

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
James R. Barber, III, Circuit Court Judge

 ORIGINAL

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APR 30 2012

S.C. Supreme Court

CHARLES X. MIXON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in dismissing petitioner's PCR application for not complying with the filing procedures of S.C. Code Section 17-27-10 to 160 by not filing within the one year requirement when he had a viable ineffective assistance of counsel claim because his attorney did not provide all of the facts to him prior to his guilty plea which made his guilty plea involuntary and not knowingly entered into?

STATEMENT

In December 2004, the Richland County Grand Jury indicted Charles X. Mixon on the charge of murder. In February 2005, the Richland County Grand Jury indicted Mixon on the charges of possession with intent to distribute crack cocaine second offense (PWID) and armed robbery (AR). ON November 15, 2005, Mixon appeared before the Honorable L. Casey Manning and entered a guilty plea to the three charges as indicted. He was represented by Rachel Dain, and the state was represented by Dietrich Lake, Assistant Solicitor. Judge Manning sentenced Mixon to twenty-five years on the PWID second offense; thirty years on the AR; and forty-five years on the murder charge. App. 45, ll. 11 – 22. Mixon did not appeal his convictions or sentences.

On May 11, 2009, Mixon filed an application for post-conviction relief (PCR). He filed an amended PCR application on June 12, 2009. The state filed a return on March 23, 2010. An evidentiary hearing was held on June 8, 2011 before the Honorable James R. Barber, III. Mixon was represented by Anna Good, and the state was represented by Brian T. Petrano, Assistant Attorney General. On August 17, 2011, Judge Barber issued an order denying Mixon's PCR application and dismissing it with prejudice. Mixon's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in dismissing petitioner's PCR application for not complying with the filing procedures of S.C. Code Section 17-27-10 to 160 by not filing within the one year requirement when he had a viable ineffective assistance of counsel claim because his attorney did not provide all of the facts to him prior to his guilty plea which made his guilty plea involuntary and not knowingly entered into.

Charles Mixon was charged in three incidents. On November 13, 2004, and he and a co-defendant, Charles Jackson, robbed Rob Santos of his money and his 1992 Mazda vehicle. App. 23, ll. 14 – 25.

Later that evening in the early morning hours of November 14, 2004, the car stalled as they were driving. An acquaintance of theirs, Troy Brady, saw them and came over and helped them move the car from the roadway. Mixon and Jackson started walking away. Then Mixon turned and shot Brady in the chest killing him on the spot. App. 24, ll. 1 – 25; App. 25, ll. 1 – 8.

Jackson, the co-defendant, gave a statement to police that Mixon shot Brady. App. 25, ll. 3 – 25; App. 26, ll.1 – 3. Mixon was found hiding in a trash dumpster. He gave a written statement to police admitting that he killed Brady. App. 26, ll. 3 – 16. Mixon was eighteen years old at the time. App.39, ll. 6 – 10.

The third incident occurred on November 15, 2004 after the murder but before Mixon was arrested. He was seen outside a crack house and gave consent to search his person. Cocaine in the amount of 1.09 grams was found on his person. App. 26, ll. 17 – 25; App. 27, ll. 1 – 10.

At his PCR hearing, the state argued that Mixon's PCR was untimely because it was filed beyond the one year statute of limitations for a PCR, and should be dismissed. The state explained

that his guilty plea was November 15, 2005, and he filed his PCR application May 11, 2009. App. 69, ll. 9 – 14; App. 65, ll. 12 – 17.

Mixon's PCR counsel argued S.C. Code Section 17-27-45 (c) provides that the applicant must file his PCR within one year from the date of the actual discovery of the facts. She argued that Mixon did not receive his discovery from Ms. Dain until after the guilty plea. When he did, he learned that the description of the shooter by one of the witnesses did not match him at all. If he had known this before his plea, he would have changed his mind about the guilty plea. App. 69, ll. 15 – 25; App. 70, ll. 1 – 25.

Counsel argued that Mixon did not knowingly plead guilty because he was not aware of all of the facts which was due to ineffective assistance of his counsel. App. 72, ll. 9 – 13.

The PCR judge ruled that Mixon's PCR application should be summarily dismissed for his failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act S.C. Code Section 17-27-45 (a). Accordingly, the judge wrote that Mixon should have filed before November 16, 2006. App. 84.

The PCR judge continued by ruling that plea counsel was not deficient in any manner, and that Mixon was not prejudiced by counsel's representation. App. 86.

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). 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).

S.C. Code Section 17-27-45 (c) provides:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of the actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

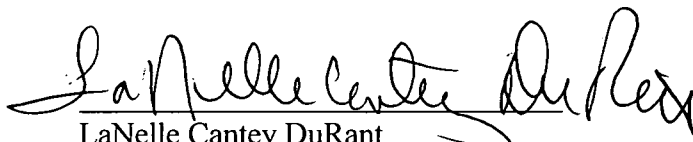
Mixon received his discovery from his plea counsel on January 12, 2009, which was after his guilty plea on November 15, 2005. Mixon filed his PCR application on May 11, 2009 which was within the one years of discovering the facts. App. 70, ll. 1 – 9.

Mixon's attorney did not insure that Mixon understood all of the issues of pleading guilty because she did not provide all of his discovery and evidence to him prior to his guilty plea. Therefore, Mixon's plea was not entered into knowingly and voluntarily.

CONCLUSION

Based on the above, certiorari should be granted and the order of the PCR court reversed and the case remanded.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a horizontal line underneath the name.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
JAMES R. BARBER, III, CIRCUIT COURT JUDGE

CHARLES X. MIXON,

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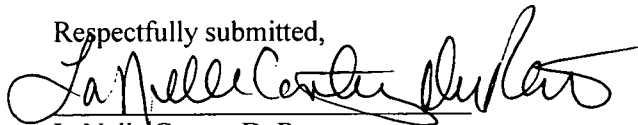
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charles X. Mixon states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on June 8, 2011. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Charles X. Mixon.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 30th day of April, 2012

STATE OF SOUTH CAROLINA

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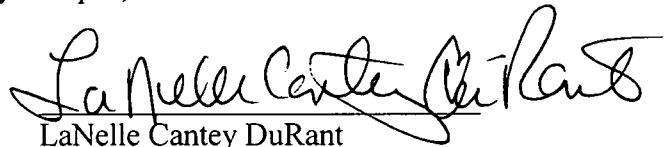
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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Brian Petrano, Esquire and Charles X. Mixon, #312475, at McCormick Correctional Institution this 30th day of April, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of April, 2012.



Notary Public for South Carolina

(L.S.)

My Commission Expires: December 4, 2017.