

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Maite Murphy, Circuit Court Judge

JOE LOUIS BAILEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000957

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
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Division of Appellate Defense
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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that Petitioner Bailey's guilty plea was entered voluntarily and knowingly because plea counsel had promised Bailey he would receive a ten year sentence if he pled guilty, and he received fifteen years?

STATEMENT

On April 19, 2015 in Ravenel in Charleston County, Ms. Schaffer, a recent widow, was preparing dinner in her kitchen. She observed Petitioner Bailey walk into her carport and enter her utility room in the residence. She retrieved a pistol from her bedroom. Then she confronted Bailey and ordered him out of her utility room. Bailey walked out slowly and left. App. 79, ll. 4 –22.

Petitioner Bailey then went down the street about aa half block later to the residence of Marvin Harrison. Bailey went into the garage and took a lawnmower, some tools, and other items that he stacked on top of the mower. He was pushing them towards his home when Marvin Harrison returned home from his job. Mr. Harrison confronted Bailey who returned the items to Mr. Harrison. Bailey then left. Deputies responded to Mr. Harrison 's call and arrested Petitioner Bailey. App. 79, ll. 22 – App. 80, ll. 9. Bailey was charged with burglary third degree. App. 150, ll. 19 – 22.

On October 19,2015, the Charleston County Grand Jury indicted Bailey on the charge of burglary first degree based on his prior record with two or more burglary convictions. App. 169 – App. 170. In June 2016, the Charleston County Grand jury indicted Bailey on the charge of burglary first degree from the Harrison home incident, based on his two prior burglary convictions. App. 172 – App. 173.

On October17, 2016, Bailey proceeded to trial before the Honorable Deadra Jefferson. Bailey was represented by Luke Malloy and John Kozelski, and the state was represented by Charles Condon and Chris Lietzow. App. 1. Following pretrial motions and jury selection, Petitioner Bailey decided to enter a guilty plea. App. 72, ll. 1-4. The state told the judge that

Bailey was pleading to two counts of burglary second degree violent. It was a negotiated plea for ten to fifteen year range. The state asked for fifteen. App. 72, ll. 1 – 24.

During the plea, the judge asked if Bailey had had a mental evaluation. Plea counsel reported that Bailey was evaluated at MUSC and was found competent. App. 73, ll. 1 – 25. The judge accepted the negotiated plea and sentenced Bailey to fifteen years' incarceration. App. 93, ll. 16 – App. 94, ll. 10; App. 77, ll. 10 – 24. Bailey did not appeal his convictions nor sentences. App. 162.

On April 17, 2017, Petitioner Bailey filed an application for post-conviction relief (PCR). The state filed a return on June 20, 2017. An evidentiary hearing was held February 1, 2018 before the Honorable Maite Murphy. Bailey was represented by Christopher Murphy, and the state was represented by Rasheeda Cleveland. App. 137.

Petitioner Bailey testified at the PCR hearing that his plea counsel was ineffective because he promised Bailey that he would get ten years if he pled guilty. When Bailey went before the judge for his guilty plea, Bailey believed that he was getting ten years in prison. His attorney told Bailey that the best thing was for him to plead guilty. App. 140, ll. 4 – 22; App. 144, ll. 8 – App. 146, ll. 25. Bailey said that he pled guilty because his lawyer told him to. App. 148, ll. 1 – 25.

Plea counsel testified that the first plea offer the state made was for Bailey to plead to burglary third degree second offense which was a zero to ten year offense. However, Bailey rejected that offer. On the day of trial, when Bailey decided to plead guilty, the state offered a negotiated plea to burglary second degree violent with a negotiated sentence range of ten to fifteen years. App. 151, ll. 18 – App. 153, ll. 17.

Counsel admitted that he believed that pleading guilty was in Bailey's best interest. App.152, ll. 1-24. Counsel reported that Bailey asked him during the lunch break how he could stop the trial. Counsel told him that the only way was to plead guilty. App. 153, ll. 8 – 25. Counsel filed a motion to reconsider which was denied. App. 156, ll. 1 – 5. Counsel also admitted that he did not discuss with Bailey filing an appeal. Counsel felt there was no basis for an appeal. App. 157, ll. 17 – 25.

The PCR judge issued an order on April 9, 2018 denying Bailey's PCR application and dismissing it with prejudice. App. 161 – App. 168. The judge ruled that Bailey's claim that counsel was ineffective for telling him he would get ten years if he pled guilty was "without merit." The judge wrote that Bailey failed to show in any way that plea counsel was "deficient in any way or that he would not have otherwise pled guilty." App. 167.

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 Bailey's guilty plea was entered voluntarily and knowingly because plea counsel had promised Bailey he would receive a ten year sentence if he pled guilty, and he received fifteen years.

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).

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

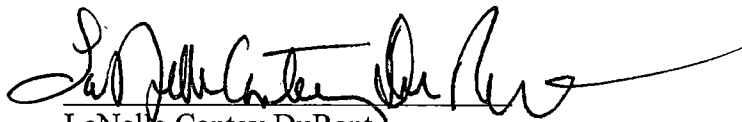
S. Ct. 1709 (1969). The record must show with certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982).

In Craddock v. State, 327 S.C. 303, 491 S.E.2d 251 (1997), the Supreme Court held that where a defendant pleads guilty in exchange for trial counsel’s promise of a certain sentence, and does not receive that sentence, his guilty plea is invalid. The Court held that offender's admission of guilt by negotiated plea did not nullify his claim that defense counsel was ineffective by erroneously promising him a twenty-five year sentence.

The PCR court erred in not finding plea counsel ineffective because counsel led Petitioner Bailey to believe that he would receive ten years when the offer was between ten to fifteen. It was counsel’s responsibility to insure that Bailey understood clearly that he could receive fifteen years. Counsel had been concerned enough about Bailey’s ability to understand that he had Bailey undergo a mental evaluation. Therefore, counsel should have made special effort to insure that Bailey understood everything before he pled guilty.

CONCLUSION

Based on the above, certiorari should be granted, and petitioner's sentences and convictions should be reversed, and his case remanded.

A handwritten signature in black ink, appearing to read 'LaNelle Cantey DuRant', written in a cursive style.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2018.

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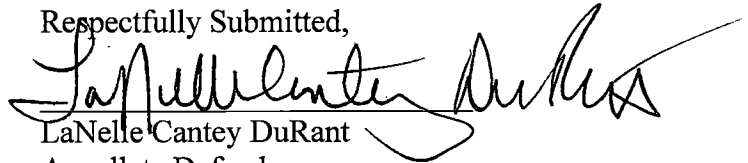
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joe Louis Bailey 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 Maite Murphy, which was held on February 1, 2018, 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 Joe Louis Bailey.

Respectfully Submitted,

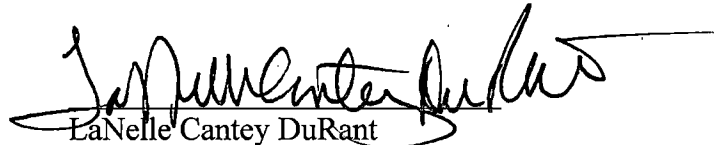


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 13th day of November, 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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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 Megan Harrigan Jameson, 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 Joe Louis Bailey, #273714, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 13th day of November, 2018.



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of November, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028