

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to York County  
Lee S. Alford, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

APR 15 2013

**S.C. Supreme Court**

JUSTIN NELSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212885  
\_\_\_\_\_

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

INDEX

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 4

CONCLUSION ..... 8

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

ISSUE PRESENTED

Did the PCR court err in failing to find plea counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly?

## STATEMENT

In April 2009, the York County Grand Jury indicted Justin Antavious Nelson on the charges of trafficking in crack cocaine more than ten grams, failure to stop for a blue light (FTSBL), and leaving the scene of an accident. In June 2009, the York County Grand Jury indicted Nelson on the charges of possession of marijuana with intent to distribute (PWID), and possession of crack cocaine with intent to distribute within the proximity of a park. On July 22, 2009, Nelson proceeded to trial before the Honorable John C. Hayes, III, and a jury. Nelson proceeded *pro se* with Twana Burris appointed as standby counsel. App. 129; App. 15, ll. 1 – App. 17, ll. 7. The state was represented by Jenny E. Desch. After jury selection, Nelson entered a guilty plea to the charges as indicted. The state offered a negotiated sentence of fifteen years. Judge Hayes accepted the negotiated plea offer and sentenced Nelson to the fifteen years. App. 40, ll. 1 – App. 14, ll. 20. Nelson filed an appeal. An appeal was perfected by the Office of Appellate Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Nelson's appeal on June 1, 2011. State v. Nelson, Op. No. 2011-UP-253 (Ct. App. filed June 1, 2011). On July 18, 2011, Nelson filed an application for post-conviction relief (PCR). The state filed a return on October 13, 2011. An evidentiary hearing was held on January 30, 2012 before the Honorable Lee. S. Alford. Nelson was represented by Charles T. Brooks, III, and the state was represented by J. Rutledge Johnson. On March 2, 2012, Judge Alford issued an order denying Nelson's PCR application and dismissing it with prejudice. App. 128 – 135. Nelson's attorney filed an appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find plea counsel ineffective for not insuring that petitioner's guilty plea was entered freely, voluntarily and knowingly.

On January 30, 2009, law enforcement officers served a search warrant on the home of Justin Nelson and his mother who consented to the search. In Nelson's room, officers found 151 grams of marijuana, a scale, and money. When Nelson was arrested on February 11, 2009, he stopped the car he was driving, but then took off again when the officers approached. He was eventually apprehended. When he was placed in the back of the police car, crack cocaine fell from his clothing. App. 47, ll. 7 – App. 49, ll. 18.

Nelson was proceeding to trial on July 22, 2009 on all of the charges. He was represented by Twana Burris, Esquire. Tr. Vol. I, p. 1. His attorney asked for a continuance as she was retained at 6:00 P.M. the evening before. She was served with discovery the morning of the trial. App. 4, ll. 1 – App. 6, ll. 25. She argued that it would be an injustice to her client for her to go forward when she had not looked at the discovery. App. 6, ll. 14 - 25.

Judge Hayes denied counsel's motion for a continuance because he said Nelson was "trying to game the system." App. 10, ll. 1 – 25. Nelson told the court that he did not have the money to hire an attorney before, and that the previous judge did not tell him a specific date for his trial. App. 13, ll. 4 – App. 14, ll. 6. Defense counsel told the court that she could not put herself in this position as she could not adequately represent him without adequate discovery. App. 14, ll. 7 – 10. The judge granted her motion to be relieved. He told Nelson that he would go forward *pro se*. App. 15, ll. 1 – 21.

Judge Hayes appointed Ms. Burris to be Nelson's standby counsel during the trial. App. 16, ll. 11 – App. 17, ll. 6. When the judge asked Nelson if he had any pretrial motions, Nelson told the

court that he wanted to object because he did not know he was supposed to be in court that day. He said he did not know what a motion was. App. 17, ll. 18 – App. 18, ll. 11.

After the jury was selected, Nelson decided to enter a guilty plea to the negotiated sentence of fifteen years offered by the state. App. 40, ll. 1 – App. 41, ll. 7. The judge appointed two attorneys to represent him on his guilty plea: Ms. Burris and Erik Delaney of the Public Defender's Office. App. 40, ll. 1 – 13.

