Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
AUG 30 2013
S.C. Supreme Court

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

STANFORD BROWN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000077

APPENDIX

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Q. And what was his version of the facts?

A. He told me he did not make the sale. I told him I understood his position, and we prepared a defense to show that.

Q. What was the defense that you prepared for the Applicant?

A. Well, that's easy to say. Here we go. There was a videotape of the incident done by Detective Nice. As we reviewed the video and Stanford pointed out the person in red that comes right by the driver's side door, that it appeared to be leaving the car, was my thing, is a small snippet, but it shows that the person that was driving got out before there was a transaction.

As the car itself, they weren't able to get anything to identify it other than it was a Chevy Malibu, white. They didn't get that it had anything distinguishing about it or it had any license plates, and, of course, they didn't stop the car. It was by a wall, so they didn't address anybody at the scene.

Further, the audio of the transaction at the scene was terrible. You couldn't hear anything, pretty much anything, certainly not any conversation on both sides. It's the State's position was that the CI, Mr. Cory Hart, had set up this buy with Mr. Brown at the Hess station and that they went to it and that Mr. Hart, who had been

a taxicab driven by an undercover, had gotten out and gotten into the car where the transaction was took place.

The video shows a white car, and it shows more than one occupant in the car. Mr. Hart couldn't identify anybody in the car other than he said he bought from Stanford, however, the car pulls up. You see a person in a red shirt, and the best of my recollection the way I argue the case, you see somebody in a red shirt get out of the car from, the driver's position, and Mr. Hart had said that the driver was Mr. Brown, and so the person who was the driver was not present when Mr. Hart allegedly made the transaction as the basis -- one of our bases of defense is that it wasn't Mr. Brown because he said Mr. Brown was the driver and there wasn't a driver in the car when it occurred, and that's what we showed over and over on the videotape.

We also had a chain of custody problem. The detective doing the chain of custody filled out all the forms, Your Honor, and he had made a mistake, and so rather than document his mistake, he didn't. He just -- he kept the drugs, even though he had turned in the forms, and then redid some forms and put them in another best kit and put it in, and it was, in my view, a serious problem.

And I had argued vigorously about the submission

because of the chain of custody problem, because I was overruled and it was admitted. Mr. Hart was the CI in the case, and we reviewed his material and I cross-examined him, I thought, very effectively.

It's a one transaction deal that he had made with the police, because he had not done work for them before, couldn't be considered a reliable confidential informant. He traded approximately 140 years worth of time, and he had been busted with a gun, marijuana, cocaine, and a child endangerment, and they were third offenses for him.

And the officers had argued they were trying to go up the chain, but in this case only were purchasing less than what they caught Mr. Hart with, and that Mr. Hart, I didn't think, was very credible on the stand and did everything I could to show he had all the incentive in the world to call the name that they wanted him to call.

The other piece of evidence that was troublesome was a jail phone call that was shortly after Mr. Brown's arrest. There is a phone call under his PIN number to his girlfriend at the time, and in that there is some discussion about Cory Hart, and the name at the beginning, the name used in the conversation is Booby, which was also a name that Stanford was known by, as she calls him that name.

And Booby, the person in the conversation, made

some reference to that Cory was the one that set him up, and that was real damaging. And I tried to keep it out because I argued first that jail -- the jail is not in the business of recording conversations and therefore it wasn't the ordinary course of business that you record on there and the business of pretrial detention. Judge Harrington found that it met the business records exception, and I argued vigorously that it didn't.

And so it would have been near impossible to show that there was a concerted plan on behalf of the police to plant someone to make that conversation, especially when it was made shortly after his arrest, a year and a half after the case ever reached trial, and on the conversation, the person says Booby.

I thought they needed someone to identify the people in the phone conversation, Your Honor, because it's hearsay otherwise. They got it in just by having the records custodian saying, Yes, this is the PIN number. This is what we recorded; however, as the judge found, it met that and overruled my objection and allowed it in, and I think that was fairly crippling to the case.

So I went over each piece of evidence. I prepared a trial strategy. I tried the case vigorously. I'm, just like Mr. Brown, not satisfied with the result, but the jury spoke. I thought I tried a good case, and I

vigorously tried the case and was prepared in every form and fashion to go forward.

