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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable William A. McKinnon, Circuit Court Judge

RONNIE BONNER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001522

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

1.

Whether the PCR court erred finding defense counsel was not ineffective where he failed to strike a juror, who during voir dire declared they formerly worked for the law enforcement agency that arrested petitioner and knew the deputies, and where counsel failed to articulate a reasonable strategy for his failure to strike that juror during the PCR hearing?

2.

Whether the PCR court erred finding defense counsel was not ineffective for failure to object to the solicitor's question which improperly introduced petitioner's prior drug crimes as evidence?

STATEMENT

On May 24, 2018, a Cherokee County grand jury indicted petitioner for trafficking in methamphetamine. App. 476. On April 16, 2019, petitioner's case was called to trial before the Honorable J. Derham Cole and a jury. App. 1. Chris Thompson represented petitioner. App. 1. Assistant solicitor, Matt Kendall, and deputy solicitor, Kim Leskanic, represented the state. App. 1. On April 18, 2019, the jury found petitioner guilty as indicted. App. 380, ll. 11-16. Judge Cole sentenced petitioner to a term of life without the possibility of parole. App. 385.

Thereafter, petitioner filed an application for PCR. App. 396-409. On June 6, 2022, an evidentiary hearing was held before the Honorable William A. McKinnon. App. 419-65. Rodney Richey represented petitioner and Chelsey Marto, assistant attorney general, represented the state. App. 419.

On October 10, 2022, Judge McKinnon signed an order denying PCR. App. 466-75. The PCR court held defense counsel was not ineffective for failure to strike a juror that previously worked at the Cherokee County Sheriff's Office, the agency that arrested and initially charged petitioner. The court found defense counsel credibly testified that "he was not concerned about the juror" because she was only "formerly" employed at the agency office and that he was not sure whether striking that juror would have made a difference in the outcome at trial. App. 472. The court found petitioner did not present any credible evidence that counsel's failure to strike the juror would have made a difference at trial. App. 472.

Additionally, the PCR court held defense counsel was not ineffective for failure to object when the state elicited testimony about petitioner's prior drug convictions. App. 472. The court found petitioner had volunteered "the testimony that he did not deal drugs," rather than that he had responded to a direct question by the state and therefore petitioner, himself, opened the door

to the admission of his prior drug convictions. The court found that because the solicitor's line of questioning was not objectionable there could be no prejudice. App. 473.

ARGUMENT

1. The PCR court erred finding defense counsel was not ineffective where he failed to strike a juror, who during voir dire declared they formerly worked for the law enforcement agency that arrested petitioner and knew the deputies, and where counsel failed to articulate a reasonable strategy for his failure to strike that juror during the PCR hearing.

Introductory facts

On March 16, 2018, petitioner was riding in a black SUV with Brian Parker and Angela Upchurch when they were pulled over by an unmarked police car because the tag light on Parker's SUV was out. App. 52, l. 20-53, l. 18; 54, ll. 12-21; 62, ll. 24-25. During the stop Parker, the driver and owner of the vehicle, gave law enforcement consent to search his SUV and 47.45 grams of methamphetamine was found in the back of the car.[1] App. 56, ll. 1-3; 57, ll. 9-11; 143, ll. 16-21; 197, ll. 3-15. All three denied ownership of the drugs. App. 64, ll. 10-14. Parker and Upchurch, who were romantically involved, were placed in one car and petitioner in another to be transported to the detention center. App. 64, l. 20-65, l. 23; 109, ll. 14-18; 119, ll. 4-8; 123, ll. 1-5; 143, ll. 8-15.

Parker and Upchurch both gave statements to police that the drugs belonged to petitioner. App. 65, ll. 14-23. When Upchurch was searched at the detention center, she was discovered to have hidden methamphetamine in her vagina. App. 66, ll. 1-4; 68-69. Parker and Upchurch testified at trial that the drugs found in the SUV were petitioner's. App. 105, l. 2-106, l. 1; 140-42.

