

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Grace Gilchrist Knie, Circuit Court Judge

CHARLES P. BLACKWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000179

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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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 call witnesses at trial who could provide a defense for Petitioner Blackwell which was prejudicial to Petitioner because the only witnesses were state's witnesses?

STATEMENT

On May 23, 2014, Detective Tracy Fowler executed a search warrant on a home on Garvin Lake Road because the police were looking for items stolen in a burglary the week earlier. The suspect in the burglary case provided information that he had sold some stolen items to Petitioner Blackwell at that home. With Detective Fowler were criminal investigation officers as well as officers from the narcotics division. App. 86, ll. 20 – App. 88, ll. 25.

Sergeant Nick Federico was knocking on the back door as Detective Fowler was knocking on the front door. Sgt. Federico testified that Petitioner Blackwell opened the back door for him. Sgt. Federico told him they had a search warrant to look for stolen items. When the sergeant asked for everyone in the house to come forward, Julie Lawson was in the kitchen and Blackwell told him that Kalynne Carroll was in the bed in a bedroom. When the officers went into the bedroom, they had to awaken Kalynne. On the bedside table, the officers saw a glassen bag with residue of methamphetamine. Kalynne told them the drug was hers. App. 112, ll. 1 – App. 115, ll. 6.

When they all returned to the main room, Sgt. Federico asked Petitioner Blackwell for consent to search the house based on the drugs they found in the bedroom. Blackwell gave consent according to the officer. Blackwell also denied any knowledge of the drugs in the bedroom. App. 119, ll. 7 – 25. Some of the stolen items were found on the outside of the home, and were returned to the owners. App. 92, ll.1 – App. 93, ll. 1.

In a further search of the house, the officers found a metal container under a mattress in a bedroom. Inside the metal container were several baggies of methamphetamine weighing over ten grams, and a half of a Viagra pill. App. 83, ll. 7 – 17; App. 124, ll. 9 – App. 125, ll. 25. The officers then arrested the three people who were in the home who were Blackwell, Julie Lawson,

and Kalynne Carroll. App. 83, ll. 18 – 23. Kalynne Carroll told the officers the drugs were hers. App. 83, ll. 24-25; App. 140, ll. 19 – App. 141, ll. 4.

When Kalynne was arrested and taken to the detention center, she was interviewed by Sgt. Federico. At that time, she changed her story and told the officers that the drugs belonged to Blackwell. App. 164, ll. 1 – 11; App. 84, ll. 1 – 22; App. 280, ll. 1 – App. 282, ll. 18.

In July 2014, the Cherokee County Grand Jury indicted Petitioner Blackwell on the charge of trafficking in methamphetamine ten or more grams but less than twenty-eight grams. App. 467 – App. 468. On March 4-5, 2015, Petitioner Blackwell proceeded to trial before the Honorable Roger L. Couch and a jury. Blackwell was represented by Michael Morin, and the state was represented by Kim Leskanic. App. 1.

Blackwell testified in a pretrial hearing. Blackwell denied signing the consent for the officers to search the house. He testified that he told Officer Federico “to get the F--- out of my house.” App. 50, ll. 1 – App. 51, ll. 10. Blackwell did not testify during the trial. The defense presented no evidence. App. 298, ll. 5 – 12.

Kalynne Carroll testified for the state against Blackwell. She testified that Petitioner Blackwell sold methamphetamine, and the drugs in the house were his. App. 267, ll. 1 – App. 271, ll. 25. Julie Lawson also testified at trial that she bought methamphetamine from Blackwell. App. 240, ll. 1 – App. 242, ll. 16. Connie Peterson and Lynn Sizemore also testified for the state that they bought methamphetamine from Blackwell. App. 229, ll.1- 18; App. 236, ll. 1 – 20.

The SLED analyst, Doug Robinson, testified that he analyzed the drugs found. It was a total weight of 11.36 grams of methamphetamine. App. 177, ll. 1 – App. 178, ll. 6.

The jury found Blackwell guilty as indicted. App. 347, ll. 1 – 25. The judge sentenced Blackwell to seven years incarceration and a fine of \$25,000. App. 354, ll. 11 – 20.

Blackwell's attorney filed an appeal which was perfected by the Division of Appellate Defense in the form of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal. State v. Blackwell, Op. no. 2016-UP-087 (Ct. App. filed February 24, 2016).

On April 18, 2016, Petitioner Blackwell filed an application for post-conviction relief (PCR). The state filed a return on February 6, 2017. An evidentiary hearing was held on September 19, 2017 before the Honorable Grace Gilchrest Knie. Petitioner Blackwell was represented by Steven D. Epps, and the state was represented by Valerie Giovanoli. App. 385.