Q. Did Mr. Brown give you any witnesses to investigate or any leads to check into?

A. No. This was a drug buy on videotape that Mr. Brown says he was not present for the drug buy. We show that the CI had incentive. We showed the videotape, showed the driver of the car that was allegedly Mr. Brown, got out of the car before any transaction was taking place.

We showed the problem with the chain of custody in the case. I attacked anywhere and everywhere that I was allowed to by the rules. It was a close call. I don't think it was a slam dunk for the State, and one of the reasons they offered -- even though it was a third offense trafficking case, at one point they offered possession with intent to distribute first offense, which would have been a zero to fifteen.

I understand completely Mr. Brown maintained, has always maintained, it was not him, and that's why we went to trial, because otherwise it was a very good situation, a very good plea offer. And on the proximity charge, Your Honor, it wasn't that it was outside the half mile, it was a church that was not covered with the statute, at least that's my recollection of why the directed verdict

was granted, because we were able to show that there are investigations that it didn't qualify within the statute.

But as far as investigation, my investigation was reading through the discovery, finding holes in their case, preparing it, and going forward. I did not hire an investigator because I knew the location and I went to the location and I looked at various viewpoints, but there wasn't anything specifically to hire an investigator to go out and do -- the true bill, I don't believe he talked to me about that, but I know the grand jury meets every month and that there is not a transcript of that, as State grand juries don't have transcripts.

They meet every month. They true bill, and if he believes in the event they didn't meet that month, I certainly would have known. I come to the courthouse quite often and would have known that they didn't meet one particular month. They meet every month, at least that's my recollection. I still believe that's what happened.

Anyway, I believe I was prepared, vigorously tried what I believe to be a good case, and I'm just as sorry at the result as Mr. Brown is because I don't know why juries decide things. I thought we gave them quite a bit of reasonable doubt and put forth a strong case.

Q. Did you feel there were any problems with

Mr. Brown's statement?

A. I went over the indictment with him, and, no, I didn't see a problem with the indictment. I'm not trying to say that if he believed there was one that we didn't talk about it, but the indictment itself -- now, in the arrest warrant and evidence, he had pointed out some things, and I was explaining them to him.

The affidavit is not the charging document that brings us here, but the indictment was and that I would cross-examine off of the affidavit if it presented itself if was any inaccuracies, but I don't remember -- but I remember having the conversation with him about the affidavit that was attached to the warrant and problems, that's what we handle at trial.

Q. And do you recall objecting to the chain missing on those two people at trial?

A. Vigorously. I objected over and over and over every way I could. And if I didn't preserve it for appeal, then, Your Honor, I made a mistake because I tried everything I could to try to keep it out, and if you didn't follow the correct procedure and the Appeal Court didn't look at that issue, then I would have -- I don't know if that's the case, I'm just saying.

I tried to cover it, I know that, and if I didn't, I would have been deficient in that area, but I don't

remember that. Don't know if that's what the Court ruled in his appeal, but we certainly thought that was an issue ripe for the Appeals Court to hear.

Q. Did you feel that your closing statement was prejudicial in any way to the defendant?

A. I hope my closing statement was strong. I mean, I did everything I could to point out the problems in their case. And the art of cross-examination, you don't ask the ultimate question because it gives the State an opportunity to explain away problems, as you get the set A, B, C answers that you need to tie it all together when you're doing your argument. I've been doing this 23 years and am pretty successful with that.

Q. Is your reason not to call any witnesses a strategic decision on your heart?

A. Yes. The only witness that I would have remembered that I would have wanted to call was LaShawn Williams about the Imapala because her Impala had rims and was distinctive where I had gotten testimony from the officers that it wasn't.

However -- and so when we were trying to have in the argument about jail tapes, I suggested that the State could fix their hearsay problem by calling Ms. Williams, strategically one of the reasons I wanted Ms. Williams to be called was to get into the Impala without giving up

last argument, which I think was important in this case.

Now, Mr. Riesen, turned out he was smart enough to see what I was trying to do, and because they got the ruling they got he didn't have to. At that point, though, I didn't think it was important enough and strategically decided we would not call Ms. Williams, but there were some pitfalls.

There were some pitfalls about her being on direct examination with me, about the jail conversation on the tape that I wouldn't have had if she would have been up here as a State's witness and I was asking the questions on cross-examination, so I was hesitant to call her on direct.

MS. WILSON: Beg the Court's indulgence.

