STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dillon County

Honorable Thomas A. Russo, Circuit Court Judge

JOHNNY JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000849

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the solicitor's comments in his closing argument to the jury that in the "war on drugs" the jury was to send a message "up and down the East Coast of this Nation" that drugs would not be tolerated on the highways of this county which was prejudicial to Petitioner because the solicitor was urging the jury to convict Petitioner Jones in order to protect community values?

STATEMENT

On February 28, 2006, Johnny Jones was a passenger in a car traveling on Interstate -95 in Dillon County. Artie Burns, the driver, swerved a "little bit" across the road lines. Sergeant David Lane, who was patrolling the interstates for safety as part of his duties with the "Interstate Criminal Enforcement" (ICE), stopped the car Burns was driving. As Sergeant Lane asked questions of both the driver and Jones, he became suspicious when their answers were not consistent. He asked the driver if he could search the car, and Burns, the driver said yes. App. 153, ll. 8 – Ap. 155, ll. 25; App. 170, ll 19 – App. 171, ll. 25.

When Sergeant Lane checked the trunk, he found a bag of cocaine. At that point, he pulled his weapon and ordered the two men to the ground. When backup arrived and the search continued, another bag of cocaine with two smaller bags in it was found. The total weight of the cocaine was 138.68 grams. App. 156, ll. 1 – 25.

In May 2006, the Dillon County Grand Jury indicted Petitioner Jones for trafficking in cocaine 100 grams or more but less than 200 grams. App. 527-App. 528. On October 17-20, 2006, Petitioner Jones and his co-defendant, Artie Burns, proceeded to trial before the Honorable John L. Breeden, Jr. Jones was represented by Lois McMillan, and co-defendant Burns was represented by David Watson. The state was represented by Mary Johnson-Lee and Kinard Redmond. App. 1.

During the trial, the solicitor in his closing argument, stated that there was a "war on drugs" that had been going on for a long time. He argued that Sergeant David Lane was the "first line of defense" in this war: "to help ensure that individuals such as these defendants do not have the opportunity to traffic and transport their poison and infect the bloodstream of this country." App. 336, ll. 4 – 12.

The solicitor then told the jury:

> But guess who the last front, the final front in that particular war is, Ladies and Gentlemen? That would be you. This is where the battle lines are drawn. But yet this is where the battle itself culminates with you, Ladies and Gentlemen. Because here today with your verdict we have the opportunity to send a message loud and clear up and down the east coast of this nation; we will not tolerate the highways in our county to be utilized to transport this poison.
>
> And, Ladies and Gentlemen, I assure you, that message will be heard loudly, it will be heard clearly. And again, individuals such as these defendants will know full well that we ain't going to take it anymore. We are not going to take your transporting and trafficking this poison through our county anymore.

App. 336, ll. 13 – App. 337, ll. 2.

There was no objection made by defense counsel. App. 336, ll. 4 – App. 337, ll. 11. The jury found Petitioner Jones and his co-defendant, Burns, guilty as indicted. App. 369, ll. 9 – 24. The judge sentenced Jones and his co-defendant to the mandatory twenty-five years and a $50,000 fine. App. 419, ll. 4 – 25.

Petitioner Jones filed a notice of appeal which was perfected by the Division of Appellate Defense of the Commission on Indigent Defense. App. 533. The Court of Appeals affirmed Jones' conviction and sentence on December 18, 2008. State v. Jones, Op. No. 2008-UP-715 (Ct. App. filed December 18, 2008). App. 550.

On May 6, 2011, Petitioner Jones filed an application for post-conviction relief (PCR). App. 422. The state filed a return on October 19, 2011. App. 446. An evidentiary hearing was held on July 21, 2014 before the Honorable Thomas A. Russo. Petitioner Jones was represented by Tristan Shaffer, and the state was represented by J. Thomas. App. 451.

At the PCR hearing, Jones' PCR attorney told the judge that he thought he had filed a "Supplemental Grounds for Post Conviction Relief" which he presented to the court. App. 454, ll. 23 – App. 455, ll. 16.

The solicitor who prosecuted Jones' case, testified at the PCR hearing that he remembered discussing a plea offer with the trial attorney but it was not written. He thought it may have been for eight years, but he could not remember if he specifically made an offer. He said that the trial attorney had told him that Jones wanted a trial. App. 456, ll. 15 – 22; App. 458, ll. 6 – App. 459, ll. 18; App. 460, ll. 4 – App. 461, ll. 25.

Jones' trial attorney testified that her trial strategy was to have the drugs suppressed as to Jones based on the Pichardo[1] case which was a suppression case. She felt "very strongly" that the judge would rule in Jones' favor because he was the passenger. However, the judge denied the pretrial motion. App.465, ll. 11 – App. 467, ll. 25.

The PCR attorney had trial counsel read from the solicitor's closing argument in the trial transcript where the solicitor argued about the "war on drugs." Trial counsel admitted that she found that argument "objectionable now" as she looked back, but admitted that she did not object to it. She said that she had read a case in the last year that held that this type of comment by the solicitor was grounds for reversal. However she could not remember the name of the case. She pointed out that that the solicitor's argument "put an onerous burden on the jury to keep the county clean instead of focusing on Johnny Jones." App. 473, ll. 19 - App. 475, ll. 24.

