

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable J. Cordell Maddox, Circuit Court Judge

KAIRON BRENTON MALDONADO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000893

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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The PCR court erred in not finding trial counsel, Attorney Brown, ineffective for not pursuing the two alibi witnesses, Marcus and David, through Petitioner’s friend, Romalio Huey, before trial because counsel learned through cross examination of Huey at trial that Huey had a cousin David and a friend Marcus. 7

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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel, Attorney Brown, ineffective for not pursuing the two alibi witnesses, Marcus and David, through Petitioner's friend, Romalio Huey, before trial because counsel learned through cross examination of Huey at trial that Huey had a cousin David and a friend Marcus?

STATEMENT

On July 25, 2012, Vipul Patel was in the convenience store owned by him and his mother on Cherry Road in Rock Hill. Around eleven o'clock p.m. two young men who appeared to be around the ages of fourteen to eighteen entered the store. Patel recognized the one who came close to the counter because he had been in that store a few times before. The other man stood near the front door. App. 141, ll. 11 – App. 148, ll. 4; App. 152, ll. 1 – App. 153, ll. 14.

The man near the counter and cash register told Patel to give him the money. Patel then pushed the security switch near the counter which notified the police of an emergency. When he did, the man near the door started shooting at Patel. Patel did not know about the gun until the man started shooting. App. 150, ll. 8 – App. 151, ll. 25. Patel was hit by two shots in his face, one of which hit his shoulder, and the other bullet hit his other shoulder. App. 142, ll. 7 – App. 143, ll. 10. A third bullet stopped at the cash register. Patel was behind the cash register and was not hit by that bullet. App. 80, ll. 1 – 13.

The two men then ran from the store. App. 153, ll. 15 – 20. Two patrolmen were in a nearby patrol car and saw the two men leave the store with a rifle. The officers suspected a robbery had occurred and decided to try to catch the two men. The co-defendant Sanders was caught, but Petitioner Maldonado allegedly got away. App. 80, ll. 12 – App. 81, ll. 17.

Patel identified Maldonado in a photo lineup. Patel then identified Maldonado in an in-court identification at trial. App. 157, ll. 1 – App. 159, ll. 21.

The York County Grand Jury indicted Petitioner Maldonado on the charges of attempted armed robbery, possession of a firearm during a violent crime, criminal conspiracy, and attempted murder. App. 383- App. 390. On March 18 – 20, 2013, Maldonado proceeded to trial

before the Honorable John C. Hayes and a jury. Maldonado was represented by Michael L. Brown, and the state was represented by EB Springs. App. 1.

During the trial, Romalio Huey testified that he and Petitioner Maldonado and Kadeem Sanders often went in the local convenience store owned by Patel. On July 24, 2012, the night before the robbery, Huey testified that Maldonado and Sanders came to Huey's house and they talked of robbing a store. Then it happened the next day. App. 131, ll. 1 -App. 133, ll. 25.

On cross-examination by trial counsel Brown, Brown asked Huey if he had two cousins named David and Marcus. Huey replied that he had a cousin named David and a friend named Marcus. App. 138, ll. 15 – 23.

Kadeem Sanders testified also that he and Maldonado went into Patel's convenience store to rob it on July 25, 2012. Sanders also admitted that he fired the rifle at the owner/clerk Patel. App. 187, ll. 1 – App. 189, ll. 24.

The jury found Maldonado guilty of attempted armed robbery, guilty of criminal conspiracy, and not guilty of attempted murder. App. 300, ll. 1 – 25. The judge sentenced Petitioner Maldonado to twenty years on the attempted armed robbery and five years on the criminal conspiracy. The sentences were to run concurrent. App. 307, ll. 14 – 25.

Maldonado appealed his convictions and sentences. The appeal was perfected by the Division of Appellate Defense. The Court of Appeals affirmed Maldonado's convictions and sentences on March 11, 2015. State v. Maldonado, Op. No. 2015-UP-132 (Ct. App. filed March 11, 2015).

On March 7, 2016, Petitioner Maldonado filed an application for post-conviction relief (PCR). The state filed a return on August 8, 2016. An evidentiary hearing was held on November

8, 2017 before the Honorable J. Cordell Maddox. Maldonado was represented by Nathan Sheldon, and the state was represented by Justin Hunter. App. 330.

Petitioner Maldonado testified at the hearing that he wanted his convictions and sentences vacated and he wanted a new trial. Shortly after his arrest on August 2, 2012, an attorney, Tyler Burns, was appointed to represent Maldonado. App. 335, ll. 1 – 25. He told this attorney that he had nothing to do with this case as he had an alibi. He gave attorney Burns the names of David and Marcus as his alibi witnesses as Maldonado was with them at Innsbrook Commons Apartments on the night of this incident. He asked Attorney Burns to follow up on this alibi. App. 336, ll. 1 – App. 337, ll. 25.

About six to eight weeks before his trial, Maldonado asked to have Attorney Burns relieved as Maldonado claimed that Burns “came at him in a homosexual manner.” The court did relieve Burns and Attorney Michael Brown was appointed to represent Petitioner. App. 339, ll. 3 – App. 340, ll. 25.

Petitioner Maldonado told Attorney Brown the same story about his alibi witnesses David and Marcus. Maldonado was with David and Marcus the night of the robbery at Innsbrook Commons Apartments smoking a “blunt.” Maldonado testified that Attorney Brown did hire an investigator. App. 342, ll. 1 – 25. However, the investigator did not find the alibi witnesses. App. 343, ll. 1 – 4.

According to Maldonado, Attorney Brown told him that his alibi could not be verified. Maldonado said he made the same statement to law enforcement about his alibi. Attorney Brown did finally tell Maldonado that he had found a Marcus and a David but Maldonado said it was never looked into any further. App. 345, ll. 17 – App. 346, ll. 25. Although, Petitioner Maldonado said he never had the last names for David and Marcus. App. 347, ll. 12 – 25.

