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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Horry County
Honorable H. Steven DeBerry, IV, Circuit Court Judge
Appellate Case No. 2024-001375

DESMOND S. COLLINS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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III. The PCR Court properly found appellate counsel was not ineffective for failing to raise the issue of the trial court's decision to deny Petitioner's request to cross-examine the lead officer because appellate counsel implemented a valid appellate strategy.

STATEMENT OF THE CASE

Petitioner Desmond Collins was indicted by a Horry County Grand Jury in September of 2016 for trafficking heroin. He proceeded to a jury trial on November 13-15, 2017, before the Honorable Benjamin H. Culberson, circuit court judge. Petitioner was convicted as charged. Petitioner was sentenced to twenty-five years' incarceration and received a $200,000 fine. Petitioner then filed a timely notice of appeal. The South Carolina Court of Appeals affirmed the conviction on December 18, 2019, in Op. 2019-UP-387.

Petitioner filed an application for post-conviction relief on July 27, 2020. Petitioner's PCR hearing was held on December 2, 2022, before the Honorable H. Steven DeBerry, IV. Petitioner's application was dismissed with prejudice on July 26, 2024. Petitioner filed a timely notice of appeal.

STATEMENT OF FACTS

On June 24, 2016, Petitioner was arrested for trafficking heroin following a traffic stop. While pumping gas, an officer smelled marijuana coming from Petitioner's vehicle. (App'x 150-1; 220). That officer radioed to Officer Crews that the smell of marijuana was present in that vehicle, and Crews began following the car. (App'x 151; 220). While following the vehicle, Officer Crews observed Petitioner run a red light. (App'x 145; 152; 220). Officer Crews initiated a stop, and two others came for backup. (App'x 152; 222). At the time of the stop, Petitioner was driving with a passenger (Darrin). (App'x 153; 221). Officer Crews smelled marijuana in the vehicle, detained the two men, and searched the vehicle. (App'x 222).

Officer Crews testified that he first found $3,000 inside the driver's side door. (App'x 223). Crews also found marijuana and a powder in the driver's side floorboard, which turned out to be heroin. (App'x 264). Also, Crews found a scale and two cell phones. (App'x 224; 231). Crews testified that Petitioner stated, "put it all on me." (App'x 228). Later during trial, the State learned some files were obtained from one of the cell phones. (App'x 298). The State disclosed a thumb drive containing all the files found on the cell phone. (App'x 306-7).

Additionally, Officer Camacho, Crews' backup, testified. (App'x 278). Camacho testified that after refueling his vehicle he went to the traffic stop. (App'x 281). Camacho did not see the drugs until after they were discovered by Crews. (App'x 282-3). Camacho testified that Crews advised him that Petitioner took ownership of the drugs. (App'x 283). At that time, they decided to allow the passenger to leave. (App'x 283).

In the opening statement, Petitioner's Counsel said the following:

> It appears my client was in the car, but what I'm going to end with is this, Darrin was in the car. Darrin was in the passenger seat. They come in, stop them, talk to them, my guys handcuffed right away. Darrin, they talk to him a little bit I think, he's handcuffed. They go to Darrin, unlock the handcuffs and wave bye. Remember what I told you about constructive

> possession; he's in the same car, same dope in plain view, it's not like it was in the trunk, it was riding in the cab or the interior of the vehicle, riding with both of them. Who drives for people that are dealing drugs? The drug dealer or the heroin addict to get his heroin. The heroin addict to get his heroin. The drug dealer is in the car, he's doing business, he's on the phone, he's doing his thing, he's riding, he's driving. The passenger, they just let him walk away.

(App'x 213).

Also, Counsel also stated the passenger "lucked out, you know, dealers know what they're doing." (App'x 216).

On appeal, Petitioner argued the trial court erred in failing to conduct a proper hearing into whether the cell phone records in the possession of the State contained any material exculpatory evidence. The Court of Appeals found the issue to not be preserved.

