STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO MARION COUNTY

THOMAS A. RUSSO, CIRCUIT COURT JUDGE

2009-UP-394

GLENN PERNELL, PETITIONER,

V.

STATE OF SOUTH CAROLINA, RESPONDENT.

PETITIONER'S AMENDED PRO SE BRIEF PURSUANT TO JOHNSON PETITION FOR WRIT OF CERTIORARI

Glenn Pernell, #263271
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Institution Q-2 A-209
430 Oaklawn Road
Pelzer, S.C. 29669

Pro-Se Petitioner

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ISSUES PRESENTED

I. DID APPEAL COUNSEL ERR FOR FAILING TO ARGUE ON APPEAL THAT THE PROBATIVE VALUE OF THE DISTRIBUTION CHARGE DIDN'T OUTWEIGH IT'S PREJUDICIAL EFFECT WHERE COUNSEL OBJECTED TO THIS AT TRIAL.

II. DID TRIAL COUNSEL ERR IN NOT GIVING THE COURT A LIMITING INSTRUCTION ON THE DISTRIBUTION CHARGE.

III. DID TRIAL COUNSEL ERR IN NOT PRESERVING ISSUE FOR APPEAL CONCERNING TESTIMONY ABOUT MARIJUANA.

STATEMENT OF THE CASE

Petitioner, Glen Pernell was convicted of trafficking in cocaine and trafficking in crack cocaine during the March 2007 term of the Marion County General Sessions Court before Judge Edward B. Cottingham and sentenced to consecutive twenty-five year prison terms. J.M. Long III represented petitioner at trial. Petitioner Appealed, but his convictions and sentences were Affirmed. See State v. Pernell, 2009-up-394 (filed July 20, 2009). J.M. Long represented petitioner on direct appeal also.

On December 14, 2009, petitioner filed PCR Application with the Marion County Office of the Clerk of Court. Subsequently, the Respondent filed a return in the case. On February 9, 2011, A PCR hearing was held at the Marion County Courthouse before Judge Thomas A, Russo. Tynika Claxton represented petitioner at the PCR hearing.

ARGUMENT I

DID APPEAL COUNSEL ERR FOR FAILING TO ARGUE ON APPEAL THAT THE PROBATIVE VALUE OF THE DISTRIBUTION CHARGE DIDN'T OUTWEIGH IT'S PREJUDICIAL EFFECT WHERE COUNSEL OBJECTED TO THIS AT TRIAL.

Appeal counsel and trial counsel is one in the same. At trial counsel objected to the prejudicial effect of the distribution charge, being that counsel objected there was no reasonably objective reason not to argue the issue on appeal.

The purpose of objecting is to preserve the issue for appellate review. Therefore it was clear ineffective assistance of counsel and Applicant was prejudice by it where he did not get a meritorious issue heard and ruled upon.

This Court should note that in the "Initial Brief of Appellant by counsel on page 5 it states verbatim", In this case, the trial court evidently permitted introduction of the evidence of the distribution under a common scheme or plan exception to State v. Lyle, 125 S.C. 406, 113 S.E. 803 (1923). Also see PCR transcript page 12 line 12-21.

This is grossly incorrect, the trial court did not do this. And the Court of Appeals stated so in the unpublished opinion No..2009-up-394, in footnote 5 holding that Appellant alleges that it was error to allow testimony about the controlled buy under the common scheme or plan exception. However the record indicates that the Court did not admit the evidence to show a common scheme or plan.

The Lyle exception is a clear error of law, where Lyle is only applicable to cases where the defendant admitted guilt or was found guilty to the prior charge to be called a prior bad act.

Applicant has not pled guilty or been found guilty of the charge, nor will he admit to anything but to the opposite, Applicant maintains his innocence. Pursuant to In re Winship, Supra, he is to be presumed innocent. Being that applicant is to be presumed innocent of the prior charge the Lyle exception to prior bad acts is inapplicable and the argument on Appeal by counsel is erroneous.

Therefore this case should be remanded back to the Court of Appeals and counsel appointed to brief, including but not limited to the issue of the probative value not outweighing its prejudicial effect.

ARGUMENT II

DID TRIAL COUNSEL ERR IN NOT GIVING THE COURT A LIMITING INSTRUCTION ON THE DISTRIBUTION CHARGE.

Counsel was ineffective for failing to have the jury instructed that applicant is to be presumed innocent of the distribution charge.

Law In re Winship, 90 S.Ct. 1068 (1970). The reasonable doubt standard applies in both state and federal proceedings. Sullivan v. Louisiana, 113 S.Ct. 2078, 2081 (1993). The Winship Court articulated three interests that the reasonable doubt standard protects. First, it protects the defendant's interests in being free from unjustified loss of liberty. 397 U.S. at 363. Second, it protects the defendants from the stigmatization resulting from conviction. Third it engenders

community confidence in the criminal law by giving "concrete substance" to the presumption of innocence.

In this regard, the Court stated that "it is critical that the moral force of the criminal law not be diluted by a standard of proof that leave people in doubt whether innocent men are being condemned". Id. at 364. In his concurring opinion, Justice Harlem noted that the standard is "bottomed on a fundamental value determination of our society, that it is far worse to convict an innocent man than to let a guilty man go free.

