

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

THOMAS TIEDEMANN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000639

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in not finding plea counsel ineffective for failing to challenge the validity of law enforcement's collection of a blood sample following Petitioner Tiedemann's accident which was done without Petitioner's consent and without a search warrant?

STATEMENT

On the afternoon of June 18, 2013, Thomas Tiedemann, who was employed as a diesel mechanic, was at the Sun Up Bar and Grill in Horry County drinking beer and bourbon and coke drinks. He left around three o'clock in the afternoon and proceeded to drive. He was driving in the wrong lane facing cars head-on. When the other cars started blowing their horns and flashing their lights, Tiedemann ran off the side of the road. When he overcorrected, he ran head-on into the car driven by Mrs. Scarsgard. App. 10, ll. 1 – 24; App. 19, ll. 1- App. 13, ll. 25.

Ms. Scarsgard was pinned in her car and it took EMS one and one-half hours to extricate her. She suffered severe injuries which resulted in fifteen surgeries. App. 13, ll. 1 – 9; App. 20, ll. 1 – 25.

Petitioner Tiedemann also suffered severe injuries and was rushed to the hospital where a blood sample was drawn. App. 21, ll. 25- App. 22, ll. 25. The blood test indicated that Tiedemann's blood alcohol level was .140 which the state argued was almost two times the legal limit. Tiedemann also tested positive for morphine, cyclobenzaprine, diazepam, and nordiazepam. App. 20, ll. 1 -11.

On December 19, 2013, the Horry County Grand Jury indicted Tiedemann on the charge of felony driving under the influence with great bodily injury. App. 82. On March 23, 2015, Petitioner Tiedemann appeared before the Honorable Larry B. Hyman and entered a guilty plea to the charge as indicted. Tiedemann was represented by Russel Long, and the state was represented by Scott Hucks. App. 1. The state argued that it was Tiedemann's intoxication that led "directly" to the accident. App. 13, ll. 10 – 15.

Sentencing was postponed until May 19, 2015 in order for Tiedemann to cooperate in the civil case of Ms. Scarsgard. After Tiedemann had been deposed in that case, he appeared for

sentencing before the Honorable Benjamin H. Culbertson. App. 19, ll. 1 – 25. Tiedemann was again represented by Russell Long, and the state was represented by Martin Spratlin. App. 17.

At the sentencing hearing, plea counsel told the court in mitigation, that Petitioner Tiedemann knew he could not make things right, but he was trying to help Ms. Scarsgard in any way that he could. Tiedemann provided an affidavit and gave a deposition to help Ms. Scarsgard get the civil case going. Tiedemann also began paying one thousand dollars per month to help with the restitution. App. 21, ll. 4 – 24; App. 23, ll. 19 – App.20, ll. 1.

The judge sentenced Tiedemann to seven years' incarceration and a fine of five thousand dollars. App. 27, ll. 10 – 17. Petitioner Tiedemann did not appeal his conviction nor his sentence. App. 76.

On November 6, 2015, Tiedemann filed an application for post-conviction relief (PCR). The state filed a return on January 10, 2017. App. 75. An evidentiary hearing was held on November 30, 2017 before the Honorable William H. Seals. Tiedemann was represented by Daniel A. Selwa, II, and the state was represented by Johnny E. James, Jr. App. 42.

At his PCR hearing, Petitioner Tiedemann testified that he was satisfied with his attorney until he got “jail time.” He and his attorney had made an agreement with the victim that Tiedemann would pay one thousand dollars per month for five years and she would not ask for jail time for him. App. 48, ll. 6 – App. 49, ll. 1.

