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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Cherokee County
Court of Common Pleas

The Honorable R. Keith Kelly, Trial Judge
The Honorable H. Steven DeBerry, IV, PCR Judge

Appellate Case No. 2022-000085

NICHOLAS BONNER. ..... Petitioner,

v.

STATE OF SOUTH CAROLINA. ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failing to object to prior bad acts testimony because Counsel made a reasonable, strategic decision not to object and Petitioner was not prejudiced because the objection would have been overruled and there was substantial evidence of guilt?

III. Did post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failure to object to jury instructions concerning inference because Counsel was not deficient for failing to object to jury instructions that were legally correct at the time and the instructions were non-prejudicial because did not impact the jury's verdict?

IV. Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failure to move to suppress the search warrants because Counsel made a reasonable, strategic decision rendering the motion unnecessary and Counsel's decision was non-prejudicial because the motion, if raised, would have been denied?

STATEMENT OF THE CASE

In September 2012, the Cherokee County Grand Jury indicted Nicholas Bonner ("Petitioner") for trafficking in crack cocaine, more than 400 grams (2012-GS-11-00820) and trafficking in cocaine, more than 400 grams (2012-GS-11-00821). Petitioner was represented by Candice Lapham, Esquire ("Counsel"). Assistant Solicitor Christopher M. Bain, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. On April 24, 2017, Petitioner proceeded to a jury trial before the Honorable R. Keith Kelly. The jury found Petitioner guilty of the lesser-included offense of trafficking in cocaine, 28-100 grams, on April 27, 2017. Petitioner was sentenced to twenty years' imprisonment. Petitioner filed a motion to reconsider the sentence and a motion for a new trial on May 5, 2017. A motions hearing convened on May 19, 2017. Judge Kelly denied the motions on May 30, 2017.

Petitioner filed a notice of appeal. On July 18, 2017, Petitioner filed a motion to remand the case to the circuit court to resolve post-trial motions. The South Carolina Court of Appeals granted the motion and dismissed the appeal without prejudice on August 24, 2017. The remittitur was issued on September 15, 2017.

Petitioner filed another motion for a new trial and a hearing on the motion was convened on November 8, 2017, before Judge Kelly. On December 5, 2017, Judge Kelly denied the motion. Petitioner did not file a timely notice of appeal thereafter.

Petitioner filed a PCR application on August 27, 2018. The evidentiary hearing occurred on August 4, 2021, before the Honorable H. Steven DeBerry, IV. Susannah Ross, Esquire was Petitioner's attorney. William Ray, Esquire of the South Carolina Attorney General's Office represented Respondent. The Court issued an order of dismissal granting belated appellate review pursuant to *White* and denying all other claims with prejudice on December 15, 2021.

STATEMENT OF FACTS

Testimony from Law Enforcement

On August 6, 2012, Prentiss Jeffries, a confidential informant for the Cherokee County Sheriff's Office ("CCSO"), told CCSO narcotics investigators Todd Parker, controlling agent, and Brandon Gardner, lead investigator, that a large shipment of cocaine arrived at Petitioner's house. (App. 122-23, 140-44, 283-86; State's Trial Exhibit #2). Gardner obtained a search warrant based on the information. (App. 276-77). Police waited to execute the search warrant until Jefferies called Parker to confirm the shipment had arrived. (App. 282-83).

Gardner reached out to Mice Scruggs, narcotics officer with the City of Gaffney Police Department, and they put together a joint team between the county and city because of the number of people anticipated to be present at the home. (App. 347-48). Nick Federico, a CCSO narcotics officer, executed the search warrant on August 6, 2012. (App. 201-03, 288-29, 347-48). During the search, law enforcement discovered cocaine in an individual's pocket, about two ounces of crack cocaine in the oven, $13,084 in cash in the top drawer of a nightstand a bedroom, $615 in another bedroom, and $1,250 in Petitioner's pocket. (App. 203-08, 291-92, 294-98, 303-09). After the first search did not produce the large shipment expected, Parker was contacted by Jefferies, who clarified the shipment was across the street. (App. 310-11, 349).

