STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2013-000348

Wayne McLaughlin, ...Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

I. Did the PCR judge properly find trial counsel was effective in objecting to the introduction of Petitioner's statement to law enforcement?

II. Did the PCR judge properly find trial counsel was effective in moving to relieve a juror that appeared to have been asleep at various times during the trial?

STATEMENT OF THE CASE

In May 2008, the Marion County Grand Jury indicted Petitioner for two counts of distribution of cocaine base, third offense, and two counts of possession of cocaine with intent to distribute. (App. p. 267-268). The State elected to try Petitioner on one count each of distribution of cocaine base and possession of cocaine with intent to distribute. (App. p. 4). Ralph J. Wilson, Esquire, ("trial counsel") represented Petitioner. (App. p. 1). On May 22, 2008, the Honorable Howard P. King ("trial judge") convened a hearing on Petitioner's motion to suppress a statement made by Petitioner to law enforcement. (App. p. 1). On May 27, 2008, the trial judge denied the motion and Petitioner proceeded to trial before a jury. (App. p. 60-63). On May 28, 2008, the jury found Petitioner guilty of distribution of cocaine base and possession of cocaine with intent to distribute. (App. p. 202). The trial judge sentenced Petitioner to twenty-five years on each charge. (App. p. 213-214).

Petitioner filed a timely notice of appeal and Wanda H. Carter, Esquire, perfected the appeal. (Supp. App. p. 3). The South Carolina Court of Appeals affirmed Petitioner's conviction on November 12, 2010. (Supp. App. p. 1).

Petitioner filed an Application for Post-Conviction Relief on October 25, 2011. (App. p. 216). On October 18, 2012, the Honorable Thomas A. Russo ("PCR judge") convened an evidentiary hearing on Petitioner's application. (App. p. 230). Petitioner was present and represented by Daniel A. Selwa, II, Esquire. (App. p. 230). The PCR judge denied the application at the hearing and issued a written order on November 16, 2012. (App. p. 259; p. 262).

ARGUMENT

I. Standard of Review

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 668). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. First, the applicant must prove counsel's performance was deficient. Under this prong, the Court measures an attorney's performance by its "reasonableness under professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have 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." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe

v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

II. Probative evidence supports the PCR judge's finding trial counsel was not ineffective in objecting to the introduction of Petitioner's statement.

Petitioner asserts the PCR court erred by finding trial counsel was not ineffective when he did not make a contemporaneous objection to the introduction of Petitioner's statement after the trial judge ruled the statement inadmissible after a pre-trial hearing. However, probative evidence exists in the record to support the PCR judge's findings. Therefore, the PCR judge properly denied Petitioner's application.

Petitioner moved during May 22, 2008, pre-trial hearing to suppress a statement given to law enforcement. (App. p. 1). At the pre-trial hearing, Marion County Sheriff's Deputy Neal Rouse ("Rouse") testified he executed a search warrant on a building in Mullins. (App. p. 9). During the execution of the search warrant, Petitioner told Rouse "it's in there in the kitchen on the shelf."[1] (App. p. 29). Rouse testified this statement was not in response to any questions about what was in the building. (App. p. 31). Instead, the only question asked of Petitioner was whether he would give the officers the keys to the building. (App. p. 29). Trial counsel argued the questioning about keys was custodial interrogation under Miranda,[2] and the interrogation elicited the response about the location of the drugs. (App. p. 37). The trial judge took the motion under advisement until the day of trial, and trial counsel renewed his argument the day of trial. (App. p. 56). The trial judge ruled the questions about the keys were not designed to elicit statements protected by Miranda, and thus the statement about the location of the drugs

[1] Presumably this statement indicated the location of drugs located in the building.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

was not a result of custodial interrogation. (App. p. 62). Rather, the statement was a "voluntary statement on [Petitioner's] part made without any questioning or without any prompting[.]" (App. p. 63).

