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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Bentley Price, Circuit Court Judge

OMAR SHARIFF GENTILE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000704

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the post-conviction relief (PCR) court err by finding trial counsel was not ineffective when counsel failed to object pursuant to Rule 701, SCRE, to the impermissible lay opinion testimony from two law enforcement officers that the bedroom where the heroin was found belonged to Petitioner and that Petitioner was not prejudiced by counsel's deficient performance where the inadmissible testimony was intended to convey to the jury that Petitioner had control over the bedroom and thus had constructive possession of the drugs?

STATEMENT OF THE CASE

On January 31, 2012, a confidential informant working for the City of Charleston Police Department conducted a controlled buy at 16 Grove Street in Charleston County. App. 247, l. 19 – 248, l. 1. The informant purchased cocaine from Maurice Gentile, Petitioner's brother. App. 269, ll. 2-16. Law enforcement obtained a search warrant for the residence based on this evidence. App. 248, ll. 2-8.

On February 9, 2012, investigators executed the search warrant at 16 Grove Street. App. 155, ll. 1-13. Upon entering the home, officers detained and handcuffed Petitioner, who was sitting on the couch in the living room. App. 159, ll. 17-24. Officers also detained Petitioner's elderly cousin, John Davis, who owned the home and was found in the downstairs bedroom. App. 160, ll. 15-23.

According to investigators, Petitioner, who was wearing a white tank top and casual shorts, asked a detective to grab his pants, shirt, and shoes from an upstairs bedroom. Petitioner told the detectives that he came to the residence every day to take care of Davis, who was physically disabled, and that he stayed at the home "from time to time." Whenever he did stay at the house, Petitioner said he slept in one of the upstairs bedrooms. Petitioner allegedly admitted that the set of keys a detective found in the lock of an upstairs bedroom door belonged to him. He also said he had over one thousand dollars in cash located inside this bedroom. App. 164, l. 4 – 165, l. 1; App. 171, l. 24 – 173, l. 24.

While searching the bedroom where Petitioner's clothing was found, a detective located 13.84 grams of heroin, glassine baggies, rubber bands, and a digital scale in a dresser drawer. Assorted personal items belonging to Petitioner were also found in this dresser drawer, including his social security card, a bank statement, and a pay stub. App. 180, ll. 4-25.

A Charleston County grand jury indicted Petitioner on May 7, 2012, for possession with intent to distribute heroin within proximity of a school, and on September 14, 2015, for trafficking heroin. App. 456-459. Petitioner's case was called to trial on January 4, 2016, before the Honorable Kristi Harrington, and a jury. App. 25. Assistant Solicitors John Sowards and Stephanie Linder represented the state. Jason King and Tamara Van Pala represented Petitioner. App. 26.

The jury struggled to reach a verdict. During its deliberations, the jury requested to be recharged on trafficking and possession with intent to distribute. It later asked for additional clarification on the elements of trafficking. After deliberating for three hours and twenty minutes, the jury indicated it could not reach a unanimous verdict. The trial court read the jury an Allen charge. Trial counsel did not object to this instruction. A *mere eleven minutes* after the Allen charge was given, the jury reached a verdict. App. 317, l. 16 – 329, l. 10.

The jury found Petitioner guilty as indicted. App. 330, l. 11 – 331, l. 1. He was sentenced to the mandatory minimum of twenty-five years imprisonment for trafficking heroin and ten years concurrent for the possession offense. App. 342, ll. 13-22.

The Court of Appeals affirmed Petitioner's convictions and sentence. State v. Gentile, 2018-UP-386 (S.C. Ct. App. Filed October 17, 2018). App. 372-373. On December 7, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 374-380. The state filed a return to this application on March 14, 2019. App. 381-392. With the assistance of counsel, Petitioner filed an amended application on March 10, 2020, raising the claim argued in this petition. App. 393-398. An evidentiary hearing was convened on February 17, 2021, before the Honorable Bentley Price. App. 399. Assistant Attorney General Benjamin Limbaugh represented the state. Christopher Geel represented Petitioner. App. 400.

By order filed April 11, 2024, the PCR court denied Petitioner relief. App. 444-455. Because Petitioner's rights to the effective assistance of counsel were violated, this petition for writ of certiorari follows.

<u>**ARGUMENT**</u>

<u>The PCR court erred by finding trial counsel was not ineffective when counsel failed to object pursuant to Rule 701, SCRE, to the impermissible lay opinion testimony from two law enforcement officers that the bedroom where the heroin was found belonged to Petitioner and that Petitioner was not prejudiced by counsel's deficient performance where the inadmissible testimony was intended to convey to the jury that Petitioner had control over the bedroom and thus had constructive possession of the drugs.</u>

Relevant Facts

During the testimony of Detective John Marn with the Charleston Police Department, the following exchange took place between Marn and the assistant solicitor:

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

A: Yes, ma'am, I do.