Officer Ronnie Anderson, then with the Gaffney City Police Department, secured the residence during the search. (App. 233-34). While on scene, Detective Parker advised him that Jefferies reported Petitioner's big drug shipment was across the street. Anderson spoke with Jefferies, who repeated the tip. (App. 234-35, 244-47). Anderson obtained a search warrant that he signed in front of the magistrate. (App. 246-47). The police executed the search warrant and found a red duffel bag inside of a trash can under the carport which contained over 400 grams of

cocaine and crack cocaine. (App. 209-10, 235, 240-41, 249-50, 349-50). Petitioner was arrested on scene along with everyone else that was present. (App. 309). Agitated "because [Eric Lattimore] wouldn't claim the drugs[,]" Petitioner shoved Lattimore and the police broke up the confrontation. (App. 309-10).

Petitioner gave a statement to Detectives Garner and Scruggs, where he claimed Lattimore came into the house looking for a scale, only to have the police raid the house. (App. 319-20, 351-52).

Testimony from the People in the House

Lattimore went to Petitioner's home on August 6, 2012, to buy a couple of cigarettes and a beer. (App. 151-52). While there, Lattimore witnessed Petitioner send a person to retrieve bags from across the street to provide drugs to "[s]ome dude from out of town[.]" (App. 152). It was not the first time Lattimore saw Petitioner dealing out of the house. (App. 161-62). Petitioner produced scales, weighed what Lattimore described as "some white stuff like cocaine, crack cocaine[,]" and gave it to the man. (App. 152-53, 159). Petitioner directed this man to return the bag of drugs across the street. (App. 153, 3-4). The police raided the house soon thereafter. (App. 159-60). While at the detention center, Petitioner verbally abused Lattimore, and threatened to force him to take the fall. (App. 164-65). Lattimore gave written police statement consistent with his trial testimony. (App. 167-68).

Stephon Adams, Petitioner's acquaintance, testified he was smoking marijuana at Petitioner's house when the police arrived. (App. 254-55, 257). Adams saw Petitioner and Lattimore exchange something unidentified, and then saw crack cocaine weighed in Lattimore's presence. (App. 254, 258-60). Petitioner said "there go the cops[,]" and at least six people, including Adams, fled out the back door. (App. 255-56). Adams was apprehended and arrested

for trafficking crack cocaine. (App. 256). While the group, minus Lattimore, were transported in the police van, Petitioner asserted that the drugs belonged to Lattimore. (App. 260-61). Adams denied knowledge of the drugs across the street. (App. 264-65). In a written statement, Adams stated that Lattimore arrived at the house with the drugs. (App. 267-68).

Jarvis McCluney, Petitioner's acquaintance, was at Petitioner's house smoking marijuana on August 6, 2012. (App. 378-80). McCluney denied familiarity with drugs other than marijuana, but testified he saw Lattimore arrive and produce a hard, white substance. (App. 381-82). McCluney handed him one. (App. 382-83). McCluney denied seeing an exchange of drugs, but explained Lattimore came to the door and called Petitioner outside, after which Lattimore came in and asked for a scale. (App. 384). Somebody yelled that the police arrived, and McCluney pocketed his scale and stepped through the door while Lattimore ran toward the kitchen. (App. 385). McCluney saw an argument between Petitioner and Lattimore over Lattimore's demand that all present stick the drugs on a fourteen-year-old juvenile. (App. 385-86). McCluney denied knowledge about the drugs recovered from across the street. (App. 390-91). McCluney gave a statement to law enforcement consistent with his trial testimony, explaining that ten to fifteen minutes passed between Lattimore's request for a scale and the raid. (App. 392).

The Defense Case

Rodney Love, Petitioner's friend, arrived at the house after the police raided it and testified that he saw law enforcement retrieve a red bag from the woods and bring it to Petitioner's property. (App. 463-65). Love testified he observed Officer Anderson leave with Lattimore in custody, then return fifteen minutes later. (App. 468). The raid team converged on the abandoned house across the street and opened the trash can, celebrating their findings. (App. 468-69). Love testified that Petitioner lived with his girlfriend at a different address, but visited

his mother, Gwen Bonner, [1] daily. (App. 471-72). Love testified Petitioner's mother would never let people smoke in the house and could not explain why drugs were there. (App. 473-74). Love testified that the $13,000 cash was in Gwen's "money drawer." (App. 487).

