

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

Honorable William P. Keesley, Circuit Court Judge

EDWARD ANTHONY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000628

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
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ATTORNEY FOR PETITIONER

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The PCR court erred in finding that Petitioner Anthony was not prejudiced by trial counsel failing to object to the solicitor asking Petitioner Anthony if he were called “Freddy the Polo guy” who sold Polo shirts on the street corner although the PCR court found that trial counsel was deficient in failing to object to the solicitor’s question or moving for a mistrial or curative instruction.....8

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ISSUE PRESENTED

Did the PCR court err in finding that Petitioner Anthony was not prejudiced by trial counsel failing to object to the solicitor asking Petitioner Anthony if he were called “Freddy the Polo guy” who sold Polo shirts on the street corner although the PCR court found that trial counsel was deficient in failing to object to the solicitor’s question or moving for a mistrial or curative instruction?

STATEMENT

On March 16, 2014, Patsy Singletary worked at Belk in North Augusta, South Carolina in Loss Prevention. The purpose of loss prevention was to prevent “internal/external thefts or to catch shoplifters.” App. 93, ll. 7 – App. 94, ll. 25. She described the IntelSystem that Belk used which consisted of several cameras where the loss prevention officers had full view of the store. The loss prevention people also walked the store. Ms. Patsy was the person who apprehended Petitioner Anthony on March 16, 2014. App. 96, ll. 7-24.

Ms. Patsy had seen Petitioner in the Belk store several times in the previous two months. She said that he always followed the same pattern. He would select several items of Polo or Chap or collared shirts like those. According to Ms. Patsy, Petitioner would conceal the Polo shirt by covering it over with another or longer shirt. Petitioner would then go into the men’s dressing room and come out without the items and “hit” the door. She had viewed these prior incidents on the store’s CC-TV. App. 98, ll. 9- App. 100, ll. 9.

On March 16, 2014, Ms. Patsy was in the office and noticed Petitioner Anthony immediately when he came into the store. She zoomed the security camera in on him as she knew him by his face at this point. She observed Petitioner go to the Polo department and select several of those type shirts and a pair of jeans and go to the dressing room. The shirts were red and white striped Polo shirts. She then observed him exit the dressing room without any of the items. The dressing room was checked with no shirts found. She contacted law enforcement immediately. She could tell that Petitioner Anthony had a bulge in the front of his black sweatshirt. App. 105, ll. 20 – App. 107, ll. 12.

Petitioner Anthony was heading to the outside doors when the North Augusta police pulled up. Petitioner then turned around and went back to the men’s department. Ms. Patsy had

left the office and was going down the main aisle pass the men's department when she saw Petitioner Anthony pull clothes from under his shirt. When she retrieved the shirts Anthony pulled from under his shirt, she saw that the shirts had holes where the EAS alarms were removed. App. 107, ll. 13 - App. 113, ll. 25.

Ms. Patsy had a videotape from the store of March 16, 2014 which did show Petitioner Anthony in the store with the Polo shirts. App. 114, ll. 10 – App. 120, ll. 20.

Daniel Smith was an officer with the North August Department of Public Safety, and was dispatched to the Belk Store on March 16, 2014 regarding a shoplifting. After a search of the store, with the help of loss prevention who pointed Anthony out to the officer, he found Petitioner Anthony. The officer found a pair of pliers on Anthony's person. App. 156, ll. 2 – App. 157, ll. 22.

After viewing the loss prevention associate's statement and viewing the store video, the officer arrested Petitioner Anthony for shoplifting. App. 161, ll. 19 – App. 162, ll. 3. On July 14, 2014, the Aiken County Grand Jury indicted Petitioner Anthony on the charge of shoplifting third offense. App. 369 – App. 370.

On April 14-15, 2015, Petitioner Anthony proceeded to trial before the Honorable R. Lawton McIntosh and a jury. Petitioner was represented by M. Bradley McMillian, and the state was represented by Jeffrey Alan Slocum, Cassie W. Hall, and Ashley Hammack. App. 1. During the trial, Petitioner Anthony testified on his own behalf. App. 198, ll. 1 – App. 217, ll. 13.

