

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Brooks P. Goldsmith, Circuit Court Judge

DESHAUN A. DRAFTS,

ORIGINAL
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AUG 24 2018
PETITIONER SUPREME COURT
S.C.S.

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000055

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

LaNelle Cantey DuRant
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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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 Drafts' guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate potential witnesses?

STATEMENT

On September 13, 2011 in the Batesburg-Leesville area of Lexington County around 9:45 in the evening, three young men knocked down the front door of the home where two young mothers, Ms. Morales and Ms. Dreher, and their five children lived. The men were armed with a handgun, a shotgun, and a baseball bat. The state reported that the shotgun was taken from another home in an earlier home invasion. App. 20, ll. 8 – 20.

The men took items from the women's purses which included money, cell phone, jewelry and keys. The men initially asked for drugs and money. Both of the women were sexually assaulted by all three men while the children were held in the living room. The women and children were told they would not be killed if they cooperated. App. 20, ll. 21 – App. 21, ll. 8.

When the men left, they took two vehicles: a gray Crown Victoria which was Ms. Morales' car, and a gold Expedition. App. 21, ll. 9 – 14.

The women reported to the police as soon as the men left. The women knew Petitioner Drafts and identified him to the police. The women were shown photo lineups that night which contained photos of the three men. All three suspects were identified that same night. App. 21, ll. 15 – 23.

Officer Crow, with the Batesburg-Leesville police, tried to initiate a traffic stop on the gold Expedition. As he pursued the car, one of the men fired shots at the police car. The officer lost contact with the suspects. The following day, officers observed the three men walking into town. When ordered to stop, Petitioner Drafts stopped but the other two ran into the woods. The two were later apprehended. App. 22, ll. 1 – 25.

Petitioner Drafts gave a statement to police confessing to the home invasion involving the two women and admitted that he had sex with one of the women. App. 70, ll. 14 – 21.

In March 2012, the Lexington County Grand Jury indicted Petitioner Drafts on the charges of kidnapping, burglary first degree, and armed robbery. App. 231 – App. 244. On December 17, 2013, Petitioner Drafts appeared before the Honorable Robert E. Hood along with his two co-defendants, Deondre Leaphart and Laquarius Brannon. All three entered guilty pleas to the three charges of burglary first degree, armed robbery and kidnapping. Petitioner Drafts was represented by Sarah Hahn, and the state was represented by Shawn Graham. Petitioner Drafts also pled guilty to a Saluda County charge of burglary second degree. App. 1 – App. 5, ll. 5; App. 86, Footnote 2.

The state informed the court that the three defendants, including Petitioner Drafts, were pleading to negotiated thirty year sentences. App. 6, ll. 1 – 10. The state also reported that numerous charges were being dismissed. App. 19, ll. 1 – 13. The judge accepted the negotiated sentence and sentenced Drafts and his co-defendants to thirty years on each charge concurrent. He sentenced Drafts to fifteen years on the burglary second to run concurrent. The judge ordered the sex offender registry also. App. 32, ll. 1 – 25; App. 16, ll. 8-12.

Petitioner Drafts' plea counsel filed a notice of appeal which the Court of Appeals dismissed pursuant to Rule 203(d)(1)(B)(iv), SCACR for failure to provide a sufficient explanation to “merit the appeal.” State v. Drafts, Appellate C.A. No. 2013-002747 (filed March 12, 2014). App. 87.

On April 15, 2014, Petitioner Drafts filed an application for post-conviction relief (PCR). The state filed a return on September 17, 2014. An evidentiary hearing was held on April 22, 2015 before the Honorable Brooks Goldsmith. Petitioner Drafts was represented by Anna R. Good, and the state was represented by Walt Whitmire. App. 48.

Petitioner Drafts testified at the PCR hearing that he told his attorney that he wanted a trial and did not want a plea. He wanted to fight for his life—not give it away. he wanted to fire his attorney because she was not working on his case. Drafts said it took his attorney two years to begin any investigation. His attorney told him that he could not fire her. App. 52, ll. 14 – App. 54, ll. 5. Drafts then testified that he felt he had no options than but to listen to his attorney. He never wanted to “take a plea.” App. 54, ll. 7 – 25. His attorney did not tell him anything about the sexually violent predator program. The first he heard about it was when the plea judge told him. App. 54, ll. 23 – App. 55, ll. 12.

Drafts said on cross-examination that he felt he had no choice but to plead guilty because his lawyer was not fighting for him. He went along with the plea because he had no way out. App. 58, ll. 1 – App. 59, ll. 24.

