

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

Honorable R. Lawton McIntosh, Circuit Court Judge

JOHN EDWARD HUNSUCKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001979

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
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The PCR court erred in not finding plea counsel ineffective for not objecting to the plea judge changing Petitioner’s negotiated plea from non-violent attempted armed robbery to violent armed robbery by scratching out the non-violent box on the sentencing sheet and marking the violent box which was prejudicial to Petitioner Hunsucker because it affected his parole eligibility.....6

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ISSUE PRESENTED

Did the PCR court err in not finding plea counsel ineffective for not objecting to the plea judge changing Petitioner's negotiated plea from non-violent attempted armed robbery to violent armed robbery by scratching out the non-violent box on the sentencing sheet and marking the violent box which was prejudicial to Petitioner Hunsucker because it affected his parole eligibility?

STATEMENT

On March 11, 2015, Petitioner Hunsucker entered a CVS store and started to purchase candy, but instead pulled a pistol and demanded money. He received \$250, and then left the store. The store clerk called 911. Law enforcement received the store's surveillance tape and put it on local media. Hunsucker was identified through the response to media exposure as the robber. App. 89; App. 11, ll.1 – 17. When law enforcement pinged Hunsucker's phone, he was located close to the robbery scene, and was arrested. App. 11, ll. 15 – 21.

On April 28, 2016, Hunsucker appeared before the Honorable Daniel D. Hall and entered a guilty plea to the lesser included charge of attempted armed robbery. He waived presentment to the grand jury. App. 4, ll. 1 – 17; App. 5, l. 25 – App. 6, ll. 4. Hunsucker was represented by Michael Brown, and the state was represented by Christopher Epting. App. 1. The state told the judge that it was a negotiated sentence with a cap of a concurrent seven years. Hunsucker also pled guilty to a forgery over \$10,000 charge. App. 4, ll. 17 – 19.

Near the beginning of the plea, the judge looked at the sentencing sheet and told Petitioner Hunsucker that he was going to change the sentencing sheet because it was marked non-violent on the attempted armed robbery charge. The judge stated that attempted armed robbery was a violent, most-serious offense. The judge said he was going to "scratch through that" and check violent and most serious. There was no objection by defense counsel. App. 6, ll.1-25.

During mitigation, defense counsel described for the court the life Hunsucker had before he developed an addiction to pain medicine following surgery on his leg when a rod was placed in his leg. He used oxycontin and hydrocodone and later heroin to ease his pain. App. 14, ll. 6 –

25. Before that, he had been active in the lives of his children and was still married. He was active in his church and maintained his own company. App. 13, ll. 1 – App. 14, ll. 5.

The judge sentenced Hunsucker to six years on the attempted armed robbery and time served on the forgery. App. 24, ll. 5 – 12.

Hunsucker did not appeal his convictions nor sentences. App. 82.

On November 2, 2016, Petitioner Hunsucker filed an application for post-conviction relief (PCR). The state filed a return on March 2, 2017. App. 82. An evidentiary hearing was held on August 1, 2017 before the Honorable R. Lawton McIntosh. Hunsucker was represented by Leah Moody, and the state was represented by Justin Hunter. App. 45.

Petitioner Hunsucker testified at the PCR hearing that the plea judge changed Hunsucker's negotiated sentence by changing the charge from non-violent to violent. His plea counsel was ineffective because he did not object. App. 53, ll. 10 – App. 56, ll. 23. Hunsucker thought he was pleading to a non-violent charge until the judge changed it during the guilty plea hearing. That was when he learned it was a violent charge. App.53, ll. 13 – App. 54, ll. 5.

Hunsucker testified that he signed the sentencing sheet before the plea, and it was marked non-violent at that time. He signed the plea waiver form which did have the charge marked violent but he did not read it because the attorney said the information was like the sentencing sheet. App. 52, ll. 1 – App. 56, ll. 7.

Plea counsel testified that he was retained by Petitioner Hunsucker to represent him. Counsel explained that Hunsucker had developed a "bad habit" from pain medication and had several other charges that were dismissed after the guilty plea. App. 62, ll. 1 – App. 63, ll. 16.

Plea counsel said he was trying to get the solicitor to allow Hunsucker to plead to strong arm robbery, but the solicitor would not agree. Counsel was positive "no doubt in his mind" that

he told Hunsucker that attempted armed robbery was a most serious, no parole offense. He said: “I don’t know if the exact word ‘violent’ was used or not.” Counsel was not sure that he went over the plea waiver form with Hunsucker. He knew that his assistant, Sean Cronin, signed the plea waiver form. Counsel did not know how the sentencing sheet was initially marked “non-violent.” App. 64, ll. 1- App. 66, ll. 25.