During his testimony on direct, trial counsel asked Petitioner Anthony if everyone called him Edward. Petitioner responded no. Then counsel asked him what people did call him. Petitioner answered: "Freddy." Counsel asked if it were okay for him to call him Petitioner

Freddy, and Petitioner said yes. App. 198, ll. 1 – 11. Petitioner Anthony denied that he had ever stolen anything from Belk's. App. 206, ll. 23 – App. 207, ll.8.

On cross-examination, the state asked Petitioner:

Q. Mr. McMillian said that you go by Freddy?

A. Yes.

Q. They also call you Freddy the Polo Guy, don't they?

A. Huh-uh.

Q. Because you sell Polos on the corner of 15th and MLK in Augusta?

A. No.

Q. That ain't you?

A. No, that's another Freddy.

App. 211, ll. 16 – 25.

There was no objection by defense counsel. App. 211, ll. 16 – App. 212, ll. 25.

The jury returned a verdict of guilty of shoplifting as indicted. App. 257, ll. 17 – 25. At sentencing, the judge said to Anthony:

But what is at issue is that Mr. Anthony, I think it's clear---I mean, although it wasn't the strongest case, granted. There were some gaps, too, but this gentleman, Freddy Polo, and he's out there on the corner selling shirts and he's stealing from Belk's and other places in my mind. And, Mr. Anthony, you disagree with me.

App. 261, ll. 3 – 10.

Petitioner Anthony spoke to the court before sentencing. He said that it was another man named Freddy Polo out there on the corner doing the same thing. He got polo shirts with the name on them in plastic. App. 263, ll. 1 – 15.

The judge sentenced Petitioner Anthony to six years suspended to 45 months active incarceration with five years probation. The judge also ordered that Anthony go to Vocational

Rehabilitation or Job Corps when he was released until he had full time employment. App. 265, ll. 9 – 21.

Anthony filed a timely notice of appeal. The appeal was perfected by the Division of Appellate Defense in the Commission of Indigent Defense. The Court of Appeals affirmed Petitioner's conviction on December 7, 2016. State v. Anthony, Op. No. 2016-UP-507 (Ct. App. filed December 7, 2016).

On February 2, 2017, Petitioner Anthony filed an application for post-conviction relief (PCR). The state filed a return on May 16, 2017. An evidentiary hearing was held on January 23, 2018 before the Honorable William P. Keesley. Petitioner Anthony was represented by Lance S. Boozer, and the state was represented by Julie A. Coleman. App. 281.

At his PCR hearing, Petitioner Anthony testified that he was wrongly convicted of a crime that he never committed. App. 287, ll. 11 – 25. He confirmed that he had been incarcerated but was not in prison at the time of the PCR hearing. He came to the hearing of his own accord. He told the court that he wanted a new trial. App. 288, ll. 5 – App. 289, ll. 23.

Petitioner Anthony testified that his trial counsel should have objected when the state asked him if he were Freddy the Polo guy who sold Polos on the corner of 15th and MLK in Augusta. Anthony said that was a "crime against him." He said it was "another error." App. 306, ll. 1 – App. 307, ll. 14. When the trial judge talked about "Freddy the Polo guy" during sentencing, Anthony said that his trial lawyer made no objection. App. 307, ll. 15 – App. 308, ll. 16.

Trial counsel testified that Petitioner Anthony was adamant about going to trial. He would not consider the state's plea offer for a probation recommendation. App. 324, ll. 1 – 24.

When asked about his knowledge of Freddy the Polo guy, trial counsel testified: “The very first time I heard of it was when Solicitor Slocum cross-examined him on it.” App. 325, ll. 1 – 10. Counsel said that he only asked Anthony about the name Freddy because at some point, Anthony had told counsel that people called him Freddy. He wanted to make Anthony comfortable during his testimony. Trial counsel was surprised when the solicitor asked Anthony about Freddy the Polo guy. Trial counsel testified that he had never heard of Freddy the Polo guy. App. 326, ll. 1 – 22.

