

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

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S.C. Supreme Court

DONOVAN MURRAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001267

JOHNSON PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
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

INDEX

INDEX 1

ISSUE PRESENTED..... 2

STATEMENT..... 3

STATEMENT OF FACTS..... 6

ARGUMENT 12

The PCR court erred in finding trial counsel effective in stipulating to the chain of custody of the drug evidence where the evidence technician of the North Charleston Police Department utterly failed in her report to identify what evidence she received from Officer Patricia Jourdan and where Officer Jourdan was unavailable to testify at trial as to what evidence she delivered to the evidence technician.

CONCLUSION..... 15

PETITION TO BE RELIEVED AS COUNSEL 16

ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel effective in stipulating to the chain of custody of the drug evidence where the evidence technician of the North Charleston Police Department utterly failed in her report to identify what evidence she received from Officer Patricia Jourdan and where Officer Jourdan was unavailable to testify at trial as to what evidence she delivered to the evidence technician?

STATEMENT

Indictments

On March 3, 2008, Petitioner Donavan Murray was indicted by the Charleston County Grand Jury for (1) trafficking cocaine base (crack cocaine) of ten grams or more; (2) possession with intent to distribute crack cocaine within proximity of a school; (3) possession with intent to distribute cocaine ("PWID"); (4) PWID cocaine within proximity of a school; and (5) possession of a firearm during the commission of a violent crime. App. 8, l. 22 – 15, l. 11; 982-983; 985-986.

Trial and Guilty Verdict

On July 7-9, 2008, Petitioner was tried before the Honorable Deadra L. Jefferson and a jury. App. 1. Petitioner was represented by Daniel L. Prenner, and the State was represented by Assistant Solicitors Peter M. McCoy, Jr. and E. Culver Kidd, IV. Id.

The jury found Petitioner guilty of PWID cocaine and PWID cocaine within proximity of a school. App. 765, l. 25 – 767, l. 8. The jury found Petitioner not guilty of trafficking crack cocaine, not guilty of the associated proximity charge, and not guilty of possession of a firearm during the commission of a violent crime. App. 767, l. 23 – 770, l. 6.

After the verdict, Judge Jefferson sentenced Petitioner to serve ten years for PWID cocaine in proximity to a school and to serve fifteen years incarceration and pay a \$50,000 fine for PWID cocaine, suspended upon the service of fifteen years incarceration. Judge Jefferson ordered that the sentences be served concurrently, with credit for time served. App. 798, l. 13 – 799, l. 9.

In addition, Judge Jefferson revoked Petitioner's probation in another matter in full, with the revocation to be served concurrently with the sentence imposed and with credit for time served. App. 803, l. 15 – 804, l. 8.

Direct Appeal

Petitioner filed a direct appeal to the South Carolina Court of Appeals. He was represented by M. Celia Robinson of the Office of Appellate Defense. The Court of Appeals affirmed his convictions on September 20, 2011, holding the Trial Court did not err in admitting (1) certain statements made by Petitioner in violation of his Miranda¹ rights; and (2) evidence and testimony regarding his possession of prescriptions drugs without a prescription in violation of Rules 403 and 404(b), SCRE. App. 803-807.

PCR Application, Evidentiary Hearing, and Order of Dismissal

On November 8, 2011, Petitioner filed an application for post-conviction relief ("PCR"). App. 808-819. The State filed its Return on May 2, 2012. App. 820-826.

Petitioner was first represented in his PCR by Adam W. Breaux, and the case was originally scheduled for the December 2012 term of court in Charleston County. Supp. App. 1. On December 6, 2012, Judge Roger M. Young, Sr. continued the case to the next term of PCR court and ordered that Petitioner was allowed to amend his PCR application within ten days. Supp. App. 1.

Petitioner's attorney, Adam Breaux, however, did not move to amend Petitioner's PCR application and instead had Mark A. Peper substituted as counsel on January 7, 2013 without Petitioner's knowledge. App. 834, ll. 13-14; 835, ll. 18-25; Supp. App. 2.

