

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Michael G. Nettles, Circuit Court Judge

MELVIN SAMUEL HOLMES,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001052

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT
PETITIONER

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not challenging the validity of the search warrant which possibly had a questionable address for the place to be searched which made Petitioner Holmes’ guilty plea unknowingly and involuntarily entered. 5

CONCLUSION 7

PETITION TO BE RELIEVED AS COUNSEL 8

ISSUE PRESENTED

Did the PCR court err in not finding plea counsel ineffective for not challenging the validity of the search warrant which possibly had a questionable address for the place to be searched which made Petitioner Holmes' guilty plea unknowingly and involuntarily entered?

STATEMENT

In December 2012, a drug investigation was conducted of Petitioner Holmes and his brother, Ahmad Holmes in Beaufort County based on telephone calls made by a confidential informant (CI) to the telephone number of Petitioner. As a result three controlled drug buys were made by Petitioner Holmes and his brother, Ahmad. App. 10, ll. 18 – App. 11, ll. 2; App. 67, ll. 24 – App. 68, ll. 9. Petitioner Holmes was on an electronic monitor at the time and so was confined to his home. However, his brother delivered the drugs to the CI for the controlled buy. App. 10, ll. 21 – App. 11, ll. 2.

A search warrant was obtained on January 5, 2013 and executed on January 11, 2013 on the residence of Petitioner Holmes. He was located in his bedroom as it was 4:58 in the morning. Found in his bedroom were 62.31 grams of crack. Most of it was packaged in fifteen baggies. DNA testing was done on the bags of crack and Petitioner Holmes' DNA was found on the fifteen bags of crack and on the scale next to his bed. App. 11, ll. 3 – 25.

On April 18, 2013, the Beaufort County Grand Jury indicted Petitioner Holmes on the charges of trafficking in cocaine base between 28 to 100 grams, and possession of a weapon during the commission of a violent crime. App. 96 – app. 101. On December 15, 2014, Holmes appeared before the Honorable Edgar W. Dickson and entered a guilty plea to the two indicted charges. Holmes was represented by Jared Newman, and the state was represented by Hunter Swanson. App. 1; App. 3, ll. 1 – 23.

During his plea, the judge asked Holmes if he were pleading freely and voluntarily. Holmes responded: “Not really.” App. 8, ll. 1 – 8. The judge then told Holmes that if he were not pleading freely and voluntarily, then he would not have a guilty plea. Holmes then said to the court:

I mean, yeah, I want to plead. Because if I don't plead, then I'm going to have to be forced to go to trial without a lawyer, so I'm pleading.

App. 8, ll. 6 – 14.

The judge sentenced Petitioner Holmes to ten years on the trafficking crack, and five years on the gun charge. Both were to run concurrent. App. 18, ll 6 – 23.

Holmes did not appeal his convictions nor sentences. App. 87. On May 13, 2015, Holmes filed an application for post-conviction relief (PCR). App. 27. The state filed a return on February 3, 2016. App. 33. An evidentiary hearing was held on October 17, 2016 before the Honorable Michael G. Nettles. App. 35. Petitioner Holmes was represented by James K. Falk, and the state was represented by Ruston Neely. App. 36.

At his PCR hearing, the PCR attorney told the court initially that Holmes “had concerns on the day of the plea going forward as he felt as though he was forced into accepting a guilty plea because his lawyer was not representing his best interests.” Counsel said that Petitioner Holmes felt that his plea attorney failed to challenge the search warrant for the residence that was the basis for his arrest. App. 40, ll. 1 – 22.

Petitioner Holmes testified that he had tried to “fire” his attorney because he was not acting in Holmes’ best interests. However, Holmes said that Judge Mullen told him that if he fired his attorney, then he would have to go to trial by himself and she would revoke his bond. Holmes said that he felt that his “back was against the wall, and he did not have a choice.”

App. 52, ll. 1 – App. 53, ll. 2.

