STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

STEVEN MICHAEL LECROY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-000745

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court err in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to timely object to the admission of Petitioner's statement to police when the statement was not voluntary because the police used a taser on Petitioner three times and Petitioner was in severe pain just prior to his statement?

STATEMENT

Indictments

On December 12, 2007, the Richland County Grand Jury indicted Petitioner Steven Michael Lecroy on the charges of (1) trafficking in methamphetamine 3rd offense; (2) possession of a controlled substance (alprazolam and diazepam) 2nd offense; and (3) possession of marijuana 2nd offense. App. 473-483.

Trial and Sentence

On February 24-25, 2009, a trial was held in Petitioner's absence before the Honorable J. Michelle Childs and a jury. App. 1. Petitioner was represented by J. Rhodes Bailey and James D. Cooper, III. The State was represented by Theodore N. Lupton. App. 1. The jury returned a verdict of guilty on all charges as indicted. App. 354, l. 12 – 355, l. 2. Judge Childs sealed the sentences. App. 369, ll. 6-9.

On September 9, 2009, Petitioner appeared before Judge Childs for sentencing. App. 371-374. Judge Childs read the sealed sentences and sentenced Petitioner to (1) one year on the possession of a controlled substance; (2) one year on the possession of marijuana; and (3) twenty-five years on the trafficking methamphetamine 3rd offense. All sentences were to run concurrently. App. 373, l. 8 – 374, l. 5.

Direct Appeal

Petitioner filed a direct appeal to the South Carolina Court of Appeals. Petitioner was represented by LaNelle Cantey Durant of the Office of Appellate Defense. On October 11, 2011, the Court of Appeals affirmed Petitioner's convictions, holding that whether the Trial Court erred in admitting Petitioner's statement claiming ownership of the drug evidence found at his residence was not preserved for appellate review. App. 376-377.

PCR Application and Evidentiary Hearing

On May 8, 2012, Petitioner filed his application for post-conviction relief ("PCR") alleging, among other things, that his trial counsel failed to preserve for appellate review whether the Trial Court erred in admitting Petitioner's statement to police. App. 378-388. The State filed a Return on June 4, 2012. App. 389-395.

An evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. on January 17, 2013. App. 396-456. Petitioner was represented by Robert FitzSimons, and the State was represented by Assistant Attorney General Robert D. Corney. App. 396. Petitioner's trial counsel, John Rhodes Bailey and James D. Cooper, III, both testified. App. 400-450. Petitioner did not testify at the hearing.

Order of Dismissal

Judge Cooper filed his Order of Dismissal on March 8, 2013 denying Petitioner's PCR application. App. 458-470. Judge Cooper found that while trial counsel had not posed a contemporaneous objection to the introduction of Petitioner's statement made to police, there was no "'reasonable probability' that but for counsel's failure to preserve the admissibility of [Petitioner's] statement for direct appeal review by contemporaneous objection, the ultimate outcome of [Petitioner's] case would have been different." App. 463. More specifically, Judge Cooper ruled that the Court of Appeals would not have found the trial judge erred in admitting the statement and Petitioner could therefore not show any resulting prejudice from his trial counsel's failure to object to the admission of his statement. App. 466.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to timely object to the admission of Petitioner's statement to police when the statement was not voluntary because the police used a taser on Petitioner three times and Petitioner was in severe pain just prior to his statement.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted).

Relevant Facts

Petitioner lived with his elderly mother in Columbia. App. 101, ll. 1 – 3; 138, ll. 21 – 25; 139, ll. 1 – 2. On January 25, 2007, at 9:30 A.M., sheriff's deputies knocked down the front door of the home where Petitioner lived, in the words of the deputies, a "dynamic entry" using a "battering ram." The deputies had a search warrant to search for drugs and related items. App. 101, ll. 3 – 5; 137, ll. 10 – 25; 138, ll. 1 – 25; 139, ll. 1 – 14.

