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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable The Hon. Dale E Van Slambrook, Circuit Court Judge

ANTONIO RICARDO LEE,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2026-001206

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the PCR court correctly found trial counsel was ineffective in allowing the jury to be instructed no less than five times that it could infer knowledge or possession when a substance was found on property arguably under the Respondent's control?

STATEMENT OF THE CASE

On July 19, 2018, a search warrant was executed at an apartment on Hilton Head Island. Tr. 68, ll. 11 – 19. As a result of the search, cocaine, heroin and marijuana were found in the apartment. Tr. 217, ll. 4 – 17; Tr. 266, l. 20 – 274, l. 3. The question before the jury was who possessed and controlled those drugs. This question was central to Respondent's counsel during opening statements to the jury:

> Now, there's also been statements about Mr. Lee sharing an apartment with Ms. Vitto and her elderly parents. I don't believe you're going to hear any testimony that Mr. Lee shared an apartment with anybody.
>
> I do believe you may hear testimony that Mr. Lee was present when representatives from the Beaufort County Sheriff's Office executed a search warrant at an address of Paddleboat Lane, Hilton Head Island.
>
> After he was removed from the apartment, there were three other adult males in the apartment, Ms. Bridget Vitto, Mr. William Vitto, and Ms. Katherine Vitto. Mr. Lee, black male, one of the white males, two white females, and I believe you're going to hear testimony that only Mr. Lee is charged with possession of any type of narcotic.

App. 58, ll. 6 – 20.

Police believed Respondent "stayed" in bedroom 1 of the apartment since they found personal items of Respondent in the bedroom. App. 71, 2 – 72, l. 3. These personal items included a driver's license and other "mail" that contained an address in Ridgeland, not the address of the apartment. App. 129, l. 1 – 130, l. 1. Some narcotics and evidence associated with narcotics were found in bedroom 1. App. 93, l. 13 – 103, l. 10. Evidence of narcotics was also found in bedroom 2. App. 111, ll. 9 – 23. Narcotics and evidence of narcotics were found in bedroom 3, particularly two bags of cocaine. App. 112, l. 2 – 22. These bags, State's Ex. 56, contained 295.8 grams of cocaine. App. 217, ll. 12 – 20. Police confirmed three adults resided in

the apartment: Katherine Vitto, William Vitto, and Bridget Vitto. App. 125, ll. 11 – 25; 136, ll. 8 - 23. William Vito claimed Respondent was Bridget Vitto's boyfriend who stayed in the apartment with Bridget on occasion. App. 153, l. 4 – 154, l. 8. Vito asserted his fifth amendment rights during trial as a State's witness and refused to respond to questions concerning drugs in the apartment.[1] App. 157, l. 3 – 10.

During the charge to the jury, the trial court informed the jury, on multiple occasions, that Petitioner's possession and intention to distribute may be inferred from finding the substance on property under the Respondent's control. This was initially charged for possession of marijuana. App. 399, ll. 7 – 21. It was repeated for the charge of possession with the intent to distribute heroin.

> Possession may be either actual or constructive. Actual possession means that the cocaine was in the actual physical custody of the Defendant.
>
> Constructive possession means that the Defendant had dominion and control or the right to exercise dominion or control over either the cocaine itself or the property on which the cocaine was found. Mere presence at the scene where drugs were found is not enough to prove possession.
>
> The Defendant's possession may be inferred when a substance is found on the property under the Defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in the case and to be given the weight, value, and effect you decide it should receive. Two or more persons may have joint possession of a drug.

App. 400, ll. 6 – 22. It was repeated again for the "lesser included offense" of possession of heroin. App. 402, l. 23 – 403, l. 19. It was repeated again for the trafficking in cocaine charge.

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[1]"Although most of the cited cases deal with the prosecution's attempt to draw improper inferences, it has been recognized that neither the state nor the defendant should be allowed to call witnesses who either side knows will invoke the Fifth Amendment. . ." State v. Hughes, 328 S.C. 146, 152, 493 S.E.2d 821, 823 (1997).

App. 404, l. 8 – 405, l. 3. Again, the charge was repeated for the "lesser included offense" of possession with intent to distribute cocaine. App. 406, l. 9 – 407, l. 22.

Based upon trial counsel's failure to object to the improper charge regarding inferring knowledge or possession, the PCR court found trial counsel was deficient and that Respondent suffered prejudice. App. 614. The State filed a Rule 59(e), SCRCP, motion, asserting that the charge was a valid statement of the law at the time of trial. App. 622. The PCR court denied rehearing. App. 633.

The State sought certiorari and this Return follow.

ARGUMENT

The PCR court correctly found trial counsel was ineffective in allowing the jury to be instructed no less than five times that it could infer knowledge or possession when a substance was found on property arguably under the Respondent's control.

