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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Kristi F. Curtis, Circuit Court Judge

GERALD JARROD ANCRUM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001730

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR Court erred in finding Petitioner received effective assistance of counsel where Counsel Gay failed to object to the improper testimony of Agent Preston which implied that CI Morris had purchased drugs from Petitioner in the past and where the testimony was relied on by the trial court to deny Petitioner's motion for a mistrial?

STATEMENT OF THE CASE

Petitioner was indicted by a Charleston County grand jury for one count of distribution of heroin and one count of distribution of crack cocaine during the June 2015 grand jury term. App. 13, l. 16-App. 14, l. 25; App. 278-279. The State, represented by Stephanie B. Linder and Whitt Sowards, called the case to trial on May 23-24, 2017, before the Honorable William P. Keesley and a jury. Petitioner was represented by Melissa Gay. App. 1.

Prior to trial Counsel Gay filed a motion to exclude testimony about prior bad acts and prior convictions. The State agreed that it would not elicit testimony about prior bad acts or prior convictions unless and until Petitioner took the stand and/or opened the door to prior conduct. App. 5, l. 19-App. 6, l. 13. The parties agreed to redact the drug buy video to exclude comments made by the confidential informant (CI) about alleged prior transactions between her and Petitioner. App. 10, ll. 19-11.

The State's first witness was Agent Frank Preston, an investigator with the Bureau of Alcohol, Tobacco, and Firearms. Agent Preston testified that on February 5, 2015, he supervised a controlled buy between CI Tessa Morris and Petitioner. With the assistance of local police agencies, a buy was conducted at the Dunkin Donuts on Savannah Highway in Charleston County. The buy was audio and visual recorded by CI Morris. App. 87, l. 15-App. 89, l. 16; App. 95, ll. 11-18. During his testimony the following exchange occurred:

Q: And you mentioned an informant, Tessa Morris, **in this case.**

A: Yes, ma'am.

Q: Can you explain to the jury why you use informants and a little bit about how you first got to know Ms. Morris?

A: Yes. **We use confidential informants because they are the way into the target. I don't know all the targets. I can't go in and say, I want to buy drugs from you if they don't know me. They won't do that. But the informant has**

had a history with the targets. They've been there before, done it before. And they know the pattern, whether the CI's pattern or drug dealer's pattern. We have two types of informants. We have an informant that's a career informant, meaning that's all they do. That is their job. They have no pending charges. They are under no obligation other than their own to be an informant, work for the government.

Then there's other types of informants who have prior arrest histories. And they are working off their charges. And this is one way they can work off their charges, to provide information, provide intel, participate in controlled purchases.

In this particular case, Ms. Morris was brought to me by Marc Brown, who was an officer with the Charleston City Police Department. Ms. Morris had information about her past dealings, about her past drug uses and drug purchases. She identified several individuals who she's gone to before, who she's purchased drugs before. That was pretty much the background of it.

App. 89, l. 17-App. 90, l. 19 (emphasis added). On cross-examination Agent Preston confirmed that CI Morris was the individual that provided Petitioner's name as a target. App. 103, ll. 9-20; App. 105, l. 23-App. 160, l. 1.

CI Morris testified that, under the supervision of law enforcement officers, she set up a meeting with Petitioner to purchase crack cocaine and heroin. The recording of the buy was published to the jury during trial. CI Morris testified that she was searched prior to the buy and after the buy. She stated that she successfully purchased crack cocaine and heroin from Petitioner and specifically said Petitioner's first name at the end of the drug transaction. She also testified to her prior convictions. App. 124, l. 4-App. 130, l. 19. During cross-examination CI Morris confirmed that she provided law enforcement with the names and phone numbers of targets. CI Morris denied that she had ever had a sexual relationship with Petitioner. CI Morris testified that there was no special or personal relationship between herself and Petitioner. App. 136, l. 13- App. 138, ll. 11.

At the close of the cross-examination the solicitor requested to take up a matter of law prior to redirect examination. The solicitor argued that Counsel Gay had opened the door to

prior drug transactions between Morris and Petitioner when she questioned Morris about her “relationship” with Petitioner. Counsel Gay argued that the questions regarding a sexual or personal relationship had nothing to do with prior drug sales but went to CI Morris’s credibility regarding how she knew Petitioner. The circuit court ruled that the solicitor could “ask her about how long she had known him and that sort of thing, but I am not going to let you get into drug transactions.” App. 141, l. 13-App 144, l. 6.

On redirect, the following testimony was elicited from CI Morris by the solicitor:

Q: How long overall had you known the defendant; a week, a month, a year?

A: I’ve known him for several years.

