ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Marion County

Thomas A. Russo, Circuit Court Judge

WAYNE MCLAUGHLIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000348

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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INDEX

ISSUES PRESENTED

1. Did the PCR court correctly find trial counsel effective where counsel neglected to make a contemporaneous objection to petitioner's statement to police giving the location of the drugs made without Miranda warnings denying petitioner the opportunity to appeal this issue?

2. Did the PCR court err in failing to find trial counsel ineffective when counsel failed to request the trial court to examine the juror to determine how long the juror had been asleep?

STATEMENT

In May 2008, the Florence County Grand Jury indicted Wayne McLaughlin on the charges of possession with intent to distribute cocaine base (PWID), and possession with intent to distribute cocaine (PWID). On March 28, 2008, McLaughlin proceeded to trial before the Honorable Howard P. King and a jury. McLaughlin was represented by Ralph J. Wilson, and the state was represented by John C. Jepertinger. The jury returned verdicts of guilty as indicted. Judge King sentenced McLaughlin to twenty-five years on each charge to run concurrently. App. 212, ll. 19 – App. 214, ll. 4. McLaughlin filed a notice of appeal which was perfected by the Division of Appellate Defense. The South Carolina Court of Appeals affirmed McLaughlin's convictions and sentences on November 12, 2010. State v. McLaughlin, Op. No. 2010-UP-503 (Ct. App. filed November 12, 2010.) Supp. App. 1-2.

On October 25, 2011, McLaughlin filed an application for post-conviction relief (PCR). The state filed a return on February 7, 2012. An evidentiary hearing was held on October 18, 2012 before the Honorable Thomas A. Russo. McLaughlin was represented by Daniel A. Selwa, II, and the state was represented by Tyson Andrew Johnson, Sr. On November 12, 2012, Judge Russo issued an order denying McLaughlin's PCR application, and dismissing it with prejudice. App. 262 – 266. McLaughlin's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred by correctly finding trial counsel effective where counsel neglected to make a contemporaneous objection to petitioner's statement to police giving the location of the drugs made without Miranda warnings denying petitioner the opportunity to appeal this issue.

On January 19, 2007, Detective Neil Rouse executed a search warrant at W.T.'s Lounge in Marion County. The officers arrested Wayne McLaughlin, the alleged owner, a few miles from the club in order for him to provide entry to the club and be present during the search. App. 90, ll. 1 – App. 92, ll. 19.

Once at the club, Detective Rouse asked McLaughlin for the keys. Eventually Petitioner McLaughlin provided a key. App. 95, ll. 1 – 25. When they entered, Petitioner McLaughlin allegedly said to the officers:

> It is on the shelf in the kitchen.

App. 96, ll. 1 – 9.

When Detective Rouse and the officers went to the kitchen, they found crack cocaine in zip-lock bags on the counter beside the stove, a bag of crack cocaine on the shelf, and a bag with crack cocaine laying on the kitchen floor. Powder cocaine was found on the stove. App. 96, ll. 12 – App. 98, ll. 7.

In a pretrial hearing on May 22, 2008, defense counsel moved to suppress the above statement allegedly made by McLaughlin regarding the location of the drugs. McLaughlin was under arrest at the time and had not been given his Miranda [1] rights. App. 27, ll. 20 – App. 28, ll. 22.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

During the Jackson v. Denno [2] hearing, Detective Neil Rouse testified that when McLaughlin made the statement, he was under arrest and Miranda warnings had not been given. e Rouse claimed that they had not asked McLaughlin any questions except for the key to the building so the statement was "spontaneous." App. 28, ll. 24 – App. 29, ll. 25.

Defense counsel argued that asking McLaughlin for the keys was interrogation because he was giving something that was incriminating to him. Since interrogation had begun, and McLaughlin was under arrest, his Miranda rights should have been given. App. 34, ll. 22 – App. 44, ll. 25.

The state argued that the statement was voluntary as Miranda applied only if the defendant was subject to interrogation. The judge made a preliminary ruling that the statement was inadmissible and the keys were admissible. App. 43, ll. 9 – 24. However, he was going to research the matter and issue a final decision before the start of the trial. App. 44, ll. 1 – 25; App. 45, ll. 1 – 16.

At the beginning of the trial on May 27-28, 2008, the judge changed his mind and ruled that the statement was not the result of custodial interrogation but was voluntary, and therefore was not protected by Miranda. The judge also ruled that evidence regarding the keys was not protected by Miranda and was admissible. Defense counsel took exception to the court's ruling. App. 60, ll. 1 – App.63, ll. 14.

