

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

SENIOR JENKINS,

ORIGINAL

RECEIVED

MAR 08 2018

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001821

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

INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not ensuring that Petitioner Jenkins understood that his indictment charged him with a third drug offense which he did not understand until the guilty plea hearing. 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 ensuring that Petitioner Jenkins understood that his indictment charged him with a third drug offense which he did not understand until the guilty plea hearing?

STATEMENT

On December 1, 2012, Petitioner Jenkins met with an undercover City of Charleston police officer in the area of Rutledge Avenue and Congress Street. Petitioner Jenkins sold .2 grams of a drug that field tested for cocaine base known as crack to the undercover officer. The transaction was recorded. App. 5, ll. 24 – App. 6, ll. 7.

On April 1, 2013, the Charleston County Grand Jury indicted Jenkins on the charge of distribution of cocaine base. App. 103-App. 104. On August 28, 2014, Petitioner Jenkins appeared before the Honorable Donald B. Hocker and entered a guilty plea to distribution of cocaine base second offense. Jenkins was represented by Donna K. Taylor, and the state was represented by Kelley Young. App. 1.

At the guilty plea, the state told the judge that Jenkins was pleading to the lesser included charge of distribution of cocaine base second offense with no recommendation by the state. The judge then repeated to plea counsel that Jenkins was pleading to distribution of cocaine base “which was actually a reduced charge from a third to a second.” Plea counsel responded that Jenkins did wish to plead guilty to that charge and she agreed with his decision. App. 3, ll. 1 – 25.

During the mitigation phase of the plea, plea counsel told the court that Petitioner Jenkins had completed three years of college but started using cocaine and had used it consistently since that time. App. 10, ll. 22 – App. 11, ll. 8. Jenkins was thirty-nine at the time of the plea. App. 4, ll. 1 – 20. Plea counsel continued to tell the court that Jenkins had mental health issues since the age of twelve. He was released from the Navy with post-traumatic stress diagnosis. His medical records indicate that much of his substance abuse problem was related to self-medication for the mental health problems. App. 11, ll. 1 -20.

Jenkins' wife, Alicia N. Mangum-Jenkins, addressed the plea court and confirmed that Jenkins had mental health problems. App. 16, ll. 15 – App. 20, ll. 25.

The plea judge told Jenkins that he was looking at the 2010 charges of two counts of distribution of cocaine base and two counts of distribution of cocaine base within the proximity of a school. He received a ten year sentence suspended to four years and two years probation. App. 6, ll. 8 – 20; App. 25, ll. 2 – 14.

The judge then told Jenkins that the state had given him the “benefit of allowing him to plead to a distribution second to avoid the mandatory unsuspendable ten years on a third.” App. 15 – 18.

The judge sentenced Jenkins to seven years incarceration. App. 26, ll. 4 – 9. Jenkins did not appeal his conviction nor sentence. App. 94.

On April 13, 2015, Jenkins filed an application for post-conviction relief (PCR). The state filed a return on November 24, 2015. An evidentiary hearing was held on January 9, 2017, before the Honorable William Seals. Petitioner Jenkins was represented by James Falk, and the state was represented by Alicia Olive. App. 40.

Petitioner Jenkins testified at the hearing that his plea counsel was ineffective for the way she advised him to plead guilty to the lesser included charge when his indictment never stated whether he was charged with a first, second or third offense. When his attorney told him that he had been indicted on a third offense, he was shocked because he had never had a second offense. App. 46, ll. 11, - 23. Therefore, he went into his plea hearing not knowing what his exact charge was. He thought that possession was the lesser included of distribution---not distribution second. App. 49, ll. 1 – App. 52, ll. 24.

Plea counsel testified that she investigated his prior offenses and found a 2006 drug conviction and the drug convictions from 2010. These were the two that made his 2012 charge a third offense. App. 61, ll. 3 – 18. She did not negotiate the plea offer as that was done by a previous attorney. App. 61, ll. 19 – 25. She stated that Jenkins never indicated that he wanted to go to trial. App. 68, ll. 1 – 5.

The first time that she met with Jenkins, he knew he was charged with a third offense. He never denied the drug transactions. App. 62, ll. 20 – 25. Because it was such a tiny amount of crack, the solicitor allowed him to plead to a second offense. App. 63, ll. 1 – 6.

The PCR judge issued an order on August 24, 2017 denying Jenkins' PCR application and dismissing it with prejudice. App. 93 – App. 102. The judge found plea counsel's testimony credible and found Jenkins' testimony not credible. App. 98. The judge wrote that Jenkins failed to meet his burden of proof that his plea counsel was ineffective. He found that the allegations of ineffective assistance of counsel to be without merit. The judge's order provided that plea counsel testified that Jenkins knew he was charged with a third drug offense before his plea based on his 2006 and 2010 drug convictions. App. 100.

Jenkins' PCR attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not ensuring that Petitioner Jenkins understood that his indictment charged him with a third drug offense which he did not understand until the guilty plea hearing.

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).

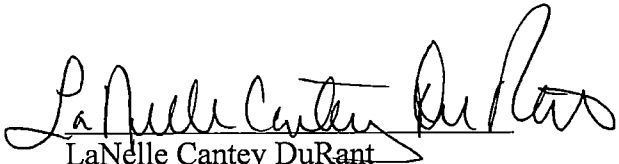
Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must

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 failing to find plea counsel ineffective for not ensuring that Jenkins understood the charge he was pleading guilty to before the plea hearing. Jenkins’ testimony revealed that he was confused about the plea. It was prejudicial to him for him to enter a plea hearing not sure of the charge to which he was pleading.

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 8th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

SENIOR JENKINS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

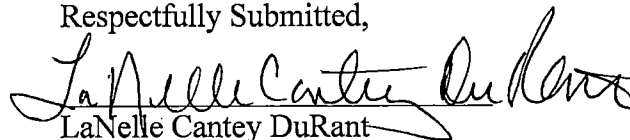
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Senior Jenkins 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 William H. Seals, which was held on January 9, 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 Senior Jenkins.

Respectfully Submitted,



LaNelle Cantey DuRant

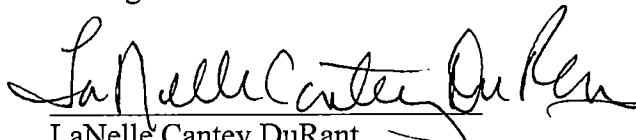
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2018.

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."



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

This 8th day of March, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————
Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

—————
SENIOR JENKINS,

PETITIONER


V.

STATE OF SOUTH CAROLINA,

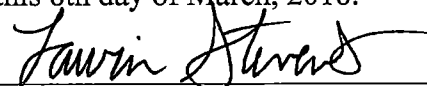
RESPONDENT

—————
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 Rasheeda Cleveland, 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 Senior Jenkins, at 2682 Louis Drive, North Charleston, SC 29405, this 8th day of March, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of March, 2018.

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