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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Judge
Appellate Case No. 2022-000714

MARK LORENZO BLAKE, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

The post-conviction relief court properly denied post-conviction relief where trial counsel did not object to witness testimony or move for a mistrial.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

A Charleston County grand jury indicted Petitioner for possession with intent to distribute heroin. On June 14–15, 2016, Petitioner proceeded to jury trial before the Honorable D. Garrison Hill. Petitioner was convicted and sentenced to twelve years' imprisonment with credit for time served. The Court of Appeals affirmed his conviction in a *per curiam* opinion, State v. Blake, Op. No. 2018-UP-111 (S.C. Ct. App. filed March 14, 2018) and denied his petition for rehearing on April 26, 2018. Petitioner filed a petition for writ of certiorari on May 25, 2018, with this Court. (App. 455-473). The State filed a return to that Petitioner on June 25, 2018. (App. 474-499). By order dated November 9, 2018, this Court denied the petition for writ of certiorari. (App. 500).

Petitioner then filed an application for PCR on June 18, 2019 (App. 501-513). An evidentiary hearing was held December 9, 2021, before the Honorable Jennifer B. McCoy. (App. 521). Christopher Murphy, Esquire, represented Petitioner. (App. 521). On May 10, 2022, Judge McCoy signed an order of dismissal denying PCR. (App. 569-594). Judge McCoy found Petitioner failed to prove trial counsel was deficient or that he was prejudiced by counsel's failure to object to testimony. (App. 594).

Petitioner filed a Petition for Writ of Certiorari on December 13, 2022. This return follows.

RELEVANT FACTS

As part of an ongoing drug investigation, officers from the Charleston County Sheriff's Office conducted surveillance on Petitioner based on information received from a confidential informant and obtained a search warrant for Petitioner's residence. (App. 44-45). After taking into consideration Petitioner's criminal history, which included drug and weapons charges, a tip that a child might be in the home, and the nexus between drugs and weapons[1], law enforcement decided to take Petitioner into custody by conducting a felony traffic stop. (App. 44-48).

On February 22, 2013, officers followed Petitioner from his residence to the workplace of his girlfriend, where they conducted the felony traffic stop. (App. 44-49). The officers pinched in Petitioner's vehicle, exited with their guns drawn, and ordered him to show his hands and exit his vehicle. (App. 48-49). He did not comply, so the officers removed him from his vehicle and took him to the ground. (App. 49). He was placed under arrest for drug distribution charges, handcuffed, and secured in an officer's vehicle. (App. 49-50). The officers drove Petitioner to his home following the arrest and used his keys to gain access and execute the search warrant. (App. 50-52). In the kitchen, officers found a bowl of rice containing many small packages of heroin bundled together, a whisk, mixing bowl, and scales. (App.201).

Before trial, Petitioner moved to suppress the evidence found during the search, claiming the search was conducted unreasonably. (App. 39). He challenged the constitutionality of the search and asked that the State demonstrate the search was executed in a reasonable manner. (App. 39). The State called Detective Frank Waddell of the Charleston County Sheriff's Office to testify regarding the felony traffic stop and arrest. (App. 40). Detective Waddell testified that following Petitioner's arrest, the officers had also arrested his girlfriend and then headed to Petitioner's

[1] *See State v. Banda*, 371 S.C. 245, 253–54, 639 S.E.2d 36, 40–41 (2006).

residence to conduct the search. (App. 50-51). Waddell advised Petitioner he had a lawful search warrant signed by a judge to search Petitioner's residence. (App. 51). Waddell explained they did not use a ram to get into the apartment, but instead used Petitioner's keys. (App. 51-52).

Petitioner was detained on the front stoop while officers conducted the search. Petitioner was very agitated, speaking loudly and aggressively. (App. 53-54). Det. Waddell testified he even had to restrain Petitioner because he continued to stand up after being ordered to stay seated. (App. 64-65). Det. Waddell stated they kept Petitioner in the presence of law enforcement personnel instead of leaving him unattended because it was a safety issue. (App. 61). Det. Waddell testified that he tried to explain to Petitioner the reason for the search. (App. 54). On cross-examination, defense counsel asked whether Det. Waddell gave Petitioner a copy of the search warrant, to which he replied that he left a copy at the residence. (App. 62). He testified that Petitioner "made vague inquiries as to what's going on, I haven't done anything, this is private property, what are y'all doing, general inquiries of that nature," but did not say that Petitioner asked to see the search warrant. (App. 62). He further explained Petitioner was handcuffed sitting in a chair so he was not handed a copy as he would not have been able to hold it and read it behind his back, but Petitioner was advised of his warrants and the nature of the search warrant and what led to it. (App. 63-64). Waddell denied telling Petitioner not to worry about where the search warrant was; rather, he stated that Petitioner would have been advised that a copy was being left at the residence as standard practice. (App. 63-64).

