

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Robin B. Stilwell, Circuit Court Judge

ALONZO COLUMBUS JETER, III,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001777

PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in not finding plea counsel ineffective for failing to challenge the improper enhancement of Petitioner’s 2015 convictions based on Petitioner’s two 2004 convictions for possession of crack which Petitioner believed were treated as one first offense so could not be used for the purpose of enhancement as they were outside the ten year limit and because he pled guilty to both at the same time, and both were marked as first offenses.10

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ISSUE PRESENTED

Did the PCR court err in not finding plea counsel ineffective for failing to challenge the improper enhancement of Petitioner's 2015 convictions based on Petitioner's two 2004 convictions for possession of crack first which Petitioner believed were treated as one first offense so could not be used for the purpose of enhancement as they were outside the ten year limit and because he pled guilty to both at the same time and both were marked as first offenses?

STATEMENT

On April 10, 2014, Petitioner Jeter was a passenger in a car driven by Kimberly McSwain in Cherokee County. Ms. McSwain was stopped for not wearing a seat belt. Ms. McSwain consented to a search of the vehicle. A bag of methamphetamine was found in the vehicle. Jeter as an occupant was searched incident to arrest. A bag of marijuana was found in his sock, and he was charged with possession of marijuana second offense. App. 15, ll. 11 – App. 16, ll. 3; App. 23, ll. 23 -25.

On January 12, 2015, an “undercover operative” with the Sheriff’s Office in Cherokee County purchased methamphetamine from Petitioner Jeter. The incident was caught on audio and video. App. 16, ll. 4 – 10. Again, on January 14, 2015, the “undercover operative” purchased a larger amount of methamphetamine—an “eight ball” – from Petitioner Jeter. Again, the transaction was caught on audio and video. App. 16, ll. 11 – 21.

The undercover sought to purchase a larger amount from Petitioner Jeter which occurred on January 15, 2015. The undercover met with Jeter and purchased 10.4 grams of methamphetamine. The incident again was caught on audio and video. App. 16, ll. 22 – App. 17, ll. 9.

On July 16, 2015, Petitioner Jeter appeared before the Honorable Lee S. Alford and entered guilty pleas to six charges. These charges were: distribution of methamphetamine third offense; distribution of methamphetamine third offense; distribution of methamphetamine within proximity to a playground or school; distribution of methamphetamine within the proximity to a school or playground; trafficking in methamphetamine between ten to twenty-eight grams third offense; and possession of marijuana second offense. App. 4, ll. 4 – App. 5, ll. 6.

Jeter waived presentment to the grand jury on all but the possession of marijuana. App.4, ll. 1-5; App. 7, ll. 10 – App. 8, ll. 10. Jeter was represented by Chris Kennedy, and the state was represented by Cliff Sams. App. 1.

The state told the court that these were negotiated pleas for a guilty plea to the lesser included charge of second offense, and a recommendation for concurrent sentences of fifteen years. App. 4, ll. 6 – App. 5, ll. 18. The judge accepted the negotiated pleas and sentences. App. 8, ll. 17 – App. 15, ll. 10. The state told the court again that Petitioner Jeter had prior convictions that “could have given rise to a third, an enhanced third offense, and these have been knocked down to a second.” App. 20, ll. 8 – 12.

The state then named Jeter’s prior convictions which would enhance his charges to a third offense. These were: a conviction in 2005 of possession of either methamphetamine or crack cocaine; 2013 conviction of a controlled substance second offense. The judge said he thought there were two possessions of crack offenses. The solicitor replied that he “misspoke.” He said: “I believe it was one.” App. 20, ll. 20 – App. 21, ll. 25.

The judge sentenced Jeter to a total incarceration of fifteen years with all charges running concurrent. The sentences were: fifteen years on each of the distribution of methamphetamine as second offenses; fifteen years on the trafficking methamphetamine as a second offense; ten years on each of the proximity charges; and a sentence of time served or a “determinate term” on the possession of marijuana. App. 22, ll. 20 – App. 24, ll. 16.

Jeter did not appeal his guilty plea, convictions nor sentences. App. 175.

On April 28, 2016, Petitioner Jeter filed an application for post-conviction relief (PCR). The state filed a return on November 15, 2016. An evidentiary hearing was held on March 20, 2017 before the Honorable Robin B. Stilwell. Petitioner Jeter was represented by Steven D.

