

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

MAY 18 2019

DEMETRIUS PRICE,

S:C: SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001580

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for failing to object to the solicitor vouching for the credibility of the witness, Devin Cannick, during the solicitor's closing argument to the jury?

STATEMENT

On July 28, 2008 at an apartment complex in Bluffton, Deon Cannick, who was eighteen years old, was living with his two older brothers, the girlfriend of one, and his younger brother. One of his older brothers was twenty-four-year-old Deverol who was known as Devin. App. 228, ll. 9 – 24; App. 311, ll. 1 – 24; App. 563, ll. 1 – 25. The brothers were playing video games. App. 563, ll. 21 – 25; App. 311, ll. 22 – 24.

Deon went downstairs to see his friend Martin. Martin told him that two guys were outside looking for Deon. When Deon went outside, he saw the two men, one of whom he recognized. He knew Price's co-defendant, Lucius Simuel because he was the uncle of Deon's former girlfriend. The two men tried to get Deon to buy some drugs, and he said no. The men then told Deon to get his older brother. App. 313, ll. 3 – App. 314, ll. 25.

Deon went inside to get Devin because the men asked for him. Deon stayed upstairs and started playing video games again. Devin went downstairs to talk to the two men. Deon's pit bull dog got out of the room and followed Devin downstairs so Deon went after the dog. App. 315, ll. 1 – App. 316, ll. 25.

When Devin went outside and spoke to the two men, one of whom he knew casually as Simuel, the men asked him if he wanted pills and other drugs. Devin said no. The men then pushed Devin back into the apartment and asked where the iron was. Devin saw the man with Simuel walk up to Deon and shoot him in the neck. App. 565, ll. 4 -App. 568, ll. 25.

When Deon got downstairs, he saw the same two men in the apartment: Simuel and the other one that Deon did not know. The one Deon did not know was pointing a gun at Deon. The man Deon did not know told Deon to come to him after Deon had started back up the stairs. Deon went to the man with his hands in the air. The man then shot Deon in the neck which left

Deon paralyzed for life. App. 321, ll. 1 – 21; App. 228, ll. 15 – 24. Deon heard his brother Devin say: “Oh my God! You shot my brother.” App. 324, ll. 14 – 21.

The two men started asking where the iron was, which Deon thought meant guns. The two men then ran outside after Deon was shot. App. 324, ll. 23 – App. 327, ll. 23.

When the men left the apartment, Devin went outside to try to see their car. Devin saw the men arguing. Both of the men had guns. One of the men shot Devin in the hand and the side. Devin then ran back inside and called 911. He was panicking trying to find the car keys. He and another brother finally got Deon in the car and met the ambulance at the front gate. App. 569, ll. 1 – App. 574, ll. 19.

While he was in the hospital, investigators showed Devin some photo lineups. Devin identified one of the photographs as the man who shot Deon. Devin also identified him in court during the trial—the man turned out to be Petitioner Price. App. 576, ll. 2 – App. 577, ll. 18.

On December 18, 2008, the Beaufort County Grand Jury indicted Petitioner Price on the charges of assault and battery with the intent to kill (ABWIK), burglary first degree, possession of a weapon during a crime of violence, and possession of a handgun by a prohibited person. App. 1113 – App. 1120.

On November 16 – 20, 2009, Petitioner Price and his co-defendant Simuel proceeded to trial before the Honorable Thomas W. Cooper, Jr., and a jury in a joint trial. Petitioner Price was represented by Christopher J. Geier; Co-defendant Simuel was represented by Ian Deysach; and the state was represented by R. Alexander Robinson and Robert Ferguson. App. 1.

Deon and Devin Cannick testified at the trial. Devin described in detail how he saw Deon get shot and how he was just lying on the floor. Devin testified that he was “just running

all around” because he could not believe that the man had shot Deon. App. 567, ll. 1 – App. 574, ll. 19. Neither Petitioner Price nor his co-defendant testified at the trial. App. 2-App. 8.

During his closing argument to the jury, the solicitor argued:

One of the things that makes your job so tough is you have to decide from that witness stand who’s telling the truth and who’s not. You saw Devin’s demeanor. You saw how it was for him to talk about seeing his brother get shot. I submit to you that he was telling the truth.

App. 883, ll. 6 – 10.

There was no objection by defense counsel. App. 883, ll. 6 – 25.

The jury returned a verdict of guilty for Petitioner Price on all of the four charges as indicted. App. 948, ll. 1 – App. 949, ll. 7. Defense counsel for Petitioner Price filed a notice of appeal. The South Carolina Court of Appeals affirmed Petitioner Price’s convictions and sentences. State v. Price, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012). Petitioner Price ultimately filed a petition for a writ of certiorari which the Supreme Court granted. On December 23, 2014, the Supreme Court dismissed the petition as improvidently granted. App. 1094.

