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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Bentley Price, Circuit Court Judge

Case No. 2018-CP-10-5819

Omar S. Gentile #289079, Petitioner,

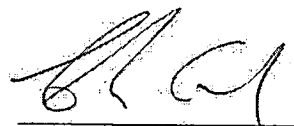
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Omar Gentile, Petitioner, appeals the attached Order issued by the Honorable Bentley Price on April 11, 2024. Petitioner, through counsel, received notice of the entry of the Order on April 15, 2024.

Date: April 25, 2024



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of
AG

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Omar Shariff Gentile, #289079)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-10-5819

ORDER OF DISMISSAL

FILED
2024 APR 11 AM 9:19
JULIE J. ARMSTRONG
CLERK OF COURT
BY DCR

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Omar Shariff Gentile (Applicant) on December 7, 2018. On February 17, 2021, an evidentiary hearing convened before the Honorable Bentley D. Price. Applicant was present and represented by Christopher R. Geel, Esquire. Assistant Attorney General Benjamin Limbaugh represented the State. At the hearing, Applicant called as a witness Jason King, Esquire (trial counsel). Following a thorough review of the records before this Court and the testimony and evidence presented at the hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving an aggregate twenty-five-year sentence. In May 2012, the Charleston County Grand Jury indicted Applicant for possession with intent to distribute (PWID) heroin within proximity of a school (2012-GS-10-2587). In September 2015, the Charleston County Grand Jury indicted Applicant for trafficking heroin (2015-GS-10-5473). These charges arose following the execution of a search warrant on a home on February 9, 2012.

On January 4-5, 2016, Applicant proceeded to jury trial before the Honorable Kristi Lea

Harrington. Assistant Public Defenders Jason T. King and Tamara M. Van Pala represented Applicant, and Assistant Solicitors John Whitney Sowards and Stephanie B. Linder prosecuted the case. The jury convicted Applicant as indicted, and Judge Harrington sentenced him concurrently to twenty-five years for trafficking and ten years for PWID heroin.

Applicant filed a timely notice of appeal, which was perfected by Appellate Defender Kathrine Hudgins (2016-000161). On appeal, Applicant argued the trial court erred in not requiring the State to disclose the name of a confidential informant (CI) who made a controlled-buy at the home that formed the basis of probable cause for the search warrant. The Court of Appeals affirmed in an unpublished Rule 220(b)-style opinion. State v. Gentile, Op. No. 2018-UP-386 (Ct. App. filed Oct. 17, 2018). The remittitur was sent November 6, 2018.

Summary of Underlying Facts

Applicant's charges arose from the execution of a search warrant on February 9, 2012.¹ Upon executing the warrant, officers found Applicant in the living room and Applicant's relative, John Davis, in a back bedroom. (Tr. 135). After waiving his Miranda rights, Applicant spoke with law enforcement and told them he went to the home daily to care for Davis, an amputee. He further told law enforcement he had a room in the home with independent locks and keys, and he considered the home to be his residence. Applicant pointed out his room, and law enforcement found keys in the door. Applicant also told law enforcement that he had over \$1,000 in cash in his bedroom. (Tr. 137-38, 140-41). After searching the bedroom, officers found sixteen grams of heroin and drug paraphernalia, including digital scales with heroin residue, glassine baggies, and rubber bands. Police also found paperwork belonging to Applicant in the drawer with the drugs, including a paycheck stub, a driver's license, and a social security card. (Tr. 156).

¹ Probable cause for the warrant was developed by a CI's controlled purchase of drugs from the home on January 31, 2012. The CI purchased the drugs from Applicant's brother.

Applicant did not testify or call any witnesses at trial. Applicant's trial strategy centered on the argument that he was only at the home caring for his relative, the drugs belonged to his brother (who had previously sold to the CI), and Applicant did not know the heroin was in the drawer or constructively possess the heroin. (Tr. 69-70, 269-70).

Current Application

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel: Counsel failed to object to hearsay.
2. Due process violations: Applicant was "[d]enied due process when video was muted, no testimony (in search warrant) concerning CI's snitch file and reliability whether he/she was paid and/or working off charges."