Tiedemann thought his attorney would review his case and see if there were any “loopholes” so Tiedemann could go to trial. App. 49, ll. 2 – 24. Tiedemann testified that he received the discovery in his case about two months after his guilty plea after he was in prison. When he reviewed the discovery, he realized there was no search warrant for his blood sample. He saw the police report that indicated there was a search warrant for the police to obtain a blood

sample from him but there was no warrant. His blood sample was taken when he was taken to the hospital for his injuries from the accident. Tiedemann testified that he told the officer that he was not consenting to having his blood drawn for a sample. However, Tiedemann's blood sample was drawn anyway. App. 50, ll. 1 – App. 51, ll. 25.

Tiedemann testified that his plea counsel, Russell Long, was ineffective for not challenging the state not having a valid search warrant for Tiedemann's blood. If Tiedemann had known there was no search warrant, he would have gone to trial. App. 51, ll. 19 – App. 52, ll. 25. Tiedemann subsequently received a copy of a search warrant, but he claimed that the warrant was not correct. It did not have a case name nor number, and had no description of the property to be searched. App. 54, ll. 22 – App. 56, ll. 25.

Plea counsel Long testified at the PCR hearing that he had represented Petitioner Tiedemann multiple times in the past on various charges. App. 59, ll. 1 – 25. Counsel explained that he and Tiedemann had never discussed taking the case to trial because it was a "bad case." The lady victim was "maimed and crippled." App. 60, ll. 1 – 25. Counsel stated that it was a bad set of facts and he "firmly believed" that a jury was going to convict Tiedemann. App. 63, ll. 6 – App. 17.

Counsel continued to explain that he could not have had the blood sample suppressed because law enforcement had an "absolute right under the statute" to take Tiedemann's blood sample without a search warrant. Counsel said the lack of a search warrant was a "moot" issue. App. 62, ll. 21 – App. 64, ll. 24.

The PCR judge issued an order on March 6, 2018 denying Tiedemann's PCR application and dismissing it with prejudice. App. 75- App. 80. The judge found that law enforcement had the right to "draw Tiedemann's blood" as Tiedemann was in custody at the

hospital. Therefore, the judge found that there was no deficiency on the part of counsel, and that Tiedemann suffered no prejudice. The judge wrote that Tiedemann failed to “offer any compelling argument that counsel could have advanced to challenge the validity of the blood draw or test.” App. 78 – App. 79.

Tiedemann’s PCR counsel filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for failing to challenge the validity of law enforcement's collection of a blood sample following Petitioner Tiedemann's accident, which was done without Petitioner's consent and without a search warrant.

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 challenging the validity of the blood sample and test. This was the only potential defense that Petitioner Tiedemann had. There was no evidence that counsel made the effort to talk with any possible witnesses to determine if Tiedemann had said he was not consenting. There was no evidence that counsel performed any research to determine any possible loophole in the statute. Tiedemann was prejudiced by counsel not challenging the blood test or trying to find a way to challenge the blood test.

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 26th day of November, 2018.

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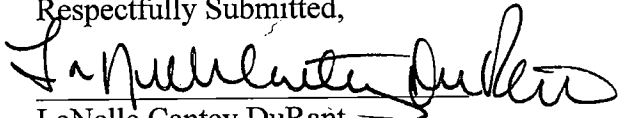
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas Tiedemann 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 November 30, 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 Thomas Tiedemann.

Respectfully Submitted,



LaNelle Cantey DuRant

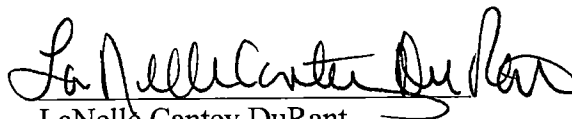
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th 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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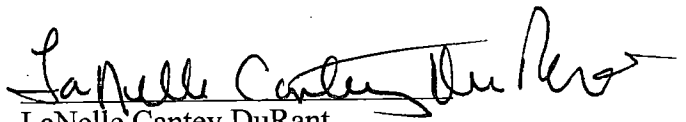
V.

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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 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 Thomas Tiedemann, at 4018 B Pilot House Court, Myrtle Beach, SC 29579, this 26th day of November, 2018.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of November, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.