

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

FORREST NELSON, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000155

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
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South Carolina Commission on Indigent Defense
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S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that Petitioner Nelson’s guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate Petitioner’s case.....6

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL9

ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Nelson's guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate Petitioner's case?

STATEMENT

On December 11, 2014 in the Myrtle Beach area, Nelson and two co-defendants entered a Circle K convenience store. One stood by the door while the other two, which included Nelson, picked up beer and proceeded to the counter. According to the state, Nelson allegedly then pointed what the clerk said he believed to be a gun at the clerk and demanded money. App. 8, ll. 1 – 9.

The co-defendant jumped the counter and assaulted the clerk who then opened the cash register. The men then left with approximately \$200, tobacco products, and a case of beer. App. 8, ll. 10 – 14.

Detectives viewed the surveillance video and produced a be-on-the-look-out flyer which included a picture of Nelson from the video. Nelson was found in North Carolina and arrested. He confessed that it was him in the video at the robbery. App. 8, ll. 1 – 21.

On November 12, 2015, the Horry County Grand Jury indicted Petitioner Nelson on the charge of armed robbery (AR). App. 79 – App. 80. On April 18, 2016, Petitioner Nelson appeared before the Honorable Steven H. John, and entered a guilty plea to AR as indicted. Nelson was represented by J. Eric Fox, and the state was represented by Thomas G. Terrell, III. App. 1.

During the guilty plea, when the judge asked Nelson, after the state presented the facts, if the facts were “true and correct,” Nelson responded: “Some of them, sir.” App. 9, ll. 1 -3. Nelson said: “Actually, I didn’t present no handgun, sir.” App. 9, ll. 6.

The judge then read the indictment that he was either armed with a handgun or there was an indication to the clerk that he was armed. The judge explained that the charge did not necessarily mean that Nelson had to have a gun but just that he indicated by his actions that there

was a weapon. The judge then asked Nelson: “All right?” Nelson responded: “Yes, sir.” App. 9, ll. 7 – 25. The judge then asked Nelson: “Are those facts true and correct?” Nelson said: “Yes, sir.” App. 10, ll. 1 – 6.

During mitigation, plea counsel provided that Nelson never denied that he committed a robbery, but always maintained that it was not an armed robbery. Counsel said that Nelson always consistently maintained that he did not have a weapon. Counsel argued that if the case had gone to trial, the issue would have been whether the robbery was strong- armed robbery or armed robbery. App. 11, ll. 5 – App. 12, ll. 25.

The judge then sentenced Nelson to the minimum sentence of ten years. App. 14, ll. 1 – 5.

Nelson did not appeal his conviction nor sentence. App. 71. On July 29, 2016, Nelson filed an application for post-conviction relief (PCR). The state filed a return on February 21, 2017. An evidentiary hearing was held on September 20, 2017 before the Honorable Williams H. Seals. Nelson was represented by Daniel A. Selwa, II, and the state was represented by Johnny E. James, Jr. App. 37.

Nelson testified at the PCR hearing that he did participate in the robbery but no one had a weapon. His attorney told him that if he went to trial he would get between 25 to 30 years. App. 42, ll. 1 – 25. Nelson saw the video and he said there was no representation by anyone that there was a weapon. App. 44, ll. 1 – App. 45, ll. 4.

Nelson testified that his two co-defendants were never caught. According to Nelson, the state offered him strong armed robbery if he would tell the names of his co-defendants. However Nelson said he could not because his life would be in danger and the lives of his wife and two children. App. 45, ll. 1 – App. 46, ll. 14.

Nelson testified that his plea counsel was ineffective because he did not explain to him the elements of strong-armed robbery and AR. His attorney did not prepare for trial as he did not present any cases to Nelson about the two crimes. App. 40, ll. 1 – App. 42, ll. 25. All his attorney did was tell Nelson that he either took the plea offer of ten years or he was going to get 25 to 30 years at trial. Nelson believed that the video had been edited and he told his attorney. However, his attorney did nothing about it. Nelson was scared because he had no defense. App. 47, ll. 1 – Ap. 48, l. 25.

Nelson said if he had known that the state had to prove there was a weapon or a representation of one, he would have gone to trial. The only reason he pled guilty was because he did not know the elements. Nelson asked the PCR court to grant him a new trial. App. 51, ll. 28 – App. 54, ll. 15.