On March 9, 2020, Applicant served on Respondent an amended application alleging counsel was ineffective for:

1. Not objecting to improper lay-opinion and "ultimate issue" testimony regarding the upstairs bedroom, and
2. Not objecting to the Court's premature and impermissibly coercive Allen charge.

At the PCR hearing, Applicant proceeded only on the two grounds of his amended application. ,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including Charleston County Clerk of Court records of the underlying convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and records of this PCR action. This Court also had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony. After a careful review based

on the Strickland standard set forth below, this Court finds Applicant failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

INEFFECTIVE ASSISTANCE OF COUNSEL

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice because of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must show "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.

Failure to object – Testimony the room belonged to Applicant

Applicant first contends counsel was ineffective for not objecting

to testimony from non-experts that (1) it is unlikely that Gentile's personal items would be found in the upstairs bedroom if it were not his personal living space, (2) the ammunition found in the upstairs bedroom is 'commonly found' in the homes/bedrooms of drug dealers, and (3) that the investigating officer had 'no doubt' that the upstairs bedroom belonged to Omar Gentile.

Applicant contends this was an opinion on the ultimate issue that counsel should have objected to. He further contends he was prejudiced by counsel's failure to object because this testimony undermined his defense strategy. This Court finds Applicant did not prove this ground.²

At trial, the following exchange occurred during Investigator John Marn's redirect

² This Court will address the allegation related to ammunition separately below.

testimony:

Q. . . . Do you believe a social security card is important?

A. Yes, ma'am, I do.

Q. Do you think a bank statement is important?

A. Yes, ma'am.

Q. Or a pay stub?

A. Yes, ma'am.

Q. These important items kept in a stranger's home?

A. Not likely.

(Tr. 177-78).

During Investigator Shealy's direct testimony, the following exchange occurred:

Q. And why, again, did you believe that bedroom number three belonged to the defendant, Omar Gentile?

A. Bedroom number three belonged to the defendant, Omar Gentile, because of this statement stating that that was his—indeed his bedroom.

He told us that was his bedroom. There was numerous identifiers located in that bedroom to place him in that bedroom. Being from his identification card—the most important thing that we take with use every day: your ID card, you never leave home without it; your bank card; your social security card.

Also, a set of keys in a locked door that I asked Mr. Omar Gentile if he wanted the keys out of the lock that was in his door and he stated that he did want his keys. And he took his keys.

Also from him asking me to get pants, shirt, and shoes from his bedroom.

So, basically, the answer to your question is from the items that we located from the bedroom, from the key we located in the door, and **from his verbal statements admitting to that was—to us, admitting that it was his bedroom.**

Q. And was there any doubt in your mind who that bedroom belonged to?

A. No, sir, no doubt whatsoever whose bedroom that belonged to.

(Tr. 237-38, emphasis added).

During the PCR hearing, trial counsel testified his primary strategy was to argue Applicant did not have knowledge of the drugs. Although he averred he “maybe” should have objected to the redirect examination of Investigator Marn, he explained that Applicant’s paperwork (including his social security card) being in the drawer with the drugs was an issue he was going to have to deal with in argument, so he did not believe the redirect questioning was that strong of a point for the State. Regarding his failure to object to Investigator Shealy’s testimony that the room belonged to Applicant, counsel explained that although he could come up with an argument for and against it being admissible under Rule 701, SCRE, he could not get around the fact that Applicant told Investigator Shealy it was his room. He averred there was no reason to object when he was conceding the room belonged to Applicant. Counsel stated he focused on arguing that even though it was Applicant’s room, other people could have accessed the room and left the drugs there.