Trial counsel introduced a copy of the search warrant statute, S.C. Code section 17-13-150, as Defendant's Exhibit #1 and asked Det. Waddell to read it. (App. 65). The statute provides in part: "When any person is served with a search warrant such person shall be furnished with a copy of the warrant along with the affidavit upon which such warrant was issued." (App. 65).

Trial counsel also introduced a copy of the search warrant as Defendant's Exhibit #2. (App. 66). Trial counsel pointed out that the search warrant contained a phrase that read: "copy of this search warrant shall be delivered to the person in charge of the premises searched at the time of search if practical." (App. 66). Sergeant Mark Bryant also testified regarding his involvement in the felony traffic stop and search warrant. (App. 71). He testified Petitioner had "a bit of an attitude," was talking back and raising his voice, and was not calm while the search was in progress. (App. 75). On cross-examination, he admitted he did not give Petitioner a copy of the search warrant. (App. 80).

Next, Detective Andrew Miller testified that while the officers were conducting the search, Petitioner asked repeatedly why he was being arrested even though Det. Miller said it was explained to him at the time. (App. 84). On cross-examination, he testified he did not give Petitioner a copy of the search warrant and did not recall Petitioner asking for one. (App. 86). The defense then called Petitioner, who offered a slightly different version of events. He claimed he stepped out of the car and was tackled. (App. 96). Petitioner also testified that he asked for the search warrant but the detectives told him, "Don't worry about that." (App. 97). On cross-examination, the State showed Petitioner his statement and asked him to read a portion that stated: "Up the stairs and told us we were both under arrest for distribution of heroin and we sold over two ounces . . . ." (App. 104). Petitioner confirmed Det. Waddell told him why he was under arrest and why the search was happening. (App. 107).

After the testimony of the witnesses, trial counsel argued based on *United States v. Thompson*, 667 F. Supp. 2d 758, 763 (2009), that the search was unreasonable because officers did not give Petitioner a copy of the search warrant, and he moved to suppress all the evidence. (App. 109). He argued the statute requires officers to serve a copy on the defendant, not just leave

a copy at the residence. He claimed they could only leave a copy at the residence if no one was there, which was not the case here. (App. 110). He further argued the felony traffic stop was a factor in the unreasonableness of the execution of the search. (App. 111).

The State argued the circumstances in Thompson were different because a woman who was not part of the investigation was left outside in the heat for five hours with only a shirt on, and law enforcement did not identify themselves or explain what they were doing. (App. 112). The solicitor argued that in this case the felony traffic stop was necessary—based on the information officers had about Petitioner's prior conviction and pending charges for guns and drugs—to minimize danger of taking Petitioner into custody. (App. 113). She referred to the testimony by officers that Petitioner was informed why he was being arrested and that a search was going to be executed at his residence. (App. 113). She further argued that a copy of the search warrant could not be handed to him because he was belligerent and had his hands cuffed behind his back such that it would have been impossible for him to hold the copy. (App. 116). Finally, she pointed out that the rationale behind suppressing evidence is to deter unlawful government behavior and because the government behaved lawfully and reasonably here while taking into consideration the safety of the community, suppression would not deter unlawful behavior. (App. 116).

The trial judge distinguished the Thompson case and ultimately found the search was reasonable. He found the testimony of the officers established justifiable reasons for the way the arrest and search were conducted. (App. 121). He took into consideration the risk to officer safety based on Petitioner's criminal history and found that the failure to give a copy of the search warrant to Petitioner while his hands were cuffed behind his back was not "enough in and of itself to deem the search unreasonable within the meaning of the Fourth Amendment." (App. 122). He therefore denied the motion to suppress. (App. 124).

At trial, Detective Frank Waddell testified consistently with his pretrial testimony. The State then called Philip Roberson, a sergeant with the Charleston County Sheriff's Office who was involved in executing the search warrant at Petitioner's residence. (App. 197-199). Roberson's role was to search the kitchen and part of the bedroom. (App. 200). He testified that in the kitchen he found a bowl in the refrigerator that contained rice and drugs; he also found a whisk, mixing bowl, and scales. (App. 201). He explained that the drugs he found were in bindles, which he said were packaged similarly to headache powder, and ten of them make up a bundle. (App. 201). On cross-examination, Roberson testified that he recalled getting into the apartment not by forced entry but by using a key. (App. 201).

