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Aug 24 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to Horry County
The Honorable H. Steven DeBerry, Circuit Court Judge

Appellate Case No. 2022-001644

Jawan White,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE STATEMENT

Whether trial counsel was ineffective for failing to object to the court's charge defining trafficking heroin in the language of the statute, and whether White showed the result of trial probably would have been different had counsel objected to the charge.

STATEMENT OF THE CASE

White was tried in his absence for trafficking heroin on June 13, 2013, before the Honorable Larry B. Hyman, Circuit Court Judge, and a jury. White was convicted and sentenced to 25 years' incarceration. After his post-trial motions were denied, White appealed his conviction. The Court of Appeals affirmed in an unpublished opinion. (App. 189–90).

White filed an application for post-conviction relief on October 25, 2019. White's claim focused on 1) trial counsel's failure to object to the court's jury charge defining the offense of trafficking heroin in the language of the statute, which makes it illegal to "conspire or attempt" to possess 28 grams or more of heroin, and 2) failure to object to hearsay testimony.

An evidentiary hearing was convened on June 1, 2022, before the Honorable Steven DeBerry, Circuit Court Judge. Trial Counsel John Hilliard was deceased at the time of the hearing. (App.224). White testified, as did prosecutor Martin Spratlin. The PCR court denied relief on October 10, 2022. (App.289–90). White's motion to alter or amend the judgement was denied on November 14, 2022. (App.310). White filed a petition for writ of certiorari with this Court on April 17, 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

White failed to show deficiency or prejudice from trial counsel's decision not to object to the court's charge defining the offense of trafficking heroin in the language of the statute.

Trial counsel was not deficient for failing to object to the trial court's charge defining the offense of trafficking of heroin. The court properly defined the offense in the language of the statute, listing alternative means by which the crime could be committed. White was not prejudiced because there is not a reasonable probability he would have been acquitted had the court omitted conspiracy as a means of trafficking heroin because White was clearly guilty of attempting to purchase heroin, and there is no indication the jury convicted him on a conspiracy theory. 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 because the charge was correct.

The S.C. Code § 44-53-370(e) defines the types of conduct that constitute “trafficking in illegal drugs.”¹ The statute prohibits the selling, manufacturing, cultivation, delivery, purchasing or bringing into the state of heroin, or aiding, abetting, attempting or conspiring to do the same. S.C. Code Ann. 44-53-370(e). The trial court gave a nearly verbatim definition of the crime charged.² Appellant claims the charge was misleading and confusing to the jury because the judge charged that Appellant could be convicted if found to have conspired to purchase or possess heroin, and the State did not produce evidence of an actual conspiracy.

¹ S.C. Code § 44-53-370(e)(3)(c) reads in pertinent part:

(e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:

(3) four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as “trafficking in illegal drugs” and, upon conviction, must be punished as follows if the quantity involved is:

(c) twenty-eight grams or more, a mandatory term of imprisonment of not less than twenty-five years nor more than forty years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars.

² The judge charged the jury as follows: “Now the Defendant is charged with trafficking in heroin. The State must prove, beyond a reasonable doubt, that the Defendant knowingly sold, manufactured, cultivated, delivered, purchased, brought into this State, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, manufacture, cultivate, deliver, purchase, or bring into this State, and was knowingly in actual or constructive possession, knowingly attempted to become in actual or constructive possession of heroin. In order to find the Defendant guilty the State must also prove, beyond a reasonable doubt, that the amount of the heroin, or any mixture containing heroin, was twenty-eight grams or more. Under trafficking in heroin, twenty-eight grams or more, the presence of only imitation heroin at the transaction is irrelevant if the State proves beyond a reasonable doubt that the Defendant conspired or attempted to purchase more than twenty-eight grams of real heroin.” (App.163).

However, the law in South Carolina and other jurisdictions is clear that when a statute provides for alternative factual grounds for guilt, each being independently sufficient to convict on the charged offense, a court may define the offense to the jury by charging the full language of the statute.

In City of Columbia v. Moser, 280 S.C. 134, 311 S.E.2d 920 (1983), Moser was charged with violating a criminal statute prohibiting certain acts of “lewdness, assignation, or prostitution.” Id. at 136, 311 S.E.2d at 921. Moser argued the trial court erred by charging the jury the entire statute when there was no evidence of assignation or prostitution, only lewdness. Id. at 137, 311 S.E.2d at 921. The Supreme Court held the trial court committed no error, especially where “the language complained of is not so offensive or confusing that reasonable minds would be mislead [sic] or prejudiced by the reading thereof.” Id.; see also Sims v. State, 258 Ga.App. 622, 574 S.E.2d 622 (2002) (holding trial court properly charged entire trafficking statute even though the evidence only supported guilt on a possession theory).

Where a statute defines the elements of a crime in plain and ordinary terms, it is proper for the court’s charge to track the language of the statute. Field v. Gregory, 230 S.C. 39, 47, 94 S.E.2d 15, 20 (1956) (“As a general rule where the law governing a case is expressed in a statute, the court in its charge not only may, but should, use the language of the statute, and may, indeed, be guilty of error if it employs language which constitutes a departure in an essential respect from the statute.”) (quoting 53 Am.Jur., Trial, para. 542, at page 433); United States v. Wills, 346 F.3d 476, 494 (4th Cir. 2003) (approving of a jury instruction that “tracks the

language of both the interstate stalking statute and of the indictment...”); accord State v. Zichko, 129 Idaho 259, 264, 923 P.2d 966, 971 (1996) (“Ordinarily the language employed by the legislature in defining a crime is deemed to be best suited for that purpose, and error cannot be predicated on its use in jury instructions.”); Lloyd v. State, 152 A.3d 1266, 1271 (Del. 2016) (“An instruction which tracks the statutory language is adequate to inform the jury.”); People v. Fromuth, 2 Cal. App. 5th 91, 108, 206 Cal. Rptr. 3d 83, 97 (Ct. App. 2016) (statutory language “is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language.”).