At his PCR hearing, Nelson told the court that he pled guilty under pressure and he wanted a new trial. He said he needed better representation. He did regret pleading guilty. App. 102, ll. 3 – App. 103, ll. 23. Nelson would have gone to trial if his chain of custody had been presented as there was no factual basis for his case. App. 104, ll. 2 – 11. His plea was not voluntarily made. App. 108, ll. 17 – 24.

Nelson's plea counsel testified at the PCR hearing that she was retained the night before the trial but she did not know the case was going to trial the next day. When she talked to the solicitor the next morning, she learned the state was getting ready to select a jury. She asked the judge for a continuance which he denied. The judge told her that Nelson was just playing a game with the system so he granted her motion to be relieved. However, he appointed her as standby counsel to Nelson for his trial. App. 111, ll. 1 – App. 113, ll. 7.

During jury selection, the solicitor began discussing plea options. When she discussed this fifteen year plea offer with Nelson, he decided to plead guilty. App. 113, ll. 8 - App. 115, ll. 23.

The PCR judge ruled on the record at the PCR hearing that Nelson's guilty plea was entered freely and voluntarily with full knowledge of the consequences and his right to go to trial. App. 125, ll. 3 – 25.

In his order, the PCR judge ruled that there was no claim for ineffective assistance of counsel when the applicant proceeded *prose*. However, the judge ruled that standby counsel was effective in her role as standby counsel. The judge wrote that Nelson pled voluntarily and knowingly. App. 133. The judge ruled that Nelson failed to meet his burden of proof that counsel's performance was deficient or that he was prejudiced. He denied the PCR application. App. 134.

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, 466 U.S. 668, 104 S.Ct. 2052 (1984).

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. 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). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

Nelson’s guilty plea was not voluntary nor knowing as he wanted a trial since he had gone through the process of selecting a jury. He objected when the judge was about to start the trial. At the end of the guilty plea, Nelson told the court that he knew these were serious charges, but fifteen years was “over the top.” He said he had not even started to live his life and had not accomplished any of his goals. App. 51, ll. 5 – App. 52, ll. 20.

His attorney asked for a continuance as she had just received discovery the day of trial. And he was being forced to represent himself. His guilty plea was not voluntarily or knowingly made.

CONCLUSION

Based on the above, certiorari should be granted, the convictions and sentences 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 long horizontal flourish extending to the right.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of April, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO YORK COUNTY  
LEE S. ALFORD, CIRCUIT COURT JUDGE

---

JUSTIN NELSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212885

---

PETITION TO BE RELIEVED AS COUNSEL

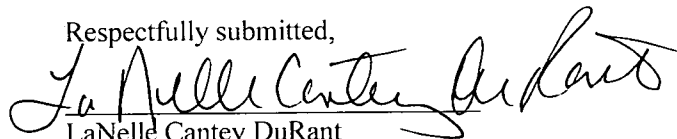
---

Counsel for Justin Nelson 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 January 30, 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 Justin Nelson.

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 15th day of April, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to York County  
Lee S. Alford, Circuit Court Judge

---

JUSTIN NELSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

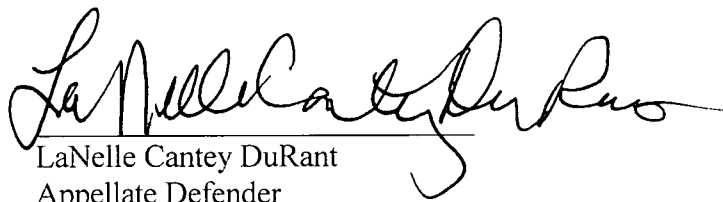
APPELLATE CASE NO. 2012-212885

---

CERTIFICATE OF SERVICE

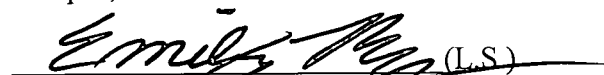
---

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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Justin Nelson, #307730, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 15th day of April, 2013.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day  
of April, 2013.

  
Notary Public for South Carolina  
My Commission Expires: November 16, 2022.