A. Standard of Review.

"There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (*citing* Strickland v. Washington, 466 U.S. 668, 687 (1984)). Second, the applicant "must show 'a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Rivers v. State, 446 S.C. 1, 11, 916 S.E.2d 335, 341 (2025) (*quoting* Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

"In an appeal from a PCR court, '[q]uestions of law are reviewed *de novo*, and we will reverse the PCR court's decision when it is controlled by an error of law.'" Jones v. State, 440 S.C. 14, 22, 889 S.E.2d 590, 595 (2023) (*quoting* Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016). "Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

B. The PCR court did not err as a matter of law in finding trail counsel was deficient in failing to object to a charge that impermissibly eliminated the burden of proof requirement for an essential element of the crime charged.

This charge creates impermissible presumptions and negates fundamental protections afforded by the presumption of innocence. Specifically, "if the State presents evidence the defendant had control over the property on which the drugs were located, then the trial court should deny a directed verdict motion. But, the mere existence of evidence the defendant had control over the property does not equate to a finding of constructive possession. *It remains the burden of the State to convince the jury the defendant had the requisite knowledge and intent.*" State v. Stewart, 433 S.C. 382, 389, 858 S.E.2d 808, 811 (2021) (emphasis added). In addition, "[t]he jury charge instructing a jury it may infer knowledge or possession when a substance is found on property under the defendant's control should no longer be given." Id., 433 S.C. at 391, 858 S.E.2d at 813. It certainly should not be given five times.

In seeking certiorari, the State would insulate trial counsel on the basis that an objection to the charge would have required foresight. This assertion insulates past decisions that were correct at the time:

> For an ineffective assistance claim, the PCR court must "determine whether counsel was ineffective at the time of the alleged error." Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019), *reh'g denied*, (September 27, 2019). Thus, the court must consider the law as it existed at the time of trial and "not as it has evolved today ...." Id. at 564, 832 S.E.2d at 601. Accordingly, trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes in the law ...." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501–02 (Ct. App. 2019)

As the PCR court noted, Stewart was decided in 2021 and Respondent's trial was on

August 12, 2019. This was more than a month after the Court of Appeals denied relief to Stewart rejecting the assertion that "the trial court erred in charging the jury on constructive possession. He asserts the jury charge allowed the jury to infer his knowledge and possession simply because the drugs were found on his property, thereby lowering the burden of proof. Stewart further argues the charge amounted to a charge on the facts." State v. Stewart, No. 2016-002524 (S.C. Ct. App. June 5, 2019), *aff'd in part, rev'd in part*, 433 S.C. 382, 858 S.E.2d 808 (2021). Thus, contrary to Petitioner's assertion that trial counsel would have needed clairvoyance to object to the improper charge, counsel merely would have needed to read the advance sheets to know to challenge the improper charge.

Moreover, Stewart itself dictates the fallacy of claiming "clairvoyance" was needed to object to the charge.

> We decided several cases *recently* addressing other jury charges "instructing juries on how to interpret and use evidence." *See* Pantovich v. State, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) (holding "the 'good character alone' charge ... is improper" and listing cases). In one of those cases, *Burdette*, the trial court informed the jury it may infer the existence of malice from the defendant's use of a deadly weapon. 427 S.C. at 494, 832 S.E.2d at 577. We held the charge is never proper, in part because "the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." 427 S.C. at 502-03, 832 S.E.2d at 582. In another case, *Cheeks*, we considered a "strong evidence" inference charge and stated it "unduly emphasizes that evidence, and deprives the jury of its prerogative both to draw inferences and to weigh evidence." 401 S.C. at 328-29, 737 S.E.2d at 484. The inference charge in this case had the same prejudicial effects we described in *Burdette* and *Cheeks*.

Stewart, 433 S.C. at 391–92, 858 S.E.2d at 813.

As noted in Pantovich v. State, decided a week before Respondent's trial, "[t]he modern trend, however, has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence." Id., 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019). Likewise, just before

Respondent's trial, the impropriety of comments telling the jury how to interpret and use evidence was emphasized in State v. Burdette. "A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted." Id., 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019). Pantovich, Burdette, and Stewart all relied upon State v. Cheeks, which noted "[e]ven if we did not agree with appellant that the 'strong evidence' charge undermines the mere presence charge, we hold that the 'strong evidence' charge is improper as an expression of the judge's view of the weight of certain evidence, and overrule *Solomon* on this point." State v. Cheeks, 401 S.C. 322, 329, 737 S.E.2d 480, 484 (2013).

Petitioner's claim that trial counsel would have needed clairvoyance to object to a charge that clearly violated the principals espoused in Pantovich, Burdette, and Cheeks is without merit. The basis for the objection was both plain and an obvious application of those cases, all of which were decided before Respondent's trial.

Moreover, trial counsel's explanation for his failure to object centered on his understanding of the law at the time, and not that the improper charge in some way *aided* Petitioner.

> No, I didn't. And -- and part of that is because I thought that the evidence was it was someone else's apartment, someone else was on the lease. And I didn't think that -- one, I thought the instruction was in line with the law at the time, and I thought that it didn't hurt Mr. Lee any more then the normal -- than just the regular charge about possession and control and stuff about an inference based your residence, I was using that to argue that these were Mr. Vito's drugs, because it was his residence. So I -- I was okay with the instruction as is, and I also thought it was consistent with the law at the time.