Holmes continued to testify that he had concerns about the search warrant because the address listed “was not me nor my brother’s address.” When he spoke to his attorney about it,

his attorney told him that “the search warrant was no good.” However, his attorney never challenged the search warrant and did not try to suppress it. App. 55, ll. 1 – 21.

Plea counsel testified at the PCR hearing that he did discuss the search warrant with Holmes. At first, he thought there may be problems with the warrant. When he received the warrant, he saw that the officers “presented” the search warrant within 72 hours of the last of three drug sales for the residence. Counsel said that in his opinion, the search warrant was “absolutely valid.” App. 67, ll. 6 - App. 68, ll. 20. Counsel admitted that if they had gone to trial, he would have made a motion to “attack the search warrant.” That would have preserved the issue for appeal. App. 76, ll 19 – 25.

Counsel also admitted that he told Holmes that the evidence against Holmes was overwhelming and it would be best for him to enter a guilty plea. Counsel said that Holmes agreed with him. App. 70, ll. 8 – 24.

The PCR judge issued an order on December 28, 2016 denying Holmes’ PCR application and dismissing it with prejudice. App. 86 – App. 92. The judge found Petitioner Holmes’ testimony regarding the lack of voluntariness of his guilty plea to be not credible. The judge found that Holmes entered his guilty plea freely and voluntarily. App. 89.

The judge also found Holmes’ allegation about the search warrant to be “without merit.” The judge wrote that Holmes had waived his right to challenge the search warrant after plea counsel had discussed the warrant with Holmes. App. 90.

Holmes filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not challenging the validity of the search warrant which possibly had a questionable address for the place to be searched which made Petitioner Holmes' 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 challenge the validity of the search warrant. If the search warrant were not valid, then there was a reasonable probability that the drugs would have been suppressed, and there would likely not have been sufficient evidence to convict Petitioner Holmes. Plea counsel provided conflicting testimony at the PCR hearing. He said that in his opinion, the search was “absolutely valid.” App. 67, ll. 6-App. 68, ll. 20. Then he admitted that if they had gone to trial, he would have made a motion to “attack the search warrant.” App. 76, ll. 19-25. This conflicting testimony showed lack of credibility of plea counsel’s testimony and actions.

The PCR judge should have found plea counsel ineffective for not challenging the search warrant which would have preserved the issue for appeal and allowed the appellate court to decide.

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 14th day of December, 2017.

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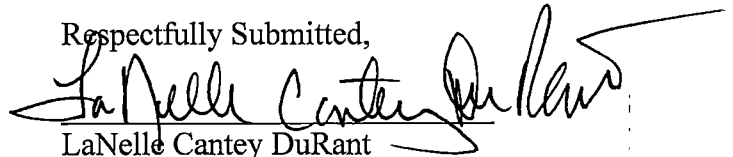
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Melvin Samuel Holmes 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 Michael G. Nettles, which was held on October 17, 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 Melvin Samuel Holmes.

Respectfully Submitted,



LaNelle Cantey DuRant

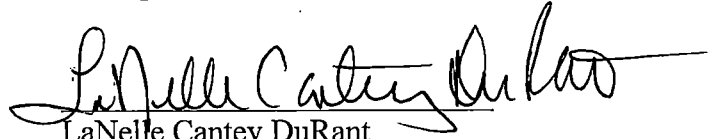
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th 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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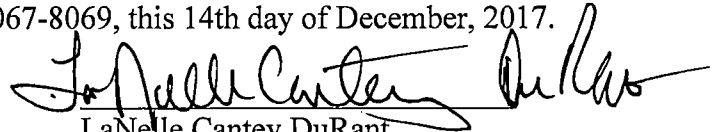
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CERTIFICATE OF SERVICE

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 Ruston Neely, 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 Melvin Samuel Holmes, #310276, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 14th day of December, 2017.

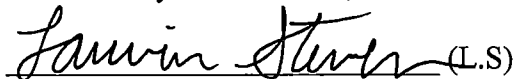


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of December, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.