ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212581

JOHNSON PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Violating Petitioner's rights pursuant to South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution to the effective assistance of trial counsel, the PCR court erred in denying Petitioner relief from his drug convictions where the PCR court held trial counsel's stipulation to the chain of custody of the drugs was not deficient performance prejudicial to Petitioner despite evidence of a clear break in the custodial chain.

STATEMENT

During its February 2000 term, the Bamberg County Grand Jury indicted Petitioner for possession with intent to distribute cocaine within proximity of a park (2000-GS-05-054) and trafficking in cocaine (2000-GS-05-055). App. 362-363; App. 365-366. Petitioner, who was represented by J. Christopher Wilson, was tried on January 14, 2004. Grant Gibbons represented the state. App. 1. After the jury found Petitioner guilty, the Honorable Reginald Lloyd sentenced Petitioner to twenty-five years on the trafficking in cocaine conviction and fifteen years on the possession with intent to distribute conviction. App. 148, line 24 – App. 149, line 11; App. 152, lines 21-25.

Petitioner filed a direct appeal thereafter. Robert Pachak filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) on Petitioner's behalf. App. 155-165. The Court of Appeals affirmed his convictions and sentences in an unpublished opinion. State v. Miller, 2005-UP-272 (Ct. App. filed April 8, 2005); App. 166-167. The Court issued remittitur on May 11, 2005. App. 168.

Petitioner filed an application for post-conviction relief on February 7, 2006. App. 169-181. An evidentiary hearing convened before the Honorable Doyet A. Early on August 10, 2006. W.D. Rhoad, IV represented Petitioner, and Colleen E. Dixon represented the state. Judge Early denied Petitioner relief by ordered filed on October 2, 2006. App. 187-195. No appeal was taken.

Petitioner filed another application for post-conviction relief on January 26, 2011. App. 196-210. The matter proceeded to a hearing before the Honorable Edgar W. Dickson on January 25, 2012. Nicole Singletary represented Petitioner, and Mary Williams represented the state. App. 217. By order dated March 21, 2012, Judge Dickson granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 229-231.

In preparing Petitioner's belated appeal, Petitioner learned that the transcript from his August 10, 2006 evidentiary hearing was no longer available. As a result, Petitioner filed a petition for order to reconstruct the record of Petitioner's PCR hearing. App. 232-236. By order dated December 20, 2012, this Court granted the petition and ordered the parties to reconstruct the hearing. The order provided for Judge Early to determine whether the hearing could be reconstruction. If he determined reconstruction were not possible, then he was directed to notify this Court of such within fifteen days. On the other hand, if he determined reconstruction were possible, then the matter would proceed upon Petitioner's receipt of the transcript. App. 315-316.

On January 22, 2013, Petitioner appeared before Judge Early to reconstruct the record of his August 10, 2006 hearing. Undersigned counsel represented Petitioner, and Megan Harrigan appeared on behalf of the state. App. 317. At the conclusion of the hearing, Judge Early ruled orally that the matter had been reconstructed. App. 356, lines 15-16.

Petitioner now files this timely petition for writ of certiorari concerning the PCR judge's finding that Petitioner is entitled to a belated appeal of the denial of post-conviction relief.[1]

[1] Pursuant to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), Petitioner files this petition for writ of certiorari raising the issue of whether the PCR judge correctly held that Petitioner had not knowingly and intelligently waived his right to appellate review of the previous PCR order. As required, Petitioner is filing a separate petition addressing the questions from the previous post-conviction relief order that Petitioner seeks to have reviewed.

ARGUMENT

Violating Petitioner's rights pursuant to South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution to the effective assistance of trial counsel, the PCR court erred in denying Petitioner relief from his drug convictions where the PCR court held trial counsel's stipulation to the chain of custody of the drugs was not deficient performance prejudicial to Petitioner despite evidence of a clear break in the custodial chain.

