

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Apr 07 2023

S.C. SUPREME COURT

Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

ASHLEY L. HAMMITT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001230

JOHNSON PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel provided effective representation where counsel failed to move for a curative instruction or for a mistrial after his objection to the solicitor's improper question was sustained, resulting in a meritorious issue not being preserved for appeal?

STATEMENT OF THE CASE

On October 6, 2016, Investigator John Schafer with the Spartanburg County Sheriff's Office met with Brady Rhodes, a confidential informant, to conduct a controlled drug purchase from Petitioner. App. 47, ll. 11-14; App. 49, ll. 12-16. Rhodes was searched prior to the buy, equipped with a recording device, and provided \$100 in U.S. currency to make the drug buy. App. 51, ll. 1-App. 52, l. 7. Rhodes had contacted Petitioner and arranged to purchase a gram of methamphetamine for \$100. App. 66, l. 13-App. 67, l. 4. When he arrived at the hotel room Petitioner was staying in, Rhodes handed Petitioner the \$100 expecting a gram of methamphetamine. However, there was only a small amount of methamphetamine available. Rhodes estimated it was between \$20 to \$30 worth of narcotics. App. 72, l. 22-App.73, l. 15. Petitioner pretended to be trying to find more narcotics for over fifteen minutes before Rhodes eventually took the small amount of methamphetamine available and left. App. 74, l. 16-App. 77, l. 20.

Petitioner was indicted by the Spartanburg County grand jury for one count of distribution of methamphetamine. App. 165-166. On January 10, 2018, the State, represented by James Edward Hunter called the case to trial before the Honorable J. Derham Cole and a jury. Petitioner was represented by J. Roger Poole. App. 1. During the trial, Rhodes testified about the drug buy and about his prior interactions with Petitioner. In response to a question from the Solicitor, Rhodes testified that he owed Petitioner \$40 for some methamphetamine he had gotten from her approximately a year earlier. Counsel Poole objected to the testimony and the objection was sustained but no further action was taken. App. 79, l. 19-App. 80, l. 5. Petitioner was ultimately found guilty as indicted. App. 157, ll. 14-22. Judge Cole sentenced her to fifteen years imprisonment. App. 163, ll. 6-12.

Petitioner timely appealed her conviction and sentence. The Court of Appeals affirmed the conviction in an unpublished opinion. State v. Hammitt, 2020-UP-037 (S.C. Ct. App. filed Feb. 12, 2020). Petitioner filed an application for post-conviction relief on May 22, 2020. App. 168-177. The State filed a return and motion for a more definite statement on September 22, 2020. App. 178-195. On January 31, 2022, PCR Counsel Susannah Ross filed an amended PCR application alleging, *inter alia*, that trial counsel was ineffective for failing to move for a mistrial after the Solicitor elicited testimony about a prior drug deal between Petitioner and Rhodes. App. 196. An evidentiary hearing was convened before the Honorable G.D. Morgan, Jr., on April 20, 2022. The State was represented by Chelsey Marto. Petitioner was represented by Susannah Ross. App. 197-198. Petitioner, Counsel Poole, and Solicitor Hunter testified at the hearing. App. 199.

Petitioner testified that she was sick and high at the time of trial. She stated that Counsel Poole had not prepared her to testify and that he was hostile with her during their interactions. App. 203, ll. 10-21. Petitioner did not want to plead guilty because she did not actually give Rhodes any drugs and understood the charge of distribution to mean that she would have to give someone drugs to be found guilty. App. 204, ll. 15-19. She maintained that she took the money from Rhodes but did not give him anything. She did admit that Rhodes tore a piece of paper and scooped up a small amount of methamphetamine from a table in the room. She believed that because she did not give Rhodes the drugs herself that she could not be found guilty at trial. App. 206, l. 2-App. 207, l. 24. Petitioner recalled the solicitor eliciting testimony about a prior drug deal between herself and Rhodes. She believed the testimony hurt her credibility and damaged her case. She did not recall Counsel Poole objecting to the testimony. She also felt

that Counsel Poole had not done enough to impeach the credibility of Rhodes. App. 208, l. 8-App. 210, l. 7.

Counsel Poole testified that Petitioner's case was clear-cut. He had advised her to plead guilty based on the evidence, the slim to no chance of success at trial, and the fact that she was facing a third or subsequent charge. App. 221, l. 8-App. 222, l. 5. He testified that when the solicitor brought up a prior drug exchange between Petitioner and Rhodes, he immediately objected, and the objection was sustained. However, he did not move for a mistrial because he knew "Judge Cole well enough to know that he was not going to grant a mistrial for that." App. 222, l. 18-6.

Solicitor Hunter testified that he had attempted to bring up prior drug sales between Petitioner and Rhodes, but Counsel Poole objected. At the bench conference on the objection, he attempted to explain why he wanted to go into those prior dealings, but the trial court sustained the objection. App. 231, ll. 3-11. Solicitor Hunter maintained that based on the video evidence, the narcotic evidence and Petitioner's statements and trial testimony, that she was guilty of distributing methamphetamine. App. 229, l. 18-App. 231, l. 2.

