STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2012-213132

Mable Irene Leebey, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

I. Did the PCR Court properly hold that trial counsel's objection under South Carolina Rule of Evidence 403 as an appropriate method to exclude evidence of other drug use, where the trial judge overruled the objection with no resulting prejudice?

II. Did the PCR Court properly hold that although the Court was misinformed and Counsel could have objected to the severity of Petitioner's second drug conviction, Petitioner has failed to establish any resulting prejudice?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Petitioner was indicted by the Spartanburg County Grand Jury during the August 1998 term for trafficking cocaine (98-GS-42-3897). Stephen Welch, Esquire, represented Petitioner.

On October 28-29, 1999, Petitioner proceeded to trial where she was found guilty of the charge. During sentencing, the State asserted, and defense counsel agreed, that Petitioner had two prior drug convictions: a 1992 conviction possession of crack cocaine and a 1997 conviction for possession of marijuana. The Honorable J. Derham Cole sentenced Petitioner to confinement for twenty-five (25) years and a fine of $50,000, using the conviction as a third offense in order to enhance the charge.

Petitioner appealed her conviction. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Leebay, 2002-UP-364 (S.C. Ct. App. filed May 21, 2002). The Remittitur was issued August 7, 2002.

Petitioner subsequently filed a PCR application on October 29, 2002. Respondent made its Return on July 15, 2003. An evidentiary hearing into the matter was convened on January 13, 2005, before the Honorable Roger L. Couch. Petitioner was represented by J. Patricia Anderson, Esquire. Molly R. Crum, Esquire, of the South Carolina Attorney General's Office, represented Respondent. By Order dated May 9, 2005, Judge Couch denied and dismissed Petitioner's Application for PCR.

Petitioner did not file a timely Notice of Appeal. On March 29, 2010, Petitioner filed a second PCR application. Respondent filed its Return on August 12, 2010. A hearing was convened on November 2, 2010, before the Honorable J. Mark Hayes, II. Petitioner was

represented by John E. Rogers, II, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing Respondent consented to Petitioner's request for a belated appeal under Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Petitioner consented to the dismissal of her other grounds in the second PCR if she were granted an appeal of her original PCR.

By Order dated November 18, 2010, Judge Hayes granted Petitioner a belated PCR appeal. Petitioner filed a Notice of Appeal on September 26, 2012 and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The PCR Court properly held that trial counsel's objection under SCRE 403 as an appropriate method to exclude evidence of other drug use, where the trial judge overruled the objection with no resulting prejudice.

Petitioner argues Counsel was ineffective for failing to object under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), to the admission into evidence of a finger scale and marijuana that were found during a search of Petitioner and her hotel room subsequent to her arrest because the evidence put Petitioner's character in evidence. However, as the record reflects, Counsel objected to the introduction of the finger scale and marijuana during the course of the trial. (App. pp. 59-60).

Petitioner argues State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997), is instructive in this case; however, the facts of Barroso are substantially different from the current case. In Bararoso, the solicitor moved for the marijuana evidence to be admitted as "other bad acts" under Lyle. Id. at 271, 493 S.E.2d 855. In the instant case, Counsel never had to object to the admission of the finger scale or marijuana under Lyle, because the State never argued the introduction of the evidence under that theory. (App. pp. 58-60).

In South Carolina, where "counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010). Counsel testified at the post-conviction relief hearing:

> We moved to suppress. We got to the point in the trial where it looked like it was fixing to come up. So, I made an objection, sent the jury out. After sending the jury out I moved to suppress. Did not use the terms specifically Rule 403, but used the suppress it on the grounds that the finger scale and the marijuana where discovered after the arrest took place, provided absolutely no probative value as to whether or not she possessed this crack

> cocaine with intent to traffic, and were highly prejudicial, which is Rule 403. It's what Rule 403 says. Well, prejudicial nature of it is, is one of the instances and it calls for a balance by the judge. The judge listened to a little bit of the testimony, and then basically overruled my objection, allowed it to come in.

(App. pp. 200-1, lines 25, 1-13). Counsel made a motion to have the finger scale and marijuana excluded and the trial judge ultimately allowed it into evidence over Counsel's objection. (App. p. 60). Because Counsel did not object under Lyle does not mean he was ineffective in his representation. In his Order Judge Couch agreed with Counsel that using the SCRE 403 to keep out the finger scale and marijuana was a proper method. (App. p. 238).