The deputies found Petitioner in his bedroom in the bed with pajama pants on wearing a dog collar and leash. App. 140, ll. 1 – 25; 141, ll. 1 – 15; 187, ll. 14 – 25; 172, ll.

10 – 25; 173, ll. 1 – 23. Petitioner refused to get out of bed and allegedly refused to show his hands. When the deputies tried to forcefully remove him from the bed, Petitioner allegedly began resisting by screaming, spitting, and kicking. Investigator Anthony Branham used his taser on Petitioner three times until Petitioner "was compliant to his verbal commands." Petitioner was then handcuffed. App. 90, ll. 1 – 25; 141, ll. 16 – 25; 142, ll. 1 – 6.

When the deputies searched Petitioner's bedroom, they found drug pipes; baggies with white powdery substance in them at several places; pills; scales; and marijuana cigarettes. App. 148 – 168. The drugs were tested by the forensic chemist, James Farmer, with the Richland County Sheriff's Department, and were determined to be methamphetamine; butanediol; alprazolam (xanax); Diazepam; Valium; and Flexeril. App. 273, ll. 13 – 25; 274, ll. 1 – 25; 279, ll.1 – 25; 280, ll. 1 – 25; 281, ll. 1 – 25; 282, ll. 1 – 25; 283, ll. 1 – 25; 284, ll. The total weight of methamphetamine was in excess of ten grams but less than twenty-eight grams, and Petitioner was charged with trafficking. App. 169, ll. 1 – 20.

At trial, evidence was presented surrounding the circumstances in which statements by Petitioner to the police were made. With respect to the use of a taser on Petitioner, Investigator Branham explained to the jury that the taser was a stun gun that sent a 50,000 volt electric charge into the person. There were two ways to use the taser. One was to place a cartridge on the end of the stun gun and deploy two prongs that could shoot out approximately 25 feet into the person. The 50,000 volt charge would go into the person when the prongs hit the person. App. 142, ll. 1 – 18.

The second way to use the taser was to remove the cartridge and do a "drive stun" call where the taser was applied directly to the skin or clothing of the person, and then the electric charge went into the person. Each application could last about five seconds. He used the second technique with Petitioner and applied the taser gun to Petitioner's back three times. App. 142, ll. 19 – 25; 143, ll. 1 – 15.

Investigator Branham said that he yelled "taser" three times before using it and that he told Petitioner he was going to use the taser unless Petitioner showed his hands. App. 143, ll. 16 – 25. He said he did not use the taser for the full five seconds but only about one to two seconds with each shot. Investigator Branham explained that the taser affected the muscles but the effects went away once the taser was turned off. App. 144, ll. 1 – 25; 145, ll. 1 – 6. Then Investigator Branham explained that their policy is to call EMS and have the person checked by them each time they use the taser on someone. App. 145, ll. 24 – 25; 146, ll. 1 – 25.

Investigator Branham stated that after putting Petitioner into handcuffs, they took him to the living room and sat him on the sofa. Petitioner began complaining of back pain as he said he had a sciatic nerve problem from a car accident years earlier. Investigator Branham said Petitioner was "noticeably in pain" so they moved the handcuffs from the back to the front so Petitioner could be more comfortable. App. 145, ll. 8 – 22.

The solicitor asked Investigator Branham if they transported Petitioner to jail after finding the drugs as they usually did when they found drugs. Investigator Branham said they did not due to Petitioner's condition. He stated:

> Due to [Petitioner's] condition at the time, he was still complaining of, you know—once he got out of his comfortable position, he indicated that his back was still hurting and spasming. He tried to get up, put clothes on so we

> could transport him to jail. He immediately went into some type of back spasm, and I know from experience that our jail will not take him in that condition. So I talked to him, asked him if he would go see his doctor and get himself squared away and turn himself in later on, and he agreed to do that.

App. 169, ll. 21 – 25; 170, ll. 1 – 14.

Investigator Branham explained again that after they had finished all the paperwork, they then advised Petitioner they needed for him to get dressed for them to transport him to jail. When Petitioner stood up, he started screaming in pain. App. 170, ll. 24 – 25; 171, ll. 1 – 6.

