

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable William H. Seals, Circuit Court Judge

CHRISTOPHER ALLEN BOLING,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002157

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to request a jury instruction on a lesser included offense to burglary first degree?

STATEMENT

On January 1, 2011, Joseph Owens related to law enforcement that he was at home with his girlfriend after the New Year's Eve party was over. There was a knock at the door around 1:00 in the morning and Tad Dempsey, whom Owens knew, was at the door offering to sell Owens a cell phone as Owens worked at a pawn shop. Owens was not interested. Suddenly, the front door of the mobile home was kicked in, and Christopher Boling and Kevin Russell, whom Owens also knew, entered. App. 69, ll. 1 – App. 70, ll. 7; App. 77, ll. 3 – 5; App. 78, ll. 24 – App. 79, ll. 14; App. 81, ll. 15 – App. 82, ll. 3.

The state claimed that Boling and Russell started assaulting Tad Dempsey and Owens, who decided to fight back. Boling and Russell left. Owens had a neighbor call the police. App. 70, ll. 6 – App. 71, ll. 3; App. 88, ll. 11 – App. 89, ll. 9. Later, Boling and Russell returned to Owens' home. According to Owens, Russell pointed a chrome revolver at Owens head and said he was going to mess him up. Boling was right behind Russell, and allegedly told Russell to “go ahead and do him—mess him up.” Owens got both of the men through the front door and onto the ground. Owens thought the two men seemed “high on something pretty strong.” App. 91, ll. 1 - App. 92, ll. 25.

The police arrived and Boling and Russell took off. Owens heard a gunshot, but did not see anything. App. 93, ll. 1 – 24. Deputy Michael Buenting with the Charleston County Sheriff's Office responded to the 911 call. App. 130, ll. 1 – App. 131, ll. 23. After he identified himself to the two men whom he found near the scene, he claimed that he was shot at as the two men ran. The officer said that he heard two shots. App. 134, ll. 22 – App. 138, ll. 24. He chased the men and ultimately caught Boling. App. 138, ll. 15 – 23.

The co-defendant Russell was arrested that night as he was found in a closet at his house. App. 141, ll. 1 – 23.

On April 4, 2011, the Charleston County Grand Jury indicted Boling on the charge of burglary first degree. App. 376 – App. 377; App. 361. On July 28 -30, 2014, Petitioner Boling proceeded to trial before the Honorable Deadra L. Jefferson and a jury. Petitioner Boling was represented by William Runyon, and the state was represented by Emmanuel Ferguson and Jennifer Shealy. App. 1.

Defense counsel told the trial judge that he had no pretrial motions. App. 4, ll. 22 – App. 5, ll. 3. During the charge conference, after the judge told the parties what jury instructions she planned to present, defense counsel presented no requests. App. 220, ll. 1 – App. 221, ll. 20. When the judge asked the attorneys if they had any exceptions to the jury charges, defense counsel replied:

No exceptions or additions, Judge.

App. 221, ll. 20 – 24.

The judge gave no jury charges on any lesser included offenses of burglary first degree. App. 249, l. 1 – App. 266, ll. 9. The jury found Petitioner Boling guilty of first degree burglary. App. 279, ll. 1 – App. 280, ll. 6. The trial judge sentenced Petitioner Boling to fifteen years incarceration. App. 299, ll. 10 – 23.

Defense counsel filed a notice of appeal. The appeal was perfected with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals affirmed Boling's conviction and sentence. State v. Christopher Boling, Op. No. 1025-UP-374 (Ct. App. filed July 29, 2015).

On August 21, 2015, Petitioner Boling filed an application for post-conviction relief (PCR). The state filed a return on June 2, 2016. Petitioner Boling's PCR attorney filed an amended PCR application on January 4, 2017. An evidentiary hearing was held on January 11, 2017 before the Honorable William Seals. Petitioner Boling was represented by James Falk, and the state was represented by Alicia Olive. App. 319.

At the PCR hearing, Petitioner Boling testified that his trial attorney told him to go to trial because the state did not have enough evidence to prove that he was guilty of burglary first degree. According to Petitioner, his trial attorney told him to turn down the state's offer to plead guilty to burglary second degree violent for fifteen years because he would still have to serve 85%. His attorney never told him that part of the offer meant that he would have to testify against the co-defendant Russell. App. 352, ll. 5 – App. 353, ll. 22; App. 356, ll. 15 – 23.

