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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari from Charleston County

The Honorable William P. Keesley, Trial Judge
The Honorable Kristi F. Curtis, Post-Conviction Relief Judge

Appellate Case No. 2023-001730

GERALD ANCRUM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION
FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Petitioner's Issue Statement

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 last and where the testimony was relied on by the trial court to deny Petitioner's motion for a mistrial?

Respondent's Counterstatement

Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel articulated a valid reason and strategy for not objecting to testimony from a law enforcement officer concerning how confidential informants provide information.

STATEMENT OF THE CASE

On June 8, 2015, a Charleston County grand jury indicted Petitioner for one count of distribution of heroin and one count of distribution of crack cocaine. (App. 13, 278-79). On May 23-24, 2017, Petitioner proceeded to trial before the Honorable William P. Keesley. (App. 1).

Before the trial began, Petitioner's trial counsel, Melisa Gay, informed the trial court that she and the State had discussed prior bad acts and convictions, which she wanted to put on the record. (App. 5). The State did not intend to go into any prior bad acts or convictions unless Petitioner testified and opened the door. (App. 5-6). The State agreed to mute parts of a video of a drug purchase that potentially referenced prior buys or plans for a future buy. (App. 6). The trial court acknowledged the parties' agreement not to go into any convictions unless Petitioner took the stand and not to go into any prior bad acts unless Petitioner opened the door. (App. 9). Trial counsel informed the trial court that in the video, the confidential informant made references to different occasions where she had met Petitioner previously to buy drugs, which was the prior bad acts information that the parties agreed to keep out. (App. 10).

At trial, Frank Preston, a special agent and criminal investigator with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), testified that on February 5, 2015, he supervised a controlled buy between Tessa Morris, who was a confidential informant, and Petitioner. (App. 85-88). Assisted by the Charleston County Sheriff's Office and the City of Charleston Police Department, the controlled buy occurred at a Dunkin' Donuts on Savannah Highway in Charleston County, and Morris captured both audio and video recordings of the controlled buy. (App. 87-89, 95). When the State asked Preston to explain how he came to know Morris, he stated:

We use confidential informants because they are the way to 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.

...

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 [from] before. That was pretty much the background of it.

...

We asked her specific questions about her history, who she bought [from] before, who she's dealt with, her history, her criminal history, her family, her drug use, her past drug use, her current drug use, whether she's on probation, stuff that could potentially interfere with our investigation.

(App. 89-91). Preston confirmed that Morris identified individuals she could purchase drugs from, including Petitioner. (App. 103).

Morris testified that in cooperation with Preston, she and Preston planned and set up the purchase of drugs from Petitioner. (App. 124-25). Morris confirmed she was searched for narcotics both before and after purchasing drugs from Petitioner and no drugs were found on her person. (App. 125, 127). Morris purchased heroin and crack cocaine from Petitioner on February 5, 2015. (App. 126). She stated Petitioner's name, as instructed by law enforcement, during the transaction, which was captured by audio and video recording. (App. 126, 129). The video Morris recorded was played for the jury without objection and with specific portions muted per prior agreement between the parties. (App. 128). Morris confirmed that she brought names and telephone numbers of potential targets to law enforcement. (App. 136). Morris testified that she did not have a sexual, special, or personal relationship with Petitioner. (App. 137). Morris

confirmed she had been previously convicted of drug possession, among other crimes. (App. 129-30).

When trial counsel finished her cross examination, the parties discussed with the trial court what the State could ask in its redirect examination based on trial counsel's questioning. (App. 141-44). The State asserted that trial counsel opened the door to prior drug transactions between Morris and Petitioner because she questioned Morris about the type of relationship Morris had with Petitioner. (App. 141-42). Trial counsel argued that her questions were pointed questions regarding specific topics, such as Petitioner's name, phone number, and car, but did not go into anything that "would indicate there was some type of drug contact." (App. 142-43). The trial court determined that the State could ask Morris how long she had known Petitioner but could not ask about prior drug transactions. (App. 144).

When asked during redirect examination if she had known Petitioner for several years, Morris responded, "From purchasing drugs." (App. 147). Trial counsel immediately made a motion for a mistrial, arguing that Morris' testimony was a violation of the parties' agreement not to go into bad acts. (App. 147). Trial counsel asserted that because the testimony concerned a prior bad act, it was highly prejudicial and could not be corrected by a curative instruction. (App. 148). The State argued that a curative instruction would be sufficient to cure any issue from Morris' testimony and that Morris' response was not a specific response to the question asked. (App. 147-48). The trial court noted that testimony regarding Morris providing target individuals to law enforcement had been provided "several times" and asked, "What other logical conclusion is there but that [Morris] is providing the target because he's involved in the drug trade in some way?" (App. 148). Trial counsel asserted that any such logical conclusion was one for the jury but emphasized that that Morris' testimony indicated prior bad acts, which should be excluded as

prejudicial. (App. 148). The State responded that Morris knew Petitioner from purchasing drugs, but she did not specifically state that she purchased drugs from Petitioner. (App. 149). The trial court denied trial counsel's motion for a mistrial, stating:

Were it a different situation, I certainly would be feeling stronger tha[t] 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 [Morris] 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 is 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 an overreaction.

