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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 16 2013

Certiorari to Cherokee County

J. Derham Cole, Circuit Court Judge

S.C. Supreme Court

THOMAS ARNOLD GREGORY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000418

JOHNSON PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to an insufficient chain of custody when Corporal Price testified that the drugs were kept in an unlocked file cabinet in his office after they were returned from SLED?

STATEMENT

In April 2007, the Cherokee County Grand Jury indicted Thomas Arnold Gregory on the charges of trafficking in crack cocaine and possession with intent to distribute crack cocaine within the proximity of a school or playground. On September 17, 2007, a jury trial was held in petitioner's absence before the Honorable James E. Lockemy. Gregory was represented by Don Thompson, and the state was represented by Kimberly Lewis Leskanic. The jury returned verdicts of guilty on both charges as indicted. App. 190, ll. 4 – 20. The trafficking charge was determined to be a third offense. App. 196, ll. 12 – 25. Judge Lockemy sealed the sentence. App. 200, ll. 11 – App. 201, ll. 11. On November 5, 2007, Gregory appeared before the Honorable J. Ernest Kinard for sentencing. Gregory was again represented by Don Thompson, and the state by Kimberly Lewis Leskanic. App. 203. Judge Kinard opened Judge Lockemy's sentences which were one year on resisting arrest, ten years on PWID proximity, and twenty-five years and a \$50,000 fine on the trafficking crack charge. App. 205, ll. 1 – 10. Judge Kinard affirmed Judge Lockemy's sentences. App. 212, ll. 16 – App. 213, ll. 13.

Gregory filed a notice of appeal which was perfected with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967) by the division of Appellate Defense of the Commission on Indigent Defense. The Court of Appeals dismissed the appeal on November 19, 2009. State v. Gregory, Op. No. 2009-UP-0551 (Ct. App. filed November 19, 2009).

On November 3, 2011, Gregory filed an application for post-conviction relief (PCR). The state filed a return on August 23, 2011. An evidentiary hearing was held on April 6, 2012 before the Honorable J. Derham Cole. Gregory was represented by N. Douglas Brannon, and the state was represented by Suzanne H. White. On January 14, 2013, Judge Cole issued an order denying

Gregory's PCR application and dismissing it with prejudice. Gregory filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to an insufficient chain of custody when Corporal Price testified that the drugs were kept in an unlocked file cabinet in his office after they were returned from SLED.

On February 26, 2007, Trooper Brian Quinn stopped Gregory and his passenger in Gaffney for not wearing seatbelts. App. 114, ll. 14 – App. 116, ll. 5. Trooper Quinn then called Trooper Stephen Poole to assist. While Trooper Poole was talking with Gregory, marijuana fell from Gregory’s pocket. Gregory then ran from the troopers. While he was chasing Gregory, Trooper Poole allegedly saw Gregory pull a bag of crack cocaine from his pocket and throw it down in the street. Gregory was arrested. App.97, ll. 18 – App. 99, ll. 23.

During the trial, the chemist with SLED, Carmen J. Tucker, testified that the drugs weighed 64.01 grams. App. 126, ll. 6 – App. 127, ll. 25; App. 132, ll. 21 – 22. Defense counsel objected to the drugs being presented to the jury through this chemist. The chemist said she could establish a chain of custody. Counsel then said he would not object if she could establish the chain. However, when the state tried to admit the drugs after her testimony, a bench conference was held and the judge did not admit the drugs at that time. App. 134, ll. 1 – App. 136, ll. 23.

Then Corporal Johnny Price, evidence technician with the Highway Patrol, testified that he picked up the drugs from SLED after testing. He kept them in a file cabinet in his office along with other evidence. He admitted that the file cabinet was not locked. Defense counsel made no objection. App. 142, ll. 18 – App. 149, ll. 15.

At his PCR hearing, Gregory testified that his trial counsel was ineffective for not adequately “pointing out the breaks in the chain of custody.” If his attorney had more vigorously objected to the flaws in the chain of custody, the drugs may have been suppressed, and the outcome

of the trial would have been different. App. 235, ll. 24 – App. 236, ll. 22; App. 232, ll. 22 – App. 235, ll. 23.

Trial counsel testified at the PCR hearing that he saw a problem with the chain and was able to keep the drugs out until the evidence custodian for the highway patrol testified that he received the drugs from SLED and kept them in his file cabinet. Then the chain was complete. App. 239, ll. 4 – App. 240, ll. 12.

The PCR judge ruled that Gregory failed to meet his burden of proof that trial counsel was ineffective regarding the chain of custody. The order stated that there was no deficiency in counsel's representation and so there was no prejudice to Gregory. App. 251. The judge found that trial counsel was thoroughly competent in his representation of Gregory.

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).

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain of-custody law:

Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]

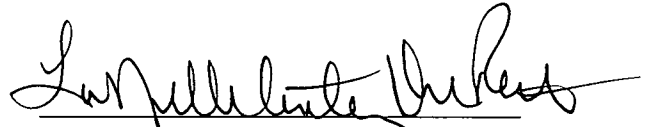
If the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

Gregory's trial attorney was ineffective for not objecting when the evidence technician for the South Carolina Highway Patrol, Corporal Johnny Price testified that the drugs were kept in an unlocked file cabinet in his office after he picked them up from SLED once testing was complete. App. 143, ll. 1 – App. 149, ll. 25. This was not a complete chain of custody as the drugs were fungible items and could have been tampered with.

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 16th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

THOMAS ARNOLD GREGORY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000418

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Thomas Arnold Gregory states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 6, 2012. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Thomas Arnold Gregory.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

This 16th day of October, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

J. Derham Cole, Circuit Court Judge

THOMAS ARNOLD GREGORY,

PETITIONER,

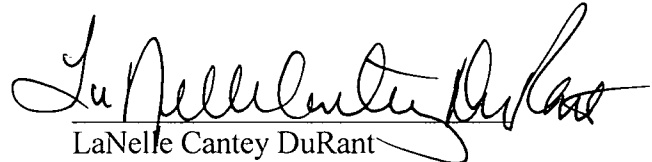
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Thomas Arnold Gregory, #279488, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of October, 2013.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day
of October, 2013.

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