An order of dismissal was filed on August 30, 2022. App. 236-248. The PCR court found that Counsel Poole acted reasonably in not moving for a mistrial because he credibly testified that he did not think a mistrial would be granted. The PCR court additionally found that the trial court would not have abused its discretion in denying a motion for a mistrial and that Counsel Poole adequately dealt with the objectional testimony without needing to request a mistrial. Thus, the court determined that Petitioner could not show prejudice. App. 245-246.

ARGUMENT

The PCR court erred in finding trial counsel provided effective representation where counsel failed to move for a curative instruction or for a mistrial after his objection to the solicitor's improper question was sustained, resulting in a meritorious issue not being preserved for appeal.

“[T]he cases are legion in holding that *if an appellant objects and the objection is sustained* but he does not move for a curative instruction or request a mistrial, he has received what he asked for and cannot be heard to complain on appeal.” State v. Primus, 341 S.C. 592, 604, 535 S.E.2d 152, 158 (Ct. App. 2000), aff'd in part, rev'd in part, 349 S.C. 576, 564 S.E.2d 103 (2002) (emphasis in original) *citing* McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 479 S.E.2d 67 (Ct.App.1996); *See also* State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) (issue concerning propriety of Solicitor's comments in closing argument was not preserved for review where defendant objected, trial court ruled in defendant's favor, and defendant failed to move to strike or request curative instruction). “If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured.” State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911–12 (1996) *citing* State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct.App.1991). “No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.” Id.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the

question becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) quoting Strickland, 466 U.S. at 686. Pursuant to Strickland v. Washington, an applicant must show that counsel’s performance was deficient and that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688). It is well settled that failure to preserve an issue for appellate review can be the basis of a claim of ineffective assistance of counsel. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003).

Counsel Poole properly objected to the impermissible prior bad act testimony elicited by the State during Petitioner’s trial. However, after the court sustained the objection, Counsel Poole took no further actions. He failed to request the jury be instructed to disregard the testimony, he failed to request a curative instruction, and he failed to request a mistrial. By failing to take further action, the error in allowing the damaging testimony before the jury was not cured and the matter was not preserved for appellate review. This was deficient performance.

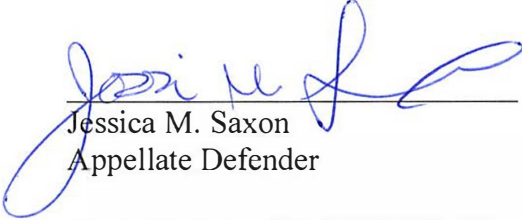
The PCR court found that Counsel Poole’s failure to take further action was not deficient performance because Counsel Poole credibly believed the trial court would not grant the motion. Trial counsel’s decision to act or not act can be based on strategy but the strategy employed must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if *the reasons given for the strategy are not sound*. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569

(2017) (emphasis added). Here, counsel's belief that he would not win a motion for a mistrial did not relieve him of his duty to make the motion and protect the record for appeal. His decision was not based on a sound strategy but on a belief that the court would rule against him. This was not a strategic or sound reasons for failing to take action on an objection that was properly sustained.

The PCR court found that Petitioner could not show prejudice because the trial court would have been within its discretion to deny a motion for a mistrial. The prejudice analysis failed to consider that by not making a motion for a mistrial, Counsel Poole entirely failed to preserve the matter for appellate review. Had he taken any action on the matter after the court sustained the objection, Petitioner could have argued on direct appeal that the admission of the prior bad act testimony was harmful error requiring a new trial. She was denied this opportunity and has therefore shown prejudice. Petitioner has met her burden of showing ineffective assistance of trial counsel.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari to allow full briefing of this issue.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2023.

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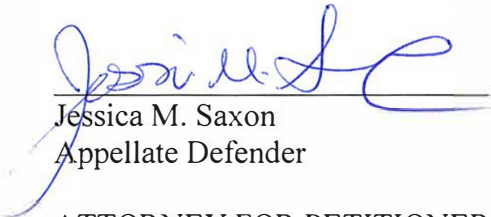
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ashley Louise Hammitt 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 G.D. Morgan, Jr., which was held on April 20, 2022, 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 Ashley Louise Hammitt.

Respectfully Submitted,



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2023.

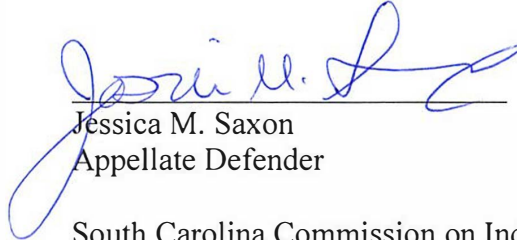
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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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This 7th day of April, 2023.