The State then called two witnesses before calling Rouse at trial. The first witness was the forensic technician at the State Law Enforcement Division ("SLED"). (App. p. 76). This witness testified to the chain of custody of the drug evidence. (App. p. 77-78). The second witness was the chemical analyst from SLED. This witness testified to the weight and composition of the drug evidence. (App. p. 83-86). The State introduced Petitioner's statement through the testimony of Rouse, who was the third witness called. (App. p. 96). Trial counsel testified he did not object again at that point because he believed the trial judge's prior ruling was final. (App. p. 248). He further testified he would have made a contemporaneous objection had there been some time between the ruling and the introduction of the evidence, but the statement came in almost immediately after the ruling. (App. p. 251-52).

Trial counsel was under no obligation to raise a contemporaneous objection to the introduction of the statement. Generally, a motion *in limine* is preliminary and "subject to change based on developments at trial." State v. Mueller, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995) (citing State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988)). However, the moving party need only renew his objection if developments during trial may warrant a change in the ruling. Id. (citing State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992)). Therefore, a final ruling that is not affected by the developments of trial need not

be renewed prior to the introduction of the challenged evidence. Id. at 269, 460 S.E.2d at 410. [3]

Here, the State presented no evidence regarding the statement between the trial judge's final ruling and Rouse's testimony. The only evidence presented was from SLED employees regarding the physical drug evidence. Rouse's testimony was the first instance of the presentation of evidence regarding Petitioner's statement. Thus, there was no evidence presented regarding the statement that could have led the trial judge to change his ruling. See id. at 268, 460 S.E.2d at 410 ("Because no evidence was presented between the ruling and Mr. Mueller's testimony, there was no basis for the trial court to change its ruling."). Therefore, trial counsel was not deficient because he was under no duty to make a contemporaneous objection.

Regardless, Petitioner was not prejudiced by trial counsel's performance. Miranda prohibits the use of "statements" stemming from "custodial interrogation" unless the accused is first advised of his Fifth Amendment rights. Miranda, 384 U.S. at 444. However, Miranda does allow the admission of a "spontaneous, free and voluntary exclamation of a defendant." State v. Redding, 252 S.C. 312, 324, 166 S.E.2d 219, 224 (1969). The fundamental import of the Fifth Amendment privilege is not whether a suspect in custody may talk to the police, but whether he can be "interrogated." Miranda,

[3] On direct appeal, the State argued Petitioner did not preserve the issue regarding admission of the statement because he made no contemporaneous objection. The Court of Appeals cited State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) for the proposition that "generally, a motion in limine is not a final determination and a contemporaneous objection must be made when the evidence is introduced at trial, unless the ruling on the motion in limine is made immediately prior to the introduction of the evidence in question[.]" State v. McLaughlin, Op. No. 2010-UP-503 (S.C. Ct. App. filed Nov. 12, 2010). The Court of Appeals then cites Doe v. U.S., 487 U.S. 201, 211 (1988), in addressing the merits of the issue. Thus, Respondent argued to the PCR judge that the Court of Appeals cited Forrester to indicate the issue was preserved. (App. p. 258). The PCR judge apparently agreed, finding trial counsel addressed the issue effectively. (App. p. 259). Therefore, Respondent contends Petitioner is incorrect in his assertion the Court of Appeals opinion held the issue was not preserved.

384 U.S. at 478. However, the privilege does not protect a suspect from being compelled to produce real or physical evidence. See Doe v. U.S., 487 U.S. 201, 210 n. 9 (1988) (being forced to surrender a key to a strongbox does not amount to testimonial communication).