Sergeant Michael Poole, who eventually took Petitioner's statement, testified that he was probably the second or third person to enter Petitioner's bedroom. App. 207, ll. 1 – 25; 208, ll. 1 – 25. He observed Petitioner being tased three times. The taser gun was pushed into Petitioner for a five second charge three times, contrary to Branham's testimony. App. 90, ll. 1 – 25; 91, ll. 1 – 7. Sergeant Poole said the purpose of the taser was to obtain compliance with a command. App. 106, ll. 22 – 24. He agreed that the taser was an electrical shock device. App. 107, ll. 1 – 13.

Sergeant Poole was aware that Petitioner had a sciatic nerve problem when they placed him on the sofa as he helped move the handcuffs from the back to the front. He said that if Petitioner moved even slightly, Petitioner experienced pain. App. 209, ll. 1 – 20. Sergeant Poole said Petitioner was in "obvious pain." App. 231, ll. 1 – 8.

Sergeant Poole took a statement from Petitioner at the home after EMS had checked Petitioner. He asked Petitioner if he were okay and comfortable to which Petitioner replied that he was fine. App. 210, ll. 1 – 23. Sergeant Poole took the statement "at least 30

minutes" after the tasing. Sergeant Poole claimed "there really were no effects of tasing." App. 210, ll. 24 – 25; 211, ll. 1 – 15.

Investigator John Lutz also participated in the execution of the search warrant at Petitioner's home. He said that he escorted Petitioner to the living room and had him lay on the couch because Petitioner's back "was causing him pain." App. 185, ll. 8 – 16; 186, ll. 1 – 25; 187, ll. 1 – 19.

Investigator Damon Robertson additionally participated in the execution of the search warrant. He was the "tool man" or the person who made the forced entry. He also inventoried all items removed from the residence. App. 192, ll. 12 – 20; 193, ll. 1 – 25. He entered the bedroom of Petitioner and tried to restrain him. Investigator Robertson knew Petitioner was tased, and he testified that EMS was always called to check the person's "vitals." App. 194, ll. 1 – 25; 196, ll. 6 – 24. He asserted that Petitioner was screaming out like he was in pain. However, once on the sofa, he appeared to get comfortable. App. 197, ll. 1 – 24.

Sergeant Poole said he read Petitioner's rights to Petitioner who said he understood his rights and did freely give up his rights. App. 226, ll. 4 – 25; 227, ll. 1 – 9. In his statement, Petitioner admitted that the marijuana and methamphetamine were his drugs and that he sold methamphetamine just to his friends. App. 222, ll. 10 – 25; 223, ll. 1 – 20.

Trial counsel argued pretrial that the statement was involuntary because Petitioner had been tased with electric shock and the officers knew about his physical condition. Trial counsel asked for the statement to be suppressed. App. 109, ll. 10 – 25; 110, ll. 1 – 25; 111, ll. 1 – 10. The Trial Court denied trial counsel's motion and ruled the statement admissible. App. 114, ll. 23 – 25.

The statement was admitted by the State into evidence during the testimony of Sergeant Poole. App. 222, l. 25 – 226, l. 13. Trial counsel did not make any contemporaneous objection to the admissibility of the statement at this point. Therefore, the Court of Appeals held that whether the Trial Court erred in admitting Petitioner's statement claiming ownership of the drug evidence and admitting to selling methamphetamine was not preserved for appellate review. App. 376-377. The Court of Appeals did not rule on the merits of the issue and made no finding that the statement would have been admissible even if the issue had been preserved.

Deficient Performance and Prejudice

The Trial Court committed reversible error by admitting Petitioner's involuntary statement, and had Petitioner's trial counsel timely objected to Petitioner's statement, this error would have been reversed on appeal.

On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. Id. The State bears the burden of showing the statement of the defendant was voluntary. Id. at 382, 652 S.E.2d at 450.