In the closing statement, Counsel stated that Petitioner was "with limited means" and simply driving the vehicle. (App'x 382). Additionally, Counsel stated "I can't imagine one person when they're 8, 10, 12-years-old saying I want to grow up to be a heroin addict or drive a drug dealer around. Unfortunately, some of these people can get in that position." (App'x 378). Counsel attempted to show that Petitioner was not aware of whether the substance was cocaine or heroin. (App'x 380).

At the PCR hearing, Petitioner alleged Counsel's closing argument constituted an unreasonable trial strategy. (App'x 430). Petitioner also claimed that trial counsel was ineffective for failing to cross-examine an officer who was previously charged with driving under the influence and that appellate counsel was ineffective for failing to appeal the issue. (App'x 425). Counsel explained that Petitioner's statement concerning putting the blame on himself was something that had to be addressed. (App'x 446-7). Counsel explained the defense was to suggest Petitioner was simply covering for the passenger. (App'x 446-7).

The PCR court found Counsel was not ineffective for failing to cross-examine the Officer concerning his prior DUI charge. (App'x 47). The court noted that an arrest without anything more did not impeach the credibility of a witness, did not constitute a prior bad act, and did not show bias. (App'x 49-50). The court noted the issue was preserved, but even if it were not, it did not constitute ineffective assistance. (App'x 49-50). The PCR court found Counsel's choice to appeal an unpreserved issue to be deficient but found no prejudice. (App'x 92).

Petitioner's application for PCR was dismissed with prejudice.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's finding of fact and will uphold them if there is any evidence in the record to support them. Id. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed de novo without deference to the lower court. Id.

ARGUMENT

I. The closing argument was not an unreasonable trial strategy because Counsel attempted to minimize Petitioner's culpability arguing he was only driving the vehicle and not trafficking heroin.

The PCR court properly found that Counsel was not ineffective for attempting to minimize Petitioner's culpability. Because Counsel's statement never effectively removed Petitioner's ability to make decisions about his defense, this claim should be analyzed under the ineffective assistance of counsel framework outlined in Strickland. Counsel's closing argument, considered in its entirety, constituted a valid attempt to shift responsibility to the passenger. Even if Counsel's statements were deficient, a different outcome is not reasonably probable given the facts and the potential risk associated with Counsel's statement.

Pursuant to the first prong of the Strickland analysis, Petitioner must prove counsel's performance was deficient. Strickland v. Washington, 466 U.S. at 686 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence"). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." Id. at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. Strickland, 466 U.S. at 688-89. The benchmark for judging any claim of

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the result cannot be relied upon as being just. Id. 466 U.S. at 686. Even if there is reason to think counsel's conduct was far from exemplary relief may still be denied so long as counsel did not take an approach that no competent lawyer would have taken. Dunn v. Reeves, 141 U.S. 2405, 2410 (2021).

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. Id. at 695. Realistically, this is found "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (quoting Strickland, 466 U.S. at 697). In examining whether an applicant has proven prejudice, courts should consider the specific impact Counsel's error had on the outcome. Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). To prove counsel was ineffective when a guilty plea is challenged, an applicant "must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not have been entered." Custodio v. State, 373 S.C. 4, 644 S.E.2d 36 (2007).

Petitioner appears to claim that prejudice need not be shown because Counsel's statements endangered Petitioner's ability to make fundamental decisions regarding his own defense. This is incorrect because Counsel's comments did not reach the level of removing Petitioner's ability to make important decisions regarding his representation. In McCoy, the United States Supreme Court determined that ineffective assistance of counsel jurisprudence was

not applicable because a client's autonomy was at issue. McCoy v. Louisiana, 584 U.S. 414, 426 (2018). In McCoy, trial counsel told the jury, during the guilt phase, "[H]e's guilty." Id. The United States Supreme Court has noted that an error may be structural when the right at issue is not designed to protect the defendant from an erroneous conviction but rather another interest such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." Weaver v. Massachusetts, 582 U.S. 286, 294 (2017). Here, Counsel's comments do not rise to the level of eroding Petitioner's ability to make due process decisions. Counsel did not admit Petitioner's guilt. Instead, he acknowledged it appeared Petitioner was in the car before suggesting to the jury it should find the State had not met its burden of proving who in the vehicle was actually in possession of the drugs found within it. Counsel's statements simply show an attempt to demonstrate that the heroin found in the vehicle could have belonged to the passenger. Accordingly, Counsels statements should be examined within the bounds of ineffective assistance and thus, are analyzed under the deficiency and prejudice prongs outlined in Strickland.

