

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Feb 12 2025

S.C. SUPREME COURT

On Petition for Writ of Certiorari from
Charleston County
Honorable Kristi Harrington, Trial Judge
Honorable Bentley Price, PCR Judge

Appellate Case No. 2024-000704

OMAR SHARIFF GENTILE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION
FOR A WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General
S.C. Bar No. 73999

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....i

QUESTION PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....4

ARGUMENT.....5

The PCR court properly found counsel was not ineffective for not objecting to law enforcement testimony that the bedroom where the heroin was found belonged to Petitioner when (1) the testimony did not constitute expert testimony, and there was no basis to object, making counsel’s failure to object reasonable under prevailing professional norms, and (2) there is no reasonable probability an objection would have changed the outcome when Petitioner himself admitted to law enforcement it was his bedroom.....5

CONCLUSION.....9

QUESTION 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?

RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED

Did the PCR court properly find counsel was not ineffective for not objecting to law enforcement testimony that the bedroom where the heroin was found belonged to Petitioner when (1) the testimony did not constitute expert testimony, and there was no basis to object, making counsel's failure to object reasonable under prevailing professional norms, and (2) there is no reasonable probability an objection would have changed the outcome when Petitioner himself admitted to law enforcement it was his bedroom?

PROCEDURAL HISTORY

Petitioner is presently confined in the South Carolina Department of Corrections serving an aggregate twenty-five-year sentence. In May 2012, the Charleston County Grand Jury indicted Applicant for possession with intent to distribute (PWID) heroin within proximity of a school (2012-GS-10-2587). In September 2015, the Charleston County Grand Jury indicted Applicant for trafficking heroin (2015-GS-10-5473). These charges arose following the execution of a search warrant on a home on February 9, 2012.

On January 4-5, 2016, Petitioner proceeded to jury trial before the Honorable Kristi Lea Harrington. Assistant Public Defenders Jason T. King and Tamara M. Van Pala represented Petitioner, and Assistant Solicitors John Whitney Sowards and Stephanie B. Linder prosecuted the case. The jury convicted Petitioner as indicted, and Judge Harrington sentenced him concurrently to twenty-five years for trafficking and ten years for PWID heroin.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender Kathrine Hudgins (2016-000161). On appeal, Petitioner argued the trial court erred in not requiring the State to disclose the name of a confidential informant (CI) who made a controlled-buy at the home that formed the basis of probable cause for the search warrant. The Court of Appeals affirmed in an unpublished Rule 220(b)-style opinion. State v. Gentile, Op. No. 2018-UP-386 (Ct. App. filed Oct. 17, 2018). The remittitur was sent November 6, 2018.

On December 7, 2018, Petitioner timely filed this application for post-conviction relief (PCR). The State filed a return requesting an evidentiary hearing. On February 17, 2021, an evidentiary hearing convened before the Honorable Bentley Price. Petitioner was present and represented by Christopher R. Geel, Esquire. Assistant Attorney General Benjamin Limbaugh represented the State. On April 11, 2024, Judge Price issued an order denying and dismissing the

application with prejudice.

Summary of Underlying Facts

Petitioner's charges arose from the execution of a search warrant on February 9, 2012.¹ Upon executing the warrant, officers found Petitioner in the living room and Petitioner's relative, John Davis, in a back bedroom. (Tr. 135). After waiving his Miranda rights, Petitioner spoke with law enforcement and told them he went to the home daily to care for Davis, an amputee. He further told law enforcement he had a room in the home with independent locks and keys, and he considered the home his residence. Petitioner pointed out his room, and law enforcement found keys in the door. Petitioner told law enforcement that he had over \$1,000 in cash in his bedroom. (Tr. 137-38, 140-41). After searching the room, officers found sixteen grams of heroin and drug paraphernalia, including digital scales with heroin residue, glassine baggies, and rubber bands. Police also found paperwork belonging to Petitioner in the drawer with the drugs, including a paycheck stub, a driver's license, and a social security card. (Tr. 156).