In this case the trial judge said he would let the evidence in of the distribution charge under the instruction that it is only being used for the purpose of showing the basis of the arrest. Tr./Tr. page 48, lines 10-22. And he, the judge, will permit the state to show what occurred but the jury will be instructed. The judge said to trial counsel that, "you might prepare what instruction you would have me do...If you have some other language that you would have me submit, let me consider it. Counsel was ineffective for failing to give the Judge language on the presumption of innocence to consider. And that the jury is not to in the slightest, form an opinion and/or consider whether Applicant is guilty or innocent of the distribution charge. Thus protecting Applicant ~~The protection Application~~ from stigmatization in which the reasonable doubt standard articulated in In re Winship, supra, is to protect.

Applicant is/was to be presumed innocent, factually innocent of the distribution charge while on trial for the other charges being critical that the moral force of the criminal law not be diluted by a standard that a jury considers whether one is guilty or innocent of a charge not being tried for, as a basis for considering whether one is guilty of another charge. Such standard does more than leave people in doubt whether innocent men are being condemned but is a gross miscarriage of justice.

The judge let this testimony in for the purpose of showing the basis of arrest. Being that Applicant was not contesting the basis of the arrest, there was nothing for the state to prove about the basis of the arrest. Compare State v. Garner, 403 S.E.2d 631 (1991). (prejudicial effect of evidence of other crimes outweighs its probative value when purpose of which it is admitted is not a contested issue).

Without counsels errors and had the jury been instructed that the Applicant is to be presumed innocent of the distribution charge and instructed that they are not to consider guilt or innocence of the charge, it is undisputable, more than a strong reasonable probability that the jury would of had a reasonable doubt respecting guilt. Based on the foregoing argument, petitioner request that the Court grant the petition and allow full briefing on the issue or vacate the conviction and remand for a new trial.

ARGUMENT III

DID TRIAL COUNSEL ERR IN NOT PRESERVING ISSUE FOR APPEAL CONCERNING TESTIMONY ABOUT MARIJUANA.

Applicant was prejudiced when counsel objected at trial about the testimony of marijuana and then did not preserve the issue for Appellate Court to review.

Counsel should have preserved this issue because any testimony or any introduction about marijuana at trial is tainted evidence.

This evidence becomes tainted when Agent Rouse first weighed the alleged marijuana blunt found in the ashtray together with the alleged marijuana found on applicant pursuant to a search incident to arrest. Trial transcript page 180 lines 8-11. Secondly in trial transcript page 178, lines 9-15 Agent Rouse states that he took custody of the marijuana blunt and had it in his custody from the time of applicants arrest until it was brought to court that day of trial. Therefore all

the alleged marijuana that was found during the incident to arrest and what Agent Rouse allegedly seen in plain-view is tainted.

Agent Rouse is not a chemist. There was not a chemist at trial to establish that the substance was marijuana. The reason for that is because Agent Rouse kept the substance in his possession from the time of Applicant arrest, until trial. Therefore Agent Rouse's own admission to his misconduct renders the states proof of chain of custody for untested substance fatally deficient, and admission of substance as marijuana is reversible error. Pursuant to State v. Joseph, 491 S.E.2d 275 (S.C. App. 1997) presence of a chemist at trial to establish that material is or contains substance stated is mandatory, not permissive.

Therefore counsel was clearly ineffective for not properly preserving the issue concerning the tainted testimony about marijuana. Applicant was prejudice by not having this meritorious issue heard and ruled upon. Thus, the trial court committed reversible error in admitting evidence without sufficient proof of chain of custody. See State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App 1997). Based on the foregoing Argument, Petitioner request that the Court grant the Petition and allow full briefing on the issue or vacate the conviction and remand for a new trial.

Please note: In my original pro-se my argument was: Did the PCR Court err and make an unreasonable determination of the facts surrounding trial counsels failure to move to suppress the drugs found in the vehicle where testimony of the Marion County Combined Drug Unit Lt. Rouse differ from PCR Courts finding of facts regarding how the drugs was obtained from the search of the vehicle subsequent to arrest:

On page 69 of the trial transcript lines 21-25, and on page 70 of trial transcript line 1. The officer states "once they got out of

the vehicle, their door was open. I could see inside of the vehicle. In the ashtray there was a blunt of marijuana in the ashtray. Based on that it gave me further cause to look further".

I went around to the drivers side and opened the door and in the seat of the car was a black pouch"...

The record shows that without the alleged blunt of marijuana in the ashtray the officer would not have went around to the drivers side to open the door. This shows the unreasonable determination of facts that the PCR Court used to dismiss my claim.

CERTIFICATE OF SERVICE

I certify that a true copy of the Pro-Se brief pursuant to Johnson Petition for Writ of Certiorari has been served upon the respondents by placing the same in the mail postage pre-paid and mailed to the following address:

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Columbia, S.C. 29201

The Supreme Court of South Carolina
Daniel E. Shearouse
Clerk of Court
Post Office Box 11330
Columbia, South Carolina, 29211

Sworn To And Subscribed Before
Me This 1st, Day of May 2012.
Steven T. McCarthy
Notary Public For South Carolina
My Commission Expires: January 7, 2016

RECEIVED
MAY 11 2012
S.C. SUPREME COURT