BY MS. WILSON:

Q. It's also your testimony today that you put the credibility of Mr. Hart -- clearly, you would argue that to the jury?

A. Absolutely. I still to this day don't believe that Mr. Hart has a whole lot of credibility, but the jury believed otherwise.

MS. WILSON: Nothing further.

MR. PEPER: May it please the Court.

CROSS-EXAMINATION

BY MR. PEPER:

Q. Good afternoon, Mr. Smiley. Mr. Smiley, the Applicant has alleged essentially just failure to investigate, and I know you've alluded to that. My understanding from your testimony is that the crux of your investigation was essentially to breeze through it and review the discovery; is that correct?

A. Absolutely.

Q. And as a result of your analysis of discovery, were there nay issues that you felt needed to be investigated in a more thorough manner?

A. No. If there had been a need for an investigator, I would have sat down with Mr. Brown and told him of our need to hire one. I did not hire an investigator.

Q. All right.

A. If there was an area to be investigating that I neglected, then I did something wrong. I don't believe I did, but if you can point it out what I didn't do, I'll be glad to tell you if I was wrong.

Q. You shared the discovery with Mr. Brown?

A. I have.

Q. And you reviewed it fully with Mr. Brown?

A. I believed I did.

Q. Now, a part of that discovery was the video of the sale, correct?

A. Right.

Q. And that was reviewed with Mr. Brown?

A. Right. Mr. Brown is the one, in looking over the video, is this person getting out of the car. It's only on there for a minute, and when Mr. Brown and I was watching it together, I didn't see it, and I had watched the video many times. The person that saw the red shirt getting out the very first time was Stanford, and he pointed it out to me.

And then we started playing that section, which helped develop the theory of the case. At least that's my recollection.

Q. And he also pointed out that the Impala that was on the video was not similar to the Impala he was driving, correct?

A. He told me that LaShawn's had rims and was more distinctive and said he didn't believe that was it, because the one on the tape -- and I got it through cross-examination of the officers.

I asked him, Why didn't you write down the tag?

Well, we just didn't think about it.

Was there any bumper stickers?

No. The only thing they could say that was distinctive about the Impala was that it had very tinted dark windows, and so when we looked at the video, Stanford was quick to point out that Impala ain't her

Impala, which, of course, it wouldn't be since it was Stanford's position that he didn't make the deal.

Q. Right. Okay. Did he ask you to take some photos of the Impala that he normally would drive?

A. Yeah, I believe he did.

Q. Were you able to secure those photos?

A. Quite frankly, I don't remember taking pictures.

Q. They were not used --

A. They were not used in trial, no.

Q. Were there any other issues that Stanford was able to bring to your attention through the reviewed discovery that he further asked you to investigate?

A. Not that I recall.

Q. Okay. With regards to the charging document, the indictment, did he ask you to investigate the validity of that?

A. I don't remember that conversation, quite frankly, that there was a problem about the grand jury not meeting. I don't remember that.

Q. Do you remember whether or not he specifically asked you to inquire as to whether or not the grand jury actually met on the date that it signed?

A. I don't remember that conversation, but I can tell you that if he would have said, Hey, look, they didn't meet that month, I would have scoffed at him and said,

They meet every month.

And so I wouldn't have done anything further. If they, in fact, did not meet that month, then I screwed up. I did not believe that they didn't meet. I would know if, all of a sudden, the grand jury didn't come in for one month because I'm here and that would be news in this courthouse.

So if they didn't meet that month and somehow that true bill got signed on the wrong day, then I messed up.

Q. Okay. With regards to the best kit, the chain of custody issues, was that issue brought to your attention by Mr. Brown or --

A. I -- I'm not going to say he didn't. I don't remember that. It was developed for the most part during trial.

Q. Okay.

A. Because you could not reconcile the chain of custody problems. I didn't figure -- I could not figure out what the problem was, I just knew I had duplicate documents signed on -- different numbers signed by the same guy or the same numbers signed on different dates; it didn't match. I knew there was a problem. I couldn't figure out what it was, but as we did direct and cross, I was able to get the officer to admit that he had torn open the tamper resistant pouch and redid it in another

pouch and never documented that he did it, because that was the problem. There wasn't any documentation to show how he had not followed procedure.