Petitioner Blackwell testified at the PCR hearing that his trial counsel was ineffective because no witnesses were called at his trial to testify on his behalf. Blackwell said there were witnesses that could have helped him. One was Shannon Alley known as "Tiny" who the two women said was staying in the room where the drugs were found. App. 394, ll. 19 – App. 395, ll. 17. Blackwell explained that he did not live at that home where the drugs were found. He was on trespass notice for that particular house. He told his trial counsel that he was on trespass notice for that house. Blackwell said he told the police that anything they found at that house had nothing to do with him because it was not his house. App. 397, ll. 1 – App. 398, ll. 25.

Petitioner Blackwell continued to testify that he had told his trial attorney that Tiny and Blackwell's daughter-in-law could testify that the two women who testified against him were lying. Julie Lawson and Kalynne Carroll, who were arrested with Blackwell at the house, testified against Blackwell at trial. His daughter-in-law knew of instances where Kalynne had lied. App. 400, ll. 4 – App. 401, ll. 25.

Tiny would have testified that the room where the drugs were found was his room and not Blackwell's. Petitioner said he had nothing to do with that room. App. 402, ll. 1 – App. 403,

ll. 23. Blackwell said his trial attorney was ineffective because Blackwell had wanted to testify but his attorney told him that he would definitely be convicted if he testified. App. 404, ll. 2 – App. 406, ll. 16.

Trial counsel testified that the two women arrested with Blackwell did testify against him. There were also two other women who testified against him at trial that had previous experience with Blackwell. They were Lynn Sizemore and Connie Peterson. App. 426, ll. 1 – 24. Trial counsel said that Blackwell told him that he did not live at that house but was simply doing some work there. He was on trespass from that house, and he did not sign a consent to search. App. 427, ll. 9.

Counsel had planned the defense that it was not Blackwell's house. Then in the pretrial hearing, Blackwell testified that he told the police to get out of "his" house. Then that defense was not valid. App. 428, ll. 1 – App. 429, ll. 25.

Trial counsel also testified that Blackwell never gave him a list of witnesses. The PCR hearing was the first time counsel ever heard about Tiny. App. 432, ll. 1 – 25.

The PCR judge issued an order on January 16, 2018 denying Petitioner Blackwell's PCR application, and dismissing it with prejudice. App. 455 – App. 466.

The PCR judge found trial counsel's testimony on the issue of failing to call witnesses more credible than the testimony of Petitioner Blackwell. The judge also found that Blackwell failed to show that trial counsel was ineffective for not interviewing the potential witnesses nor for not calling them to testify. The judge wrote that prejudice cannot be shown when the witnesses do not testify at the PCR hearing. The judge found that trial counsel could not be expected to interview a witness that he knew nothing about. App. 463 – App. 464.

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

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to call witnesses at trial who could provide a defense for Petitioner Blackwell which was prejudicial to Petitioner because the only witnesses were state's 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). 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).

In Ard v. Catoe, *supra*, 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.

The PCR court erred in failing to find trial counsel ineffective for not calling the two witnesses Petitioner Blackwell wanted. Trial counsel had a duty to ask Blackwell about any potential witnesses. Counsel did not need to wait for Blackwell to provide that information especially since they were going to trial. Counsel was also ineffective for not interviewing the two women - Kalynne Carroll and Julie Lawson. If he had, he would have known about Tiny. This lack of talking to potential witnesses was prejudicial to Blackwell because if the two witnesses Blackwell had wanted had testified, there was a reasonable probability the jury would have found him not guilty.

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 9th day of August, 2018.

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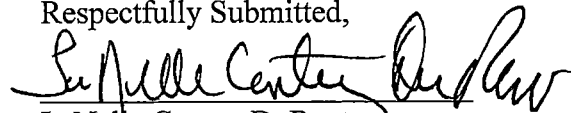
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charles P. Blackwell 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 Grace Gilchrist Knie, which was held on September 19, 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 Charles P. Blackwell.

Respectfully Submitted,



LaNelle Cantey DuRant

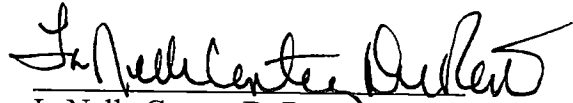
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of August, 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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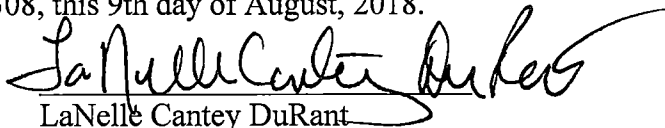
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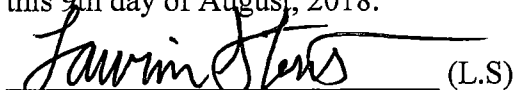
CERTIFICATE OF SERVICE

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 Charles P. Blackwell, #218728, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 9th day of August, 2018.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of August, 2018.



(L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.