Ronda Norris, Petitioner's ex and mother to one of his children, testified Gwen acted maternal towards everyone and would not allow the activities in question in her home. (App. 490-94). Norris testified Petitioner did not consume drugs and that she would not allow her children to be in that environment. (App. 495-96). Norris testified that "Gwen Bonner wasn't home at the time" when prompted to explain the recovered marijuana. (App. 499-500, 510). Norris testified she pulled up at the house after the raid. (App. 510-11).

Shakeia Davidson, Petitioner's first cousin and Rodney's wife, testified the house was Gwen's and people regularly gathered there. (App. 526-28). Shakeia was not present during the raid and was unaware of any gatherings at Gwen's home that day. (App. 527-29).

Rodney Davidson, Petitioner's acquaintance, testified Petitioner was typically at the home every weekend. (App. 517-22). Rodney asserted Petitioner's mother did not allow drugs in her house and was surprised to hear that crack was in the oven. (App. 523-34). Rodney was not present during the raid. (App. 523).

Daphine Bonner, Petitioner's aunt, testified Petitioner visited the home daily. (Tr. 530-31). She testified Petitioner's mother did not allow parties to be thrown at her house in her absence. (App. 533-34). Daphine declined anything unusual about the money. (App. 534-35).

Todd Fernanders, a lifelong friend of Petitioner's family, happened upon the raid while returning from bible school. He testified he saw an officer recover a bag from city property and drop it near a big tree between his sister's home and the raided house. (App. 546-50).

[1] Gwen Bonner was deceased at the time of trial. (App. 494).

Latonya Smith, the older sister of one of the arrested juveniles, learned of her younger brother's arrest and promptly went to the scene with her mother and cousin. (App. 573-74). Federico and Gardner let them into the house to meet with the handcuffed juvenile. (App. 574-76). Smith learned that Lattimore tried to pin the drugs on her brother. (App. 576-77).

Chris Bonner, Petitioner's cousin, was near the tree when Lattimore arrived and asked for a scale; Chris denied knowledge of a scale and Lattimore went into the house. (App. 578-80). Chris did not see what occurred inside the house, and testified he never saw Lattimore and Petitioner leave. (App. 580-81). Chris denied drug activity was common in the house and testified that he never saw Petitioner involved in drug activity. (App. 581). Chris was arrested during the raid. (App. 586-87). As the police brought everybody out of the house, Lattimore said "put the drugs on the young guy, and [Petitioner] hit him in his mouth." (App. 587).

Petitioner testified he visited his mother daily, who was in poor health and could not be around smoking. (App. 613). Petitioner listed his mother's home as his own on all paperwork to ensure that she received it. (App. 613-14). Petitioner testified the money found was his mother's, who worked for nearly forty years after inheriting the home from her father, allowing her to save a large amount of cash. (App. 614-15). Petitioner admitted to smoking marijuana when he was younger. (App. 615). On the incident date, Applicant testified Lattimore pulled up, asked Chris for a scale, and came in and asked him "Nick, do you got a weed scale?" (App. 615-16). Petitioner said no and Lattimore obtained one from McCluney. (App. 616). Petitioner testified that when he saw Lattimore's dope, he told them to leave, only to have law enforcement raid the house. (App. 616). Lattimore threw his drugs in the oven and fled towards the back door, which was nailed shut. (App. 617). Lattimore insisted Petitioner "put the drugs on the 14 year old[,]" which prompted Petitioner to strike him. (App. 617-18). Petitioner explained the $2,500 in his

pocket was from selling a four-wheeler to Gus Logan, who testified to the same. (App. 619-20).

On cross-examination, Petitioner denied anybody smoked marijuana at the house and noted the absence of paraphernalia in the pictures of the home. (App. 625). Petitioner denied knowledge about his mother's cash drawer. (App. 625-26). Petitioner claimed the cash in the drawer was $35,000 and implied the police underreported the amount to steal it. (App. 631-34). Petitioner claimed no valid search warrant was served during the raid, and that Officer Federico "was reading blank pieces of paper[.]" (App. 634-37). Petitioner gave a statement to the police that Lattimore entered the home, asked for a scale, indicated that he wanted to sell crack, and that the police came right after. (App. 640).