Q. Did Mr. Brown bring to your attention prior to trial that there were two different best kit numbers?

A. Yeah, and so I knew there was a problem, but it's not -- I mean, let me put it this way: Okay. I got a problem with the chain. It's before trial, so let me go fix it for the prosecutor? No. You wait until you're in trial, and then tear it wide open, which I thought I had.

Q. So it's a strategic decision not to bring it to their attention --

A. Right. If I bring it to them before trial, one of two things are going to happen, and I pretty much know which one it is: Number one, they're going to say there is a problem with evidence and dismiss the case, and that isn't going to happen; or, number two, they're going to get together and make sure they have a way to explain it.

I didn't want to give them the opportunity beforehand to get their stories together. It's one of the reasons we sequester the officers in the chain so I could get each one -- and they admitted on the stand that they didn't follow procedure, that they had torn open the tamper resistant and didn't document it and several days later had resubmitted it, so they admitted their problem.

I just didn't get the ruling I expected as a result of showing that there was a problem with the chain of custody.

Q. Now, did you discuss with Mr. Brown that specific issue that you would rather not bring it to their attention prior to trial and try to surprise them with it?

A. With that level of detail, no. Did I tell him, I got it? I know how to handle it?

Q. Right, right.

A. I'm certain I did, and if that's a mistake, then it's a mistake, but I knew what to do.

Q. But by your own admission, it is possible that had you brought it to their attention, the State could have dismissed the case?

A. Yes, that is possible. This was a very contentious case. The reason Mr. Riesen and I had gone back and forth. Ms. Knobeloch, when she had the case, had gone back and forth; of course, during the course of the case, Mr. Brown had begun a hybrid representation issue by filing motions that were given to Mr. Riesen that I didn't get that was addressed.

At Court, so there was a lot of focus on this case, and of course, he then wrote to the Supreme Court and we had a response. There was a lot of focus on this

case. It wasn't like it was a case that, Oh, okay. We screwed up. Bye.

I didn't expect that there was much of any chance that they were going to go, Okay. An officer shouldn't do that, and we're just not going to prosecute the case.

I felt that that was a card that should be played during trial, played strongly with the hope that the judge, the presiding judge, would see that there was a chain of custody problem and that would not let the evidence in.

I thought that was our best chance of getting the directed verdict that it would be at that point.

Q. Still to this day, with all due respect to the Trial Court, you believe that that was an erroneous ruling?

A. Absolutely, and that's why I said if on appeal they failed to address it because I didn't preserve the issue, then I am dead wrong, because I expected that that would be an issue at appeal that could be decisive.

Q. With regards to any specific request that Mr. Brown asked to you make on his behalf, one of which was he was pretty adamant that you file a motion to reconsider his bond; is that correct?

A. I don't remember that at this point.

Q. Okay.

A. But I'm sure -- Mr. Brown was very adamant about a lot of things in this case, and I say that in a good way, not a bad way, because Mr. Brown was very -- from day one, even though he had a very good plea offer from the day I took the case, wanted his trial or the case dismissed and was adamant that he wasn't pleading and that he didn't do anything wrong and he wanted out of jail.

Q. Okay.

A. And so if he asked me to have it reconsidered, it was possible under the rules. I'm sure I would have.

Q. All right.

MR. PEPER: Court's indulgence one second, Your Honor.

BY MR. PEPER:

Q. If it please the Court, Mr. Smiley, Mr. Brown has a couple additional questions for you.

With regards to your continued employment by Mr. Brown, it's my understanding that he at least on two separate occasions instructed you to no longer work for him, or be his attorney?

A. I know of one occasion for sure, and we came in front of Judge Jefferson because he wanted -- and it was over the hybrid representation also, and at that point in time, the judge asked me -- and this is from memory, Your

Honor -- asked me if I wanted off the case and I said no, I was prepared, but I would do whatever the Court or my client wanted me to do.

And after back and forth between Mr. Brown and Judge Jefferson, it was ruled I would remain the attorney. Mr. Brown and I did not have a problem communicating and preparing for trial or during trial. Ms. Hensley sat next to me all during trial, answered any questions Mr. Brown would have had. While the jury was out, I asked Mr. Brown if he felt good about his defense and he told me did.

Now, we didn't know the result that was coming back, and I felt terrible about it too, but I don't -- I did everything I could and believe to this day I did everything I could in trying this case. I can't change the cards we were dealt. I just try them as well as I could, and with the exception of not preserving that issue, if, in fact, that was the case, if I didn't preserve it, I screwed up.