On July 17, 2015, Petitioner Price filed an application for post-conviction relief (PCR). The state filed a return on June 7, 2016. Petitioner Price filed an amended PCR application on May 29, 2018. An evidentiary hearing was held on June 6, 2018 before the Honorable Diane Goodstein. App. 1002. Petitioner Price was represented by James Falk, and the state was represented by Christian Saville. App. 1003.

Petitioner Price testified at the PCR hearing that he felt from the beginning of his case that he was fighting a “lost cause.” App. 1065, ll. 1 – 25. Petitioner’s PCR counsel told the court that one of Petitioner Price’s allegations that trial counsel was ineffective was that trial counsel did not object to the solicitor’s closing argument where the solicitor did vouch for the credibility

of the state's witness, Devin Cannick. App. 1007, ll. 18 – App. 1008, ll. 10 – 15. Petitioner Price wanted his trial counsel to make the trial fair. App. 1076, ll. 14 -19.

Trial counsel testified that this trial was his first General Sessions case “of note” that had gone to trial. App. 1016, ll. 9 – 22. Counsel told that Petitioner Price gave a statement to police that he was not in Bluffton or Beaufort County on the day of the incident. App. 1046, ll. 1 – 16. Trial counsel admitted that he did not object when the solicitor gave his personal opinion in his closing statement that the witness was telling the truth. Counsel testified that the solicitor was “definitely trying to convince the jury that what he was saying was true.” Counsel admitted that he did not recall that or if he “even noticed it.” App. 1061, ll. 1 – 14.

The PCR judge issued an order on August 14, 2018 denying Petitioner Price's PCR application and dismissing it with prejudice. App. 1093 – App. 1112.

The PCR judge found that Petitioner Price failed to prove any of his allegations of ineffective assistance of counsel. The PCR court found that trial counsel “rendered competent and calculated representation before and during Petitioner Price's trial. The PCR judge also wrote that Price failed to prove that he suffered prejudice from trial counsel's performance. App. 1100. The PCR judge found that Price's allegation that trial counsel was ineffective for not objecting to the solicitor's closing argument was “meritless.” The judge found that the solicitor's statement was not referring to Devin's testimony in general but only to how hard it was for Devin to see his brother get shot. App. 1106 – App. 1107. PCR counsel filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to object to the solicitor vouching for the credibility of the witness, Devin Cannick, during the solicitor's closing argument to the jury.

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 Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002), the Supreme Court held that trial counsel was ineffective for failing to object to the solicitor's comments where the solicitor vouched for the credibility of the state's witness. In Matthews, the solicitor told the jury that she did not "trust any of the witnesses until she had corroborated their testimony. The Supreme court ruled that the solicitor's statement was improper. The court held that a solicitor may argue the credibility

of the state's witness if the argument is based on the record and its reasonable inferences. The court continued to hold that a solicitor may not vouch for the credibility of a state's witness based on personal knowledge or other information outside the record.

The solicitor's comments regarding Devin telling the truth was based on Devin's demeanor when he talked about his brother getting shot. That was very clearly the solicitor's personal opinion because it was based on the solicitor's subjective opinion about Devin's demeanor. Trial counsel should have objected and the PCR court should have found trial counsel ineffective for not objecting.

CONCLUSION

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

A handwritten signature in black ink that reads "LaNelle Cantey DuRant". The signature is written in a cursive style with a long, sweeping horizontal line extending to the right.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of May, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Diane Schafer Goodstein, Circuit Court Judge

DEMETRIUS PRICE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Demetrius Price states:

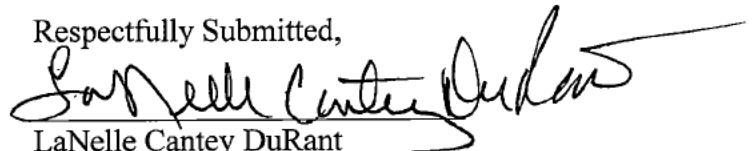
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Diane Schafer Goodstein, which was held on June 6, 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 Demetrius Price.

Respectfully Submitted,



LaNelle Cantey DuRant

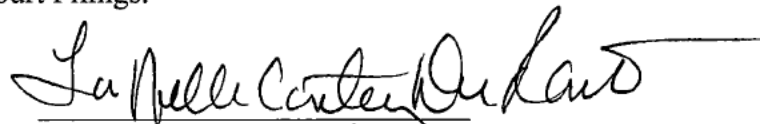
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of May, 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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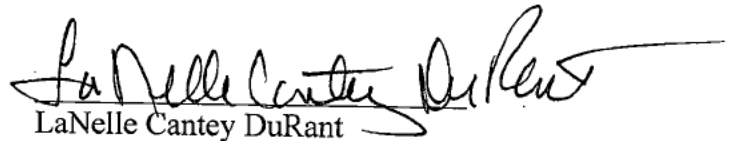
V.

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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 Benjamin Limbaugh, 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 Demetrius Price, #338142, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of May, 2019.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2019.

 (L.S) :

Notary Public for South Carolina

My Commission Expires: September 27, 2028.