Q: You were not in a sexual relationship with him

A: No, we were never.

Q: But you knew him for several years

A: From purchasing drugs

Q: And in fact, you knew him through your boyfriend

A: Correct.

App. 146, l. 21-App. 147, l. 7 (emphasis added). Counsel Gay promptly made a motion for a mistrial based on CI Morris’s statement that she knew Petitioner for several years “from purchasing drugs.” She argued the testimony violated the agreement of the parties to exclude prior bad acts and the ruling of the judge that the State could not go into prior drug transactions. Counsel Gay argued the testimony was bad act evidence that was highly prejudicial and could not be remedied through a curative instruction. The solicitor argued that if the matter needed to be addressed, a curative instruction would be adequate. App. 147, l. 8-App. 148, l. 7.

The trial judge stated that he understood Counsel Gay's position in requesting a mistrial but questioned "if the testimony has been offered several times now that she provided the targets. What other logical conclusion is there but that she is providing the target because he's involved in the drug trade in some way?" App. 148, ll. 8-12. Counsel Gay argued that conclusion was an inference the jury was allowed to make on its own but that the testimony from CI Morris was direct evidence of prior bad acts that had been specifically excluded from the trial due to their prejudicial nature. She argued there was no doubt that CI Morris's statement "from purchasing drugs" was in direct response to the questioning of how she knew Petitioner and how long she had known Petitioner. She maintained that there was no way to fix the prejudice caused by the testimony. App. 148, l. 13-App. 150, l. 10.

The trial court denied the motion for a mistrial ruling stating,

All right. Here's the difficulty that I'm wrestling with. If I were to give what would be referred to as limiting instruction, it seems to me that I would have to tell the jury that the inquiry would be limited only to certain thing [sic] or a certain thing. And in this instance, I assumed it would be only to go to the issue of her giving law enforcement this number, telephone number of this individual as a target. And that doesn't really sit too well. It doesn't show motive, opportunity, those things that are traditionally in the rule. So[,] the other option is to tell the jury that they have to exclude that testimony, the testimony about any other activities involving in [sic] drugs, that would have to be excluded and they are not to use it in any way against the defendant.

Were it a different situation, I certainly would be feeling stronger than [sic] a mistrial needs to be declared, but the difficulty I have goes back to what I said earlier. Witnesses have testified, more than one witness, that she identified targets for law enforcement to go after. And the only reasonable conclusion that someone could draw from that is that she believed that those people were involved in drug transactions, and not just using drugs, but in providing drugs to other people. Otherwise, there's no basis for her to make that assertion. And so[,] when I think about having a mistrial over this issue, it really seems to be overreaction. Having said that, don't talk about any other drug deals with him.

App. 150, l. 13-App. 151, l. 14 (emphasis added).

The trial judge gave a curative instruction, over Counsel Gay's objection, instructing the jury to disregard "the statement that this witness [CI Morris] made that in any way implied or suggested that she knew this defendant from other activities involving drugs." App. 155, l. 9-App. 156, l. 17. The following morning the parties again addressed the motion for a mistrial, but the trial judge declined to alter his prior ruling. App. 168, l. 1-App. 174, l. 8. Petitioner was ultimately convicted of distribution of heroin. The jury hung on the distribution of crack cocaine charge. App. 266, l. 5-App. 267, l. 22. Petitioner was sentenced to fifteen years incarceration. App. 275, ll. 20-25.

Petitioner timely appealed his conviction and sentence. The Court of Appeals affirmed his conviction in an unpublished opinion. State v. Ancrum, Op. No. 2019-UP-075 (S.C. Ct. App. filed February 13, 2019). The Remittitur was sent to the circuit court on June 28, 2019. Petitioner filed the present PCR application on February 19, 2020. App. 281-287. The State filed a return on August 3, 2020. App. 288-293. PCR Counsel James Falk filed an amended application on February 24, 2022, alleging:

1) Trial Counsel provided ineffective assistance of counsel by failing to object to the testimony by ATF investigator Frank Preston that confidential informants are chosen because they "*had a history with the targets*" of the drug investigation. (Tr. 89, l. 25-Tr. 90 l. 1). Investigator Preston went on to testify that: *Ms. Morris had information about her past dealings, about her past drug uses and drug purchases. She identified several individuals who she's gone to before, who she's purchased drugs before.* (Tr p. 90 l. 15-18). Since Ms. Morris was used as a confidential informant to make a controlled purchase from Applicant, this testimony allowed the jury to infer that Ms. Morris had personal knowledge that Applicant sold drugs in the past. Such testimony was excludable under Rule 404(b), SCRE.