Q. The only other issue that Mr. Brown would like me to inquire is with regards to a specific request that he made you with regards to a Frank v. Delaware hearing?

A. I've been practicing for 22 years, and forgive me. I don't know what a Frank V. Delaware hearing is.

Q. You don't recall having a conversation with him

where he specifically asked you to request a certain hearing?

A. He may have, but I would not have requested a Frank -- if you tell me in context what kind of hearing that is. Maybe we have a different name for it, and I either told him yes or no, I'll do it or I won't do it. I don't know what a Frank v. Delaware hearing is.

Q. Mr. Smiley, did he specifically or -- did he specifically tell you he wanted to challenge the validity of the arrest warrant itself?

A. He may have, and what I can tell you -- and what I tell you, I would say to him is, You've been indicted. That's what brings us to court. We challenge the arrest warrant at preliminary hearing, and at that point, once it's bound over, it goes to the grand jury process.

And I'm not saying I told him that specifically, but if he had asked me that, I know that's what my response would be, because I dealt with arrest warrant questions in preparation for trial before very similarly.

Q. Mr. Smiley, was it ever discussed prior to trial or at trial Mr. Brown's request to suppress the video on the fact that it did not show him on the video?

A. That wouldn't be a grounds for suppression, so no, I wasn't asked that, and if I was asked that, I would have told him the fact that he's not on the video, it's

not a grounds to suppress the evidence. We would have shown the evidence and shown he wasn't on the video, which is what we attempted to do.

Q. Okay. And would that be the same answer to any audio issues as well?

A. Certainly.

Q. Okay.

MR. PEPER: That's all I have, Judge. Thank you.

MS. WILSON: No further witnesses for the State.

THE COURT: You can step down.

THE WITNESS: Thank you very much, Your Honor.

THE COURT: Any other witnesses for either side? All right. You want to make a closing?

MR. PEPER: Thank you, Your Honor.

May it please the Court: Mr. Brown under the Strickland test asserts his trial counsel was ineffective for all the reasons that we've alleged, Judge, mainly with regards to Mr. Smiley's failure to adequately investigate some evidentiary issues that he presented to Mr. Smiley during the course of his representation, mainly with regards to the true bill issue, with regards to taking photographs of the --

THE COURT: Is there any evidence in the record that, in fact, the grand jury did not meet on the date that they --

MR. PEPER: No, Your Honor.

THE COURT: -- true billed?

MR. PEPER: I tried to raise that issue with the witness today, but unfortunately that issue was overruled, so we don't have any proof that the grand jury did not, in fact, meet that day other than the Applicant's feed, which we typically we attempted to introduce. With regards to his specific request to Mr. Smiley to investigate the matter of the Malibu, he specifically asked Mr. Smiley to take pictures of his fiancee's Malibu which could have been used to impeach at trial the officer, given that they were different models or different fixtures on them.

With regards to the chain of custody, Judge, the main issue there is that Mr. Brown feels as though he presented that argument to Mr. Smiley well in advance of the trial, and as Mr. Smiley indicated, while he made a strategic decision, he did admit that had he presented that to him it's possible the State would have dismissed the case against him; therefore, it would have met that second prong of different outcome.

And then, finally, Judge, on that note,

Mr. Brown asserts that there is a matter of law that was wrongfully decided at trial, but unfortunately Mr. Smiley was unable to preserve that for review and therefore it was not argued in the Court of Appeals.

So for those following reasons, Judge, we believe we met the two-prong test, the Strickland test, and we ask that you remand for a new trial.

Thank you.

MS. WILSON: May it please the Court: The State requests you deny Mr. Brown's conviction for post-conviction relief. Regarding the chain of custody, Mr. Smiley gave credible testimony that he knew there was a problem with the chain and he fully discussed it and brought those issues out to the jury and the judge during the trial.

He testified that it's possible that he could have made motions regarding that, but he thought it would be unlikely that the Court would dismiss the charges based on those clerical issues in the chain.

Regarding the arrest warrant, the problems -- the allegations about Mr. Smiley not investigating the problems with the arrest warrant and indictment, Mr. Smiley testified that he didn't see any problem with either of those.

