

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

Honorable Michael G. Nettles, Circuit Court Judge

DANIEL OWENS, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001826

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 trial counsel ineffective for failing to conduct the necessary investigation into Petitioner Owens' case in order to prepare a defense for Petitioner, when the only evidence from the two alleged incidents involving two of Petitioner's minor nieces were the statements of the two nieces?

STATEMENT

In June of 2004, Petitioner Owens allegedly got his then seven-year-old niece (“Minor 2”) alone, and he then allegedly pulled down his pants, and touched her. They were visiting Petitioner’s brother David at David’s home at the time. App. 134, line 17 – App. 140, line 25. Petitioner Owens was also charged with raping a separate niece in July 2007 when the girl was ten years old (“Minor 1”).¹ The girl and her family were living with Petitioner Owens at that time. App. 74, line 10—App. 78, line 12; App.90, lines 1 -25.

Minor 2 told her Aunt Michelle, who was visiting from North Carolina, of the incident. App. 140, line 19 – App. 141, line 24. Aunt Michelle told Minor 2’s parents. App. 160, line 14 – App. 161, line 2. Minor 1 told her Aunt Doris. App. 91, line 6 – App. 97, line 15.

In February 2010, the Marion County Grand Jury indicted Petitioner Owens on the charges of criminal sexual conduct (CSC) with a minor first degree (Minor 2) and committing or attempting to commit a lewd act on a minor (Minor 1). App. 475 – App. 476. On August 12 – 14, 2013, Petitioner Owens proceeded to trial before the Honorable Steven H. John and a jury. Petitioner was represented by Thurmond Brooker, and the state was represented by Fitzlee McEachin. App. 1.

During the trial, Minor 2 testified that she, her parents, Petitioner Owens, and Minor 1 went to their Uncle David’s house in June of 2004. Her testimony was that Petitioner Owens allegedly locked himself in a room alone with Minor 2, pulled down his pants, and attempted to pull down her pants, prompting her to kick him and exit the room. She went to the living room and met back up with the rest of the family but initially did not say anything about the alleged incident. However, when the family returned to their home later that day, Minor 2 told her Aunt Michelle

¹ Both nieces were around sixteen at the time of trial. App. 88, lines 5-12; App. 133, 13-23.

who was visiting from North Carolina what allegedly occurred. App. 135, line 4—App. 141, line 1. She also said that Aunt Michelle told her parents on the same day. App. 160, line 14—App. 161, line 2.

Minor 2 claimed that as a result of her allegation, Petitioner Owens no longer stayed at their house. However, she next stated that within the next few years she and her three sisters and their parents moved into Petitioner Owens' home. App. 141, line 2—App. 142, line 11.

Minor 1 testified that in July of 2007, she and Minor 2 went to bed in the same room together while staying in Petitioner Owens' three-bedroom mobile home. They were alone, as the other two girls "normally slept in whichever room that they landed in." She claimed she awoke from sleep and her clothes were off, Petitioner Owens was on top of her, and his "private part was in [her] private part." She testified that she did not speak about the incident until a year and a half later when she moved into her grandmother's home from a foster home. At that time, she made the allegation to her Aunt Doris. App. 91, line 6—App. 97, line 15.

Petitioner Owens did not testify at trial. App. 2 – App. 4.

The jury found Petitioner Owens guilty of both charges as indicted. App. 384, line 11 – App. 385, line 7. Petitioner Owens did appeal his conviction and sentence which was perfected by the Division of Appellate Defense with the filing of a brief pursuant to Anders v. California, 388 U.S. 738 (1967). The Court of Appeals dismissed Petitioner Owens' appeal on March 18, 2015. State v. Owens, Op. No. 2015-UP-154 (Ct. App. filed March 18, 2015).

On April 28, 2015, Petitioner Owens filed an application for post-conviction relief (PCR). The state filed a return on April 19, 2017. An evidentiary hearing was held on November 15, 2017 before the Honorable Michael G. Nettles. Petitioner Owens was represented by Jonathan Waller, and the state was represented by Lindsey McCallister. App. 414.

PCR counsel told the court at the beginning of the hearing that Petitioner Owens alleged in his application that his trial attorney was ineffective for “failure to properly investigate the facts and circumstances surrounding his case.” App. 418, line 2 – 14. Petitioner Owens testified at the PCR hearing that his trial attorney did not investigate as to whom “Aunt Doris” was because no one named Doris testified at the trial. The only person named Doris that Owens knew was his sister. App. 428, lines 2 – 25.