2) Trial Counsel provided ineffective assistance when her cross examination of investigator Preston opened the door that because of Morris' drug history she had a prior relationship with Applicant.

Q: (trial counsel) It wasn't as if you gave her a name and said, hey, can you call this man for us? She's the one day who said, I can call Mr. Ancrum?

A: (Investigator Preston) Yes, ma'am. (Tr. 103, ll. 13-16).

3) Trial Counsel provided ineffective assistance of counsel when her cross examination of Tessa Morris (Tr. 137, ll. 6-16) regarding the nature of her past relationship with Applicant, opened the door to for the State's re-direct examination. During her re-direct testimony Morris then testified that she knew Applicant for several years "from purchasing drugs" (Tr. 147, l. 5).

App. 294-295.

An evidentiary hearing was held on June 24, 2022, before the Honorable Kristi F. Curtis. The State was represented by Lauren Mims. Petitioner was represented by Counsel Falk. Petitioner and Counsel Gay testified at the hearing. App. 296-297. Counsel Gay acknowledged that she did not object to Agent Preston's testimony about how and why he uses confidential informants. She testified "I believe that the reason I wouldn't have objected is because it wasn't specifically discussing the informant and Mr. Ancrum..." App. 328, l. 22-App. 329, l. 25. She confirmed she asked Agent Preston if CI Morris brought him Petitioner's name. She stated she asked that question and others like it to set up a history between Petitioner and CI Morris because she was arguing that CI Morris was setting up Petitioner for personal reasons. App. 330, l. 1-App.331, l. 25.

She testified that the testimony of CI Morris during redirect examination was "a real problem" which led her to make a motion for a mistrial. She agreed that the trial court relied on the earlier testimony of Agent Preston in denying the mistrial motion. She acknowledged that she had not objected to the testimony of Agent Preston and again stated his testimony had only been "talking broadly about targets," not specifically about Petitioner. App. 332, l. 4-App. 334, l. 10.

On cross-examination Counsel Gay testified that she did not remember her trial strategy for the case, "[j]ust that she...that he [Petitioner] had told me that they had other reasons to be

talking and had other contact with each other and that he didn't sell her drugs." App. 338, ll. 1-3. She testified that she did not believe a curative instruction could fix the problem with CI Morris's testimony about purchasing drugs in the past from Petitioner because "how can you stick the rabbit back in the hat." App. 339, ll. 16-24. She continued that the trial judge had bolstered his ruling on denying the mistrial on Agent Preston's testimony about targets. She further stated that when Agent Preston testified "at that moment by brain wasn't connecting those two things but the judge obviously connected it." App. 339, l. 25- App. 340, l. 3. At the end of her cross-examination, she agreed that her defense strategy was arguing that CI Morris was setting up Petitioner for other reasons. App. 341, ll. 1-5.

In closing Counsel Falk argued,

Your Honor, it was an issue she felt was serious enough to raise a motion for a mistrial. And when the Court considered the motion for a mistrial and acknowledged the fact that she had missed three other opportunities or however many opportunities to object to this testimony prior to that our position is that from the very first line from Officer Preston's testimony about that CI's always go to people they've done business with before and their testimony at first had to talk about it that's where the first discussion should have been made, that's where the first objection should have been made. There is no way; you know the Appellate Court could never have addressed that issue on appeal because there is no preservation of the objection. And that's where the problem started. That's where the ineffective assistance of counsel was in failing to try to immediately seek a remedy to this testimony and then it just kept coming. And that we think that any testimony about prior transactions that might have occurred between, prior illegal transactions that might have occurred between the witness and the defendant it comes in, it comes before the jury, and it is highly prejudicial and that's why we have Rule 404(b).

App. 344, ll. 3-25

An order of dismissal was filed on October 10, 2023. The PCR court found that Counsel Gay was not deficient for failing to object to testimony of Agent Preston's about informants because she found the testimony to be general and unobjectionable which was a valid trial strategy. The PCR court further found that Petitioner had not established any prejudice from

counsel's failure to object to the testimony which did not relate to or implicate Petitioner. The PCR court disposed of the other two allegations by finding that Counsel Gay had articulated strategic reasons for her lines of questioning and Petitioner could not establish any prejudice. App. 347-360.

ARGUMENT

The PCR Court erred in finding Petitioner received effective assistance of counsel where Counsel Gay failed to object to the improper testimony of Agent Preston which implied that CI Morris had purchased drugs from Petitioner in the past and where the testimony was relied on by the trial court to deny Petitioner's motion for a mistrial.