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[1] State v. Pichardo, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005) where Court of Appeals affirmed the circuit court's granting of motion to suppress evidence from search of vehicle because the deputy did not have reasonable suspicion to further detain defendants and the deputy's encounter after traffic stop and issuance of warning was a seizure.

On cross examination, trial counsel found a note that she wrote on July 5 that read: "Five years plea to trafficking first." She could only assume that she did discuss that offer with Jones. App. 478, ll. 3 – 12.

Petitioner Jones testified that trial counsel never addressed him with a plea offer. App. 485, ll. 6 -23. If he had known about the eight year plea offer, he would have taken it. App. 488, ll. 1 – 22. He said that twenty-five years was excessive for the crime for which he was convicted. App. 489, ll. 7 – 14.

The PCR judge issued an order on December 17, 2014 denying Jones' PCR and dismissing it with prejudice. App. 515 – App. 528. Regarding the issue of trial counsel's failure to convey a plea offer, the judge found the testimony of trial counsel and the solicitor to be credible, but found Jones' testimony to be not credible. App. 522.

The judge found that Jones failed to meet burden of proof that trial counsel was ineffective for failing to object to the solicitor's comments in his closing argument about the "war on drugs." The judge wrote that because trial counsel had objected to the solicitor's comments in his closing argument defending law enforcement which was overruled, trial counsel was not ineffective for not objecting later to the solicitor's comments about the "war" in his closing "because the trial court had already allowed such references." App. 520.

The judge also found that Jones was not prejudiced by trial counsel's failure to object the second time to the solicitor's closing argument because he said that even "improper closing arguments may be harmless if viewed in the context of the entire record they did not so infect the trial with unfairness to offend due process." The judge found that the solicitor's comments did not "rise to such a level." App. 520. For his argument, PCR counsel had relied on the case of State v. Liberte, 336 S.C. 648, 655-56, 521 S.E.2d 744, 748 (Ct. App. 1999) which the judge

cited as standing for the proposition that comments about the "war on drugs" were improper, Liberte's case was reversed because the "improper argument invited the jury to disregard the reasonable doubt standard." The judge wrote that the solicitor in Jones' case did not "directly argue that Jones was using the reasonable doubt standard to protect himself from conviction." The judge found that the "solicitor's comments did not infect the trial with unfairness as to require reversal." The judge found that Jones had not shown that he was prejudiced by trial counsel's failure to object. App. 520 – App. 521.

On December 20, 2016, Judge Roger E. Henderson issued an order granting a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 529 – App. 532. Judge Henderson found that Jones had not voluntarily waived his right to an appeal of the dismissal of his PCR application. Judge Henderson explained that PCR counsel failed to place the order of dismissal in Jones' file. Therefore, Jones was never notified of the decision of the PCR court and missed the deadline for filing an appeal. App. 535 – App. 536.

On April 11, 2017, PCR counsel filed a notice of appeal explaining that he was not aware when the order of dismissal was mailed to his office. He received the order granting the Austin appeal on March 13, 2017. App. 533

This petition for a writ of certiorari pursuant to Austin is being filed simultaneously with a petition for a writ of certiorari.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to the solicitor's comments in his closing argument to the jury that in the "war on drugs" the jury was to send a message "up and down the East Coast of this Nation" that drugs would not be tolerated on the highways of this county which was prejudicial to Petitioner because the solicitor was urging the jury to convict Petitioner Jones in order to protect community values.

In State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999), the Court of Appeals held that improper comments by the prosecutor in his closing argument required reversal. Liberte was on trial for conspiracy to traffic in cocaine. The prosecutor in that case in closing asked the jury to consider whether the judge's instructions about reasonable doubt were being used as a "sword to attack law and order, to attack law enforcement, to attack people who were trying to keep drugs off of our streets." The Court wrote that those comments were calculated to appeal to the jury's passions and prejudices by playing on their fear of the impact of drugs on society. The Court of Appeals stated:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

State v. Liberte, id.

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).

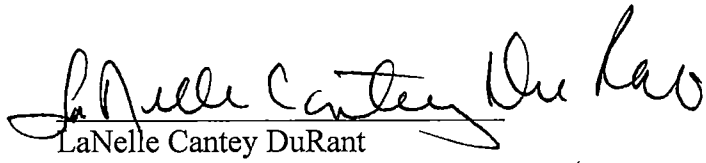
A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The PCR court erred in not finding trial counsel ineffective for not objecting to the closing argument. Trial counsel admitted with her own words at the PCR hearing that those comments about the "war on drugs" by the solicitor in his closing argument were objectionable. Those comments were meant to incite the passions and prejudices of the jurors. The solicitor telling the jury that they had the opportunity to send a message up and down the East Coast of our Nation that the poison of drugs would not be tolerated was urging the jury to convict Jones to protect community values and solve the social problem of illegal drugs. That was a totally irrelevant reason to convict Jones and was extremely prejudicial to him.

The PCR judge found that because trial counsel had objected once to the solicitor's argument about law enforcement, there was no need to object again. However, an objection about defending law enforcement was very different from asking the jury to convict to protect community values and correct a social problem. This was a very different issue.

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 11th day of January, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari pursuant to Austin v. State in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari pursuant to Austin v. State has been served on Johnny Jones, #318253, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 11th day of January, 2018.

LaNelle Cantey DuRant
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 11th day of January, 2018.

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

ATTORNEY FOR PETITIONER