This Court finds counsel’s strategy for not objecting was reasonable under prevailing professional norms and not deficient. Critically, Applicant himself told Investigator Shealy the bedroom belonged to him—making it difficult for counsel to then argue the bedroom did *not* belong to Applicant. Using the evidence and the facts that existed (and that he could not avoid), counsel formulated a reasonable strategy in arguing that although the bedroom belonged to Applicant, the drugs themselves were put in the room without Applicant’s knowledge. This Court finds Applicant has not set forth a better strategy counsel should have employed under the facts and evidence that existed, and thus did not meet his burden of proving deficiency.

Likewise, it is not reasonably likely an objection would have changed the outcome. Investigator Shealy's testimony that Applicant said the room belonged to him and testimony that officers found Applicant's paperwork in the drawer was admissible, and Applicant has not articulated a valid, legal objection for excluding that evidence. Further, this Court finds Investigator Marn's testimony that bank statements, social security cards, and paycheck stubs are important documents that are not normally kept in a stranger's home was rationally based on Investigator Marn's perception, helpful to a clear understanding of his testimony or a fact in issue, and did not require special knowledge, skill, experience, or training. See Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."). This Court likewise finds Investigator Shealy's testimony that Applicant's numerous items in the bedroom supported Applicant's statement that the bedroom belonged to him was rationally based on Investigator Shealy's perception, helpful to a clear understanding of his testimony or a fact in issue, and did not require special knowledge, skill, experience, or training. Thus, it is not reasonably likely an objection would have excluded this testimony. Finally—and critically—due to testimony that Applicant himself admitted the room belonged to him, it is not reasonably likely the outcome would have been different had counsel successfully objected to Investigator Marn's testimony about not storing important documents in a stranger's home or Investigator Shealy's testimony that Applicant's items in the bedroom corroborated Applicant's statement that the room was his. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failure to Object – Testimony about Ammunition

During Investigator Shealy's direct testimony, as he was recounting items recovered from the bedroom identified as Applicant's room, the following exchange occurred:

There was various identification for Mr. Omar Gentile, such as pay stubs, South Carolina ID card, social security card belonging to Mr. Omar Gentile, Bank of America cards.

There was also a box of ammo in that room, which is commonly found in rooms or homes that drug dealers have where—

The Court: Hold on. I'm having a hard time with the coughing.

Mr. King: May we approach?

The Court: Yes, you may.

(Whereupon, an off-the record bench conference is held)

[The Court]: Mr. Sowards, if you need to re-ask the question so that it's clear. It's been a while. Thank you.

Mr. Sowards: Yes, ma'am. I'll move on to something else, Your Honor.

The Court: All right. Thank you.

(Tr. 231-32).

At the PCR hearing, counsel testified the solicitor agreed pretrial not to introduce evidence of the ammunition, but Investigator Shealy blurted it out during his testimony. Counsel explained someone was coughing at the time and the judge cut off Investigator Shealy's testimony. He testified he told the judge at the bench conference that the State had agreed not to introduce evidence of the ammunition, and the solicitor agreed not to go into it anymore and just move on. Trial counsel testified he did not object or request the judge strike the testimony because someone was coughing during the testimony and he believed the jurors may not have heard it. He also averred further instruction by the court could have drawn more attention to the statement—which

he did not want to do. Counsel testified he would have otherwise objected, but his primary concern was that evidence about the ammunition had been introduced at all.

This Court finds counsel articulated a valid, strategic reason for not objecting and thus was not deficient. Critically, counsel explained that although he *did* believe the testimony was objectionable—both as improper lay testimony and because the State agreed not to introduce evidence of the ammunition—he decided an objection would draw more attention to the issue. Based on the record, this testimony occurred as someone was coughing, and counsel was able to accomplish his primary purpose of having the State move on from the testimony. Thus, counsel’s decision to not object because he did not want to draw more attention to the issue was objectively reasonable and not deficient.

Likewise, it is not reasonably likely an objection would have changed the outcome. Officers recovered heroin from the drawers of a room Applicant claimed as his own, and the ultimate issue for the jury was whether Applicant was aware of the drugs. The fact ammunition was also found (which Investigator Shealy stated was commonly found in rooms or homes of drug dealers) did not make it more or less likely Applicant had knowledge of the drugs. It was uncontradicted heroin was found, and the fact ammunition was also found did not go to the ultimate issue before the jury—Applicant’s awareness or knowledge of the drugs. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failure to object to premature Allen charge

Finally, Applicant contends counsel was ineffective for not objecting to the premature Allen charge that was impermissibly coercive. This Court finds Applicant did not prove this claim.