The right to effective assistance extends to closing arguments. See Bell v. Cone, 535 U.S. 685, 701-702 (2002). A closing argument should be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). So long as the attorney stays within the record and its reasonable inferences, the attorney may "legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (quoting State v. Durden, 264 S.C. 86, 92, 212

S.E.2d 587, 590 (1975) (quoting 23A C.J.S. Criminal Law §1107, closing arguments)). Also, the attorney "may argue with reference to any matter which the jurors may properly consider in arriving at their verdict and may point out as well the matters which they should not consider." Id. Due to the broad range of legitimate trial strategy, counsel should be given wide latitude in deciding how best to represent their client. Yarborough v. Gentry, 540 U.S. 1, 5 (2003).

Here, Counsel's statements did not deviate from the prevailing standards of professional norms. Counsel stated in the PCR hearing that the only defense he saw, given the facts, was to make a distinction between Petitioner and the passenger. (App'x 469). Counsel attempted to distinguish Petitioner's role as a driver from potentially that of the passenger in a way that could give the passenger ownership of the drugs. Additionally, while Counsel presented a scenario similar to the one at issue, he never specifically stated Petitioner was an addict. Counsel rather expressed that he found it unlikely that a dealer, who was in ownership of the drugs, would be driving the vehicle in an effort to cast doubt on whether the State met its burden. Because counsel articulated a valid trial strategy, he did not rise to the level of unconstitutionally deficient representation.

Even if Counsel rendered deficient performance, Petitioner was not prejudiced[1]. Petitioner has failed to establish a different outcome is reasonably probable. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) ("in a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application"); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding applicant failed to establish prejudice from counsel's failure to investigate criminal background of victims and witnesses where applicant failed to show at PCR hearing that

[1] If Petitioner fails to satisfy either the performance or the prejudice prong of the test, then this Court need not consider the other. Jones v. State, 661 S.W.3d 806, 809 (Mo. Ct. App. 2023); Strickland 466 U.S. 686.

victims and witnesses had criminal records). Petitioner failed to establish he suffered any prejudice for Counsel's failure to object.

Here, it is not reasonably likely the outcome would have been different had Counsel implemented a different strategy. Counsel's closing argument attempted to establish the passenger as the owner of the materials. Counsel emphasized the difficult position Petitioner was in stating "the only direction I saw to try to get a not guilty verdict, to make that distinction between the two of them." (App'x 469). Petitioner's statement to the police encouraging them to "put it all on" him along with being the driver of a vehicle where heroin was found limit the likelihood of a different outcome. Accordingly, Counsel did not render unconstitutionally deficient representation because he acted within the prevailing professional norms by attempting to establish the drugs found in the vehicle belonged to the passenger rather than Petitioner. Additionally, given the nature of the evidence presented by the State and the limited risk of Counsel's statement, Petitioner has failed to establish prejudice.

II. The PCR Court properly denied relief because Petitioner failed to establish prejudice by showing a reasonable probability of a different result had the lead officer testified regarding his prior DUI charge.

Petitioner argued at the PCR hearing that Counsel was ineffective for failing to properly raise and preserve the issue of whether the court erred in limiting the cross-examination of Officer Crews. Accordingly, the ineffective assistance of counsel challenge should be analyzed under the two-pronged test outlined in Strickland. First, Counsel preserved the issue for appellate review. Next, Counsel was not ineffective for failing to elicit testimony from the officer because it would not have shown evidence of bias, a prior bad act, or impeached credibility. Additionally, Petitioner failed to establish prejudice by showing what bias or credibility concerns in Crews' testimony would have been reasonably likely to produce a different result.