When Detective Rouse testified about McLaughlin's statement before the jury, defense counsel made no objection. App. 95, ll. 1 – App. 96, ll. 25. Further, the Court of Appeals has so held and that is the law of the case.

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[2] Jackson v. Denno , 378 U.S. 368 (1964).

Detective Brian Wallace also testified that he was in the club executing the search warrant. He heard McLaughlin say: "It's in the kitchen or it's on the kitchen shelf." There was no objection by defense counsel. App. 115, ll. 6 – App. 117, ll. 25.

In his closing argument, the solicitor cited the statement by McLaughlin, and argued that it was spontaneous and indicated "consciousness of guilt." App. 159, ll. 16; App. 164, ll. 1 – App. 165, ll. 5.

At his PCR hearing, Petitioner McLaughlin testified that his trial counsel was ineffective, and he wanted a new trial. App. 235, ll. 10 – 25; App. 236, ll. 21 – App. 237, ll. 25. He said he was not guilty because he leased the club to someone else, and was not running the club at that time. The police did not give him the Miranda warnings. And he denied making the statement in the way the police describe. McLaughlin said he was on the telephone talking to his stepdaughter when the statement was made, and he was referring to something else. App.239, ll. 1 – App. 241, ll. 2.

He knew that his attorney made the pretrial motion to suppress the statement but the judge denied it. On cross examination, then McLaughlin said his trial attorney did not object to the solicitor saying he made the statement. App. 243, ll. 1 – App. 244, ll. 24. In any event, the court reporter's record demonstrates the absence of objections.

Trial counsel testified at the PCR hearing that he did not object to the drugs coming in, but he did not answer as to whether he objected to the statement. He clarified that he objected to the keys coming in as a violation of .Miranda. App. 245, ll. 8 - App. 247, ll. 25.

When asked specifically on cross examination if he objected when the police officers made the statements about what they heard McLaughlin say, trial counsel responded inaccurately:

> I didn't have to. I had already ---the judge had already ruled that they could say it. So what we did was we –we did a hearing. We actually had a hearing on that. The judge ruled and once he makes the final ruling, then there's no

> point in objecting after that because he had already ruled that it was admissible.

App. 248, ll. 9 – 17.

He had not reviewed the appeal, and had no idea why the appeal was denied. When asked if it would surprise him to know that it was denied because the issues were not properly preserved, trial counsel responded that he did not know what issues PCR counsel was talking about. App. 248, ll. 18 – App. 249, ll. 4.

PCR counsel then read the opinion of the Court of Appeals into the record at the PCR hearing. The opinion addressed the two issues raised on direct appeal: (1) that the trial court erred in admitting the incriminating evidence at trial when the arresting officer failed to advise McLaughlin of his Miranda rights; (2) the trial court erred in refusing to remove a sleeping juror. The Court of Appeals held that a motion in limine is not a final determination and a contemporaneous objection must be made when the evidence is introduced at trial, unless the ruling on the motion in limine is made immediately prior to the introduction of the evidence. App. 249, ll. 5 – App. 251, ll. 2.

The state argued that the objection was not needed because the evidence was introduced immediately after the objection. App. 257, ll. 14 – App. 259, ll. 1.

The PCR judge stated on the record that he denied the PCR application because Petitioner McLaughlin had not shown that trial counsel was ineffective. The judge stated that the issues were raised by trial counsel and were addressed well. The court "entertained the objections and overruled them." He said the issues were addressed effectively. App. 259, ll. 4 – 25.

In his order of dismissal, the PCR judge quoted McLaughlin's issues he raised in his PCR application which included one that said "trial counsel was ineffective for failure to make a sufficient record for review on direct appeal." App. 263. Then the judge wrote that one of

McLaughlin's claims was that trial counsel was ineffective for failing to object to the use of Applicant's statement the "stuff's over there." App. 265.

The PCR judge then ruled that trial counsel made a motion to suppress the statement but was not successful. "Though the evidence came in, counsel objected to it. Counsel renewed his motion at the end of the trial." Then the judge continued to write: "On each matter raised by Applicant, counsel made a timely objection but was overruled by the trial judge." App. 265.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant 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. 117-118, 386 S.E.2d 624 (1989).

The Court of Appeals affirmed McLaughlin's convictions and sentences because the issues were not properly preserved. A motion in limine was not a final determination of the issue and a contemporaneous objection was needed. The Court cited State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). Supp. App. 1 -2.

In Rhode Island v. Innis, 446 U.S. 291 (1980), the United States Supreme Court held that for *Miranda* purposes, the term "interrogation" refers to any words or actions on the part of the police,

other than those normally attendant on arrest and custody, that the police know are reasonably likely to elicit an incriminating response. The Court also held that the *Miranda* safeguards come into play whenever a person in custody is subjected to express questioning or to its functional equivalent.