Nickcos Smith testified he was present when Lattimore entered. (App. 697-98). A few minutes later, Ronnie Littlejohn entered and threw marijuana down on the table while Lattimore looked out the back window. (App. 698, 701). Smith denied seeing Jefferies that day and anybody from North Carolina bring drugs to Lattimore. (App. 698). Smith recalled Lattimore producing the crack and asking McCluney for the scale, and that Petitioner told him to leave. (App. 699-701). During the raid, Lattimore threw his crack into the oven. (App. 699).

DeeGee Bonner, Petitioner's sibling, testified Petitioner visited his mother often and denied drug transactions occurred in the home. (App. 705-06). She clarified the money was her mother's savings and denied ever seeing Petitioner use, buy, or transport drugs. (App. 706-11).

Stacy Covington, Petitioner's sister, testified the home was his mother's, where his mother saved almost thirty thousand dollars. (App. 714-18). She denied seeing Petitioner use, sell, or buy drugs and stated their mother never allowed drugs in the house. (App. 718-19, 726).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the petitioner shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs only if no probative evidence to support the findings. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts only conduct a *de novo* review only if evaluating questions of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

In a PCR action, the petitioner bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When a petitioner asserts ineffective assistance of counsel as a ground for relief, the petitioner must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.").

Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S.

at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant because of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

I. Petitioner is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

Respondent concedes that Petitioner is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967). *Id.*

South Carolina's Appellate Courts have no jurisdiction to entertain appeals when the notice of appeal is not timely given and served. *White*, 263 S.C. 110, 119, 208 S.E.2d 35, 40 (1974). Nevertheless, if a PCR court finds that a petitioner has been denied his right to direct appeal from trial due to counsel's errors, his request for post-conviction relief may be denied, but he may be permitted to seek belated review of trial errors in conjunction with his appeal of the order dismissing his PCR application. *Id.*

At the PCR hearing, Counsel testified that she initially filed a notice of appeal, but requested the matter be sent back to the circuit court to resolve a pending motion. (App. 902). The appellate court dismissed without prejudice. (App. 902). The motion was denied. (App. 903). Counsel stated she had prepared the paperwork to effectuate the appeal but failed to file the notice because she was dealing with health issues. (App. 903). Counsel testified that the failure to timely file a notice of appeal was "one-hundred percent" her fault. (App. 903-04).

Respondent concedes that Petitioner did not waive his right to an appeal and the failure to file the notice of appeal was Counsel's fault. Accordingly, Respondent recognizes and concedes that Petitioner is entitled to relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

II. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failing to object to prior bad acts testimony because Counsel made a reasonable, strategic decision not to object and Petitioner was not prejudiced because the objection would have been overruled and there was substantial evidence of guilt.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failing to object to prior bad acts testimony. However, the PCR court properly rejected this argument, finding that Counsel made a reasonable, strategic decision not to object and Petitioner was not prejudiced because the objection would have been overruled and there was substantial evidence of guilt. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

Evidence of a defendant's crimes, wrongs, or acts is generally not admissible. Rule 404(b), SCRE. South Carolina courts view a defendant's previous distribution of drugs as a prior bad act. *Id. See also State v. Bostick*, 307 S.C. 226, 414 S.E.2d 175 (Ct. App. 1992) (finding that testimony of a defendant's prior drug distribution acts constituted prior bad acts). However, "[i]n the context of a criminal case, we have noted that while evidence of other crimes is generally inadmissible to show criminal propensity or to demonstrate that the accused is a bad individual, evidence of other crimes is admissible if necessary to establish a material fact or element of the crime charged." *In re Corley*, 353 S.C. 202, 205-06, 577 S.E.2d 451, 453 (2003).

A defendant's prior bad acts may nevertheless be admitted to show motive, identity, existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible under this exception, "there must be a

logical relevance between the acts in question and the purpose for introduction." *State v. King*, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002). Evidence of prior drug distribution must be clear and convincing before it can be admitted. *State v. Dickerson*, 341 S.C. 391, 399, 535 S.E.2d 119, 123 (2000). Additionally, "pursuant to Rule 403, SCRE, the prejudice resulting from the admission of this evidence must be outweighed by its probative value." *King*, 349 S.C. at 153, 561 S.E.2d at 645. When the admissibility of prior bad acts evidence turns on the credibility of conflicting witnesses, it should not be excluded because credibility is an issue solely reserved for the jury. *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (2002).