In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). Before trial, the State requested the Court direct Petitioner to not mention Crews' DUI charge during trial. (App'x 137). Counsel argued that the prior charge concerned Crews' credibility. (App'x 138). The State noted that the charge was dismissed prior to trial for lack of evidence. (App'x 137; 139). The Court ruled in favor of the State noting it was not a prior bad act and that it did not involve dishonesty or fraud. (App'x 140-1).

If the issue was not sufficiently preserved, Counsel was not deficient in failing to attempt to cross-examine Crews. Pursuant to the first prong of the Strickland analysis, Petitioner must prove counsel's performance was deficient. Strickland, 466 U.S. at 686 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness

under prevailing professional norms." Strickland, 466 U.S. at 688. See also Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence").

Second, counsel's deficient performance must have prejudiced the petitioner so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

"Courts generally entrust cross-examination techniques, like other matters of trial strategy to the professional discretion of counsel." Henderson v. Norris, 118 F.3d 1283, 1287 (8th Cir. 1997). "The cross-examination of a witness is a delicate task; what works for one lawyer may not be successful for another." Id. The Eighth Circuit Court of Appeals observed "there are few, if any, cross-examinations that could not be improved upon." Id. The Ninth Circuit noted great deference should be given to counsel's decisions at trial such as refraining from cross-examining a particular witness. Brown v. Uttecht, 530 F.3d 1031, 1036 (9th Cir. 2008).

Here, Counsel was not deficient for eliciting testimony from the officer because the prior charge does not establish bias or a prior bad act. Counsel did cross-examine Crews on his pursuit of Petitioner, the fact that a passenger was in the vehicle, and the fact that Crews initially mistook the heroin for cocaine. (App'x 249-51). Further cross-examination relating to Crews' prior charge would have provided limited probative value at best. See Michelson v. United States, 335 U.S. 469 (1948) (arrest alone does not impeach the integrity or damage the credibility of witness).

Further Petitioner was not prejudiced. Courts "do not ... need to address the performance prong if petitioner does not affirmatively prove prejudice." Boysiewick v. Schriro, 179 F.3d 616, 620 (8th Cir.1999). Petitioner has failed to establish either that the trial court would have changed its ruling or that Crews' testimony would have established bias. 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. The deficient performance must be considered in the entirety of the evidence produced supporting a conviction. Strickland, 466 U.S. at 669. Petitioner failed to establish any evidence which demonstrates the officers bias or attack his credibility. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (prejudice from trial counsel's failure to interview or call witnesses could not be shown where witnesses did not testify at PCR hearing). Further, considered in its entirety to the case as a whole, any evidence of the officer's charge is insignificant in light of Petitioner's statement and the fact that heroin was found under his seat.

III. The PCR Court properly found appellate counsel was not ineffective for failing to raise the issue of the trial court's decision to deny Petitioner's request to cross-examine the lead officer because appellate counsel implemented a valid appellate strategy.

The PCR court properly found appellate Counsel was not ineffective for failing to raise the issue of the officer's impeachment on direct appeal. Courts have noted that experienced appellate advocates typically winnow their arguments to few issues. Additionally, the potential impeachment of the officer would not have been proper as it would not have shown bias or evidence of a prior bad act.

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Yet, counsel is not required to raise every non-frivolous claim but may select among them in order to maximize the likelihood of a favorable outcome. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal." Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004).

Counsel was not deficient for failing to raise the issue because the prior charge does not establish bias or a prior bad act. First, our Supreme Court has stated courts should not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion. State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012).

Next, the prior charge is not evidence of an other bad act. Arrest alone does not impeach the integrity or damage the credibility of witness. Michelson, 335 U.S. 469. Accordingly, only a conviction should be inquired about to challenge the reliability of a witness. Id.

The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. Gracely, 399 S.C. at 372, 731 S.E.2d at 885. In Sims, our Supreme Court found the circuit court improperly prevented a defendant from cross-examining a witness about potential bias relating to certain charges pending against the witness. State v. Sims, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002). Although the State had not promised the witness a deal in exchange for his testimony, the witness "had been told when he went to trial on the charges, the State would tell the trial judge he had cooperated by testifying in the instant case." Id. at 24, 558 S.E.2d at 522.