Regarding the allegation about the grand jury

convening, I believe it was Mr. Brown's testimony that he wasn't able to recall if he discussed that with Mr. Smiley, and here today, he only speculated to the result. He didn't have any proof that the grand jury actually didn't meet. Mr. Smiley gave credible testimony that he thought his closing was strong and that none of the statements were prejudicial to the Applicant.

He also articulated a strategic reason for not calling any witnesses at trial. He testified that with regard to Mr. Brown's voice on the jail tape, jail phone conversation tape, he testified that the fact that he wanted to argue Mr. Brown's voice is not on the tape was not a reason for the tape to be suppressed, that was just an argument that he would have made to the jury and did make to the jury.

The Respondent says that Mr. Smiley investigated all the issues. He was prepared for trial. He testified that he discussed -- that he and Mr. Brown said that he discussed the discovery that he received from the State, and we would just request that you deny his application for post-conviction relief.

THE COURT: This chain of custody, Mr. Smiley did or did not contest it?

MS. WILSON: I'm sorry. He did contest that because he argued before the jury, and he made a motion

objecting to the chain of custody at the trial.

THE COURT: And it was denied.

MS. WILSON: Yes, Your Honor.

MR. PEPER: If it please Court, just a brief issue I failed to argue. Mr. Brown believes that the ineffectiveness was a result of his continued motions to be relieved and instructions that Mr. Smiley remove himself and that may have played a part in Mr. Smiley's ineffectiveness to properly investigate at trial.

THE COURT: Sounds to me like Mr. Smiley did prepare it for trial and provided good counsel for him but the judge wouldn't relieve him, but he nevertheless investigated the case and sounded like prepared for trial and presented a vigorous defense. Anything that he disagreed with his client on some things, which sounds to me like a valid trial strategy for things that they may have differed on, but the only one that I see any real merit to that might have made any difference would be the chain of custody issue, and you presented that to the Court as an objection and the Court ruled against him, and it looks like the Appellate Courts upheld the conviction, so I don't see how the outcome is any different.

Even if you could somehow argue that Mr. Smiley didn't do something correct, the evidence came

in. He objected. You know, that's the way it goes sometimes, but that's the only thing that I think there would have been any merit to, and he attempted to keep it out.

So, you know, it looks to me like the Applicant has failed to prove that his counsel was ineffective, and any errors that he might have had and any strategy or anything like that, it didn't fall within the parameters of what a good lawyer would do or, aren't prejudicial, but I don't even find he didn't do anything that a good lawyer should do. He presented the case, and sometimes you lose, but there is nothing he can do about it, and so therefore I'm going to dismiss the case and would ask that the Attorney General prepare an order.

MS. WILSON: Thank you, Your Honor.

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(Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 6th of December 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 18, 2013

Circuit Court Reporter

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AG
AT
BS
SA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2012-CP-10-3627
	)	
Stanford Brown, #293743,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
2013 NOV -2 AM 9:42
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated June 4, 2012. The Respondent made its return on October 24, 2012. An evidentiary hearing on the matter was convened on December 5, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Mark Peper, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

At the hearing, the Applicant testified along with Cheryl Brown, and James Smiley, IV, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, the appellate records, and the Applicant's exhibits.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the August 2007 term of the Charleston County Grand Jury for trafficking

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cocaine base (2007-GS-10-9933). He was represented by James Smiley, IV, Esquire, and Laree Hensley, Esquire.

The Applicant proceeded to trial and was found guilty. On July 8, 2009, the Applicant was sentenced by the Honorable Kristi Lea Harrington to confinement for a period of 30 years and a fine of $50,000.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Wanda Carter, Esquire of the South Carolina Office of Indigent Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Brown, Op. No. 12-UP-063.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. Failure to investigate.

At the hearing, Applicant proceeding solely on the allegation of ineffective assistance of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of Testimony

At the evidentiary hearing, the Applicant testified that he reviewed with counsel the video of the controlled buy and the jail phone calls prior to trial. He testified that he met with trial counsel four times and that he wrote the South Carolina Bar about trial counsel not visiting him more frequently. The Applicant also testified that he did not want trial counsel to represent him prior to trial. He testified that he tried to have trial counsel relieved, but that his request was denied. The Applicant testified that prior to retaining trial counsel, he was represented by Laura Knobeloch.