Q: Do you think a bank statement is important?

A: Yes, ma'am.

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

A: Not likely.

App. 201, l. 24 – 202, l. 7. Trial counsel did not object to this testimony. However, Jason King, Petitioner's trial counsel, agreed during his testimony at Petitioner's PCR hearing that Detective Marn was offering his opinion that such items would not be found in a location one did not have control over. King testified "maybe" he should have objected to this testimony. However, King explained that he knew the solicitor was going to argue during trial that the bedroom where the heroin was found was Petitioner's bedroom "therefore the drugs were his [Petitioner's]." King knew that "that was what we were going to fight over during the trial."

Consequently, King maintained that he did not "run from that issue" and tried to counter the state's argument during his closing. Despite this, King acknowledged that there is "a difference between a solicitor arguing that this is what the evidence shows versus a witness testifying to their personal opinion that that's what the evidence shows." App. 410, l. 9 – 412, l. 24.

Later during Petitioner's trial, the assistant solicitor asked Agent Jonathan Shealy of the South Carolina Law Enforcement Division (SLED), "And, why again, did you believe that bedroom number three belonged to the defendant, Omar Gentile?" Shealy answered:

> Bedroom number three belonged to the defendant, Omar Gentile, because of his statement stating that that was his - - indeed his bedroom.
>
> He told us that that was his bedroom. There was numerous identifiers located in that bedroom to place him in that bedroom. Being from his identification card - - the most important things that we take with us every day: your ID card, you never leave home without it; your bank card; your social security card.
>
> Also, a set of keys in a locked door that I asked Mr. Omar Gentile if he wanted his keys out of the lock that was in his door and he stated that he did want his keys. And he took his keys.
>
> Also, from him asking me to get his pants, shirt, and shoes from his bedroom.
>
> So, basically, the answer to your question is from the items that we located from the bedroom, from the key we located in the door, and from his verbal statements admitting to that was - - to us, admitting that it was his bedroom.

App. 261, l. 17 – 262, l. 12.

The solicitor followed up with, "Was there any doubt in your mind who that bedroom belonged to?" Shealy responded, "No, sir, no doubt whatsoever whose bedroom that belonged to." App. 262, ll. 13-16. Trial counsel again did not object to this testimony.

Trial counsel King agreed at the evidentiary hearing that the assistant solicitor's question was soliciting Detective Shealy's opinion as to whether the bedroom where the heroin was found was under Petitioner's control. King maintained that he believed such testimony may be admissible

pursuant to Rule 701, SCRE. He could make an "argument" both "for and against" the admissibility of this opinion testimony. King further explained that he did not object to Shealy's testimony because he believed "it would look bad" to object but at the same time admit that Petitioner used the bedroom where the heroin was found whenever he visited the residence and that Petitioner's possessions were found in the bedroom the day the warrant was executed. King testified that his strategy was to argue to the jury that even though Petitioner used the bedroom, "other people could have gotten in there [the bedroom] and put the drugs there." App. 417, l. 2 – 420, l. 10.

The PCR court found Petitioner failed to prove trial counsel was ineffective for not objecting to Detective Marn's and Agent Shealy's testimony. App. 447-452. The court concluded trial counsel stated a reasonable strategy for not objecting. Specifically, the court emphasized counsel's testimony that "he could not get around the fact that [Petitioner] told Investigator Shealy it [the bedroom where the heroin was found] was his room" so counsel chose to focus "on arguing that even though it was [Petitioner's] room, other people could have accessed the room and left the drugs there." App. 449.

The PCR court further found it was not reasonably likely an objection would have excluded Marn's and Shealy's opinion testimony because the evidence was admissible pursuant to Rule 701, SCRE. However, the court's reasoning for why the testimony was admissible pursuant to Rule 701 was conclusory and essentially stated the language of the rule. App. 450.

Discussion

The PCR court erred by finding trial counsel was not ineffective when counsel failed to object pursuant to Rule 701, SCRE, to Detective Marn's and Agent Shealy's opinion testimony that the bedroom where the heroin was found belonged to Petitioner. Petitioner was prejudiced by

counsel's failure to object because the only dispute at trial was whether Petitioner had constructive possession of the heroin found in the upstairs bedroom. Accordingly, there is a reasonable probability that Marn's and Shealy's improper lay opinion testimony that the bedroom where the heroin was found belonged to Petitioner affected the outcome of Petitioner's trial. This is supported by the fact that the jury clearly struggled to reach a verdict.

