App. 827, ll. 24 – App. 828, ll. 8.

Petitioner Heath filed a notice of appeal which was perfected by the Division of Appellate Defense of the Commission on Indigent Defense. The Court of Appeals affirmed Heath’s convictions on October 14, 2015. State v. Heath, Op. No. 2015-UP-487 (Ct. App. filed October 14, 2015). App. 899.

Petitioner Heath filed an application for post-conviction relief (PCR) on November 24, 2015. The state filed a return about June 23, 2016. An evidentiary hearing was held on January 31, 2017 before the Honorable Mark Hayes. Petitioner Heath was represented by Leah B. Moody, and the state was represented by Justin James Hunter. App. 852.

At his PCR hearing, Petitioner Heath testified that he wanted a new trial or his sentence vacated because his trial attorney was ineffective. App. 856, ll. 22 – App. 858, ll. 11. He told his trial attorney that he did not commit this crime and he was ready to go to trial. App. 861, ll. 8 – 14. Heath explained that his DNA was not found anywhere in the case. However, he believed that his trial attorney was ineffective because he did not call an expert to fully explain to the jury and help them understand the DNA results. He said he was not a match but the prosecutor tainted the jury because he indicated that there was a chance that the DNA matched Heath. If Heath had had an expert testify about the DNA, it would have helped the jury have a better understanding of the “situation.” App. 875, ll. 3 – 18.

Trial counsel testified that he cross-examined the DNA expert “extensively” about the difference between someone who cannot be excluded and someone who was a match to the DNA. He believed that the difference between the numbers for the victim and Heath were so dramatic that the jury understood that they were not able to find a matching DNA for Heath. App. 879, ll. 23 – App. 880, ll. 20.

The PCR judge issued an order on April 17, 2017 denying Heath’s PCR application and dismissing it with prejudice. App. 898 – App. 908. The judge found as a “matter of general impression” that trial counsel’s testimony was credible and “persuasive” on all matters. App. 900. The judge found that Petitioner Heath failed to show that trial counsel was ineffective because trial counsel cross-examined extensively the DNA expert concerning the possibility of a link between the DNA evidence and Heath. Because Heath failed to call an expert witness to testify at the PCR hearing, Heath failed to show that the result of the trial would have been different. The judge dismissed this allegation. App. 907.

Heath filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for not presenting an expert to clarify at trial the difference between a DNA finding that a person “cannot be excluded” and a person who was a “match” to the DNA because Petitioner Heath was determined to not be excluded.

In Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991), the Supreme Court found trial counsel ineffective for failing to subpoena a witness who would have testified that he saw the defendant leaving a lounge 15 minutes prior to conclusion of the rape of the victim in her bed. Martinez was convicted of criminal sexual conduct and first degree burglary in the incident. The Supreme Court reversed and remanded for a new trial.

In Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994), the defendant was convicted of receiving stolen goods. The defendant’s son and boyfriend were in jail on unrelated charges. The defendant bailed them out of jail by pawning stolen items that she did not know were stolen. Six days later the son and boyfriend were arrested for the burglary offense related to the stolen goods. Trial counsel failed to introduce evidence that the son and boyfriend were in jail on unrelated charges. The Court found that there was a reasonable probability that the result of the trial would have been different if trial counsel had introduced evidence regarding the unrelated charges for which the boyfriend and son were in jail when the defendant sold the goods.

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*; Butler v. State, *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 a probability 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).

Trial counsel was ineffective for not calling an expert witness to clarify in depth to the jury the difference between a person being excluded from the DNA and a person being an actual match to the DNA. Trial counsel's cross-examination of the DNA expert, Lilly Gallman, did not thoroughly explain this difference to the jury. App. 528, ll. 1 – App. 550, ll. 25. There was a reasonable probability that the result of the trial would have been different if the jury understood the minimal possibility of Heath's DNA being present.

CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences reversed, and his case remanded for a new trial.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of December, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable J. Mark Hayes, Circuit Court Judge

DANTONYO ANDROPULIS HEATH,

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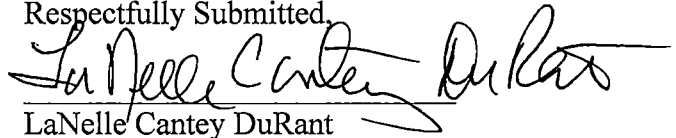
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dantonyo Heath states:

1. She is 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 J. Mark Hayes, which was held on January 31, 2017, 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 Dantonyo Heath.

Respectfully Submitted,



LaNelle Cantey DuRant

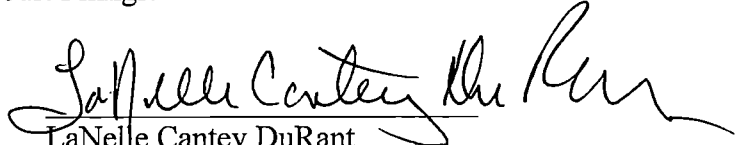
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of December, 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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This 12th day of December, 2017.

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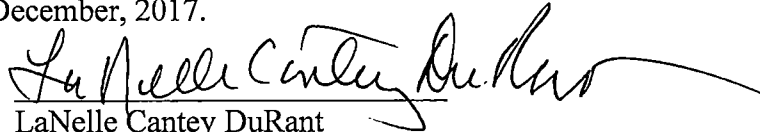
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RESPONDENT

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 Justin J. Hunter, 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 Dantonyo Heath, #263884, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of December, 2017.



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

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

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.