Epps, and the state was represented by Julie Coleman. App. 48. Jeter testified at the PCR hearing that he did plead guilty in October 2004 to a cocaine base charge which for enhancement purposes ended in October 2014. That charge was past the ten year time period for a charge to be used for enhancement of a later charge. Jeter agreed that when the solicitor said at his guilty plea in July 2015 that Jeter had pled guilty to that cocaine base (crack) charge in July 2005, that that statement was incorrect. Therefore, it could not be used to enhance his 2015 charges. App. 58, ll. 17 – App. 59, ll. 25.

Next, Jeter testified that the August 2013 charge which the state also tried to use for enhancement was a guilty plea to possession of marijuana second offense. His PCR attorney stated that marijuana could not be used to enhance his later charges. However, Jeter said that the court used that 2013 marijuana conviction to enhance his 2015 charges. App. 59, ll. 25 – App. 62, ll. 3.

At the time of his 2015 guilty plea, Jeter testified that he had two other methamphetamine charges pending from 2014 but they were *nolle prossed*. Jeter explained that in 2015 he was charged with third offense but the solicitor's office reduced the charges to second offense for his guilty plea. App. 62, ll. 4 – App. 65, ll. 22.

Jeter testified that if he had known then what he knew at his PCR hearing about the underlying charges that would have enhanced his sentences, he would have gone to trial instead of taking a guilty plea. App. 67, ll. 16 – 21. Petitioner Jeter asked the PCR court to grant his PCR so he could return to his original position and have a trial. App. 69, ll. 4 -10.

Plea counsel testified that he had reviewed the video and could see Jeter's face in two screen shots. He believed that the state had accurate charges against Jeter. However, he did believe that charging him with third offense in the first warrant was not "accurate." Counsel

believed that the state had enough to convict Jeter if he went to trial. App. 84, ll. 3 – 25. Counsel knew that the cocaine base charges were from 2004. Counsel testified that his understanding from the state was “that they were going to try the cases individually” which subjected Jeter to a “significant” amount of more time. If he were convicted with consecutive sentences, he probably would have been “subject’ to a LWOP sentence. App. 90, ll. 8 – App. 91, ll. 4.

Counsel recommended that Jeter plead guilty. He testified that Jeter wanted to go to trial on the first charge but Jeter never indicated to counsel that he wanted a trial on the subsequent charges. Jeter never told counsel that he wanted to appeal his sentences. App. 92, ll. 3 – App. 93, ll. 23.

Plea counsel testified that it really did not matter to him that the warrants said that all of the charges were thirds. He said that it did not matter to him if the charges were seconds or thirds if the state was going to try the charges individually. Counsel’s concern was “limiting the risk of the potential amount of time Jeter could receive.” App. 91, ll. 1 – 25.

The judge said he was prepared to deny the PCR application on the first two charges because whether they were treated as first or second offenses, Jeter was sentenced to fifteen years which was within the “allowable penalty for a distribution first offense.” The judge found there was not ineffective assistance of counsel in those two offenses. He continued to find that even if there had been ineffective assistance of counsel, there was no prejudice to Jeter because he was sentenced in accordance with a first offense. App. 113, ll. 1 – 11.

The judge took the decision on the remaining offenses under advisement. He explained that on the trafficking and two proximity charges, Jeter was sentenced as a second and was sentenced more than he would have been on a first offense. App. 113, ll. 11 – App. 114, ll. 22.

The judge said at the close of the hearing, for the state to prepare a proposed order on the first two offenses. App. 114, ll. 25 – App. 115, ll. 21.

On May 1, 2017, the state filed a motion to reopen the record and memorandum in support of denying the post-conviction relief. App. 152- App. 154. Petitioner objected to the motion to reopen the record. App. 174. A second hearing was held on June 30, 2017 before the Honorable Robin B. Stilwell. Again, Petitioner Jeter was represented by Steven D. Epps, and the state was represented by Julie Coleman. App. 120.

At the hearing, the state presented documents, including the sentencing sheets and two indictments, for two convictions for possession of crack first offense that Jeter pled guilty to in October 2004. App. 156 – App. 173. The state argued that they found these two convictions that they were not aware of at the first PCR hearing. App. 121, ll. 15 – 24. The judge took judicial notice of Jeter’s two 2004 convictions. App. 132, ll. 13 – 15.

The state argued that these two convictions were separate events as one occurred on January 30, 2004, and the other occurred September 3, 2004. Although Jeter pled guilty to both the same day - October 12, 2004 - these were two separate convictions with concurrent sentences. Therefore, the state argued that under the statute, these charges were used to “properly enhance Jeter’s 2015 charges.” App. 122, ll. 7 – 23.