Deputy Andrew Miller testified next regarding his role in the search as evidence custodian. (App. 212). Miller collected all evidence found on the scene, took photographs of it, and transported it back to headquarters. (App. 212-213, 222). He verified at trial that the bowls the drugs were found in were in the same condition as the day of the search except for the addition of fingerprint powder. (App. 222-223). On cross-examination, trial counsel questioned him about a photograph of the door, and Dep. Miller testified he did not remember whether a key was used for entry. (App. 233). He admitted the door looked like it had been busted open, but on redirect, he said it did not look like the door had been rammed because there was no large round mark on the door and the handle was not broken. (App. 233, 237). When trial counsel asked him on recross, "Isn't this just a photograph of the door before it was busted open?" he answered that he would not take a photograph before entry because it would put him at risk. (App. 238).

Jason Riley then testified as a forensic technician for the sheriff's department and went through the evidence storage process and explained chain of custody. (App. 245-259). Riley recalled that Dep. Miller submitted a sealed package containing the bindles of heroin into evidence

to him. (App. 250-251). He testified he would not have accepted them into evidence if they had been tampered with. (App. 253). He transported the evidence on several occasions, taking it to the City of Charleston's drug lab, and testified that it appeared to be in substantially the same condition as when he first saw it. (App. 254). He named two other people in his unit who also touched the evidence: Investigators Mark Watson and Aaron Meyer. (App. 255). On cross-examination, he went over the dates the evidence was signed in and out and testified it was outside of his control three times. (App. 256).

Next, Susan Payne testified as the evidence custodian in the forensic services division of the City of Charleston Police Department. (App. 259). She testified she received the drug evidence at the city's lab, that the evidence had not been tampered with, and that she would not have transported the evidence at any time if it had appeared to be tampered with. (App.260-261). She testified that it looked like it was in the same condition as when she first saw it and that she received it from Jason Riley and transported it to Renee Hilton (App. 262). On cross-examination, she testified in more detail that after receiving the evidence from Riley on March 1, 2013, she placed it in a safe and then it went to Elizabeth Mitchell before coming back to her on June 1, 2015. (App. 263-264). It then went to Renee Hilton and stayed at the Charleston Police Department for seven days, from June 1-8, 2015, before going back to the sheriff's office. (App. 264). Payne received it again on November 23, 2015, before it went to Hilton again. (App. 264). Payne admitted that when she received it back from Mitchell on June 1, 2015, the bag had been cut open. (App. 265).

Hilton, a criminalist, and laboratory manager at the City of Charleston Police Department, testified next. (App. 266). As lab manager, Hilton was responsible for the upkeep and management of the lab's equipment and personnel. (App 267). The trial court qualified her as an

expert in drug analysis without objection. (App. 269). Hilton testified she analyzed the substances in this case and prepared a report on December 1, 2015. (App. 273-274). She testified the same sample had previously been tested by Elizabeth Mitchell. She knew this because she performed the technical review of the previous analysis. (App. 272). She testified the drugs were retested because the Mitchell was no longer employed at the lab and was not available to testify. (App. 272). She testified each time a substance is tested there is an amount removed for testing that changes the weight and that temperature can also affect weight. (App. 272-273). When the State tried to admit the report, trial counsel objected, and the jury was excused. (App. 274).

Petitioner objected to the chain of custody based on the fact that the State did not call Elizabeth Mitchell to testify, citing *State v. Joseph*, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997). (App. 275). He also objected on the basis that Ashley Earl and Mark Watson, two people who were identified as having had possession of the drugs at some point, did not testify. (App. 275-276). Petitioner moved to exclude the drugs based on the chain of custody, claiming Mitchell was a crucial element. (App. 276). The State argued that it had presented a sufficient chain of custody. (App. 276-279). After arguments from both parties, the trial judge ruled the chain of custody had been sufficiently established, noting that the purpose of a chain of custody is to ensure an item is what it is purported to be. (App. 299-300). He found the chain had been established as far as practicable, the identity of all people who handled the evidence had been established, and there was no evidence of tampering. (App. 300). Finally, he determined that any discrepancies were certainly grounds the defense could pursue on cross-examination regarding credibility but did not change his ruling on admissibility. (App. 300).

After the State rested, the trial judge clarified his ruling after realizing he had misnamed the case he was relying on. He explained he was relying on *State v. Hatcher* and *State v. Taylor*.

He noted "[t]here was expert testimony by Ms. Hilton that the State presented that demonstrates the likely and probable manner in which Ms. Mitchell tested and resealed this fungible item. And the identity of the people who transported it and had control at various times was established as far as practicable." (App. 319). Trial counsel renewed his motions to suppress based on the search and chain of custody and moved for a directed verdict. The trial judge denied the motions. (App. 319-320).

Ultimately, the jury found Petitioner guilty, and Judge Hill sentenced him to twelve years' imprisonment with credit for time served. (App. 381, 389).

ARGUMENT

The post-conviction relief court properly denied post-conviction relief where trial counsel did not object to witness testimony or move for a mistrial.