App. 595, ll. 13 – 24.

While counsel is not expected to be clairvoyant, counsel is expected to act reasonably and

conform to professional norms. *See* Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial"). "When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (*quoting* Strickland v. Washington, 466 U.S. at 690).

Trial counsel here did not need to be clairvoyant in order to realize the constructive possession charge improperly alleviated the State's burden of proof on a key element of the offense charged. "Due process requires the State to prove every element of a criminal offense beyond a reasonable doubt." Dervin v. State, 386 S.C. 164, 168, 687 S.E.2d 712, 713 (2009). At the time of Respondent's trial, counsel should have been aware of Pantovich, Burdette, and Cheeks. Counsel should have also been aware that this very charge was actively being challenged before our appellate courts in State v. Stewart, No. 2016-002524 (S.C. Ct. App. June 5, 2019).

Neither the PCR court nor Respondent was asking to hold trial counsel to the impossible standard of accurately predicting the future of appellate decisions--rather that Respondent was entitled to an attorney who represents him within the bounds of the prevailing professional norms. At the time of Petitioner's trial, Pantovich, Burdette, and Cheeks undermined any continuing validity on the charge used multiple times in Respondent's trial. The PCR court found trial counsel should have also been aware that this very charge was actively being challenged before our appellate courts as established in State v. Stewart, No. 2016-002524 (S.C. Ct. App. June 5, 2019), issued several months before Respondent's trial.

C. The PCR court's factual finding regarding prejudice is supported by the Record and must be affirmed.

As noted in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017), a PCR court's finding that "there is a reasonable probability that the result of the Applicant's trial would have been different" requires deference if supported by the Record. Id., 421 S.C. at 334, 806 S.E.2d at 723.

Trial counsel's claim that the improper charge "didn't hurt any more than normal" was in some way a valid strategic decision or negated prejudice is without merit. Allowing the jury to convict Respondent on something less than proof beyond a reasonable doubt as to his possession or control of the large quantity of drugs found in the Vito bedroom would not have been an independent strategic decision. Trial counsel affirmatively claimed that even had he realized the charging language was then subject to appellate challenge, he would not have raised the issue:

> Q. Do you have any reason to believe that the law would have changed between trial and direct appeal?
>
> A. It's -- it's not something I thought that particularly in Mr. Lee's case, because again, I didn't think that instruction hurt Mr. Lee, given the facts of the case and that the apartment was in the name of someone else. I actually thought I was -- could use that, but -- but it wouldn't have occurred to me to -- to challenge it. Even if I had known that -- that that particular instruction was -- was currently on appeal, it wouldn't have occurred me to challenge it, just because I didn't think it harmed him.

App. 604, l. 16 – 605, l. 2.

Certainly, the PCR court found trial counsel's assertion that the charge "didn't harm" petitioner lacked credibility: "This charge gave the jury license to place anything found in the house on Applicant personally, regardless of whether they were in another resident's bedroom, or even his person. Thus, Counsel's failure to object was both unreasonable and prejudicial." App. 619.

In this case, the State's theory relied extensively on Respondent being connected to the entire apartment since the large quantity of cocaine was found in William Vito's bedroom:

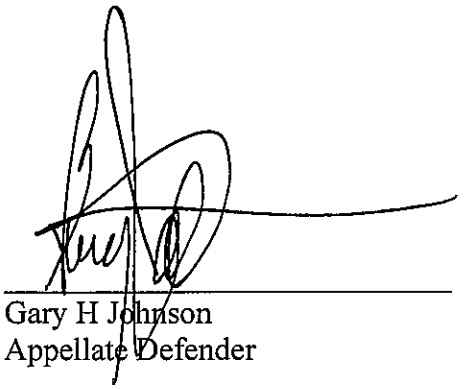
> Who was there? Antonio Lee. *He had free range of this apartment. He had access to every room. He had opportunity to go in every room.*
>
> Now, you've heard a little bit from Squires how there was a bag found on William Vitto. We aren't here for William Vitto. We are here for Antonio Lee.

App. 346, ll. 13 – 18 (emphasis added). In fact, according to the State, one should expect a drug dealer to "hide" his product in other people's bedroom: "You heard from Squires that drug dealers have a habit of hiding their drugs within an apartment or residence. Because they're sneaky." App. 348, l. 25 – 349, l. 2.

This argument, combined with the trial court's charge allowing the jury to infer possession "when a substance is found on the property under the Defendant's control" and that two "or more persons may have joint possession of a drug" allowed the jury to convict Respondent solely on the presumption of possession even if the jury believed the drugs found in Vito's bedroom were in fact Vito's drugs. App. 400, ll. 6 – 22. The Record clearly supports the PCR court's finding of prejudice and requires affirmance as dictated by Briggs.

CONCLUSION

This Court should deny review as the PCR court's decision is both supported by the Record and not based upon an error of law.



Gary H Johnson
Appellate Defender

ATTORNEY FOR RESPONDENT

This 9th day of November, 2026.