(App. 151). The trial court noted that it had not yet made any determination that prior bad acts would be excluded; rather, it only acknowledged that the State and Petitioner came to an agreement that such acts would be excluded. (App. 153).

The trial court subsequently gave a curative instruction to the jury over trial counsel's objection. (App. 155-56). The trial court instructed the jury to disregard Morris' testimony "that in any way implied or suggested that she knew [Petitioner] from other activities involving drugs." (App. 156). The parties addressed the mistrial motion at the start of the second day of trial, but the trial court did not change its ruling. (App. 168-74).

Due to the jury's deadlock, the trial court declared a mistrial on Petitioner's charge of distribution of cocaine. (App. 267). However, the jury found Petitioner guilty of distribution of heroin, and the trial court sentenced him to fifteen years' imprisonment. (App. 267, 275, 280).

Petitioner filed a timely notice of appeal, and the Court of Appeals affirmed his conviction and sentence in an unpublished opinion. *See State v. Ancrum*, Op. No. 2019-UP-075 (S.C. Ct. App. filed Feb. 13, 2019). The Court of Appeals issued a remittitur on June 28, 2019.

On February 19, 2020, Petitioner filed an application for post-conviction relief (PCR), alleging ineffective assistance of counsel and a violation of his Sixth Amendment rights. (App. 280-86). On August 3, 2020, the State filed its return, requesting a more definitive statement. (App. 288-92). On February 24, 2022, Petitioner filed an amendment to his PCR application, in which he alleged that trial counsel provided ineffective assistance of counsel (1) by failing to object to Preston's testimony that confidential informants are chosen because they have a history with targets of drug investigations; (2) when her cross examination of Preston opened the door "that because of Morris' drug history she had a prior relationship with" Petitioner; and (3) when her cross examination of Morris regarding Morris' past relationship with Petitioner opened the door for the State's redirect examination, in which Morris testified she knew Petitioner for several years "from purchasing drugs." (App. 294-95).

On June 24, 2022, Petitioner proceeded to an evidentiary hearing before the Honorable Kristi F. Curtis (the "PCR court"). At the evidentiary hearing, Petitioner testified that he did not recall trial counsel discussing trial strategy with him and that he felt trial counsel went too far by asking Morris about her relationship with him. (App. 315).

Trial counsel testified that she did not object to Preston's testimony about how and why he used confidential informants because he was not specifically discussing Morris and Petitioner. (App. 329). She stated that Preston described his process, including how he set up controlled buys, and that she was dealing with a drug buy case. (App. 329). Trial counsel's trial theory was that Petitioner knew Morris for reasons other than drug purchases and that on some level, she may have been upset with him or biased toward him. (App. 330). She confirmed Morris brought Petitioner's name to law enforcement, set up the deal with Petitioner, and recorded him selling drugs to Morris. (App. 331).

Trial counsel testified that Morris' testimony that she had known Petitioner for several years from purchasing drugs was problematic and lead her to move for a mistrial. (App. 332). She confirmed that the State did not ask how Morris knew Petitioner; rather, Morris was a "rogue witness." (App. 332). She stated that the trial court's ruling in denying her mistrial motion did "go back to the fact that [she] didn't object at the time of . . . [Preston] identifying targets through informants." (App. 333-34). She noted, again, that Preston did not say that Morris had prior transactions with Petitioner but was broadly discussing how targets were identified. (App. 334).

On cross examination, after briefly not recalling her trial strategy, trial counsel testified that Petitioner told her that he and Morris had reasons other than drug transactions to be talking and that he did not sell Morris drugs. (App. 338). She confirmed that she believed a curative instruction could not fix Morris' testimony that she knew Petitioner from purchasing drugs. (App. 339). She noted that the trial court "bolstered" its ruling denying her mistrial motion with Preston's testimony about confidential informants identifying targets. (App. 339-40).

On October 10, 2023, the PCR court issued an order of dismissal. (App. 347). Regarding Petitioner's claim that trial counsel provided ineffective assistance of counsel for failing to object to Preston's testimony about confidential informants, the PCR court found that Petitioner failed to establish that trial counsel was deficient. (App. 357). Specifically, the PCR court found that trial counsel did not object to Preston's testimony because she believed that the testimony was generally describing how drug buys were set up and was not objectionable because it did not specifically relate to Morris or Petitioner. (App. 357). The PCR court found this to be a valid trial strategy. (App. 357).