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." Brown v. State, 383 S.C. 506, 514, 680 S.E.2d 909, 914 (2009). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

Rule 701, SCRE, states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding

of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."

In State v. Pickrell, Investigator Bailey, who interviewed Pickrell shortly before her arrest, testified that Pickrell's statement that the decedent was lunging toward Pickrell when Pickrell fired the pistol did not "match up" with the fact that the decent was shot in the back. Bailey subsequently testified over defense counsel's objection that he "had a hard time understanding how if he [the decedent] was lunging forward how he was shot in the back." State v. Pickrell, Op. 28229 (S.C. Sup. Ct. filed August 14, 2024) (Howard Ad. Sh. No. 31 at 12). This Court held Bailey's testimony should have been excluded pursuant to Rule 701, SCRE. The Court reasoned, "Bailey's testimony that he had trouble understanding Pickrell's account was not helpful to a clear understanding of Bailey's easily understood testimony that the only entry wound was in [the decedent's] back. Nor was the disputed testimony helpful to a clear understanding of a fact in issue. Here, the 'fact in issue' was whether Pickrell's account was inconsistent with [the decedent] being shot in the back, and Bailey's testimony of his puzzlement added nothing to that determination." State v. Pickrell, Op. 28229 (S.C. Sup. Ct. filed August 14, 2024) (Howard Ad. Sh. No. 31 at 15).

In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), this Court held a police officer who was qualified as an expert in crime scene processing and fingerprint identification was not qualified to testify as an expert with respect to crime scene reconstruction. That officer exceeded the scope of his expertise in testifying to his conclusion that the decedent had been riding a bicycle at the time he was shot. In the context of the case, the officer's testimony was meant to convey that the decedent was not a threat to Ellis as claimed. The improper opinion testimony regarding the position the decedent was in at the time he was shot was not harmless error. State

v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (citing State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991)).

In State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018), witness Graham was qualified as an expert in the field of emergency medical services. Accordingly, Graham was qualified to testify as an expert as to prehospital emergency care administered to the decedent, and to the resulting medical observations of his body and injury. The Court of Appeals held the trial court abused its discretion by allowing expert testimony from Graham regarding the decedent's location at the time of the shooting. Her opinion that the decedent was standing on the porch when he was shot exceeded the scope of her expertise in emergency medical services, and it went to the ultimate issue of whether the defendant was acting in self-defense when he shot and killed the decedent. The error was not harmless.

In this case, the prosecution sought to prove Petitioner had constructive possession of the heroin found in the upstairs bedroom. Because Petitioner's control of the upstairs bedroom and his alleged knowledge of the presence of heroin in the bedroom were strongly contested at trial, it was objectively unreasonable for trial counsel not to object to the impermissible lay opinion testimony from Agent Shealy and Detective Marn regarding Petitioner's control over the bedroom. Unlike the PCR court found, the evidence was not admissible pursuant to Rule 701, SCRE. Marn's testimony that an individual was unlikely to store his social security card, bank statement, and other important documents in another's home was not helpful to a clear understanding of Marn's testimony that he located these documents in bedroom number three, which was not disputed at trial. Additionally, Shealy's testimony regarding why he believed the bedroom belonged to Petitioner was not helpful to understanding Shealy's testimony concerning what was found in the bedroom and what statements Petitioner made while and after the search

warrant was being executed. Consequently, if counsel had properly objected to the testimony, there is a reasonable probability the trial court would have sustained the objection.

Petitioner was prejudiced by counsel's deficient performance. This Court emphasized in State v. Ellis, "While the state was free to argue that the evidence supported an inference that the victim was astride the bicycle when shot, and while the jury could certainly have concluded he was, Sergeant Walters was not qualified to give such an 'expert' opinion. An officer's improper opinion which goes to the heart of the case is not harmless." Ellis, 345 S.C. at 178, 547 S.E.2d at 491 (citing Fordham v. State, 254 G.A. 59, 325 S.E.2d 755 (1985)).

Likewise, Detective Marn's and Agent Shealy's impermissible opinion testimony went to the heart of Petitioner's defense. Petitioner's defense at trial was that while he had occasional access to the upstairs bedroom when he was at the residence to care for his cousin, the bedroom where the heroin was found was not under his exclusive control and someone else placed the drugs in the bedroom without Petitioner's knowledge. Allowing multiple witnesses to opine that this defense was inconsistent with the state's evidence was extremely prejudicial to Petitioner. Consequently, there is a reasonable probability that if counsel had correctly objected, the outcome of Petitioner's trial would have been different, particularly given that the jury clearly struggled to reach a unanimous verdict.

Respectfully, this Court should reverse Petitioner's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of September, 2024.