At the hearing, the PCR judge ruled that he denied Hunsucker’s PCR petition because plea counsel “credibility testified” that he advised Hunsucker that attempted armed robbery was a violent charge. And the PCR judge found that according to the plea transcript the plea judge advised Petitioner Hunsucker that the attempted armed robbery was a violent charge. The PCR judge found that: “The change of the sentencing sheet was just an administrative change, and it’s actually initialed by the applicant as well as the fact that he signed the plea waiver form that showed the charge as being violent.” App. 71, ll. 15 – App. 72, ll. 6.

On September 12, 2017, the PCR judge filed an order denying Petitioner Hunsucker’s PCR application and dismissing it with prejudice. App. 82 – App. 87. In his order, the PCR judge found as a “matter of general impression,” that plea counsel’s testimony was credible and persuasive on all matters. App. 84.

The PCR judge found that Petitioner Hunsucker failed to prove that counsel’s actions were ineffective.” The order provided that the record indicated that during the hearing the plea judge informed Petitioner that the sentencing sheet contained a “clerical error” where it listed the offense as non-violent. The plea judge changed the error as shown where he scratched through non-violent and initialed that change he made. App. 85.

The PCR judge found that the plea judge did not “erroneously” change the negotiated plea nor sentence. The judge wrote that all parties understood the plea to be a violent offense.

Therefore, counsel was not ineffective for failing to object. The PCR judge found that Petitioner was not prejudiced as he failed to show that the outcome would have been different. App. 86.

PCR counsel filed a notice of appeal for Hunsucker. This petition follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not objecting to the plea judge changing Petitioner's negotiated plea from non-violent attempted armed robbery to violent armed robbery by scratching out the non-violent box on the sentencing sheet and marking the violent box which was prejudicial to Petitioner Hunsucker because it affected his parole eligibility.

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).

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).

Where a defendant pleads guilty in exchange for trial counsel's promise of a certain sentence, and does not receive that sentence, his guilty plea is invalid. Craddock v. State, 327 S.C. 303, 491 S.E.2d 251 (1997).

The PCR court erred in not finding plea counsel ineffective for not objecting when the plea judge changed Hunsucker's negotiated plea from non-violent to violent. Hunsucker testified that he signed the sentencing sheet before the plea, and the record is clear that the sentencing sheet initially had non-violent marked. Therefore, Hunsucker believed that he was pleading to a non-violent charge of the attempted armed robbery. Plea counsel said he did not review the plea waiver form with Hunsucker as his assistant did that since the assistant signed the form. Hunsucker said he did not read the waiver form as he was told it was basically the same information as the sentencing sheet.

Hunsucker was prejudiced because the violent charge had a high probability of affecting his activities in prison and where he was housed.

CONCLUSION

Based on the above, certiorari should be granted, petitioner's convictions and sentences reversed, and the case remanded.

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable R. Lawton McIntosh, Circuit Court Judge

JOHN EDWARD HUNSUCKER,

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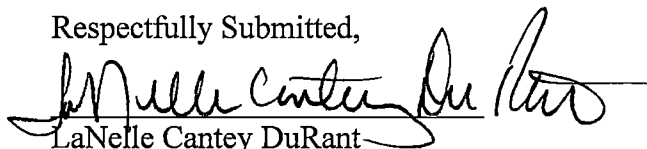
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Edward Hunsucker 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 R. Lawton McIntosh, which was held on August 1, 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 John Edward Hunsucker.

Respectfully Submitted,

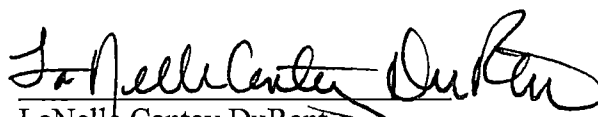


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of June, 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."



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This 5th day of June, 2018.

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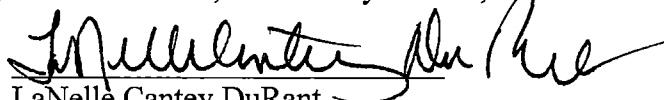
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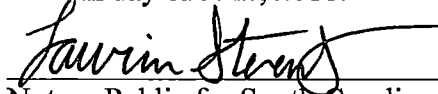
RESPONDENT

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 Megan Harrigan Jameson, 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 John Edward Hunsucker, #368035, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 5th day of June, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

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

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