Owens knew nothing about his attorney contacting his brother, David about the 2004 incident that allegedly happened at his brother’s house. Owens said that he and his brother were “not getting along well at that time.” App. 423, line 1 – 25.

Owens told the court that the charges were all “lies” because he would not “stoop that low.” App. 430, ll. 24 – App. 431, ll. 8. He did not know about the 2007 charge until he was arrested. Then he learned later about the 2004 incident. App. 421, line 2 – App. 422, line 25.

Trial counsel testified that he never talked with Petitioner Owens’ brother, David. App.448, line 16 – 25. Trial counsel admitted that he knew that one of the girls first reported the incident to “Aunt Doris.” Then Doris told the grandparents, who reported the incident to law enforcement. App. 445, line 1 – 12. However, trial counsel admitted again that he did not try to contact “Aunt Doris.” App. 444, line 3 – 25. The judge asked trial counsel if he talked to Doris before “he case was tried.” Counsel responded that he had no recollection of talking with Doris. App. 449, line 4 – 25.

Trial counsel testified that he did speak with the father of the two girls and with Aunt Michelle. He did not talk to the mother of the girls. Counsel said that he did not normally contact family witnesses as he used family members to contact witnesses because he believed the

witnesses would be more open with family members rather than a lawyer. App. 444, line 3 – App. 447, line 24.

Doris Bryant, sister of Petitioner Owens, testified at the PCR hearing. She did not know of any other relative of the girls named Doris. The girls never talked to her about any sexual assault. Law enforcement did not talk with her. App. 432, line 15 – 22. Ms. Bryant did speak with trial counsel and told him that the girls had never spoken with her about the allegations of sexual assault by Owens. App. 435, line 1 – 24.

Margaret Grover, grandmother of the girls, testified at the PCR hearing that she did testify at trial that she heard about these allegations from Doris who was her husband's sister. That was a different person than the lady who testified at the PCR hearing. App. 459, line 16 – App. 460, ll. 20.

PCR counsel argued in his closing remarks to that court that the fact that there were two different women named Doris made it even more important for trial counsel to have contacted them and investigated them. App. 461, ll. 8 – 25.

The PCR judge issued an order on September 19, 2018 denying Petitioner Owens' PCR application and dismissing it with prejudice. App. 467 – App. 474. The judge found that Petitioner Owens had failed to prove that trial counsel's performance "was deficient in any way." The judge wrote that trial counsel "investigated the existence of an 'Aunt Doris' to the best of his ability." The order provided that Owens failed to call the witnesses that he "alleged should have been called." Therefore, Owens' "speculation as to the existence of helpful witnesses was insufficient to meet his burden of proof." App. 473.

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

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to conduct the necessary investigation into Petitioner Owens' case in order to prepare a defense for Petitioner, when the only evidence from the two alleged incidents involving two of Petitioner's minor nieces were the statements of the two nieces.

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

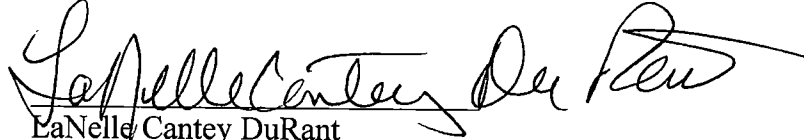
potential witnesses and to make an independent investigation of the facts and circumstances of the case.

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 order of the PCR court denying Owens' PCR application should be reversed because trial counsel was ineffective for not conducting an adequate investigation. Counsel should not have relied totally on family members to talk to witnesses. Counsel should have made any and all efforts to talk to Owens' brother David since the incident allegedly happened at David's house. Counsel should have made any and all efforts to find the right Doris and determine if the minor girl told her of the incident. If the girl did not, then there was a reasonable probability that Owens' charges would have been dismissed.

CONCLUSION

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

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

Honorable Michael G. Nettles, Circuit Court Judge

DANIEL OWENS, JR.

PETITIONER

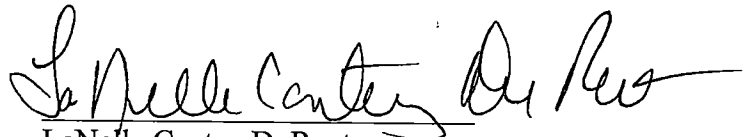
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Samuel Key, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Daniel Owens, #356538, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of May, 2019.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of May, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.