This Court explained application of the intent exception from *Lyle* in two drug cases. The Supreme Court noted, "We have held that evidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing *State v. Gore*, 299 S.C. 368, 384 S.E.2d 750 (1989)). In *Gore*, the Court held that evidence of prior sales by defendant was admissible on the issue of intent where the prior sale occurred one month before the charged offense. *Gore*, 299 S.C. at 370, 384 S.E.2d at 751 ("The evidence that appellant sold cocaine from the trailer on two occasions only one month earlier tends to establish his intent regarding the cocaine in his possession at the time in question.").

In *Wilson*, the Court held evidence of a prior drug transaction was relevant on the issue of intent when the prior sales occurred only a few days earlier. *Wilson*, 345 S.C. at 7, 545 S.E.2d at 830. The Court relied on circumstantial evidence to prove intent. *Id.* (finding the amount of baggies and cash found in hotel room, evidence of flushing before police entered the room, and testimony that defendant himself did not smoke crack was properly admitted by the trial judge to prove intent of prior bad acts exceptions).

Whether failure to object constitutes deficient performance generally hinges on whether a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Counsel was not ineffective on this ground. A pre-trial hearing was held concerning Lattimore's proffered testimony. Lattimore proffered that he went to Petitioner's home several times before and witnessed Petitioner selling drugs. (App. 83-89). Lattimore's testimony was admissible as evidence of intent, existence of a common scheme or plan, and absence of mistake. (App. 90-91). At trial, the State specifically focused on intent because aiding and abetting is an element of the offense, and repeated drug deals shows at least an intent to aid and abet the drug transactions and that the evidence was admissible under *King*. (App. 91-92). This was deemed admissible by the Court, noting that generally prior bad acts are not allowed, but the probative value of Lattimore's testimony outweighed the risk of unfair prejudice on the issue of intent to aid and abet. (App. 93). The trial court stated that courts have generally allowed such testimony when it goes to an essential element of the charged offense. (App. 93).

At the PCR hearing, Counsel testified that Judge Kelly presided over both trials. (App. 894). She testified that she did not make a contemporaneous objection because she exhausted the issue pre-trial, she was aware of what Judge Kelly's position would have been because of his rulings at both trials, and because she did not want to highlight his guilt to the jury. (App. 900). She testified after her pre-trial motion was denied, she did not want to relitigate the issue, but elected to focus on cross-examination instead. (App. 900).

Here, Counsel was not deficient because Counsel requested a pre-trial motion on this issue, which was denied. She also raised the same issue at the mistrial, in front of the same judge. Counsel reasonably concluded that another objection on this basis would have been fruitless and potentially harmful because it likely would have drawn greater attention to the issue by the jury.

Additionally, no prejudice has been established. Any objection launched would have been overruled, given that it was legally proper testimony and Counsel was aware of the Court's decision on the matter both during the first trial and at the pre-trial hearing. Also, the evidence of guilt at trial was substantial. Uncontroverted testimony from both the State's and the defense's witnessed showed that Petitioner either lived at the house or was there daily. (App. 254-55, 378-80, 530-31, 613). Several witnesses' testimonies support the jury's finding that he was selling, or at the very least, aiding and abetting the sale of narcotics from the house. (App. 122, 152-53, 161-62, 254-56, 384-86). Numerous individuals inside the home were found to be in possession of narcotics, paraphernalia and large sums of cash were found in the home and on Petitioner's person, Lattimore stated that Petitioner was responsible for the operation, and police claimed that they were informed of the operation through Jeffries. (App. 151-53, 161-62, 203-10, 235, 240-41, 249-50, 254-56, 276-77, 291-98, 303-10, 310-11, 349-50, 381-85, 615-17). Thus, even if Counsel was deficient, no prejudice was suffered. Accordingly, relief should be denied.

III. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failure to object to jury instructions concerning inference because Counsel was not deficient for failing to object to jury instructions that were legally correct at the time and the instructions were non-prejudicial because did not impact the jury's verdict.