Plea counsel testified that the case was going to trial as the jury had been selected, but Nelson decided to plead guilty. App. 55, ll. 1 – App. 56, ll. 1. Plea counsel said that Nelson never denied committing the robbery. He just had problems understanding how it was AR when he did not have a weapon. He believed it was strong armed robbery. The video did not show any representation of a weapon according to plea counsel. Counsel thought the video showed only strong- armed robbery. The clerk of the store was very definite that the defendants represented they had a gun. App. 58, ll. 21 – App. 60, ll. 18.

When plea counsel was asked if Nelson's representation was cut short on the video, counsel responded that he did not think the video needed further investigation. App. 61, ll. 4 – 20.

On cross-examination plea counsel described what he did to investigate Nelson's case. The primary activity he performed was "reviewing and familiarizing" himself with the discovery

and meeting with Nelson. He said he did visit the convenience store. His investigator did try to speak to the clerk but was not successful. App. 66, ll. 17 – App. 67, ll. 21.

The PCR judge issued an order on January 2, 2018 denying Petitioner Nelson's PCR application and dismissing it with prejudice. App. 70 – App. 77. The judge found “no deficiency on the part of counsel nor prejudice therefrom.” The judge wrote that in order to prevail, Nelson would have had to present evidence of what counsel could have discovered, and how that evidence would have “resulted in a different outcome” for Nelson. The judge found that Nelson did not present any evidence that could have been discovered. App. 73 – App. 75.

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 Nelson's guilty plea was entered voluntarily and knowingly because plea counsel failed to adequately investigate Petitioner's case.

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).

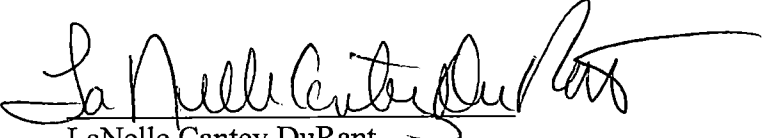
In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court held that for purposes of the claim of ineffective assistance of counsel, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make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

The PCR court erred in denying Petitioner Nelson's PCR application. After Nelson told plea counsel that the video had been edited, counsel had an obligation and duty to investigate the video. Counsel needed to talk to the Sheriff's Department and determine the chain for the video. Counsel himself should have tried to talk to the clerk and determine if there were any other witnesses in the store at the time. Counsel's ineffective performance was prejudicial to Nelson as the charge could reasonably been reduced to strong-armed robbery if counsel had investigated.

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 28th day of September, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

FORREST NELSON, JR.

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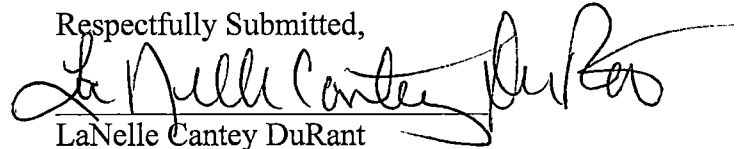
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Forrest Nelson 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 William H. Seals, which was held on September 20, 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 Forrest Nelson.

Respectfully Submitted,



LaNelle Cantey DuRant

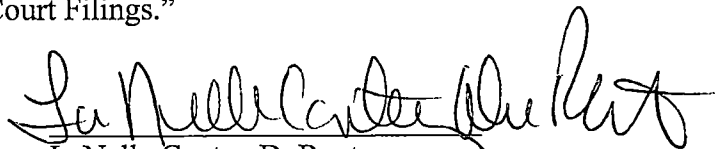
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of September, 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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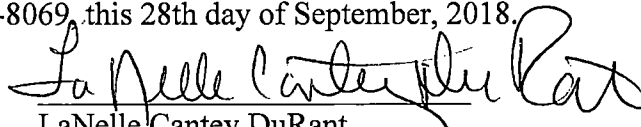
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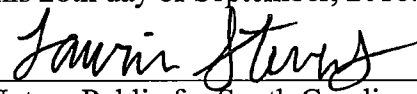
RESPONDENT

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 Johnny Ellis James, Jr., 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 Forrest Nelson, #367870, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 28th day of September, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of September, 2018.

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