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**Jun 28 2023**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Supreme Court

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Appeal from Charleston County  
The Honorable Deadra L. Jefferson, Trial Court Judge  
The Honorable G. Thomas Cooper, Jr., Post-Conviction Relief Judge

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Appellate Case No. 2023-000842

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Henry Nesbit, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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## ISSUE STATEMENT

Whether Nesbit proved his trial attorneys were ineffective for failing to request a charge on simple possession of cocaine where his two attorneys agreed during trial there was no basis for the charge based on the amount of drugs found on Nesbit, and whether Nesbit showed the result of trial would have probably been different had counsel requested the charge.

## STATEMENT OF THE CASE

This case arose from a traffic stop on the Isle of Palms. When signaled to stop, Nesbit fled police, crashing the motorcycle he was driving. (App.92–99). The arresting officer found nearly \$3,000 in cash stuffed into Nesbit's pants pocket. (App.101; 131). Police also found bags containing two different types of narcotic drugs. The first was a "brown crystalline substance" later identified as Methylone. (App.102). It was contained in four "freezer-style bags" recovered from Nesbit's front left pocket. (App.102). The Methylone field-tested positive for methamphetamine, and totaled nearly a pound. (App.102–08).

In Nesbit's right front pocket the officer recovered another freezer bag containing a white powdery substance later identified as cocaine. (App.102; 133–34). This bag contained 19.53 grams of cocaine. (App.102). A much smaller amount, 2 grams, was later found during an inventory search of Nesbit's pants, which were confiscated at the hospital after being cut off by medical staff. (App.110).

In September 2013, a Charleston County Grand Jury indicted Nesbit for failure to stop for a blue light (2013-GS-10-5527), trafficking cocaine (2013-GS-10-5634), and possession with intent to distribute Methylone (2013-GS-10-5639). The indictment charging Nesbit with trafficking in cocaine charged him for the combined weight of the two packages found on his person, 21 grams. (App.636).

Melisa Gay, Esquire and Michael Nelson, Esquire represented Nesbit. He proceeded to jury trial on May 5-8, 2014, before the Honorable Deadra L. Jefferson. At the close of trial, Nesbit requested and received a charge on the lesser included

offense of simple possession of Methylone. (App.209). He also requested and received a charge on the lesser included offense of PWID cocaine, but did not request a charge on simple possession of cocaine. During their deliberations, the jury sent a note stating that they "couldn't decide" on the cocaine charge. (App.262). The court sent a note back asking them "what their question was." The jury asked: "can we select the lesser charge for cocaine possession even though the law says greater than 10 grams is trafficking?" (App.262–63). The trial court concluded the jury was referring to the lesser included charge of PWID cocaine, not cocaine possession. (App.263). It explained, "I just think they didn't write out PWID." (App.266). The court sent back a response of "yes," i.e. that the jury could select the lesser included charge of PWID. (App.265–66).

Nesbit was convicted for failure to stop for a blue light and the lesser-included-offenses of PWID cocaine and possession of Methylone. Judge Jefferson sentenced him to concurrent terms of fifteen years for PWID cocaine, five years for failure to stop for a blue light, and one year for possession of Methylone.

Nesbit timely appealed his conviction, raising one issue—that the trial court erred by failing to charge the lesser included offense of possession of cocaine. Appellate counsel, Robert Pachak, Esquire, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on Nesbit's behalf. (App.592). The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion. State v. Nesbit, Op. No. 2015-UP-483 (S.C. Ct. App. 2015). The Remittitur was returned to the circuit court on October 30, 2015.

Nesbit filed an application for post-conviction relief on May 26, 2016, raising several claims of ineffective assistance of counsel. An evidentiary hearing was held on December 6, 2018, at the Charleston County Courthouse before the Honorable G. Thomas Cooper. Nesbit was present and was represented by counsel, Mark Peper, Esquire. Respondent was represented by Assistant Attorney General Benjamin Limbaugh of the South Carolina Attorney General's Office. At the hearing, testimony was taken from trial counsel Melisa Gay, trial counsel Michael Nelson, and Nesbit. The PCR court denied relief in an order dated February 15, 2019. (App.779).

Nesbit appealed from this order, and this Court transferred the case to the Court of Appeals on October 21, 2019. Certiorari was granted on September 27, 2021, and the parties submitted briefs. The Court of Appeals affirmed in an unpublished opinion. Nesbit v. State, Unpublished Op.No. 2023-UP-086 (S.C.Ct.App. filed March 15, 2023). Nesbit petitioned for rehearing, which was denied on April 26, 2023. Nesbit filed a petition for writ of certiorari with this Court on May 24, 2023. This return follows.

## STANDARD OF REVIEW

The appellate court will defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). However, questions of law are reviewed de novo, with no deference to trial courts. Id.

## ARGUMENT

Nesbit failed to show his trial attorneys were ineffective for failing to request a charge on simple possession of cocaine because his two attorneys reasonably agreed during trial there was no basis for the charge based on the amount of drugs found on Nesbit. He also failed to show the result of trial would have probably been different had counsel requested the charge.

Nesbit has failed to show his trial attorneys were ineffective for failing to request a charge on simple possession because his two attorneys reasonably agreed during trial there was no basis for the charge based on the amount of drugs found on Nesbit. He also failed to show the result of trial would have been different had counsel requested the charge because the evidence strongly supported a verdict of guilty for PWID. Certiorari should be denied.