Petitioner maintained at trial and continues to maintain that the drugs found in Parker's

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1 Officer David Owens, the individual who searched the car, could not recall whether the drugs were found in the floorboard or on seat he testified the drugs were "laying in the back area somewhere." App. 86, ll. 20-25.

SUV did not belong to him. App. 10, l. 12-11, l. 3; 242, ll. 14-16; 384, ll. 7-19; 423, ll. 16-21. Before trial he was offered a beneficial plea deal from the state for fifteen years and he rejected it because he was innocent. App. 10-13. Petitioner was ultimately sentenced to life without the possibility of parole. App. 385.

Relevant facts

During voir dire juror 18, Susan Cash, told the court that she was a former employee of the Cherokee County Sheriff's Department and "worked with several of the deputies." App. 19, 22-25. The court asked Cash "would that have any bearing in your decision?" App. 20, ll. 1-2. Cash responded, "no sir." App. 20, l. 3. During jury selection Cash was selected and defense counsel did not move to strike her. App. 28, ll. 1-7. Cash was later chosen by the court to be the foreperson. App. 34, l. 16-35, l. 25.

At petitioner's evidentiary hearing he testified he believed Cash should have been struck from the jury pool because of her association with the Cherokee County Sheriff's Department. App. 424-25. He asserted Cash was partial to the state because of her former association with deputies that still worked at the sheriff's department. App. 425, ll. 3-20.

Defense counsel did not remember why he did not strike Cash stating, "I think she said she was a former employee with . . . Cherokee County" and "something led me to not strike her." He said "maybe I thought she was a disgruntled employee." App. 443, ll. 11-22.

Discussion

To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733

(1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.* Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Defense counsel was deficient where he failed to strike a juror that was formerly employed at the Cherokee County Sheriff's Office and who admitted she had "worked with several of the deputies." The arresting officers who both testified at trial worked at that agency and another officer from that agency, Billy Anthony, testified for the state in this case.

Petitioner was prejudiced by counsel's failure to strike a juror who was likely partial to the prosecution. The state's case against petitioner was incredibly weak where their star witnesses were Parker and Upchurch, the driver of the vehicle and the other passenger. Upchurch's testimony was incredible as she lied during the search of the car regarding having drugs only to be found later have methamphetamine hidden on her body. Only after she had been found to have methamphetamine did Upchurch become cooperative with law enforcement. At that point Upchurch conveniently claimed all the methamphetamine found in the car was petitioner's. Parker was the owner of the SUV that the arresting officers had received an anonymous tip about prior to the stop. App. 60, ll. 17-25. Tate testified at trial that an unknown person called and tipped the narcotics unit off that a man driving that exact vehicle was running dope. App. 60, ll. 17-25. Additionally, Parker was carrying brass knuckles.

Accordingly, the officers were the most reliable witnesses in the case and a juror's prior relationship "several of the deputies" would undoubtedly play a role in their deliberations.

Petitioner was merely a passenger in Parker's SUV that day. Petitioner was not armed and did not have any drugs hidden on his person at the time of arrest. Petitioner has never changed his story.

Our courts have found that of jury selection falls within the expertise and experience of trial counsel. *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). In *Palacio*, this Court reviewed a finding of the PCR court that counsel was ineffective for failing to use a peremptory strike as her client instructed. *Id.* at 516, 511 S.E.2d at 67–68. In holding that counsel was ineffective, the PCR court found that jury selection was a defendant's right and not trial strategy. This Court reversed the PCR court, finding that jury selection is within the ambit of trial strategy. *Id.* at 517, 511 S.E.2d at 68; *see also Wilcher v. State*, 863 So.2d 719, 754–55 (Miss.2003) (holding that counsel was not ineffective for failing to use all of the available peremptory challenges). In addition, this Court noted that "a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." *Id.* at 516, 511 S.E.2d at 68. Finding no evidence that defendant's right to a trial by a competent and impartial jury was violated, the Court reversed. *Id. Mag. v. State*, 361 S.C. 610, 617, 606 S.E.2d 761, 764–65 (2004), abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

