

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

JOHN WILLIAM KENNEDY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002019

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL

RECEIVED

JUN 11 2019

S.C. SUPREME COURT

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not
conducting a thorough and sufficient investigation into Petitioner
Kennedy’s case which made Petitioner’s guilty plea involuntary
and unknowingly made.....6

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL.....9

ISSUE PRESENTED

Did the PCR court err in not finding plea counsel ineffective for not conducting a thorough and sufficient investigation into Petitioner Kennedy's case which made Petitioner's guilty plea involuntary and unknowingly made?

STATEMENT

On September 17, 2015, Petitioner Kennedy went to the home of his ex-girlfriend in Greenville County where the ex-girlfriend's father lived also. Petitioner Kennedy took the keys to the father's 2015 GMC Sierra truck because Petitioner Kennedy knew where the keys were kept. Kennedy then left with the truck and its contents. App. 8, ll. 8 – 18.

Petitioner Kennedy met his co-defendant, Ashley Moore, at the Express Mart about 6:45 AM. Petitioner was trying to sell the Sierra truck to Moore. However, the Sierra truck was equipped with OnStar which the owner used to locate his truck. The owner called the police who located Petitioner and the Sierra truck at the Express Mart. Deputies McQueen and McGuire were the ones who responded and saw the two men transferring items from the Sierra truck to Moore's truck. App. 8, ll. 19 – App. 9, ll. 17.

When Petitioner Kennedy saw the deputies, Petitioner jumped into Moore's truck and started to run from the scene. Deputy McQueen jumped in front of the truck in an effort to stop it. However, Petitioner Kennedy did not stop and struck the deputy in the leg. Deputy McQueen still fired at the truck and did strike Petitioner. App. 9, ll. 18 – App. 10, ll. 10.

Petitioner Kennedy fled and led law enforcement on a high speed chase through traffic. Petitioner then switched over into the opposite lane and began traveling down the wrong side of the road at a high rate of speed. App. 10, ll. 11 – App. 11, ll. 19. Petitioner hit a fireman, Jordan Howard, who was on his way to work driving his motorcycle. Petitioner continued to flee the scene on foot but was apprehended and arrested. App. 11, ll. 20 – App. 12, ll. 12.

In April 2016, the Greenville County Grand Jury indicted Petitioner Kennedy on the charges of grand larceny, reckless homicide, leaving the scene of an accident with death, attempted murder, and failure to stop for a blue light (FTSBL). App. 4, ll. 4 – 16; App. 108 –

App. 117. On November 9, 2016, Petitioner Kennedy appeared before the Honorable Letitia H. Verdin and entered a guilty plea to all charges as indicted. Petitioner Kennedy was represented by Chris Scalzo, and the state was represented by Andrew Culbreath. App. 1.

The judge sentenced Petitioner Kennedy to twenty years on attempted murder; ten years on grand larceny consecutive with the balance suspended to probation for five years; ten years on reckless homicide; twenty years on the FTSBL resulting in death; twenty years on leaving the scene of an accident with death. App. 25, ll. 10 – 23; App. 118 – App. 122.

Petitioner Kennedy did not appeal his convictions nor sentences. App. 97.

On November 3, 2017, Petitioner Kennedy filed an application for post-conviction relief (PCR). The state filed a return on March 9, 2018. An evidentiary hearing was held on October 22, 2018 before the Honorable Alex Kinlaw, Jr. Petitioner Kennedy was represented by R. Mills Arial, Jr., and the state was represented by Deshawn H. Mitchell. App. 52.

Petitioner Kennedy testified at the PCR hearing that his plea counsel was ineffective because he did not do some things that Petitioner Kennedy thought he should have done. App. 66, ll. 12 – 25. Petitioner's PCR application claimed that plea counsel failed to investigate his case. App. 103. Petitioner testified that he felt "railroaded" into pleading guilty. He was told it was either go to trial or "go zero to 30 before the judge." App. 59, ll. 1 – 8.

Petitioner claimed that there was evidence missing such as the medical records of the victim, and the 911 tape which Petitioner never heard. App. 59, ll. 9 – App. 60, ll. 24; App. 65, ll. 5 – 10; App. 67, ll. 12 -14. There was also a correctional officer at Greenville County Detention Center that Petitioner asked counsel to talk to, but counsel never did. This officer had talked with one of the deputies involved in the chase. App. 63, ll. 20 – App. 65, ll. 4.

