

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

RECEIVED

COURTNEY LAMONT PAULING,

JUL 30 2018

V.

PETITIONER
SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000190

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Pauling's guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate possible defenses involving numerous similar robberies and failed to investigate alibi witnesses?

STATEMENT

On July 6, 2013, Petitioner Pauling, who allegedly had been stalking his former girlfriend, Leslie, went to her apartment building. When she moved her car back to the front of the building and stepped out to enter the apartment, Pauling allegedly began to assault her. He punched her in the face and broke a facial bone. He dragged her into the apartment. One of her neighbors witnessed the assault and went to the apartment. Leslie was able to get out when the neighbor knocked. Leslie immediately called the police. App. 4, ll. 4 – App. 5, ll. 23. Petitioner Pauling then took the ex-girlfriend's car and fled. App. 5, ll. 24 – App. 6, ll. 7.

There had been a series of robberies in the county. Six of these robberies the police believed Pauling was involved. On July 9, 2013, the police were called to the Kangaroo Express where a masked man held up the clerk, stole money, and fled. There was a video from a local business that showed the vehicle Pauling was driving. The police put out a BOLO and five days later, Pauling was arrested. Another former girlfriend was driving the car and she identified Pauling as the robber. She consented for the police to search her apartment. There, the police found items from other robberies connecting Pauling to the robberies. App. 6, ll. 12 – App. 8, ll.2.

On June 18, 2013, Domino's Restaurant was robbed by a masked man who held up the manager, took money and fled. Pauling was linked to this robbery. App. 6, ll. 16 – 25.

On August 21, 2014, the Spartanburg County Grand jury indicted Petitioner Pauling on the charges of assault and battery of a high and aggravated nature (ABHAN), kidnapping, and use of vehicle without owner's permission. App. 104 – App. 113. On November 1, 2013, the Spartanburg County Grand Jury indicted Pauling on two counts of armed robbery for June 18, 2013 and July 9, 2013. App. 98 – App. 103.

On February 11, 2015, Petitioner Pauling appeared before the Honorable Letitia H. Verdin and entered a guilty plea to two armed robberies which occurred June 18, 2013 and July 9, 2013; kidnapping; the lesser included charges of assault and battery and use of vehicle without permission for temporary use.. App. 6, ll. 8 – 25; App. 8, ll. 18 – 23; App. 109. The judge sentenced Pauling to twenty-five years on each of the robberies and the kidnapping as indicted to run concurrent. The judge sentenced Pauling to time served on the assault and battery and the use of the vehicle. App. 17, ll. 4 – 10.

Petitioner Pauling filed a notice of appeal. The Court of Appeals dismissed Pauling's appeal pursuant to Rule 203 (d)(1)(B)(iv). State v. Pauling, Appellate Case No. 2015-000573 (Ct. App. Order filed May 15, 2015). App. 19.

On June 2, 2016, Petitioner Pauling filed an application for post-conviction relief (PCR). The state filed a return on May 16, 2017. An evidentiary hearing was held on November 14, 2017 before the Honorable G. Thomas Cooper. Pauling was represented by Susannah C. Ross, and the state was represented by Valerie Giovanoli. App. 34.

Petitioner Pauling testified at the hearing that he entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). Pauling said that his attorney advised him to plead guilty. App. 39, ll. 5 – 21. He had wanted a trial from day one because he believed that he would have won at trial. He could prove his innocence. App. 42, ll. 1 – 25; App. 45, ll. 1 – 25. He pled guilty to avoid a life without parole sentence. App. 57, ll. 2 – 4. He had several alibi witnesses but his trial attorney did not “pursue to get in contact with. them.” He named Darrius Carson, Lashavetta Grant, Alexis Alexander, and Todd Richardson. App. 61, ll. 1 – 25.

Plea counsel testified at the PCR hearing that Petitioner Pauling had written letters to the ex-girlfriend “intimidating her not to testify and to drop the charges.” App. 64, ll. 8 – 10; App.

67, ll. 8- 24. Counsel stated that he did advise Pauling to plead guilty because he knew they were going to lose the kidnapping and assault and battery. One reason was because Pauling's letters to the victim were "really, really bad." App. 67, ll. 3 – 24. He said that Pauling was facing LWOP. App. 66, ll. 1 – 8.

When asked what independent investigation he conducted, plea counsel could not remember and did not have his notes. He then said that he familiarized himself with the area. App. 70, ll. 1 – 25. Pauling told him that the alibi witnesses went with the armed robberies. App. 73, ll. 1 – 14.

The PCR judge issued an order on December 12, 2017 denying Pauling's PCR application and dismissing it with prejudice. App. 85 – App. 96. The judge found plea counsel's testimony regarding his investigation more credible than Pauling's "self-serving" testimony. App. 92. The judge found plea counsel's investigation and preparation for trial to be "reasonable" in light of the circumstance in which Pauling found himself. Therefore, Pauling failed to meet the burden of proving deficiency or prejudice. App.93. The judge denied Petitioner's PCR application and dismissed it with prejudice. App. 96. PCR counsel filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Pauling's guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate possible defenses involving numerous similar robberies and failed to investigate alibi witnesses.

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991). Counsel representing a criminal defendant has a duty to conduct a reasonable investigation, which encompasses the defendant's right to interview potential witnesses against him. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000).

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 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. 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, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). The record must show with 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).


In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that for purposes of the claim of ineffective assistance of counsel, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court reversed the PCR court and remanded Lounds' case because his defense counsel was ineffective for failing to adequately prepare for trial so as to be able to call key witnesses. Counsel failed to make an independent investigation of the facts and circumstances.

Plea counsel was ineffective for not investigating possible defenses.

CONCLUSION

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


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G. Thomas Cooper, Circuit Court Judge

COURTNEY LAMONT PAULING,

PETITIONER

V.

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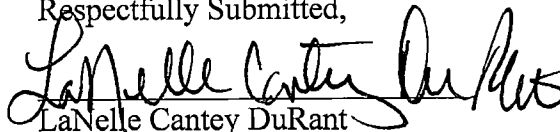
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Courtney Lamont Pauling 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 post-conviction relief hearing before Judge G. Thomas Cooper, which was held on November 14, 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 Courtney L Pauling.

Respectfully Submitted,



LaNelle Cantey DuRant

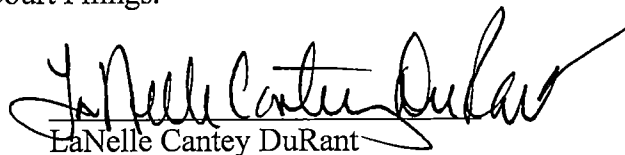
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of July, 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 30th day of July, 2018.

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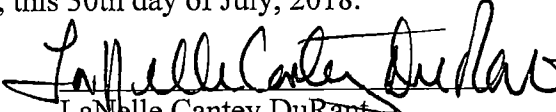
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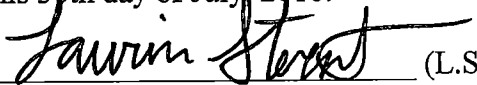
RESPONDENT

—————
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 Jordan Cox, 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 Courtney Lamont Pauling, #314748, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 30th day of July, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2018.

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