Relevant Facts

Relevant Facts from Trial

Prior to the start of trial, trial counsel stipulated to the chain of custody and the testimony of the chain witnesses. He explained that the stipulation would mean the state would not need to present testimony from the witnesses in the chain of custody. App. 12, line 20 – App. 13, line 10. As a result, the trial judge released witnesses the state had placed under subpoena. It appears the judge released "Mr. Trantham" and Joe Bell as a result of the stipulation. App. 13, lines 11-15.

Ben Hay, a former employee of the City of Denmark Police Department, and Judy Walton, a current employee of the City of Denmark Police Department testified that on July 31, 1998, they went to the train station in Denmark at 11:50 pm to intercept drugs officers believed were arriving based upon a tip. App. 64, line 5 – App. 65, line 13; App. 76, lines 20-21; App. 77, lines 8-14. Hay, Walton, and other officers observed two people exit the train, one of whom, Petitioner, went toward a pay phone at the station. App. 65, lines 16-21. Three officers approached Petitioner. App. 66, lines 4-10; App. 77, lines 17-22. Officers searched Petitioner's belongings and found "big bundles of stuff wrapped in tape." App. 69, lines 21-25; App. 78, lines 20-21. Walton was the officer who actually removed the package from a pillow allegedly carried by Petitioner. App. 78, lines 5-22.

Walton testified the drugs never left her custody and control – she secured everything at the train station and transported it to the police station. App. 79, line 25 – App. 80, line 2. Walton identified State's Exhibits #1, #2, and #3 as the bundles she removed from the pillow. Although she identified three bundles as present in court, she explained there were only two bundles in the pillow. App. 81, line 22 –App. 82, line 1. She did not know why there were now three items, rather than two. She speculated that the analyst may have broken them down for testing. App. 82, lines 2-8. Additionally, Walton testified testing indicated the packages were positive for cocaine in the amount of 476 grams and 461 grams. App. 83, line 3 – App. 84, line 16.

At the conclusion of the testimony, the prosecutor placed the stipulation regarding the drugs. The prosecutor stated: "We have a stipulation that the chain of custody on the drugs is not in issue here, and neither are the nature and weight of the drugs." He further stated: "We have agreed that what has been testified to is what the facts show." App. 100, line 20 – App. 101, line 1. Trial counsel agreed with the recitation. App. 101, lines 2-3. The trial judge informed the jury that the stipulation was the same as evidence taken from the witness stand. He explained the jurors were to treat it like any other piece of evidence introduced at trial, "and take it as a fact that has been put into evidence before you." App. 101, lines 4-9.

Petitioner testified in his defense. He denied having a pillow in his possession when he was stopped by police at the train station. App. 112, lines 14-23. During closing argument, trial counsel explained to the jury that the prosecution had entered into evidence three bags of cocaine and the defense stipulated

> that all of this stuff was handled properly; that the police when they recovered it, wherever they recovered it from, it went up to SLED and go tested properly; that it came back from SLED, and that it is cocaine and it is four hundred and some grams and four hundred and some rams. Nine hundred and some in total. We stipulated to all those things. Ladies and gentlemen, I dispute not how much cocaine it is and I dispute not that it is cocaine. [Petitioner] disputes that it was his cocaine.

App. 127, line 19 – App. 128, line 8.

In his closing argument, the prosecutor emphasized the undisputed and stipulated evidence. The prosecutor explained the defense agreed the substance was over four hundred grams of cocaine leaving the only issue as to the owner of the cocaine. App. 131, lines 22-25.

Relevant Facts from PCR Order of Dismissal

The Order of Dismissal filed on October 2; 2006 summarized the testimony of the PCR witnesses.[2] The chain of custody paperwork revealed that Judy Walton seized a quantity of white powder from Petitioner and delivered it to Joe Bell. The second form indicated that Christine Simpkins of the Denmark Police Department received a quantity of white powder from Joe Bell. No form was signed by Joe Bell, creating a break in the chain of custody. App. 190.