On appeal, Petitioner argues the PCR court erred in denying relief because Counsel was ineffective for failing to object to jury instructions that possession of an object on premises can give rise to an inference that the person has power and intent to control that evidence's

disposition and use. However, the PCR court properly rejected this argument, finding that Counsel was not deficient for failing to object to jury instructions that were correct at the time and that on the whole did not impact the jury's verdict. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

The facts must support a jury instruction for it to be proper. *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003). Jurors are presumed to follow the instructions of the court. *State v. Queen*, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). Jury instructions, when analyzed, must be considered in their entirety. *See Todd v. State*, 355 S.C. 396, 585 S.E.2d 305 (2003).

If the jury charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App. 2000). The law to be charged to the jury must be determined by the evidence presented at trial. *State v. Harris*, 382 S.C. 107, 113, 674 S.E.2d 532, 535 (Ct.App. 2009). Mere presence is insufficient to prove constructive possession. *State v. Tabory*, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973). To prove constructive possession, the "State must show a defendant had dominion and control, or the *right to exercise dominion and control* over the [illegal substance]." *State v. Halyard*, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) (emphasis added). The State may establish constructive possession by either circumstantial or direct evidence. *Id.* An instruction on constructive possession is not appropriate when drugs are discovered in a public area in which the defendant has no dominion or control. *State v. Fripp*, 397 S.C. 455, 725 S.E.2d 136 (2009).

This Court has found that "[t]he proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control," and the jury may accept or deny this inference of

knowledge and possession depending upon its view of the evidence. *State v. Adams*, 291 S.C. 132, 135-36, 352 S.E.2d 483, 486 (1987). However, persons who are merely present with knowledge of the drugs at the scene are not converted into possessors without evidence that provided some assistance to the operation. *State v. Cheeks*, 408 S.C. 198, 758 S.E.2d 715 (2014).

Since Petitioner's trial this Court has ruled that an instruction that the existence of evidence showing the defendant had control over the property does not equate to a finding of constructive possession because it unduly emphasizes a piece of evidence and deprives the jury of its prerogative both to draw inferences and to weigh evidence. *State v. Stewart*, 858 S.E.2d 808, 813 (2021) (citing *Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019)).

Counsel is not required "to be clairvoyant or anticipate changes in the law which were not existent at the time of trial." *Gilmore v. State*, 314 S.C. 453, 456, 445 S.E.2d 454, 457 (1994), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). *See generally e.g. Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992); *Arnette v. State*, 306 S.C. 556, 413 S.E.2d 803 (1992); *Kirkpatrick v. State*, 306 S.C. 359, 412 S.E.2d 389 (1991).

Counsel was not deficient for failing to object because the jury instruction given regarding inference was in accord with the Supreme Court precedent at the time of trial and the rule as it currently stands is not retroactively applicable in post-conviction relief proceedings. Counsel is not deficient for failing to object to the jury instruction that were both appropriate at the time and where Counsel never could have anticipated the change in law. *See e.g. Thornes*, 310 S.C. at 309-10, 426 S.E.2d at 765-66 ("[t]his court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial.").

Additionally, Petitioner has not met his burden of proof in establishing prejudice because

the jury instruction could not have led the jury to apply the law incorrectly. Specifically, the instruction informs the jury that their role as the finder of fact, and the Judge also told the jury that he could not comment on the evidence (App. 784-85). Likewise, the jury was instructed that mere presence at the scene was not sufficient to prove possession. (App. 792-93).

Uncontroverted testimony showed that Petitioner either lived at the house or was frequently present to visit his mother, who was not present that day. (App. 254-55, 378-80, 530-31, 613). Witness testimony also supports the jury's finding that he was selling, or at the very least, aiding and abetting the sale of narcotics from the house. (App. 122, 152-53, 161-62, 254-56, 384-86). Numerous individuals inside the home were found to be in possession of narcotics, paraphernalia and large sums of cash were found in the home and on Petitioner's person, Lattimore stated that Petitioner was responsible for the operation, and police claimed that they were informed of the operation through Jeffries. (App. 151-53, 161-62, 203-10, 235, 240-41, 249-50, 254-56, 276-77, 291-98, 303-10, 310-11, 349-50, 381-85, 615-17). This is sufficient to support the jury's finding that Petitioner was in constructive possession of the crack found in his oven. As such, there is no reasonable probability that the outcome of the trial would have been different had Petitioner's counsel objected to the jury instruction on inference. Petitioner has failed to establish prejudice and relief should be denied accordingly.