¹ 384 U.S. 436 (1966).

The evidentiary hearing occurred fifteen days later on January 22, 2013 before the Honorable Markley Dennis, Sr. App. 827-937. Petitioner was represented by Mark A. Peper, and the State was represented by Assistant Attorney General Ashleigh R. Wilson. App. 827.

Mark Peper moved on behalf of Petitioner to continue the evidentiary hearing because Petitioner did not believe that his attorney appointed only fifteen days earlier and who had only spoken to Petitioner the morning of the hearing was prepared to proceed. App. 832, l. 2 – 836, l. 4. Mr. Peper, however, stated that he had investigated the case and felt comfortable going forward with the hearing. App. 836, ll. 5-10. The State additionally consented to the one amendment that Petitioner sought to add – an allegation of ineffective assistance of appellate counsel. App. 837, l. 1 – 840, l. 16. Judge Dennis granted the motion to amend the PCR application to include the claim of ineffective assistance of appellate counsel and denied the motion to continue the hearing. App. 840, l. 17 – 841, l. 4.

At the evidentiary hearing, Petitioner and his trial counsel, Daniel L. Prenner, both testified. App. 841-929.

On February 28, 2013, Judge Dennis filed his Order of Dismissal denying Petitioner's PCR application. App. 958-974. Petitioner moved to reconsider the Order of Dismissal on March 1, 2013, which Judge Dennis denied by order filed April 22, 2013. App. 975-981.

This petition for writ of certiorari follows.

STATEMENT OF FACTS

Relevant facts from trial

On December 12, 2007, at approximately 1:30 in the morning, Lieutenant Christopher Johnson of the North Charleston Police Department was dispatched to the Relax Inn on Ashley Prosphate Road to assist the initial dispatch officer on a drug activity call. App. 266, l. 13 – 267, l. 3; 272, l. 3 – 273, l. 23; 324, l. 7-22; 327, ll. 16-22. There had been a call from a person named C.C. Derrick reporting drug activity from room 223. This C.C. Derrick left a telephone number, but officers made no attempt to contact C.C. Derrick before immediately setting out to investigate the alleged complaint. App. 266, ll. 2-4; 304, ll. 9-25; 334, l. 23 – 336, l. 8.

Lieutenant Johnson, who was driving an unmarked vehicle, at first patrolled the parking lot of the Relax Inn to see if he noticed any suspicious persons walking in and out of the room or in that area. He did not see anything suspicious. He then proceeded to Room 223 and met up with Officer Patricia Jourdan, the initial dispatch officer, who was also heading to the room at the same time. App. 266, ll. 4-25.

The two officers went to Room 223 and knocked on the door. Edward Ickes opened the door and looked surprised that two uniformed officers were standing at his door. The officers advised Mr. Ickes that there was a report of drug activity coming from this room. Lieutenant Johnson asked Mr. Ickes if the room was registered to him, and Mr. Ickes advised that the room was registered in his name. Lieutenant Johnson asked Mr. Ickes if the officers could come into the room, and Mr. Ickes said yes. When Mr. Ickes opened the door wider, the officers noticed a black male in the room who was later identified as Petitioner. App. 275, l. 1 – 276, l. 5.

The officers also noticed two pink colored tablets on the bed. App. 305, ll. 11-14. According to Lieutenant Johnson, Petitioner was very agitated and was making statements to Mr. Ickes like “don’t let him in the room. You don’t have to let him in the room. They need a search warrant. You don’t have to talk to them.” App. 305, ll. 15-25.

Petitioner spoke with Officer Jourdan and said the pills were his, that the pills were Percocet, and that he did not have a prescription for the pills. App. 306, ll. 11-21.