If his attorney had talked with the correctional officer, there would have been more facts about the chase. Petitioner believed that if he had received his discovery earlier and had had time to review it thoroughly, he would have gone to trial. App. 68, ll. 6 – App. 69, ll. 24.

Plea counsel testified at the PCR hearing that he provided the discovery to Petitioner two months prior to trial. App. 77, ll. 1 – 10. Concerning the investigation of the case, Counsel admitted that he did not have the victim's medical records. App. 77, ll. 13 – 24. Counsel explained that he sent an investigator to get a copy of the store's video but learned that there was no store video. App. 75, ll. 3 – 25.

In planning a defense for a trial, counsel said: "I don't know that there's a specific sort of legal defense that we really would have discussed." App. 83, ll. 22 – 24. Counsel did say that the main potential defense was the fact that the police bullet did strike Petitioner in the head but did not enter his skull. However, counsel said that it obviously had an effect on Petitioner, and may have contributed to his behavior during the incident. App. 83, ll. 1 – 24. Counsel admitted on cross-examination that he did not try to obtain an expert to evaluate Petitioner. App. 91, ll. 4 – 11.

The PCR judge issued an order on November 5, 2018 denying Petitioner Kennedy's PCR application and dismissing it with prejudice. App. 96 – App. 107. The judge found that Petitioner Kennedy had to present evidence at the PCR hearing to show what counsel could have discovered if counsel had fully investigated in order to show ineffective assistance of counsel. App. 103. The judge's order provided that plea counsel did investigate the issues that Petitioner wanted him to do, and that Petitioner presented no evidence to show what counsel could have found during an investigation. Petitioner presented no medical records, no 911 tapes, and no testimony from other witnesses. App. 104.

The PCR judge also found that the record showed that Petitioner's guilty plea was entered freely, voluntarily, knowingly, and intelligently. App. 105.

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

ARGUMENT

The PCR court erred in not finding plea counsel ineffective for not conducting a thorough and sufficient investigation into Petitioner Kennedy's case which made Petitioner's guilty plea involuntary and unknowingly made.

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).

The PCR court erred in not finding plea counsel ineffective for not insuring that Petitioner’s guilty plea was entered freely and knowingly and voluntarily. Plea counsel did not conduct a sufficient investigation. Counsel admitted that he did not seek an expert to evaluate Petitioner to determine if he suffered damage from the bullet that struck him which could have been a defense at trial. Counsel did not seek the 911 tape.

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.

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 11th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

JOHN WILLIAM KENNEDY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

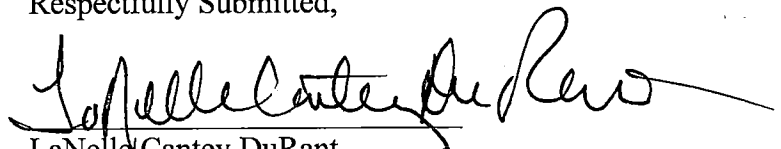
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for John William Kennedy 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 Alex Kinlaw, which was held on October 22, 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 John William Kennedy.

Respectfully Submitted,

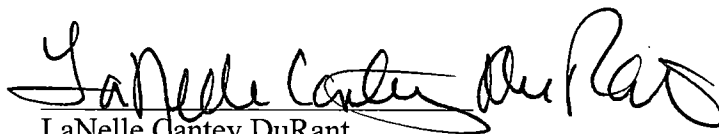


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 11th day of June, 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."



LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 11th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

JOHN WILLIAM KENNEDY,

PETITIONER

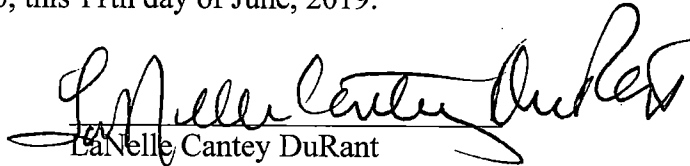
V.

STATE OF SOUTH CAROLINA,

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 Taylor Z. Smith, 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 John William Kennedy, #370431, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 11th day of June, 2019.



Lanelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of June, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.