IV. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failure to move to suppress the search warrants because Counsel made a reasonable, strategic decision rendering the motion unnecessary and Counsel's decision was non-prejudicial because the motion, if raised, would have been denied.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel failed to move to suppress the search warrants, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). However, the PCR court properly rejected this argument, finding that Counsel

articulated a reasonable, strategic decision that did not necessitate moving to suppress the warrants and that no prejudice was established because the motion would have been denied by the trial court. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

The Fourth Amendment does not permit police officers to obtain search warrants based on information that is knowingly and intentionally false or offered with reckless disregard for the truth. *Id.* A criminal defendant seeking to challenge the fruits of search a search warrant must make a substantial preliminary showing of the falsity of the warrant affidavit, and also show that the alleged false statement was necessary to the finding of probable cause. *Id.* Once such a showing is made the defendant is entitled to an evidentiary hearing where he must prove the statement was included in the search warrant affidavit knowingly and intentionally, or with reckless disregard for the truth. *Id.* If the warrant does not support probable cause with the false statements excluded, the fruits of the search must be excluded at trial. *Id.*

A defendant's challenge "must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id.* 438 at 171, 98 S.Ct. at 2684. The deliberate falsity or reckless disregard is only that of the affiant, not of any nongovernmental informant. *Id.*

The South Carolina Constitution contains an express right to privacy provision in its article prohibiting unreasonable searches and seizures. S.C. Const. art. I, §10. This favors an interpretation offering a higher level of privacy protection than the Fourth Amendment. *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). While this provision provides a higher level of protection in the search and seizure context, it does not go so far as to require such rigid

construction of a warrant that renders otherwise reasonable searches and seizures unlawful. *See State v. Sullivan*, 282 S.C. 522, 316 S.E.2d 404 (1984) (warning against overly technical readings of warrants that ignores the nature of the stated place to be searched and the objects to be sought). South Carolina law allows warrants to be issued only upon affidavit sworn to before a magistrate and establishing probable cause for the places to be searched and the persons to be seized. S.C. Code Ann. 17-13-140.

Counsel was not deficient on this ground. Specifically, she testified that the trial strategy utilized was not to deny drugs existed, but to place the blame on Mr. Lattimore. (App. 894). Counsel testified that she convinced several of Petitioner's co-defendants to testify at trial, where they placed blame upon Lattimore. (App. 894). She stated that she wanted Lattimore to testify to expose his prior record and intent to work with narcotics officers to drop his charges as part of the trial strategy. (App. 894). Counsel testified Lattimore was the only witness blaming Petitioner for the drug possession, with the other five or six witnesses primarily blaming Lattimore. (App. 895). She also testified the confidential informant, Prentiss Jefferies, testified in Petitioner's favor. (App. 896). Specifically, Counsel testified Counsel met with Jefferies before the second trial and Jefferies signed a piece of paper stating there were drugs in the home in exchange for money and a dismissal of charges from 2008 and 2012. (App. 896). Thus, Counsel was not deficient because tactically deciding to let the drugs in at trial so she could place the blame on another individual while attacking the credibility of the search warrants and investigation more broadly through aligning with the main provider of information used securing the warrants and conducting the raid was a reasonable, strategic decision.

Even if this Court were to find Counsel deficient, Petitioner were not prejudiced by the deficiency. Specifically, the motion likely would have been denied because the only evidence

suggesting that the warrant affidavit mischaracterized Jeffries' testimony. This, by itself, would have been insufficient to suppress the drugs in the case because it would have come down to a battle over credibility by the witnesses, which is a jury determination issue. Additionally, the search revealed marijuana, consistent with the warrant, and the other drugs that Applicant was convicted of trafficking were found pursuant to that search in a place where marijuana could have been found. As the PCR Court found, Petitioner's attack of the search warrants would require an overly rigid reading of the warrant unauthorized by South Carolina law. *See State v. Sullivan*, 282 S.C. 522, 316 S.E.2d 404 (1984) (warning against overly technical readings of warrants that ignores the nature of the stated place to be searched and the objects to be sought). Thus, Petitioner has failed to meet his burden of proof in showing both deficiency and prejudice and relief should be denied as a result.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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