Petitioner did not testify or call any witnesses at trial. Petitioner's trial strategy centered on the argument that he was only at the home caring for his relative, the drugs belonged to his brother (who had previously sold to the CI), and Petitioner did not know the heroin was in the drawer or constructively possess the heroin. (Tr. 69-70, 269-70).

¹ Probable cause for the warrant was developed by a CI's controlled purchase of drugs from the home on January 31, 2012. The CI purchased the drugs from Petitioner's brother.

Standard of Review

The standard of review for PCR depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found counsel was not ineffective for not objecting to law enforcement testimony that the bedroom where the heroin was found belonged to Petitioner when (1) the testimony did not constitute expert testimony, and there was no basis to object, making counsel's failure to object reasonable under prevailing professional norms, and (2) there is no reasonable probability an objection would have changed the outcome when Petitioner himself admitted to law enforcement it was his bedroom.

Petitioner contends the PCR court erred in not finding counsel ineffective for not objecting to impermissible lay opinion testimony based on Rule 701, SCRE. He further contends he was prejudiced by counsel's failure to object because the testimony was intended to convey to the jury that Petitioner had control over the bedroom and thus had constructive possession of the drugs. However, the PCR court properly found counsel was not deficient because the testimony was not objectionable. Further, the PCR court properly found Petitioner did not prove prejudice when he himself admitted to law enforcement it was his bedroom.

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided

representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that counsel’s deficient performance prejudiced the applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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.

Rule 701, SCRE.

1. The testimony did not constitute impermissible lay opinion testimony and was not objectionable.

In his petition, Petitioner asserts counsel should have objected to the following during the State’s redirect examination of Detective John Marn:

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. 201-02). Petitioner likewise contends counsel should have objected to the following during

Investigator Shealy's direct examination:

Q. And why, again, did you believe that bedroom number three belonged to the defendant, Omar Gentile?

A. **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 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 thing 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 the 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 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.**

Q. And was there any doubt in your mind who that bedroom belonged to?

A. No, sir, no doubt whatsoever whose bedroom that belonged to.

(Tr. 237-38, emphasis added).

The PCR court properly found the foregoing was admissible, and Petitioner failed to articulate a valid, legal objection for excluding that evidence. Specifically, Investigator Marn's testimony that bank statements, social security cards, and paycheck stubs are important documents that are not normally kept in a stranger's home was rationally based on Investigator Marn's perception, helpful to a clear understanding of a fact in issue, and did not require special knowledge, skill, experience, or training. Likewise, Investigator Shealy's testimony that

Petitioner's paperwork in the bedroom supported Petitioner's statement that the bedroom belonged to him was rationally based on Investigator Shealy's perception, helpful to a clear understanding of a fact in issue, and did not require special knowledge, skill, experience, or training. Thus, the PCR court properly found the foregoing was not objectionable under Rule 701, SCRE. Petitioner did not set forth another basis for a valid legal objection and thus did not meet his burden of proving deficiency.

2. There is no reasonable probability an objection would have changed the outcome when Petitioner himself admitted the bedroom belonged to him.

The PCR court properly found Petitioner did not prove prejudice. Here, Investigator Shealy's testimony that Applicant said the room belonged to him and testimony that officers found Applicant's paperwork in the drawer was clearly admissible, and Petitioner has not articulated a valid, legal objection for excluding that evidence. Further—and critically—based on testimony that Petitioner himself admitted the room belonged to him, it is not reasonably likely the outcome would have been different had counsel successfully objected to Investigator Marn's testimony about not storing important documents in a stranger's home or Investigator Shealy's testimony that Petitioner's items in the bedroom corroborated Petitioner's statement that the room was his. Thus, the PCR court properly found Petitioner did not prove prejudice.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for a Writ of Certiorari.


Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General



Danielle Dixon
Assistant Attorney General
S.C. Bar No. 73999

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
803-734-3737
DanielleDixon@scag.gov

ATTORNEYS FOR THE RESPONDENT

This 12th day of February, 2025.