Plea counsel testified that Drafts had never told her that he wanted to have her relieved from his case. App. 66, ll. 8 – App. 67, ll. 14. Plea counsel testified that Petitioner Drafts wanted a plea offer from the beginning. She did not remember any talk of his wanting a trial. If he had, she would have gone to trial. Her goal was to minimize his exposure in sentencing because he had confessed. He was also facing potential life in prison with the burglary first. App. 70, ll. 11 - App. 72, ll. 25.

On cross-examination, counsel admitted that she began the investigation late in the case because she believed he wanted a plea. She hired an investigator but the investigator did not find any information that was “usable.” Drafts had some witnesses he wanted counsel to talk to but counsel did not remember the details. Drafts was disputing some of the facts and he wanted counsel to find out if there was any positive information that would help. App. 78, ll. 4 – App. 79, ll. 3.

The PCR judge denied Petitioner Drafts' PCR application on the record. The judge agreed with the position of the attorney general which was that Drafts did not show that plea counsel was ineffective and failed to show that he was prejudiced. App. 82, ll. 13 – App. 84, ll. 9.

On June 3, 2015, the PCR judge issued an order denying Drafts' PCR application and dismissing it with prejudice. App. 86 – App. 95. The judge found as a matter of general impression that “Applicant’s allegations were solely supported by his speculative and dubious testimony.” Then the judge found that “counsel’s testimony exhibited her diligence, competency, and effectiveness.” App. 90.

The judge also found that Drafts' allegation that counsel was ineffective for failing to investigate his case was without merit. The judge found that Drafts failed to “even make a prima facie case of what counsel should have investigated.” Then the judge cited Franklin v. Catoe, 346 S.C. 570, 552 S.E.2d 718 (2001), that overwhelming evidence of guilt negated any claim that counsel’s deficient performance could have treasonably affected the result of the defendant’s trial. App. 91- App. 92.

PCR counsel failed to file a notice of appeal following Petitioner Drafts' PCR. App. 226 – App. 227.

On February 18, 2016, Petitioner Drafts filed a second PCR application with the allegation that PCR counsel failed to file an appeal following his first PCR. App. 98. The state filed a return on August 28, 2017. An evidentiary hearing was held on December 13, 2017 before the Honorable J. Cordell Maddox, Jr. Petitioner Drafts was represented by Arthur K. Aiken, and the state was represented by Sherrie Butterbaugh and Melody Jane Brown. App. 219.

At the hearing, the state's attorney told the court that Drafts' PCR attorney at the first PCR wrote an affidavit admitting that she failed to file an appeal for Drafts even after he told her that he wanted an appeal. The state agreed that Drafts was entitled to an appeal from his first PCR. App. 222, ll. 1 – 25.

Drafts' PCR counsel at this second hearing agreed that Drafts was entitled to an appeal. App. 222, ll. 25 – App. 223, ll. 25.

On December 13, 2017, the PCR judge issued an order granting an appeal of his first PCR to Petitioner Drafts pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). This petition follows accompanied by a Petition for a Writ of Certiorari.

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Drafts' guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate potential witnesses.

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 (1997).


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 earlier in the case any potential witnesses Drafts may have had. If counsel had adequately investigated the case, there was a reasonable probability that she would have found a witness who knew that Drafts knew one of the women and the sex was consensual with that victim.

CONCLUSION

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


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Cordell Maddox, Circuit Court Judge

DESHAUN A. DRAFTS,

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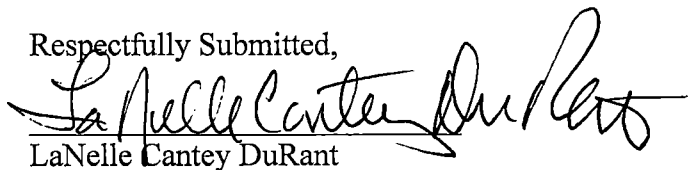
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Deshaun A. Drafts 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 J. Cordell Maddox, which was held on December 13, 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 Deshaun A. Drafts.

Respectfully Submitted,



LaNelle Cantey DuRant

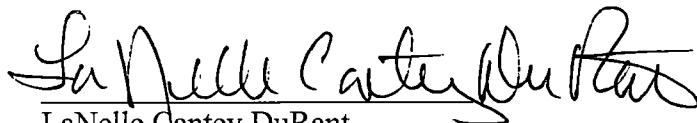
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th 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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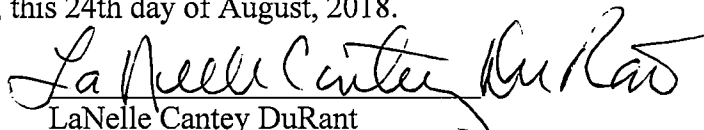
V.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari pursuant to Austin v. State in the above referenced case has been served upon Kelly Oppenheimer, 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 pursuant to Austin v. State has been served on Deshaun A. Drafts, #358211, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of August, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of August, 2018.

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