Within a couple of minutes, another back-up officer, Darren Cobb, arrived. Petitioner was still agitated and at one point allegedly “made a swift movement towards one of the beds, underneath the bed.” App. 307, ll. 3 – 20. Because the officers did not know if any weapons were in the room, Officer Cobb placed Petitioner in handcuffs. App. 307, ll. 20-24.

Lieutenant Johnson took Mr. Ickes outside into the breezeway to talk with him. Mr. Ickes was scared and nervous but very cooperative according to Lieutenant Johnson. App. 307, l. 25 – 16. Mr. Ickes gave Lieutenant verbal and written consent to search the hotel room that he had rented. He also told Lieutenant Johnson that there were other drugs in the room and that he would point out where in the room those drugs were located. App. 309, ll. 1 – 25.

During the search of the room, the officers retrieved:

- (1) a Colt firearm in a drawer of a nightstand located farthest from the door of the hotel room;
- (2) a dark colored bag containing around twenty-five grams of crack cocaine found in the same nightstand drawer as the firearm;
- (3) approximately eight grams of powder cocaine in another dark colored bag found in the same nightstand drawer farthest from the door; and

- (4) a prescription bill bottle found in the nightstand closest to the door containing two clear baggies in it, one bag containing powder cocaine and one bag containing crack cocaine. This bottle contained a label indicating it was from the Veteran's Administration. Mr. Ickes asserted at trial that this prescription bottle did belong to him.

App. 310, l. 3 – 319, l. 9; 349, ll. 11-22; 363, l. 19 - 368, l. 1; 370, ll. 4-9; 401, l. 14 – 402, l. 14; 432, ll. 13-19; 518, l. 14 – 519, l. 8; 526, l. 22 – 527, l. 8.

Jill Clark, a forensic scientist employed by the South Carolina Law Enforcement Division (“SLED”), tested the drug evidence and determined the evidence to be the following:

- (1) 23.14 grams of crack cocaine;
- (2) 7.76 grams of powder cocaine;
- (3) 0.42 grams of powder cocaine, the cocaine found in a baggie in the prescription pill bottle; and
- (4) 0.17 grams of crack cocaine, the crack cocaine found in a baggie in the prescription pill bottle.

App. 425, l. 25 – 426, l. 16; 431, l. 19 – 433, l. 3.

Both Petitioner and Mr. Ickes were arrested and both charged with trafficking crack cocaine, PWID cocaine, the associated proximity charges, and possession of a firearm during the commission of a violent crime. App. 362, l. 25 – 362, l. 3; 495, l. 21 – 496, l. 5; 531, l. 22 – 532, l. 1. Mr. Ickes' charges were still pending at the time of Petitioner's trial. App. 499, ll. 17-20.

Mr. Ickes claimed in a written statement that he was just a user of drugs and that the drugs all belonged to Petitioner. App. 330, ll. 4-10. At trial, Mr. Ickes claimed Petitioner came by Mr. Ickes' hotel room, and Mr. Ickes purchased some cocaine from Petitioner. Mr. Ickes claimed he was just a user of cocaine. App. 502, l. 15 – 504, l. 2. Despite telling

police the night of the incident that all the drugs belonged to Petitioner, at trial Mr. Ickes stated that the drugs found in the prescription pill bottle did belong to him. App. 518, l. 14 – 519, l. 8; 526, l. 22 – 527, l. 8; 536, ll. 14-21. On cross-examination, Mr. Ickes admitted that he had been previously convicted in Ohio for attempted trafficking of marijuana. App. 593, ll. 10-14.

At trial, the following stipulation between the State and the defense was read by the solicitor to the jury:

The stipulation that we're placing on the record today involves a case agent in this case who is Officer Patricia Jourdan, who is on vacation right now. She is the actual one who takes the drugs from the hotel room, bags the drugs, and takes them and places them into the evidence locker where the chain of custody picks up with Alex Teachey who testified earlier today. We are stipulating to the fact that the chain has not been broken, along with Mr. Prenner and I, and that Patricia Jourdan's link of the chain of custody is secure and that everything was properly managed and, properly the whole, the whole – it was a proper function

App. 598, l. 14 – 599, l. 14.