In Petitioner's case, the Rouse's request for the key to the building did not constitute an "interrogation" within the scope of Miranda because Rouse was not attempting to elicit any verbal statement or admission of guilt from Petitioner. See Redding, 252 S.C. at 323, 166 S.E.2d at, 224. Rouse sought to receive a piece of physical evidence, not to compel Petitioner to reveal his own factual knowledge or thoughts. Thus, the request for the key was not the functional equivalent of direct or indirect "interrogation" and did not subject Petitioner to the "cruel trilemma" of "self-accusation, perjury, or contempt." Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990); see also State v. Franklin, 299 S.C. 133, 136, 382 S.E.2d 911, 913 (1989). Therefore, the statement regarding the location of the drugs was not in response to a custodial interrogation and the trial judge did not err in admitting it. Rather, it was a voluntary statement, the introduction of which is not barred by the Fifth Amendment. Miranda, 384 U.S. at 478; Franklin, 299 S.C. at 136, 382 S.E.2d at 913. Because the trial judge properly admitted the spontaneous statement made by Petitioner, Petitioner cannot show that renewing the objection would have resulted in a reversal of his conviction on appeal.

Trial counsel was under no duty to make a contemporaneous objection to the introduction of the statement and the trial judge properly admitted the statement over trial counsel's objection. Therefore, the record contains significant probative evidence that trial counsel acted reasonably and within professional norms when implementing Petitioner's trial strategy and that no prejudice resulted from trial counsel's actions.

Accordingly, the PCR judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

II. Probative evidence supports the PCR judge's finding trial counsel was not ineffective in moving to relieve a juror that appeared to have been asleep at various times during the trial.

Petitioner asserts the PCR judge erred by finding trial counsel was not ineffective when he did not when he did not request the trial judge examine a juror to determine if the juror had been sleeping. However, probative evidence exists in the record supports the PCR judge's findings. Therefore, the PCR judge properly denied Petitioner's application.

After the trial judge issued his charge, trial counsel asked the trial judge to remove a juror who appeared to be sleeping during various times during the trial. (App. p. 197-98). The trial judge denied the motion, finding the juror watched and listened throughout the trial. (App. p. 198). The trial judge could not conclude the juror was actually sleeping during arguments and the charge. (App. p. 199). At the PCR hearing, trial counsel testified he raised the sleeping juror issue to the trial judge. (App. p. 253). He further testified the trial judge would not have questioned the juror if he requested. (App. p. 253). More importantly, trial counsel testified he made a tactical decision not to question the juror because he did not want to question the juror's integrity and risk prejudicing the juror against Petitioner. (App. p. 253). The PCR judge found this strategy to be reasonable. (App. p. 265-66).

The PCR judge properly found trial counsel employed a reasonable trial strategy in not requesting further examination of the witness. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of

counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). The trial judge found the juror was not asleep. Counsel could have only challenged this finding by calling the juror to the stand. See State v. Smith, 338 S.C. 66, 73, 525 S.E.2d 263, 267 ("[T]he trial court found that the juror who appeared to be sleeping was in fact alert. Defendants apparently accepted this finding and did not ask the trial court to voir dire the juror or undertake further inquiry."). However, trial counsel articulated he did not want to run the risk of prejudicing the juror. Cf. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (valid trial strategy to not request curative instructions because it may focus jury on negative aspect of case). Therefore, he articulated a valid trial strategy for not calling the juror as a witness. See Stokes, 308 S.C. at 548, 419 S.E.2d at 779 (1992) (valid trial strategy not to call witness because "testimony would not have been of value to petitioner's case"). Regardless, Petitioner presented no evidence at the PCR hearing to prove further questioning the juror would have changed the outcome of his trial. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different).

Trial counsel articulated a valid strategic reason for not further questioning the trial judge's finding. Therefore, the record contains significant probative evidence that trial counsel acted reasonably and within professional norms when implementing Petitioner's trial strategy and that no prejudice resulted from trial counsel's actions. Accordingly, the PCR judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

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

By: _____
ATTORNEYS FOR RESPONDENT

January 16, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County

The Honorable Thomas A. Russo, Circuit Court Judge

Wayne McLaughlin,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Lanelle C. Durant
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 6th day of January, 2014

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

January 6, 2014

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Wayne Mclaughlin v. State of South Carolina**
Appellate Case No: 2013-000348

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua L. Thomas
Assistant Attorney General

JLT/nb
Enclosures

cc: Appellate Defender Lanelle C. Durant (2 copies)