According to the Order, Petitioner testified that trial counsel informed him there were no problems with the chain of custody and based upon this advice Petitioner agreed to consent to the chain of custody during the trial. Petitioner further testified that if he had known of the chain's defect, he would not have consented. App. 188-189. Trial counsel testified that he reviewed the chain of custody evidence and discussed the evidence with Petitioner. Although trial counsel did not contact Captain Joe Bell or request the missing paperwork, he advised Petitioner to consent to the chain of custody. He believed the prosecutor would be able to produce any missing link in the chain. Trial counsel did not want the chain witnesses to testify because he believed the additional testimony would emphasize the amount of cocaine found allegedly in Petitioner's possession. App. 189-190.

[2] None of the witnesses disputed the Order's summary of the testimony at the reconstruction hearing.

Regarding this issue, the PCR court found Petitioner had failed to meet his burden of proof to show that trial counsel was deficient in consenting to the chain of custody. The PCR judge found the forms did not establish a full chain of custody, but found there was "no evidence admitted to dispute trial counsel's assertion that Captain Joe Bell would have been able to testify to complete the chain of custody had it been necessary." App. 190-191. The PCR court further found that the two forms presented during the hearing "serve[d] to establish who handled the white powder substance." The PCR court found "trial counsel was not deficient in consenting to the admissibility of the drugs because the alleged 'weak link' would not have affected the admissibility of the evidence at trial." Additionally, the PCR court found no prejudice because Petitioner failed to show that the cocaine would not have been admitted had trial counsel not consented. App. 191.

Relevant Facts from Reconstruction Hearing

Chris Wilson, Petitioner's trial counsel, testified at the reconstruction hearing that he had no recollection of his testimony at the PCR hearing in August of 2006; however, he remembered the issue concerning the chain of custody as it arose at trial. App. 324, lines 11-14. Trial counsel recalled discussing the chain of custody issues with Petitioner. Wilson recalled the issue as follows:

> As I recall the officer had - - who had initially seized the drugs had turned the drugs over to either the chief or the captain at the police department who had then turned the drugs over to the SLED box and there wasn't the chain six custody paperwork between the officer and the captain or chief.

App. 324, lines 15-22. Wilson elaborated that "[i]t was Captain Joe Bell who still live[d] in Bamberg County and the solicitor's office would easily bring Captain Bell to fill in the missing link on the paperwork with testimony." Wilson recalled he and Petitioner decided not to proceed with the chain of custody issue. App. 324, line 23 – App. 325, line 3. Wilson also noted that Petitioner's defense was "it was not his cocaine" as opposed to a challenge of whether the substance was actually cocaine. App. 325, lines 4-5. Therefore, "the chain was not a vital part of the defense."

App. 325, line 5. Wilson claimed Petitioner agreed to waive the chain of custody issues. App. 325, lines 7-8.

William D. Rhoad, IV, Petitioner's prior PCR counsel, testified that Petitioner was "even more in the dark concerning the chain of custody issue." App. 332, lines 22-24. Petitioner testified at the PCR hearing that he did not understand what transpired and later, Petitioner was surprised to learn trial counsel stipulated to an incomplete chain of custody where the drugs would have been inadmissible as a result of the defective chain. App. 333, lines 2-9.

Colleen Dixon, the assistant attorney general at the time of Petitioner's initial PCR hearing, testified that she recalled trial counsel testifying that he had reviewed the chain of custody forms. Trial counsel noted a break in the chain concerning the police chief or captain. Trial counsel did not

> think it was a big deal because that officer still worked here; that he knew the officer was available to testify and that he explained that to [Petitioner] and said you know, we can object to it, but it's not going to do anything and his testimony, basically, was that he didn't want to talk about the drugs.

App. 339, line 17 – App. 340, line12. She then explained trial counsel's trial strategy was not to talk about the drugs because the amount of the drugs weighed against Petitioner. Trial counsel did not want to have each person testify as to transferring the drugs as it would damage the defense case. App. 340, lines 13-18.