Petitioner contends that the PCR court erred finding that trial counsel was not ineffective where he did not object to specific testimony from State's witness, Andrew Miller, and for failing to move for a mistrial following the below referenced testimony. Petitioner's PCR counsel directed the Court to the following testimony in support of this allegation. "In my training and experiencing this is how they would in – especially with the drugs that he was selling, how they would keep those together. They would wrap it up so they wouldn't lose any of the drugs that were inside." [sic] (App. 217). Though Applicant's PCR counsel placed this allegation on the record at the beginning of the evidentiary hearing, PCR counsel informed the PCR Applicant would rest on the record and would not present testimony or argument for this allegation. The PCR Court found Applicant's allegation was without merit as Applicant failed to present any evidence to suggest that Counsel's performance was deficient, nor did Counsel present any evidence that Applicant was prejudiced by Counsel's failure to object to support the allegation.

When an applicant alleges ineffective assistance of counsel, the applicant must prove "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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. The attorney's performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such 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, 386 S.E.2d at 625.

Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. See Millidge v. State, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); see also id. at 380, 811 S.E.2d at 804 ("[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court's finding . . . . If so, an appellate court would necessarily have affirmed the trial court's [ruling] . . . .").

Petitioner failed to meet his burden. Petitioner provided no evidence of deficiency. Petitioner argues that trial counsel was ineffective for failing to object to Detective Miller's comment about "the drugs he [Petitioner] was selling" pursuant to Rule 404(b), SCRE, claiming that it was inadmissible propensity evidence. Specifically, Petitioner argues that the State presented no evidence connecting Petitioner to the heroin found in his apartment and that based on the comment by Detective Miller, the jury likely inferred that Petitioner constructively possessed the heroin because he had a general propensity to sell drugs. (Petitioner's Writ of Certiorari pg. 7).

Similarly, "[a]n ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Petitioner attempts to argue that Detective Miller's comment was inadmissible evidence pursuant to Rule 404(b), SCRE. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, absence of mistake or accident, or intent." Rule 404(b), SCRE. "To be admissible, a bad act must logically relate to the crime with which the defendant has been charged." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008) "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id

Petitioner attempted to argue that not objecting to the comment of "In my training and experiencing this is how they would in – especially with the drugs that he was selling, how they would keep those together. They would wrap it up so they wouldn't lose any of the drugs that were inside," was deficient. Petitioner failed to meet his burden by providing any evidence that not objecting was deficient. Further, Petitioner has failed to prove that even if it had been deficient that there was any prejudice. It is clear that the officer is talking in general terms throughout his

experience in saying "they" and "he." Further even if the officer had clarified and said he was specifically referring to Petitioner, there is no indication that he is talking about prior drug sales of Petitioner. He could have been referring to the actual drugs found in this case in Petitioner's house which the jury heard about continuously throughout the trial. Petitioner did not have a prior conviction for any drug charges nor did the comment made by Detective Miller reference a prior conviction.[2] The comment made by Detective Miller was a vague reference to the selling of drugs. The comment does not specifically reference Petitioner and it was made in response to a broad question of the Detective's training and experience. He states "In my training and experiencing this is how they would in – especially with the drugs that he was selling, how they would keep those together. They would wrap it up so they wouldn't lose sight of any drugs that were inside." (App. 217). Miller was vaguely referencing "he" and "they" as people throughout his training and experience.[3] Petitioner has not shown that the evidence was inadmissible and therefore trial counsel was not deficient in not objecting to it.

Petitioner further contends Counsel was ineffective for failing to move for a mistrial as a result of the elicited testimony. The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident

[2] During Petitioner's sentencing the court is made aware that Petitioner had one count of distribution of heroin pending from 2012, two counts of distribution of heroin pending from 2013, and a pending trafficking cocaine charge from 2012. (App. 386).

[3] On cross-examination, Petitioner asked Counsel about the referenced testimony. Counsel agreed that while he did not believe witness, Deputy Miller, was referring to a specific sell or specific residence, he could not speculate to why he not did not contemporaneously object to the testimony.

is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999), *abrogated on other grounds* by State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.'" State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct.App.2000) (quoting Gilliam v. Foster, 75 F.3d 881, 895 (4th Cir.1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).).

Petitioner has failed to prove that he was prejudiced by trial counsel's failure to object to the witness's statement and Petitioner has failed to show that the comments infected the trial with unfairness as to make his conviction a denial of due process. See e.g. State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975); Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009). Moreover, Petitioner has failed to show that a mistrial would have been granted if trial counsel had moved for a mistrial. The statement does not rise to the level of manifest necessity required to warrant a mistrial, even if the testimony were improper. Therefore, Counsel cannot be deemed deficient for failing to object to the statements or move for a mistrial. Further, Petitioner did not present any testimony suggesting that trial counsel's failure to object prejudiced Petitioner or had an effect on the outcome of Petitioner's trial.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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