The Applicant also testified that he told counsel about the problems he saw with the indictment and trial counsel said he would look into it. He testified that he was indicted by the grand jury on August 6, 2007, but he did not believe the grand jury met on that day. He testified that he wrote Court Administration for a calendar of court terms in August and July 2007 and for a transcript of the grand jury proceeding. The Applicant testified that he did not ask trial counsel to look into the convening of the grand jury because counsel told him that he had already been true billed.

The Applicant testified that he told trial counsel about someone using his jail phone pin. He testified that he asked counsel to look into the voice on the jail tape since there was no voice analysis or testimony from the person on the other line. The Applicant testified further that trial counsel should have crossed the confidential informant on "Joe Joe" getting into the car during the buy.

The Applicant testified that he told trial counsel about the issues with the chain of custody prior to trial, but trial counsel did not look into the issue. The Applicant testified further that trial counsel should have made a motion to suppress the chain of custody. He testified that

had counsel investigated he would have known the SLED procedure. He testified that counsel also should have objected to the officer's false testimony. Lastly, the Applicant testified that trial counsel abandoned him during his closing argument.

Cheryl Brown, the Applicant's mother, was also present and testified on the Applicant's behalf. She testified that she and her oldest son hired trial counsel to represent the Applicant. She testified that they were able to meet with trial counsel to discuss the Applicant's case after they had finished paying trial counsel. Lastly, she testified that when meeting with counsel, her main concern was the video of the controlled buy.

Trial counsel was present and testified that he has been practicing law since 1993 and all of his experience has been in criminal law. He testified that he was retained to represent the Applicant about one year after the Applicant was arrested. He testified that he filed Brady and Rule 5 motions on the Applicant's behalf. He testified that he reviewed the discovery material, discussed with the Applicant the elements of the charges against him and what the State was required to prove, and discussed the Applicant's version of the facts. He testified that the Applicant did not give him any potential witnesses or leads for investigation.

Trial counsel testified that he investigated the Applicant's case by reviewing the drug buy video, reviewing the discovery he received, and going to the scene of the buy. He also testified that as a result of his investigation he was able to determine that the church located near the scene was not a school resulting in a directed verdict motion being granted on the Applicant's proximity charge. Counsel testified that he had ample time to prepare for trial.

Trial counsel testified that he engaged in plea negotiations with the State and the Applicant was offered a chance to plead to possession with intent to distribute- first offense. Counsel also testified that he reviewed the indictment and did think it was objectionable. He

testified that he had no concerns about the true billing of the indictment by the grand jury. Trial counsel testified further that he knew that there were problems with the chain of custody prior to trial, but for strategic reasons he waited until trial to develop the issue because he did not want to give the State the opportunity to explain away the problems with the chain of custody. Trial counsel testified that the chain of custody was problematic because the officer filled out the "best kit" form incorrectly. He testified that he objected vigorously to the chain of custody missing two people. He testified further that when his objection was overruled, he was able to get the officer to admit on the stand that he opened the kit and did not document it. Counsel testified that there was no chance that the State would have dismissed the case because of the problems with the chain of custody.

Counsel testified that he objected to the admission of the jail phone conversations at trial. Counsel testified that he made a strategic decision not to call Williams to testify about her distinctive car because she had pitfalls as a witness and he did not want to give up the opportunity to argue last to the jury. Counsel testified that he did not feel his closing argument was prejudicial to the defendant.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), Porter v.

State, 368 S.C. 378, 383,629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds that counsel has extensive experience in the practice of criminal law and has been practicing law since 1993. This Court finds that counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds that counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds that counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

This Court finds that the Applicant failed to meet his burden of proving trial counsel failed to investigate the facts of his case prior to trial. Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an

independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003). This Court finds trial counsel undertook a reasonable investigation into the facts of the Applicant's case prior to trial. This court finds further that the Applicant has failed to show what would have been discovered had counsel investigated his case further.

This Court finds that trial counsel thoroughly investigated the issues related to the chain of custody of the drugs at trial. This Court finds that trial counsel gave credible testimony that he was aware of the inconsistencies in the chain of custody documents prior to trial. Counsel also gave credible testimony that it was a strategic decision not to further develop that issue until trial. This Court finds and the record reflects that trial counsel vigorously objected to the chain of custody at trial. (Vol. 3, T. 65) and effectively cross-examined the State's witnesses on the problems with the chain of custody. The Applicant has failed to carry his burden of proving that trial counsel was ineffective for failing to investigate the problems with the chain of custody.