The test of voluntariness is "whether a defendant's will was overborne" by the circumstances surrounding the given statement. The due process test takes into consideration the totality of all surrounding circumstances-both the characteristics of the accused and the details of the interrogation. Id. at 384, 652 S.E.2d at 451 (citing Dickerson v. United States, 530 U.S. 428, 434 (2000)).

In Withrow v. Williams, 507 U.S. 680 (1993), the Supreme Court of the United States set forth a non-exclusive list of factors which may be considered in the totality-of-the-circumstances analysis:

> Under the due process approach . . . courts look to the totality of circumstances to determine whether a statement was voluntary. Those potential circumstances include not only the crucial element of police coercion, Colorado v. Connelly, 479 U.S. 157, 167 (1986); the length of the interrogation, Ashcraft v. Tennessee, 322 U.S. 143, 153–154 (1944); its location, see Reck v. Pate, 367 U.S. 433, 441 (1961); its continuity, Leyra v. Denno, 347 U.S. 556, 561 (1954); the defendant's maturity, Haley v. Ohio, 332 U.S. 596, 599–601 (1948) (opinion of Douglas, J.); education, Clewis v. Texas, 386 U.S. 707, 712 (1967); ***physical condition***, Greenwald v. Wisconsin, 390 U.S. 519, 520–521 (1968) (per curiam); and mental health, Fikes v. Alabama, 352 U.S. 191, 196 (1957).

507 U.S. at 693–94 (emphasis added).

In State v. Breeze, 379 S.C. 538, 665 S.E.2d 247 (Ct. App. 2008), the Court of Appeals ruled that Breeze properly waived his Miranda rights and the trial court correctly admitted Breeze's statement. Breeze argued his statement was not voluntary because his statement occurred shortly after a physical altercation between him and police where the police sprayed him with pepper spray. Id. at 544, 665 S.E.2d at 250. The Court of Appeals rejected this argument, holding the evidence presented showed that Breeze was not threatened in any way to make a statement and prior to questioning, the officers offset the effects of the pepper spray by decontaminating Breeze with an aerosol water bottle. Id. at 544, 665 S.E.2d at 251.

Petitioner's case is distinguishable from Breeze in that the four officers agreed that Petitioner was in obvious pain. Petitioner had a preexisting condition of the sciatic nerve problem when the officers gave him an electric shock directly into his back.

Petitioner's statement was not voluntary viewing the totality of the circumstances. He was in obvious pain; he was awakened by officers bursting down the door of his home. He had the sciatic nerve condition. The officers said there were no after effects of tasing but that is contradictory to their policy of having to call EMS to check the person's vital signs after tasing. The State did not prove by a preponderance of the evidence that Petitioner voluntarily waived his rights as he knew the officers had the capability to use the taser again.

It cannot be said beyond a reasonable doubt that the admission of Petitioner's statement that the drugs belonged to him and that he sold methamphetamine did not contribute to the jury's verdict finding Petitioner guilty of trafficking methamphetamine and possession of marijuana and a controlled substance. The solicitor highlighted Petitioner's statement multiple times during closing argument to the jury, emphasizing at one point that the statement was enough for a conviction for trafficking: "[T]he statement clearly states, my drugs, my meth, I only sell meth. That is enough for the conviction." App. 304, l. 13 – 305, l. 7; 306, l. 8; 311, ll. 4 – 18; 312, l. 9; 313, ll. 3-4; 314, ll. 6-8. Petitioner's statement would have been suppressed by the Court of Appeals had trial counsel properly objected to the statement. Therefore, Petitioner is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Steven Michael Lecroy requests that this Court grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of February, 2014.

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IN THE SUPREME COURT

Certiorari to Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

STEVEN MICHAEL LECROY,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

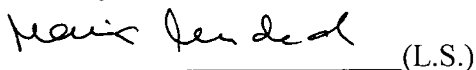
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Steven Michael LeCroy, #282554, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 27th day of February, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of February, 2014.


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