### A. The Strickland Standard.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “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, 466 U.S. 668. Strickland does not guarantee perfect representation, only a “reasonably competent attorney.” Strickland, 466 U.S. at 687.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, an applicant must

prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Even if there is reason to think that counsel's conduct "was far from exemplary," a court still may not grant relief if "[t]he record does not reveal that counsel took an approach that no competent lawyer would have chosen." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021).

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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

#### **B. Trial counsel was not ineffective.**

The PCR court correctly found trial counsel was not ineffective for failing to request a charge on simple possession of cocaine. This finding is supported by trial counsel Nelson's testimony that he did not believe he had a meritorious basis to request a charge of simple possession based on the weight of the cocaine recovered. (App.725). 20 grams of cocaine were recovered—far more than the 1 gram supporting an inference of intent to distribute under the statute. Nesbit did not testify, and there was no testimony presented that the 20 grams of cocaine was for his personal use. Nelson testified he discussed the issue with Gay at trial and both "didn't think there was a basis for it." (App.726).

Counsel Gay testified at the PCR hearing that she should have requested a simple possession charge, but she was referring to the small amount of cocaine found in Nesbit's pants pocket at the hospital. (App.734). As stated above, Nesbit was charged with trafficking cocaine based on the total amount found on his person—approximately 20 grams. He was not charged separately for the approximately 1 gram found at the hospital. Counsel Gay claimed—inaccurately—at the evidentiary hearing that the remaining 19 grams were found on the ground near Nesbit, instead of in his pocket. This is not consistent with the officer's trial testimony that he recovered the bag containing 19 grams from Nesbit's pocket at the scene of the accident. (App.102; 133–34; 137). Referencing the small amount found at the hospital, Counsel Gay explained: "I didn't think about the fact that it didn't even weigh a gram . . . . There was no evidence of intent . . . with the stuff that was in his pocket." (App.735). She claimed she should have requested a simple possession charge because the amount of cocaine found on Nesbit was "tiny" and

"minor" and "just a possessory quantity." (App.736–37). She claimed the cocaine found on Nesbit did not support a charge on PWID because there "was nothing presented that would have been evidence of intent to distribute. Not even weight." (App.740). However, she agreed that the overall amount of cocaine Nesbit was charged with possessing was "a lot of drugs." (App.741).

Counsel Gay did not have her file with her at the evidentiary hearing. (App.732). She was clearly not familiar with the evidence. Thus, her testimony that she should have requested a simple possession charge based on the "itty-bitty" amount found in Nesbit's pocket at the hospital is not consistent with the evidence, and does not accurately reflect the decisions she and Counsel Nelson were faced with at trial. (App.734). Of course, if Nesbit were charged with PWID based only on the 1 gram recovered during the inventory search of his pants, any competent attorney should have requested a simple possession charge. But that is not what happened in this case. Nesbit was charged with PWID based on possession of 20 grams of cocaine and a wad of \$3,000 cash. Counsel Gay's testimony at the PCR hearing indicates a fundamental misunderstanding of the evidence presented at trial.

Based on the evidence presented, Nesbit's attorneys reasonably concluded they did not have a good faith basis for requesting a charge on simple possession of cocaine. "There should be a good-faith basis for any motion filed in a court." United States v. Tart, 877 F.2d 61 (4th Cir. 1989). An attorney's decision not to request a charge on a lesser included offense does not constitute ineffectiveness when the attorney has a valid strategic reason. See Abney v. State, 408 S.C. 41, 46, 757

S.E.2d 544, 547 (Ct. App. 2014). Trial counsel reasonably believed the only viable defense to the cocaine charge was to dispute whether Nesbit was actually in possession of the bag containing 19 grams of cocaine. This was the focus of Counsel Gay's closing argument. (App.529–33). The PCR court concluded this was reasonable trial strategy. Under the extremely deferential Strickland standard, trial counsels' decision not to request a charge on simple possession was not so far outside prevailing professional norms that it constitutes ineffective assistance of counsel.

**C. Nesbit was not prejudiced.**

Even if counsel was ineffective, Nesbit has not proven prejudice. Nesbit argues that the jury's note during deliberations shows they "wanted to convict [him] only of simple possession of cocaine." Brief of Petitioner at 17. This is speculative, and the trial court found otherwise. Trafficking in cocaine is based solely on possession of more than 10 grams. The evidence supported a trafficking conviction because Nesbit was found in possession of 20 grams. The jury was likely asking whether they were required to convict Nesbit of trafficking based on the weight of the cocaine, or whether they could convict him of the lesser included PWID. Even though the jury sent a note asking whether they could convict Nesbit of "possession," the trial court reasonably concluded that they were referring to "PWID," but simply did not write out the entire name of the offense. (App.262).

Besides, the jury could have always found Nesbit not guilty of either charge, as was made clear in the jury instructions. If they truly felt he was guilty of

possession only, they would have simply checked the "not guilty" box on the verdict form. Nesbit has not shown prejudice. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, the State respectfully asks that this Court deny certiorari.

Respectfully submitted,

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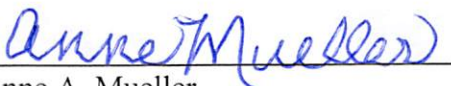
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**PROOF OF SERVICE**

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I, Anne Mueller, certify that I have served a copy of the within Return To Petition For Writ Of Certiorari on Jeffrey Wayne Buncher, Jr., Esquire, counsel of record for the Petitioner by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.  
This 28<sup>th</sup> day of June 2023.



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