In State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001), the Supreme Court held that to preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made.

The state argued that the evidence was introduced immediately after the motion in limine. However, this was in error because the first witness at trial was Ammie Stephens who was the forensic technician in evidence control at SLED. She had never met McLaughlin. App. 47 – App. 48; App. 76, ll. 15 – App. 78, ll. 24.

The PCR judge ruled in error that trial counsel made a timely objection on each matter raised by McLaughlin. Trial counsel was ineffective for not making a contemporaneous objection to McLaughlin's statement coming in. In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), the Supreme Court held that counsel was ineffective for failing to object to the admission of prejudicial inadmissible evidence such as "devil worship" and "Mafia membership."

This was prejudicial to McLaughlin because he was denied an appellate review of the issue. There was a reasonable probability that the Court of Appeals would have reversed his case for anew trial because McLaughlin's constitutional rights were violated when he was not given his rights pursuant to Miranda.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective when counsel failed to request the trial court to examine the juror to determine how long the juror had been asleep.

On January 19, 2007, Detective Neil Rouse executed a search warrant on the establishment of W.T.'s Lounge in Marion County. The officers detained and arrested Wayne McLaughlin, the alleged owner, a few miles from the club in order for him to provide entry to the club and be present during the search. App. 90, ll. 1 – App. 92, ll. 19.

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When Detective Rouse and the officers went to the kitchen, they found crack cocaine in zip-lock bags on the counter beside the stove, a bag of crack cocaine on the shelf, and a bag with crack cocaine laying on the kitchen floor. Powder cocaine was found on the stove. App. 96, ll. 12 – App. 98, ll. 7.

At the close of the trial judge's charge to the jury, defense counsel made a motion to have a juror removed and replaced with the alternate because the juror had been sleeping "pretty much all day." Counsel argued that the juror slept through most of both closings but his main concern was that she slept through the judge's charge. Counsel argued that in this particular case, the charge on constructive possession was very technical and a person had to listen or they could miss critical pieces. App. 197, ll 8 – App. 198, ll. 7.

The solicitor argued he was opposed to removing the juror because the juror could have been listening with her eyes closed. He admitted, however, she did appear to be nodding off. He could not tell which scenario was correct. But he opposed removing her. App. 198, ll. 8 – 15.

The trial judge denied defense counsel's motion to remove the juror. The judge had been watching the juror also and she did have her eyes closed at times. But she watched the judge and listened. Defense counsel made no other request or argument. App. 198, ll. 17 – App. 199, ll. 12.

At his PCR hearing, McLaughlin testified that there was a juror who had been sleeping during the trial. He thought his attorney brought it up during the trial, but said it had been five years. App. 242, ll. 1 – 25.

Trial counsel testified at the PCR hearing that he raised the issue of the sleeping juror to the trial court. He believed the judge was not going to question the juror and put her back on the jury which counsel would not have wanted because it would have been a bad situation if he had questioned the juror's integrity and the judge put her back on the jury. That was why, as a tactical matter, he did not go any further with the juror issue. App. 253, ll. 1 – 25.

The PCR judge ruled that trial counsel's performance was not deficient and petitioner had not proven prejudice. App. 265.

The Court of Appeals held in McLaughlin's case, State v. McLaughlin, Op. No. 2010-UP-503 (Ct. App. filed November 12, 2010), that because the defendant bore the burden to show the juror was actually asleep, failure to request direct examination of the juror waived any complaint on appeal. The court cited State v. Smith, 338 S.C. 66, 525 S.E.2d 263 (Ct. App. 2000). Supp. App. 1-2.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

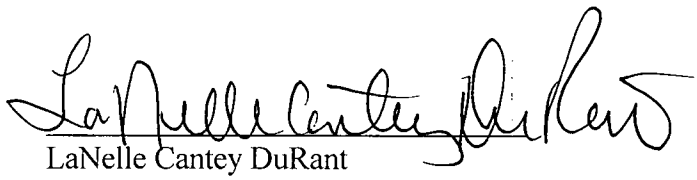
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

Trial counsel was ineffective for not requesting a direct examination of the juror to determine if she were sleeping or not. This failure denied McLaughlin the opportunity to have this issue reviewed on appeal. This was prejudicial and the PCR judge should have found trial counsel ineffective.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of September, 2013.

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WAYNE MCLAUGHLIN,

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RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Tyson Andrew Johnson, Sr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Wayne McLaughlin, #156168, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 19th day of September, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of September, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.