This Court finds that the Applicant's indictment was not objectionable and was properly true billed by the grand jury. This Court finds that trial counsel was not ineffective for failing to quash the indictment prior to trial. Defects in the indictment do not affect subject matter jurisdiction. *See* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). *See also* S.C.

Code § 17-19-20 (2003). This Court finds that the Applicant failed to present any evidence that the grand jury did not convene on the day listed on his indictment. The Applicant states that he received from Court Administration a list of the terms of court for the month listed on his indictment and the grand jury did not meet. However, Court Administration has no jurisdiction over when the county grand jury meets, only when Circuit Court matters (either Common Pleas terms or General Sessions terms) are scheduled. Grand jury meetings are scheduled within the county. This Court finds that the Applicant failed to carry his burden of proving that the grand jury did not meet as indicated on the indictment and that trial counsel was ineffective for failing to challenge the indictment.

This Court finds that trial counsel's closing argument was proper. This Court finds that during the defense's closing argument, trial counsel effectively argued the Applicant's defense at to the jury and highlighted the inconsistencies in the testimony of the State's witnesses. The record reflects that counsel replayed for the jury the video of the controlled buy and identified a man other than the confidential informant getting into the car during the buy. During the defense's closing argument, counsel also called into question the confidential informant's credibility and the relevance of the jail phone call tapes. This Court finds that the Applicant has failed to carry his burden of proving that trial counsel's closing argument was improper or prejudicial to the Applicant at trial.

This Court finds that trial counsel was not ineffective for stipulating that the Applicant was the voice on the jail phone call tape. This Court finds that at trial, counsel articulated a valid trial strategy for the stipulation. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v.

State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

The record reflects that trial counsel agreed to stipulate that the Applicant's voice was on the jail phone call tapes to avoid the tapes being introduced during the testimony of the confidential informant and the informant being allowed to authenticate the Applicant's voice on the tape. (T. 84-85). This Court finds that the Applicant has presented no evidence to show that counsel's strategy at trial was unreasonable or prejudicial. This Court finds that the Applicant failed to carry his burden of proving that trial counsel was ineffective for stipulating that the Applicant's voice was on the jail phone call tape.

This Court finds that trial counsel effectively cross-examined the confidential informant at trial. The purpose of cross-examination at trial is "to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). This Court finds and the record reflects that through his cross-examination of the confidential informant, trial counsel was able to put before the jury the informants drug related criminal history, the lower bond and sentence that he received by cooperating with the police on the controlled buy, and the informant's desire to "get out of trouble". The Applicant has failed to carry his burden of proving that trial counsel did not effectively cross-examine the confidential informant at trial.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order is he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 31 day of January, 20 11

The Honorable Roger M. Young, Sr.
Presiding Judge
9th Judicial Circuit

Charleston, South Carolina.

BMW20070507408

WITNESSES

BROWN, M.

Charleston County Sheriff

AGENCY CASE NUMBER

2007008770B

ARREST WARRANT NUMBER

K221634

DATE OF ARREST

2007-05-09

ACTION OF GRAND JURY

TRUE BILL

TRUE BILL

AUG 08 2007

Foreperson of Grand Jury

Date: Lisa Cohen

VERDICT

Foreperson of Petit Jury *Date:*

INDICT.DOT

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DOCKET NO. **2007GS1009933**

The State of South Carolina

County of Charleston

FILED

2007 AUG -9 PM 12:14

JULIE J. ARMSTRONG
CLERK OF COURT

COURT OF GENERAL SESSIONS

August Term 2007

THE STATE

vs.

STANFORD LAVELLE BROWN

07-2967 (2)

Indictment for

Trafficking Cocaine Base Crack

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT

At a Court of General Sessions, convened on August 6, 2007 the Grand Jurors of Charleston County present upon their oath:

Trafficking Cocaine Base Crack

That in Charleston County, South Carolina, on or about May 4, 2007, the Defendant, STANFORD LAVELLE BROWN, knowingly did sell, manufacture, deliver, purchase, or bring into this State; or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State; or did possess or attempt to possess a controlled substance or a controlled substance analogue, to wit: Cocaine Base Crack, in excess of 10 grams; in violation of 44-53-375 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

BURNS WETMORE
ASSISTANT SOLICITOR