PCR counsel argued initially a due process violation of the rights of Jeter for the state to reopen the record. Then counsel argued that at the first hearing, the evidence was that Jeter had only one prior conviction for possession of crack in 2004. Counsel argued that the “enhancement statute provided that a first violation will only serve to enhance when it is faced with another conviction within a ten year period.” App. 124, ll. 1 – 15.

Counsel continued to argue that if Jeter had only that one 2004 conviction, then none of his 2015 charges could have been second offenses as they were all “temporally connected and there was no ten year prior charge that could enhance.” App. 124, ll. 16 – 23. Counsel then argued that reopening the record to allow this other 2004 offense in was prejudicial to Jeter. Second, counsel argued that under the enhancements statute, the 2015 charges should be viewed as a first violation. App. 124, ll. 21 – App. 125, ll. 22.

Petitioner Jeter testified at this second hearing that the two 2004 possession crack charges were supposed to be merged into one conviction. He agreed that he signed the sentencing sheets for both and that both were for possession of crack first offense. That was the agreement and the reason he signed the plea. App. 128, ll. 23 – App. 130, ll. 5. Jeter pointed out that his criminal record had only one charge for possession of cocaine (crack). There were two dates: November 13 which was listed as PWID crack, and the other date was November 18. He claimed that his NCIC record showed only one conviction in 2004. App. 130, ll. 1 – App. 131, ll. 5.

The state argued that their opinion was that one of the two 2004 convictions served as a second offense which would be used to enhance his 2015 charges. Because he pled to second offenses, he could not show any prejudice. App. 135, ll. 1 – 17.

PCR counsel argued that both of the two 2004 convictions were listed as possession of crack first offense. They were more than ten years prior to his conviction on the second charges in 2015. Therefore the 2004 offenses were both first offenses and they were more than ten years before the second charges in 2015. Counsel said there was never a second offense. He argued that the statute’s wording was “interesting and difficult.” App. 135, ll. 19 -App. 136, ll. 20.

The judge questioned if Subsection 4, which said “convicted of a second or subsequent violation of a controlled substance” meant a conviction of a possession second or PWID second

offense or was it a simple adjective describing the number of convictions. The judge determined that it was a matter of “numerical characterization.” The judge thought that was the “simple interpretation” of the statute and the way he had seen it customarily interpreted. App. 136, ll 21 – App. 139, ll. 24.

The judge stated that under his reading of the statute, if a person has a second violation for a drug offense at any time of his life, a subsequent offense would be a third offense. The judge then stated that the only “real room” for disagreement was how to define a second or subsequent offense. He said that “most courts have interpreted that as the numerical number and not the precise charges of which one is convicted.” Therefore, he told Jeter that he had two prior convictions so it would not matter if it was ten years or not. “It would only matter whether there were two and it happened in your lifetime.” App. 146, ll. 1 – App. 147, ll. 24.

On July 24, 2017, Judge Stilwell issued an order denying Petitioner Jeter’s PCR application and dismissing it with prejudice .App. 174 – App. 188. The judge found that plea counsel was not ineffective for failing to challenge the improper enhancement of Jeter’s 2015 charges to a third offense although he pled guilty to a second offense. The judge found the two 2004 convictions for possession of crack cocaine first offense were two separate and distinct convictions because they were several months apart. Therefore, the judge ruled that one of them was a second or subsequent offense which was allowed under the enhancement statute S.C. Code Ann. Section 44-53-470(A) (4). According to the judge, the statute provided that if “the offender had at any time been convicted of a second violation of a controlled substance other than marijuana, it was considered s second offense.” App. 185.

The judge explained in his order that the solicitor at the 2015 guilty plea did use the wrong prior conviction to enhance the 2015 charges. Thee 2013 offense the solicitor used was

for marijuana which could not be used to enhance under the statute. The judge found that Petitioner Jeter was not prejudiced by plea counsel's failure to challenge the enhancement convictions because Jeter did have the proper prior convictions to enhance his charges to "at least" a second offense. The judge denied this allegation and dismissed it with prejudice. App. 185 - App. 186.

Petitioner Jeter timely filed a motion for reconsideration pursuant to Rule 59, SCRCF. App. 193 – App. 208. The PCR judge denied the motion on August 14, 2017. App. 209. Petitioner Jeter's PCR attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for failing to challenge the improper enhancement of Petitioner's 2015 convictions based on Petitioner's two 2004 convictions for possession of crack which Petitioner believed were treated as one first offense so could not be used for the purpose of enhancement as they were outside the ten year limit and because he pled guilty to both at the same time, and both were marked as first offenses.