Boling testified that his trial attorney never discussed with him his trial strategy nor whether he should give the jury the chance to convict him of a lesser-included offense. App. 355, ll. 16 – 22.

Trial counsel testified at the PCR hearing that Petitioner Boling told him that Boling never saw co-defendant Russell with a gun. Boling explained to his attorney that he and Russell went to Owens' house to get Russell's cell phone because it had been taken from Russell. Boling claimed that they were "let into the house voluntarily." Trial counsel explained that this was not the typical burglary case because there was no intent to commit a crime when Boling and Russell entered the home. Counsel believed it was an aggravated trespass and aggravated assault case but not a burglary case. App. 322, ll. 3 – App. 325, ll. 24; App. 329, ll. 6 – 23.

Trial counsel testified that he told Petitioner Boling that he should take the plea offer. App. 334, ll. 9 – App. 335, ll. 9. Counsel’s trial strategy was that Boling and Russell made a consensual entry into the house. App. 339, ll. 1 -24.

Trial counsel testified that he “would have been more than happy to get a charge of burglary second.” He admitted that he did not ask for that. He said: “To be quite candid, we didn’t ask for that.” App. 340, ll. 6 – 13. When asked if that was part of an “all-or-nothing” trial strategy, counsel responded that it was. App. 340, ll. 14- App. 341, ll. 25.

The PCR judge issued an order on September 24, 2017 denying Petitioner Boling’s PCR application and dismissing it with prejudice. App. 361 – App. 372. The PCR judge found that Petitioner Boling failed to “carry his burden” regarding any of his allegations of ineffective assistance of counsel. The judge found that trial counsel’s reasoning for not requesting jury instructions on lesser included offenses was a “valid trial strategy.” The judge found that trial counsel had testified that he did not want to risk the jury “compromising” on a second degree or third degree burglary rather than acquitting Boling. The judge found that was a valid trial strategy. App. 370 – App. 371.

Boling’s PCR attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to request a jury instruction on a lesser included offense of burglary first degree.

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.

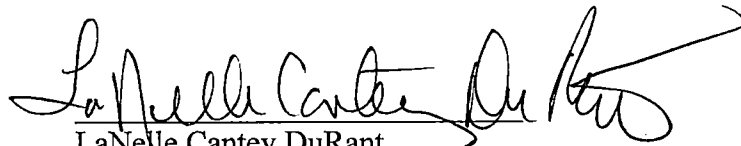
Failure to request proper jury instructions constitutes ineffective assistance of counsel. Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991).

The PCR court erred in not finding trial counsel ineffective for failing to request a lesser included jury charge for Petitioner Boling. The state had made a plea offer for burglary second degree so obviously the state believed there was evidence of the lesser included. Boling was

prejudiced because he would have been required to serve less time on a burglary second instead of the 85% required for burglary first degree even though he received only a fifteen year sentence on the burglary first.

CONCLUSION

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

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

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable William H. Seals, Circuit Court Judge

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V.

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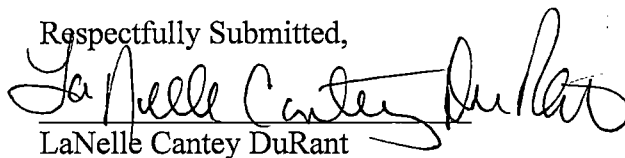
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Allen Boling 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 11, 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 Christopher Allen Boling.

Respectfully Submitted,



LaNelle Cantey DuRant

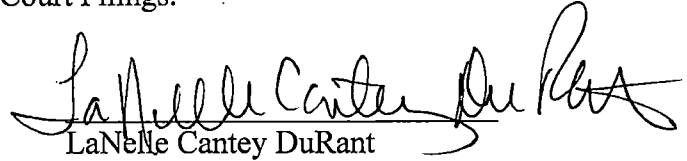
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of April, 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

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Defense
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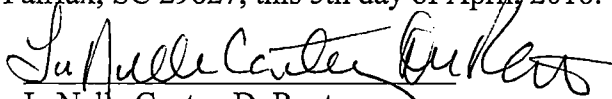
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RESPONDENT

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 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 Christopher Allen Boling, #360859, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 5th day of April 2018.

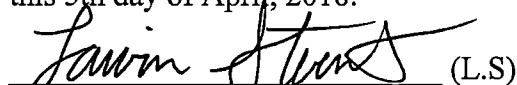


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of April, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2028.