Tyler Burns testified that he was the first attorney appointed to represent Maldonado. However, Burns asked the court to be relieved because Maldonado accused Burns of making a homosexual advance toward Maldonado. The court did relieve Burns. Burns testified that he did not remember “much about this one at all. He said he “did not know about the case.” App. 349, ll. 12 – App. 350, ll. 25.

Attorney Michael Brown testified that he was appointed as trial counsel for Maldonado after Tyler Burns was relieved. App. 354, ll. 15 – 25. Attorney Brown said that the co-defendant Sanders admitted being the shooter so Maldonado was found not guilty on the attempted murder. App. 355, ll. 1 – 25. Attorney Brown believed that Petitioner should have received the plea deal from the prosecutor since Petitioner was less culpable because he was not the shooter. However, the prosecutor gave the deal to the co-defendant Sanders, who was the shooter. App. 357, ll. 1 – 25.

Attorney Brown said the alibi, in his opinion, was a “waste of time.” However, he did hire an investigator, Sam Ludlam, to investigate the alibi. The investigator found two children ages five and seven but their mother said the children were not out during that time of night. The mother discounted the story. App. 358, ll. 1 – 17.

Attorney Brown admitted that he did cross examine Huey during the trial about the two alibi witnesses. According to Attorney Brown, he thought Huey said they “were cousins or some relation Huey or Sanders” but the attorney could not remember clearly. He did know that Huey said he knew the two men. App. 358, ll. 18 – App. 359, ll. 10.

Trial counsel Brown stated that his trial strategy was that Petitioner Maldonado was not at the scene of the crime, and that his co-defendant Sanders was a “liar.” App. 364, ll. 3 – 15.

The PCR judge issued an order on March 30, 2018 denying Petitioner Maldonado's PCR application and dismissing it with prejudice. App. 370 – App. 381. The judge found that Petitioner Maldonado failed to prove that trial counsel Brown was ineffective. The judge found that trial counsel Brown provided "credible" testimony that he had hired an investigator to investigate the two alibi witnesses "Marcus" and "David." The judge wrote that Maldonado acknowledged that trial counsel hired an investigator. The judge also wrote that the investigation "came back" to two children in the neighborhood. The judge found that Petitioner failed to show prejudice as he did not show how the outcome of his trial would have been different as the two alibi witnesses did not come to the PCR hearing. App. 376 – App. 377.

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

ARGUMENT

The PCR court erred in not finding trial counsel, Attorney Brown, ineffective for not pursuing the two alibi witnesses, Marcus and David, through Petitioner's friend, Romalio Huey, before trial because counsel learned through cross examination of Huey at trial that Huey had a cousin David and a friend Marcus.

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).

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 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.

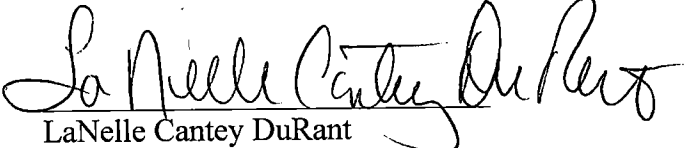
Petitioner Maldonado's trial counsel Brown, was ineffective for not pursuing the two alibi witnesses by talking to Petitioner's friend Romalio Huey before the trial about the alibi witnesses David and Marcus. Counsel learned through his cross examination of Huey during the trial that David was a cousin of Huey's and that Marcus was his friend. App. 138, ll. 1 – 23; App. 358, ll. 1 – App. 359, ll. 10.

If counsel or his investigator had talked with Huey before trial about the names of David and Marcus, there was a reasonable probability that Huey could have told them where to find David or Marcus or at least one of them. Although trial counsel Brown had hired an investigator to find these two alibi witnesses, there was no evidence that the investigator tried to talk to Huey about Marcus and David. App. 358, ll. 1 – 17.

Because Huey testified that he was a friend of Petitioner and that Petitioner and his co-defendant Sanders met at Huey's house to plan the robbery, there was a very strong probability that Huey knew some of the other people that Petitioner did associate with. App. 133, ll. 1 – 22.

CONCLUSION

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


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of December, 2018.

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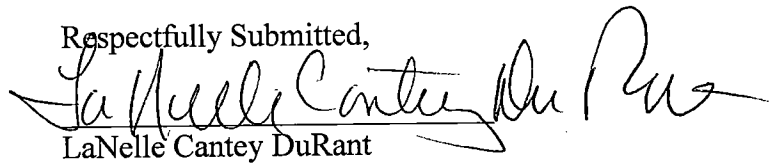
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Kairon Brenton Maldonado 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 November 8, 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 Kairon Brenton Maldonado.

Respectfully Submitted,

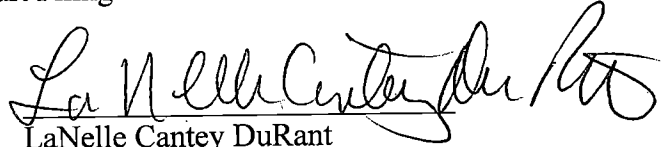


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of December, 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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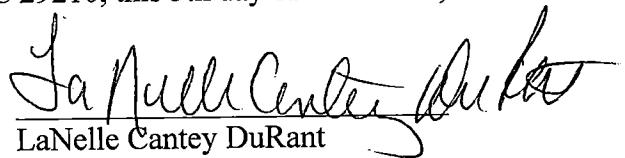
V.

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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 Janell Gregory, 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 Kairon Brenton Maldonado, #354792, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of December, 2018.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of December, 2018.

 (L.S)
Notary Public for South Carolina

My Commission Expires: September 27, 2028.