When the PCR court is reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Consequently, courts apply a "highly deferential" standard of review. *Strickland*, 466 U.S. at 689. Counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Counsel's strategy will be reviewed under "an objective standard of reasonableness." *Id.*

Defense counsel's failure to strike this juror was unreasonable. Counsel did not articulate a valid reason for his failure to strike a juror who was likely pro law enforcement as she had formerly worked at the sheriff's department with the deputies that were involved in petitioner's arrest and testified at his trial. Counsel did not articulate *any* reason or strategy for his failure to strike the juror. Instead, defense counsel testified that "something" led him not to strike her and that "maybe [he] thought she was a disgruntled employee."

2. The PCR court erred finding defense counsel was not ineffective for failure to objection to the solicitor's question which improperly introduced petitioner's prior drug convictions as evidence?

Relevant facts

At trial, petitioner testified in his defense. During cross examination the solicitor asked petitioner, "[s]o are you just a meth user?" Petitioner responded, "[y]es ma'am, I will not sell drugs." App. 247, ll. 20-21. After this exchange the jury was dismissed and an off the record discussion was had. App. 248, ll. 1-9. The state moved to be able to ask about petitioner's prior convictions and the court allowed a proffer. During the proffer, outside the jury's presence, petitioner testified that he had prior convictions for distributing cocaine base within proximity to a school. App. 248-49.

Without any argument on the record, the court ruled that petitioner opened the door when he stated that he did not sell drugs. Defense counsel thought petitioner had testified that he did not sell "meth" but it was ultimately determined petitioner said drugs and defense counsel conceded petitioner opened the door to the admission of his prior drug convictions. App. 248-49. During the state's closing the solicitor pointed out to the jury that petitioner said he never sold drugs but was later forced to admit he did in fact sell drugs. App. 319, ll. 14-20.

At the evidentiary hearing defense counsel acknowledged that petitioner's prior drug convictions were "outside the window" of admissibility at trial. App. 447, ll. 21-25. Regarding his conversations with petitioner about testifying in his defense, counsel claimed that it was his practice to advise clients to be short and concise and not offer information that is not asked. Counsel testified that he assumed he and petitioner had that conversation. App. 448, ll. 1-10. Counsel contended he did not believe the state's question was objectionable and that petitioner

had volunteered information that opened the door to his prior drug convictions. App. 450-51. However, counsel admitted that if he had objected the trial judge would have sustained and asked the solicitor to rephrase the question. App. 452, ll. 9-19.

Discussion

The applicant bears the burden to prove allegations in a PCR. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985. To prove ineffective assistance of counsel, the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, supra.

The PCR court erred finding counsel was not deficient for failure to object when the state asked petitioner if he was "just a meth user." The PCR court cited *Thompson v. State*,[2] for the proposition that whether the failure to object constitutes deficient performance generally hinges on if a reasonable trial strategy was utilized. However, the court failed to analyze it under that standard. Defense counsel did not articulate any strategy for his failure to object to the solicitor's question which invited petitioner to answer in a way that would open the door to his previous convictions. Similar, to his testimony regarding his failure to strike a juror that had previously worked with three of the state's law enforcement witnesses defense counsel did not appear to have any actual memory or notes of the conversations he had with petitioner regarding testifying in his own behalf. Counsel testified that he did not believe the question was objectionable but later admitted that if he had objected the court would have made the solicitor

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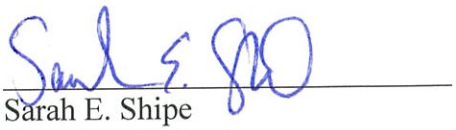
2 423 S.C. 235, 814 S.E.2d 487 (2018).

rephrase the question.

The order went on to declare the line of questioning was not objectionable and that petitioner opened the door when he volunteered that he did not deal drugs. Contrary to the court's order counsel should have objected to the solicitor's question because the word "just" implied an answer. Petitioner was prejudiced where the jury learned about his prior drug convictions which invited the jury to make its decision on an improper basis instead of the evidence presented at trial.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on the issues.



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This 29th day of March, 2023.