The PCR court also found that Petitioner failed to establish any resulting prejudice from trial counsel's failure to object to Preston's testimony, "which does not relate to or implicate"

Petitioner. (App. 357). While Petitioner argued that Preston's testimony allowed the jury to infer that Morris knew he had previously sold drugs, the PCR court noted that trial counsel disagreed with this assertion and that Petitioner was recorded on video selling drugs to Morris without dispute as to his identity in the video. (App. 357).

The PCR court disposed of Petitioner's two remaining allegations by finding that trial counsel articulated valid trial strategies and that Petitioner could not establish prejudice. (App. 357-59).

This appeal followed.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the court. *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 839 (2018). The burden is on the petitioner to prove the allegations in the PCR application. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). Appellate courts will defer to a PCR court's findings of fact and will uphold them if evidence in the record supports the findings of fact. *Id.* Appellate courts review questions of law de novo with no deference to the conclusions of the PCR court. *Id.* Appellate courts will reverse the decision of the PCR court when such a decision is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. **The PCR court properly determined that Petitioner failed to prove that trial counsel provided ineffective assistance of counsel because trial counsel articulated a valid reason for employing certain trial strategies, including her strategy for not objecting to a law enforcement officer's testimony regarding how confidential informants provide information.**

The PCR court properly found that trial counsel did not provide ineffective assistance of counsel to Petitioner because evidence in the record shows Petitioner failed to prove that trial counsel's performance was deficient and that any such deficient performance prejudiced him such that the outcome of his trial would have been different but for trial counsel's performance.

A two-prong test for determining effective assistance of counsel has been set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must show that counsel's performance was deficient. Under this prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 669. The defendant is required to overcome the presumption that counsel was effective to receive relief. *See Cherry*, 300 S.C. at 117, 386 S.E.2d at 625.

A. Deficiency

The PCR court properly determined that Petitioner failed to prove that trial counsel's performance was not reasonable under prevailing professional norms. *See Cherry*, at 117, 386 S.E.2d at 625 (stating that under the deficiency prong, courts are to evaluate an attorney's performance by its "reasonableness under prevailing professional norms" (quoting *Strickland*, 466 U.S. at 688)); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The proper measure

of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases.”).

Here, trial counsel testified that she did not object to Preston's testimony because the testimony concerned, generally, how drug buys were set up, which she believed was not objectionable. (App. 357). Further, trial counsel noted that in his testimony, Preston did not say that Morris had previous transactions with Petitioner, but rather Preston broadly discussed targets. (App. 357). Trial counsel provided effective assistance of counsel to Petitioner because trial counsel articulated a valid reason for not objecting to Preston's testimony—that the testimony was not objectionable and multiple conclusions could be drawn therefrom. *See Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (“Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” (quoting *Strickland*, 466 U.S. at 690)); *Id.* (“Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”); *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (“[E]ven if there is reason to think that counsel's conduct ‘was far from exemplary,’ a court still may not grant relief if ‘the record does not reveal’ that counsel took an approach that no competent lawyer would have chosen.” (quoting *Harrington v. Richter*, 562 U.S. 86, 104 (2011))). Therefore, the PCR court did not err in finding that Petitioner failed to prove that trial counsel was deficient.

B. Prejudice

First, should the Court determine that the PCR court properly found that trial counsel did not provide deficient representation, then the Court need not consider the prejudice prong of the *Strickland* ineffective assistance of counsel test. *See Strickland*, 466 U.S. at 700 (“Failure to make

the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”).

Second, should the Court decide to address the issue, Petitioner failed to prove that any prejudice resulted from trial counsel’s decision not to object to Preston’s testimony concerning how confidential informants generally provide information to law enforcement. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625 (stating that a PCR applicant must prove that their counsel’s deficient performance prejudiced them such that “there is a reasonable probability that, but for [the lawyer’s] unprofessional errors, the result of the proceeding would have been different”).

At trial, a video recording taken by Morris that shows Petitioner selling drugs to Morris was presented to the jury. Petitioner has never disputed that he was the person in the video selling drugs to Morris. Therefore, no reasonable probability exists that the result of the trial would have been different if trial counsel had objected to Preston’s testimony because a jury could reasonably conclude Petitioner sold drugs based on Morris’ video. Thus, Petitioner did not show a reasonable probability that the result of the proceeding would have been different but for trial counsel’s alleged deficiency of failing to object to Preston’s testimony.

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CONCLUSION

Based on the foregoing, the PCR court correctly determined that Petitioner failed to show that trial counsel provided ineffective assistance at trial for not objecting to Preston's testimony concerning how confidential informants generally provide information to law enforcement. Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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