South Carolina Code Section 44-53-470 (A) (4) provides that an offense is considered a second or subsequent offense if for an offense involving a controlled substance other than marijuana, the offender has at any time been convicted of a second or subsequent violation of a controlled substance offense provision, other than marijuana, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs.

In Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009), the Supreme Court ruled that three armed robberies committed over three day period and which involved three different victims were not one offense for sentencing purposes. The Court held that the issue of the interpretation of a statute is a question of law for the court citing Catawba Indian Tribe of S.C. v State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). The Court also cited Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996), which held that the primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.

Petitioner Jeter's case is distinguished from Bryant's in that Jeter's case concerns only drugs: methamphetamine and crack cocaine. Bryant's case concerns the recidivist statute— Sections 17-25-50 and 17-25-45. The enhancement statute for drugs, Section 44-53-470, does not clarify when two offenses litigated at the same time count as one for enhancement purposes.

The two possession of crack offenses that Jeter pled guilty to in 2004 were treated as one offense by that plea court and the state as evidenced by the sentencing sheets both of which were clearly marked as a first offense. App. 158—App. 161. Both offenses were indicted the same day: September 30, 2004. App. 160- App. 163. Both received the same sentence that ran concurrent. App. 158; App. 161. Jeter believed that the charges were “merged” as one offense.

Jeter’s 2015 charges should have been treated as first offense because the two 2004 offenses were treated as one and therefore could not be used to enhance because they were outside the ten year limit pursuant to the statute.

The PCR judge’s interpretation of Section 44-53-470 (A) (4) that prior charges were to be counted only as a “numerical characterization” or the number of charges, and not be counted as a second or third offense in the legal definition would not be the intent of the legislature nor the meaning of the statute. The logical interpretation is that circuit courts should consider the seriousness of the charges as related to the particular defendant and that would be shown as a first, second or third offense. These legal designations are what allow the state to make plea offers and reduce charges to a second or first offense.

Jeter was prejudiced by his plea counsel not challenging the charges used for enhancement. It was a violation of Jeter’s due process rights for the judge to reopen the record because the state used the wrong prior conviction to enhance which the PCR judge noted in his order. The state also cited a 2005 conviction for possession of crack or methamphetamine. The solicitor clearly stated that it was only one possession of crack. Then he cited a 2013 possession of a controlled substance which was a second offense at that time which Jeter explained was a marijuana charge. App. 20, ll. 20 – App. 21, ll. 25.

Jeter was prejudiced because he would have received less time for his sentence on trafficking if his 2015 charge had been treated as a first offense which would have been the case if the court had followed the law and considered the 2004 offenses as a first offense for enhancement purposes. Under Section 44-53-375(C) a first offense for trafficking ten to twenty-eight grams of methamphetamine carries a sentence of three to ten years.

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*.

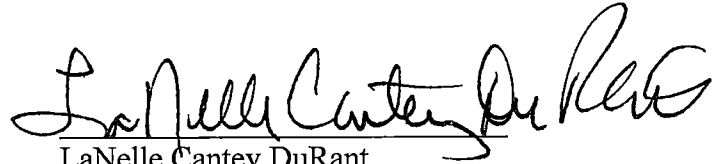
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would 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).

The PCR court erred in not finding plea counsel ineffective for not challenging the prior convictions used to enhance Jeter's 2015 convictions to third offenses. Although the state allowed Jeter to plead to second offenses, the charges would have been first offenses if the 2004 offenses were treated as one offense for enhancement purposes. The record for the 2015 guilty plea was not clear as to the specific prior charges the state used for enhancement. There was a reasonable probability that the plea judge would have sentenced Jeter to the ten years on the trafficking which was the maximum, and then only ten years on the two PWID charges and the proximity charges.

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 6th day of June, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Robin B. Stilwell, Circuit Court Judge

ALONZO COLUMBUS JETER, III,

PETITIONER

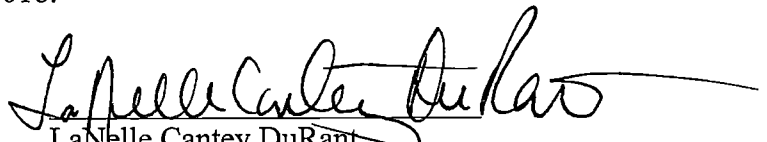
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STATE OF SOUTH CAROLINA,

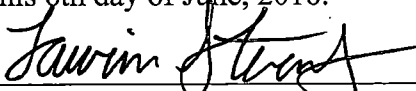
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Alonzo Columbus Jeter, #282902, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 6th day of June, 2018.


LaNelle Cantey DuRant
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 6th day of June, 2018.

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