The trial judge may read the language of the statute verbatim, or he may phrase the statute in his own words. Keel v. Seaboard Air Line Ry., 108 S.C. 390, 95 S.E. 64, 65 (1918) (“He read the statute to the jury, and that was sufficient. He had the right to read the statute to the jury, or, if the language of the statute was embodied in his own language, this was sufficient.”). It is common practice for trial courts to charge the full language of drug trafficking statutes. See, e.g., State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996); State v. Taylor, 323 S.C. 162, 165, 473 S.E.2d 817, 818 (1996). The judge’s charge correctly stated the applicable law. A jury charge which is substantially correct and covers the law does not require reversal. State v. Cherry, 348 S.C. 281, 287, 559 S.E.2d 297, 299 (Ct. App. 2001).

Stromberg v. People of State of Cal., 283 U.S. 359 (1931), does not support White's argument. In that case, Stromberg was convicted under a statute that contained three clauses with alternative bases for liability, one of which was ruled facially unconstitutional. Because the jury verdict did not specify under which clause it convicted, and because the prosecutor argued “emphatically” that conviction could be based on the unconstitutional portion of the statute alone, the possibility that the jury convicted under that portion meant that the verdict could not stand. Stromberg, 283 U.S. at 368-69 (explaining “if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.”). In Yates v. United States, 354 U.S. 298 (1957), the court held that conviction on one of the grounds for liability was barred by statute of limitations, meaning that the general verdict possibly rested on an error of law, and could not stand. Neither of these circumstances is present in this case. Instead, each part of the trafficking statute is constitutionally and legally valid; the jury was merely asked to decide which part of the statute, if any, was violated.

The United States Supreme Court addressed this question in Griffin v. United States, 502 U.S. 46 (1991). In Griffin, defendant was charged with conspiracy to defraud the U.S. government. The indictment alleged that Griffin obstructed the IRS *and* DEA in the performance of their respective duties, either of which could constitute guilt of defrauding the government. The evidence presented at trial implicated Griffin only for obstructing the IRS. Griffin asked for a jury charge instructing the jury that it could not find her guilty of the underlying offense based on the allegation that she obstructed the DEA, which the trial court refused.

The Court instead instructed the jury that it could find defendant guilty if it found that she engaged in *either* type of conduct alleged in the indictment. The Supreme Court held that the court committed no error. The Court described the history of general verdicts on multi-count indictments before addressing the issue before it—whether a jury charge on an indictment charging various factual grounds for conviction on a *single offense* may present the jury with these alternative bases for liability, even though there is no evidence to support one or more of the factual grounds. The court found that, whether on constitutional or procedural grounds, neither Yates nor Stromberg applied to the issue presented by Griffin. Calling Griffin’s argument “unprecedented and extreme,” the Court distinguished Stromberg and Yates, pointing out that Griffin’s insufficient “bases of conviction was neither unconstitutional as in Stromberg, nor even illegal as in Yates, but merely unsupported by sufficient evidence.” Griffin, 502 U.S. at 56 (1991). The Court described approvingly the “regular practice for prosecutors to charge conjunctively, in one count, the various means of committing a statutory offense.” Griffin, 502 U.S. at 51 (1991). The Court held the issue had already been decided in Turner v. United States, 396 U.S. 398 (1970), a drug case where Turner was convicted under a statute prohibiting the purchasing, selling, dispensing, or distributing of narcotics. Because the State had proven distribution, “the status of the case with respect to the other allegations is irrelevant to the validity of Turner's conviction.” Turner, 396 U.S. at 420 (1970). Griffin and Turner establish that no constitutional or procedural violation occurs under federal law when a court submits various factual grounds for relief to a jury even though the evidence submitted does not

support conviction on one of those legally valid grounds. See also Crain v. United States, 162 U.S. 625, 636 (1896) (approving “a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.”); Schad v. Arizona, 501 U.S. 624, 636 (1991) (“Because statutes frequently enumerate alternatives that clearly are mere means of satisfying a single element of an offense, adoption of the dissent's approach of requiring a specific verdict as to every alternative would produce absurd results.”). Certiorari should be denied.

C. White was not prejudiced.

Even if counsel was ineffective, White has not shown prejudice. The State's case was extremely strong. White was caught red-handed attempting to purchase heroin. Furthermore, there is no indication the jury convicted White on a conspiracy theory. The evidence showed and arguments of counsel clearly demonstrated the State's theory was that White was guilty because he attempted to purchase heroin. The jury was well aware of the State's theory of the case. As the Supreme Court noted in Griffin, jurors are well equipped to analyze evidence; left with “the option of relying upon a factually inadequate theory,” there is no reason to believe jurors cannot weigh the evidence appropriately. Griffin, 502 U.S. at 59 (1991). White 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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August 24, 2023