When PCR counsel asked trial counsel if he could see that the solicitor was trying to insinuate that Anthony was Freddy the Polo guy, trial counsel responded that he “believed that to be the case.” However, trial counsel stated that the solicitor did not call Anthony Freddy the Polo guy, but just asked Anthony if he were Freddy the Polo guy. Counsel testified: “At the time, as I heard it, I didn’t see anything objectionable about it because he was asking a request which Mr. Anthony could admit or deny.” Counsel did admit that it could have been an idea the solicitor was throwing to the jury. App. 326, ll. 23 – App. 327, ll. 19.

Trial counsel then admitted that he thought it was “prejudicial to Anthony in this case.” App. 328, ll. 1 – 17.

The solicitor on Petitioner Anthony’s case was Jeff Slocum who testified at the PCR hearing. Solicitor Slocum testified about the evidence the state had against Anthony. This included the testimony of Ms. Patsy Singletary and the video from the Belk store. App. 346, ll. 1 – App. 347, ll. 25. The solicitor stated that during the direct testimony of Anthony, trial counsel asked Anthony if he went by the name of Freddy. During that testimony. One of the solicitor’s investigators or officers whispered to the solicitor that Anthony was Freddy the Polo guy. That

was the reason Solicitor Slocum asked Anthony if he were Freddy the Polo guy. App. 348, ll. 1 – 23.

The PCR judge issued an order on March 29, 2018 denying Petitioner Anthony's PCR application and dismissing it with prejudice. App. 352 – App. 368. The PCR judge found that trial counsel was "deficient" in failing to object and/or move for a mistrial or curative instruction when the solicitor asked Anthony if he were "Freddy Polo." The judge wrote that "using a nickname implying that the accused was someone who did steal and sell stolen merchandise was objectionable and inappropriate." App. 362.

However, the PCR judge found that "the evidence in the record of Anthony's guilt was very strong, and this court finds no resulting prejudice on the outcome of the trial based on the evidence against him." App. 362. The PCR judge found that the "deficiency by trial counsel did not affect the jury's verdict." App. 363.

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

ARGUMENT

The PCR court erred in finding that Petitioner Anthony was not prejudiced by trial counsel failing to object to the solicitor asking Petitioner Anthony if he were called “Freddy the Polo guy” who sold Polo shirts on the street corner although the PCR court found that trial counsel was deficient in failing to object to the solicitor’s question or moving for a mistrial or curative instruction.

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).

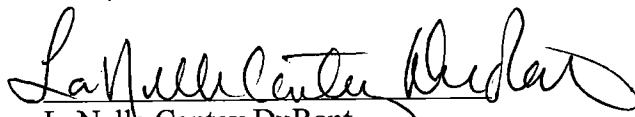
In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that in determining whether the applicant alleging ineffective assistance of counsel has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome

of the trial. In addition, the PCR court should consider the strength of the state's case in light of all the evidence presented to the jury.

The PCR court erred in finding that Petitioner was not prejudiced by trial counsel failing to object to the state asking Petitioner if he were a known criminal. This put reasonable doubt in the minds of the jurors. Therefore it was extremely prejudicial.

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 1st day of February, 2019.

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Honorable William P. Keesley, Circuit Court Judge

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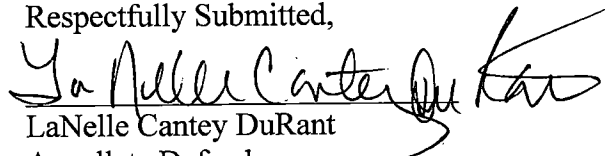
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Edward Rodriguez Anthony 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 P. Keesley, which was held on January 23, 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 Edward Rodriguez Anthony.

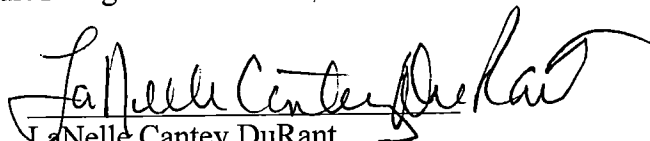
Respectfully Submitted,


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 1st day of February, 2019.

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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This 1st day of February, 2019.

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S.C. SUPREME COURT

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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 Megan H. 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 Edward Rodriguez Anthony at 2210 Bungalow Road, Augusta, GA 30906, this 1st day of February, 2019.



LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of February, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.