“Whether an Allen charge is unconstitutionally coercive must be judged ‘in its context and under all the circumstances.’” Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)

(quoting Lowenfield v. Phelps, 484 U.S. 231 (1988)). “South Carolina approves the use of a modified Allen charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority.” State v. Taylor, 427 S.C. 208, 214, 829 S.E.2d 723, 727 (Ct. App. 2019).

No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four factors: (1) whether the charge speaks “specifically to minority jurors”; (2) whether the charge includes “you must return a verdict” type language; (3) whether there was an “inquiry into the jury’s numerical division,” which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion.

Id. at 214-15, 829 S.E.2d at 727 (citing Tucker, 346 S.C. at 492-95, 552 S.E.2d at 178-19). “Like most multi-factor constructs, the Tucker test does not tell us the relative weight each factor carries, nor is the list of factors exclusive.” Id. at 215, 829 S.E.2d at 727.

Here, the jury began deliberating around 3:22 p.m. (Tr. 293). After asking two questions and being recharged on trafficking and possession twice, the jury sent a note around 6:41 p.m. indicating it could not “agree on both charges.” (Tr. 302). The Court responded it would read an Allen charge. Following the charge, (Tr. 303-04), the jury reached a verdict.

At the PCR hearing, counsel testified he did not see a reason to object to the court’s decision to give an Allen charge, and this Court agrees. Ultimately it was within the trial court’s discretion to give the charge, and under these circumstances, counsel’s decision to not object to the *giving* of the charge was reasonable under prevailing professional norms. State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974) (“It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them.”); id. (finding trial court did not err in “urging the jury to reach an agreement” two hours and thirty-two minutes after the jury began deliberating).³ Applicant did

³ Here, the charge was given more than three hours after the jury began deliberating.

not set forth a valid, legal objection to the court's *decision* to give the charge, and Applicant thus did not prove deficiency or prejudice in this regard.

Further, counsel testified he did not believe the charge was coercive, and this Court agrees. The charge did not speak specifically to minority jurors but rather addressed both minority and majority jurors. (Tr. 303). The charge did not include language that "you must reach a verdict" but rather informed the jurors that if they were unable to agree, the court would declare a mistrial. (Tr. 304). Additionally, the court never inquired into—or received—the numerical division. Viewed in context and under all circumstances, this charge was not unconstitutionally coercive.

Applicant's argument at the PCR hearing related to the coerciveness of the charge centered on his contention that the jury reached a verdict only eleven minutes after receiving the charge. This fact, however, is not dispositive. *Cf. Darr*, 262 S.C. at 586-87, 206 S.E.2d at 870 (finding trial court did not coerce a jury that deliberated for only thirty-two minutes after the court "urged it" to reach a verdict). Ultimately Applicant did not point to any language in the charge that he believed was unconstitutionally coercive, and this Court has reviewed the charge and did not find any. Applicant has not met his burden of proving deficiency or prejudice related to counsel's failure to object the court's decision to give the charge or the language of the charge itself. Thus, this claim is denied.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

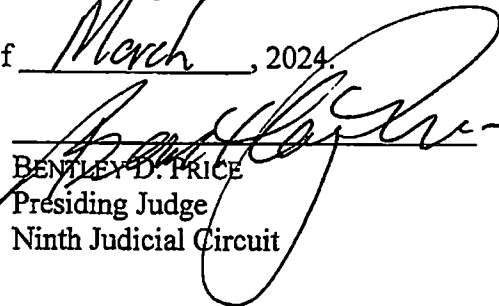
Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203,

SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRPC. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 27th day of March, 2024.


BENTLEY D. PRICE
Presiding Judge
Ninth Judicial Circuit

Charles A. ..., South Carolina