The testimony by Agent Preston detailing the use of CI's was immaterial and improper. While the testimony started off in general terms, Agent Preston focused the testimony on "this particular case" and CI Morris specifically. He informed the jury that CI Morris provided information about her past dealings, past drug use, and past drug purchases. He stated she provide several individuals who she had previously purchased narcotics from. This testimony was specific enough for the jury to improperly conclude that Petitioner had previously sold drugs to CI Morris in violation of the party's agreement to exclude all mention of prior bad acts. Her failure to object to this testimony was deficient performance. Petitioner was prejudiced when the trial court relied on the testimony, and other testimony elicited by Counsel Gay, to deny her motion for a mistrial.

The standard of review in PCR cases depends on the specific issue before the appellate court. This Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018) citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo with no deference to trial courts. Id. To prove ineffective assistance of counsel, a PCR applicant must establish that (1) counsel failed to render reasonably effective assistance under prevailing professional norms and (2) he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C.

115, 386 S.E.2d 624 (1989). To establish prejudice, the applicant must show, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000).

Counsel Gay was deficient in failing to object to the testimony of Agent Preston because the testimony was an improper effort to introduce character evidence that Petitioner had committed other drug transactions with CI Morris. While Agent Preston never directly said Petitioner's name, he did narrow the general testimony specifically to Petitioner's case and CI Morris. The only logical inference, as the trial judge ultimately ruled in denying the mistrial motion, was that Petitioner had previously sold drugs to CI Morris. The testimony was not relevant to any elements of the crimes the State sought to prove and only served to place improper character evidence before the jury. The failure to object to this testimony under Rule 404(b), SCRE, was deficient performance. (Evidence of other crimes or bad acts is inadmissible to show propensity to commit a crime. Rule 404(b), SCRE).

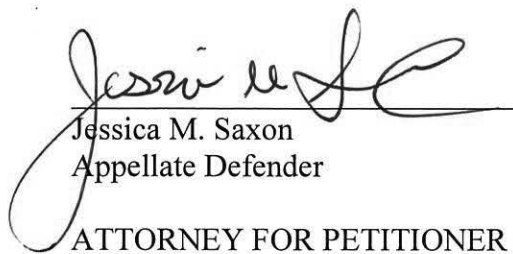
The PCR court's order of dismissal found that counsel had articulated a valid strategy to not object because the testimony was generalized and not specific to Petitioner's case. However, this "strategy" is refuted by the record where the testimony goes from general to specifically how Agent Preston used CI Morris in this case. Where counsel articulates a valid reason for employing certain strategy, the conduct will not be deemed ineffective. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). However, 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, where there was specific testimony that led to only one logical inference, the strategy articulated by counsel was not sound.

The PCR court also found that Petitioner could not establish any resulting prejudice from Counsel Gay's failure to object. This finding is refuted by the record as the trial judge stated specifically that he was denying the mistrial motion relating to CI Morris testifying she had purchased drugs from Petitioner for years because the prior testimony of other witnesses had established the "logical conclusion" that CI Morris had provided Petitioner's name because he was involved in the drug trade. The trial judge stated that "were it a different situation" where such testimony had not come in, that he would have felt differently about declaring a mistrial. However, the testimony of Agent Preston had established that "the only reasonable conclusion that someone could draw from that is that she believed that those people were involved in drug transactions, and not just using drugs, but in providing drugs to other people. And so[,] when I think about having a mistrial over this issue, it really seems to be overreaction."

As Counsel Falk argued at the PCR hearing, the testimony was improper and should have been excluded under 404(b). The failure of Counsel Gay to object to the testimony of Agent Preston was deficient performance, unexcused by any valid strategy, that prejudiced Petitioner as it formed the basis of the denial of the mistrial motion. Had Counsel Gay objected to the testimony of Agent Preston and avoided eliciting further harmful testimony from CI Morris, the trial court would likely have granted the mistrial motion, resulting in a different outcome.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that 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 6th day of May, 2024.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Kristi F. Curtis, Circuit Court Judge

GERALD JARROD ANCRUM,

PETITIONER

V.

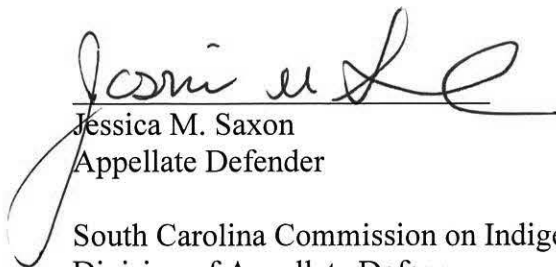
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001730

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and Appendix in the above-referenced case has been served upon Tracy A. Meyers, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 6th day of May, 2024.



Jessica M. Saxon
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