Dixon described Petitioner as "irritated" by the chain of custody issue. Petitioner's "basic testimony" was that he and trial counsel discussed the chain of custody issue, but Petitioner did not understand the discussion. App. 340, line 19 – App. 341, line 4. During Dixon's testimony, the state introduced, without objection, an exhibit purporting to be two chain of custody forms. The forms indicate Walton took initial possession of the evidence on August 3, 1998, which she delivered to Captain Joe Bell. App. 360. The next form indicated Christine Simpkins, a police

officer, received the evidence from Captain Joe Bell on August 3, 1998 and delivered the evidence to a person whose name is illegible on the same date. App. 361.

Petitioner testified that trial counsel advised him "it would be irrelevant for [him] to go through with the chain of custody." Petitioner "just went along" with trial counsel's advice. App. 354, lines 13-20. He recalled trial counsel testifying that it was not necessary to challenge the chain of custody because the officer was available at the police department. App. 354, line 21 – App. 355, line 1.

Discussion

In a post-conviction relief proceeding, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. See Strickland v. Washington, 466, U.S. 668 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different. See Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997).

"[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). Although the evidence must be clear as to who handled the evidence and what was done with it between the taking and the analysis, testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility. Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957); Sweet, 374 S.C. at 7, 647 S.E.2d at 206. If other evidence establishes the identity of those who handled the evidence and "reasonably

demonstrates the manner of handling of the evidence," courts are willing to fill gaps in the chain of custody due to an absent witness. Sweet, 374 S.C. at 7, 647 S.E.2d at 206. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). This Court has found evidence inadmissible "only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable." Id. Police need not account for every transfer of the fungible evidence, but must demonstrate a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial. State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011)(quoting State v. Price, 731 S.E.2d 287, 290 (Mo. Ct. App. 1987).

Establishing a chain of custody of a controlled substance may be established by "a certified or sworn statement signed by each successive person having custody of the evidence that he or she delivered it to the person stated" as long as the statement contained a sufficient description of the substance to distinguish it and the statement provided that the substance was delivered in substantially the same condition as it was received. Rule 6 (b), SCRCrimP. If the chain is established through the sworn statements, then Rule 6 provides that the persons signing the statements need not testify in court. However, the defendant may demand appearance in court of the persons within the chain of custody not later than ten days prior to the trial of the case. Rule 6(b), SCRCrimP.

Trial counsel's decision to stipulate to the chain of custody was deficient performance resulting in prejudice to Petitioner. The clear testimony was Walton removed two bundles from the pillowcase. The bundles were transported to SLED, after passing through several hands at the police station. When the bundles were presented in court, there were three, rather than the two

bundles initially seized. This was significant in light of the charge presented against Petitioner – trafficking cocaine, which carried a minimum sentence of twenty-five years due to the weight of the drugs. Trial counsel's stipulation permitted the prosecution to introduce the evidence despite the obvious fact that it had changed in a substantial way after being seized. Although the paperwork identified Joe Bell as having had custody and control over the evidence at some time, neither the paperwork nor the evidence presented at trial explained how or when the drugs were altered from two bundles to three bundles. The prosecution could not provide reasonable assurance that the evidence remained the same from the time it was obtained until its introduction at trial as it had so obviously been changed. Although the defense theory may have been that the drugs did not belong to Petitioner, if the state had been unable to prove the chain of custody, then the drugs would have been inadmissible. Without the drugs, the prosecution had no case against Petitioner. He was simply a man who arrived at the train station in Denmark in July of 1998.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BAMBERG COUNTY
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Miller states:

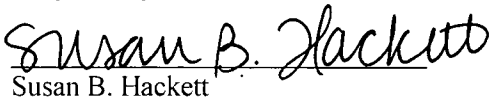
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on January 25, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Michael Miller.

Respectfully submitted,



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of July, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212581

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari pursuant to Austin v. State and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Michael Miller, #259269, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 11th day of July, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of July, 2013.

Emily Bryson (L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.