Similarly, in Smalls, our Supreme Court found counsel was ineffective for failing to argue, on the record, that evidence of a witness's carjacking charge the State had dismissed on the morning of trial was admissible as evidence of the witness's bias. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The relevance of current or pending charges in a cross-examination concerning bias has not only been recognized by our courts but has also been recognized in other jurisdictions. State v. Bass, 132 A.3d 1207, 1217 (Nj. 2016) ("A defendant's claim that there is an inference of bias is particularly compelling when the witness is under investigation, or charges are pending against the witness, at the time that he or she testifies"); Carmona v. State, 698 S.W.2d 100, 102–03 (Tex. Crim. App. 1985) ("cross-examination on pending charges in order to establish motive or bias is generally an exception to the rule ... that a witness may only be impeached with final convictions"). The potential for bias is recognized because a witness without a final disposition may hope for favorable treatment from the prosecutor, even if no such

deal has been discussed. Com. v. Evans, 512 A.2d 626, 632 (Pa. 1986). Similarly, a witness with a long criminal record can be impeached to show a pattern of being given plea bargains for his testimony. State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001).

Yet, where there is no evidence linking the dismissal of charges to a witness's decision to cooperate with the police, the Court can limit cross-examination relating to that charge. State v. Taylor, 404 S.C. 506, 745 S.E.2d 124 (App. 2013); United States v. Sutherland, 929 F.2d 765 776–77 (1st Cir.) (holding that when defendant presents "no basis for suspecting bias other than a conclusory allegation," trial court may bar cross-examination on claimed bias without violating Confrontation Clause). As noted by the Court of Appeals of New York "[i]mpeachment of a witness by evidence or inquiry as to prior arrests or charges is clearly improper. The mere fact that a person has been previously charged or accused has no probative value. There is absolutely no logical connection between a prior unproven charge and that witness' credibility." People v. Cook, 338 N.E.2d 619, 621 (N.Y. 1975).

In Taylor, a cooperating witness was charged with the unrelated offenses including, amongst other things, assault with the intent to kill. Taylor, 404 S.C. 506, 745 S.E.2d 124. The court found evidence of prior convictions and pending charges to be admissible but not the dismissed charges. Id. The Taylor Court noted any probative value was limited at best and that the defense had other means to attack the witness's credibility.

Additionally, our Supreme Court affirmed a trial court's refusal to allow defendant to cross-examine a witness concerning nine dismissed indictments for narcotics charges because narcotics offenses were not generally probative of truthfulness and the dismissed indictments were not evidence of "bias, prejudice, or any motive to misrepresent." State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000).

A witness cannot be impeached with charges dismissed in another state if no connection is shown between the other prosecutor's office and the solicitor now prosecuting the defendant. Id., 343 S.C. 20, 538 S.E.2d 248.

Here, Counsel was not deficient because the prohibited testimony concerning Crews' prior charge was dismissed prior to Petitioner's trial and accordingly had no connection concerning his testimony. Further, Crews' prior charge is similar to the charge in Aleksey in that it is not generally probative of truthfulness or of bias with respect to the current case. Because Crews' prior charge did not concern his truthfulness or bias, Counsel is not deficient for failing to raise this issue on appeal.

Further, Petitioner has not shown prejudice. Petitioner has failed to establish a different outcome is reasonably probable. See Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) ("in a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application"). A different outcome is not reasonably probable due to the limited probative value associated with Crews' potential testimony. Due to the reasons stated above, it is unlikely that the Court of Appeals would have found any error warranted reversal[2]. In addition, a violation of the right to confront a witness by questioning about pending charges is not *per se* reversible error if it is harmless beyond a reasonable doubt. State v. Curry, 370 S.C. 674,636 S.E.2d 649 (Ct. App. 2006). Here, even if an error had occurred the court may have found any error harmless due to the fact that Petitioner was in the vehicle where drugs were found and told the police to "put it all" on him.

Accordingly, this Petition for Writ of Certiorari should be denied.

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[2] The evidence of Crews' prior charge did not establish bias or a prior bad act. See Taylor, 404 S.C. 506, 745 S.E.2d 124; Michelson, 335 U.S. 469.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

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