Accordingly, Petitioner has failed to prove the first prong of the Strickland test that Counsel was deficient for failing to specifically object under Lyle against the admission of the finger scale and marijuana. Also, Petitioner failed to show how she was prejudiced by Counsel's performance as a result or that the outcome of the trial would have been different had Counsel made that specific objection. Therefore, the post-conviction relief court's finding that Counsel was not ineffective should be affirmed.

II. The PCR Court properly held that although the Court was misinformed and Counsel could have objected to the severity of Petitioner's second drug conviction, Petitioner has failed to establish any resulting prejudice.

Petitioner also alleges Counsel was ineffective in failing to discover that Petitioner's previous marijuana conviction was not a conviction for possession of twenty-eight grams, but rather an uncounseled guilty plea to simple possession of marijuana that should not have been considered by the Court in sentencing Petitioner as a third offender. At trial, the State told the court of Petitioner's prior drug convictions. (App. p. 119. According to the court records:

> Mr. Marby: Only to make the court aware of her record, your honor. March 12th of 1992 ---- actually March 16th of 1992 she

> was convicted of possession of crack cocaine. Also, in 1997 she was convicted of possession of 28 grams of marijuana or ten grams of hashish, on 1/7 of 1997 also another count of possession of 28 grams of marijuana or one gram of hashish. Both of these convictions occurring on 1/7 of 1997, so this is a third offense.
>
> The Court: All right, Mr. Welch, any disagreement with the –
>
> Mr. Welch: Judge, prior to standing up here today I've taken the printout. I've gone over it with my client, and I've discussed her prior record with her. I've gone over the dates. We've looked at everything, and there is no disagreement with that, Judge.

(App. p. 119, lines 10-24. Petitioner had no objection to the charges as presented to the court at the time of sentencing.

Petitioner argues that since the second offence, possession of twenty-eight grams of marijuana was uncounseled the conviction cannot be used as a conviction for enhancement. However, Counsel was under the impression the printout he was provided with had the proper criminal convictions. (App. p. 216-17). Both the State and Counsel agreed the charges were as that stated to the Court. Furthermore, Petitioner's actual conviction, of simple possession, would still qualify for enhancement under the statute. S.C. Code Ann. § 44-53-370.

Although, Petitioner claims her conviction in 1997 was uncounseled, she has not met her burden of proof required under Strickland to show that she was prejudiced by Counsel's actions. The only evidence produced at the PCR trial about Petitioner's guilty plea was her testimony about what had happened and a letter from the Spartanburg Municipal Court. (App. pp. 173-174, 229). Petitioner has presented no evidence as to whether she waived her right to counsel, or asked for counsel to be dismissed. It is generally accepted that trial counsel cannot be held ineffective for failing to anticipate every possible event or outcome. Reasonable efforts and performance are all that is required of trial counsel. *See* Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding trial counsel was not ineffective for failure to interview the victim

who already gave a damaging statement to the police - counsel, "unless clairvoyant, could not have reasonably known that any additional benefit would accrue to his client"); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996) (finding counsel cannot be incompetent in failing to receive discovery materials from prosecution that they had no reason to know existed). The lack of evidence supporting the uncounseled conviction fails to meet the standards required by Strickland.

In the alternative, Petitioner argues that under Alabama v. Shelton, 535 U.S. 654 (2002), Petitioner should have requested the court not count the second conviction for enhancement purposes. However, Counsel would not have been aware of Shelton, since the trial took place in 1998 and Shelton was decided by the United States Supreme Court in 2002. Petitioner has failed to show how Counsel's actions at trial rendered him ineffective, and how Petitioner was prejudiced as a result.

Accordingly, Respondent submits that Petitioner failed to meet her required burden of proof and probative evidence in the record exists to support the PCR Court's denial of her post-conviction relief application.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
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SUZANNE H. WHITE
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By: _____
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Sept. 16, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Circuit Case No.: 2010-CP-42-1494
Appellate Case No.: 2012-213132

MABLE IRENE LEEBEY, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Carmen V. Ganjesani, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 16th day of September, 2013.

Anne Mueller
Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
16th day of September, 2013.

_____(L.S.)
Notary Public for South Carolina.
My Commission Expires: 10/28/2014

ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
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September 16, 2013

Via Hand Delivery
Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Mable Irene Leebey v. State of South Carolina
Circuit Court Case No: 2010-CP-42-1494
Appellate Case No.: 2012-213132

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White
Assistant Attorney General

SHW/aam
Enclosures

cc: Carmen V. Ganjehsani, Esquire (w/enclosure)