The jury ultimately found Petitioner not guilty of trafficking crack cocaine, the associated proximity charge, and the possession of a firearm during the commission of a violent crime charge. App. 767, l. 23 – 770, l. 3. The jury did, however, find Petitioner guilty of PWID cocaine and that associated proximity charge. App. 766, l. 5 – 767, l. 8.

Relevant facts from PCR Hearing

Petitioner testified that he believed his trial counsel's representation of him was "very ineffective." App. 843, ll. 20-21. He believed his trial counsel failed to conduct a reasonable investigation, failed to adequately prepare for trial, and made unprofessional judgments. App. 844, ll. 1-4.

Petitioner further testified that his trial counsel failed to challenge the chain of custody at trial and agreed upon the stipulation regarding the chain of custody even though Petitioner did not agree to this stipulation. App. 847, ll. 4-15. He believed the chain of custody was broken when the 0.17 grams of crack cocaine was initially weighed with the powder cocaine when the arrest warrants were obtained. App. 847, l. 21 – 851, l. 5.

Petitioner also asserted that Jill Clark's drug analysis report was not given to Petitioner prior to trial and in fact he did not even see this report until after trial when he requested his trial counsel's entire file. App. 851, l. 20- 852, l. 20; 944-945 (Petitioner Exhibit 2).

Petitioner also testified that he was not provided by his trial counsel with the chain of custody form completed by Alex Teachey. This chain of custody form was incomplete and failed to contain any description at all of the substance or container delivered by Officer Patricia Jourdan to Alex Teachey, the evidence technician employed by the North Charleston Police Department. App. 853, l. 11 – 854, l. 12; 946 (Petitioner Exhibit 3).

Petitioner testified that had he seen this chain of custody document prepared by Alex Teachey prior to trial, he would have objected to his trial counsel's stipulation at trial that the chain of custody had not been broken. App. 854, l. 19 – 855, l. 5; 879, ll. 6-17. Petitioner asserted that Alex Teachey's failure to include any description of the evidence she received from Officer Jourdan completely broke the chain of custody thus rendering the drug evidence against Petitioner inadmissible at trial. App. 854, l. 25 – 855, l. 7. He stated his trial counsel should have discovered that the chain of custody of the drugs was broken and moved to have had the drug evidence suppressed. App. 873, ll. 1 – 14.

Petitioner iterated at the PCR hearing that he never received the Alex Teachey chain of custody form from his trial counsel prior to trial and that his trial counsel never explained the chain of custody to him. App. 856, ll. 7-13.

At the PCR hearing, trial counsel testified that he stipulated to the chain of custody in exchange for being allowed to admit the police report of Officer Patricia Jourdan into evidence because he felt like the police report was beneficial to Petitioner. App. 898, l. 1 – 899, l. 3. Trial counsel said he could not recall if there were any problems with the chain of custody prior to trial but thought there must have been some problem if he had agreed to a stipulation in exchange for something in return. App. 899, ll. 4 – 10.

Order of Dismissal

Judge Dennis denied Petitioner's PCR application and dismissed it with prejudice. App. 958-974. Judge Dennis found that trial counsel conducted a proper investigation and was thoroughly competent in his representation of Petitioner. Specific to the issue raised in this Petition, Judge Dennis ruled that trial counsel was not ineffective for failing to investigate the chain of custody and stipulating to the chain of custody at trial. Judge Dennis found that trial counsel made a strategic decision at trial to stipulate to the chain of custody of the drug evidence in exchange for the admission into evidence of a police report written by Officer Jourdan. App. 966-967.

ARGUMENT

The PCR court erred in finding trial counsel effective in stipulating to the chain of custody of the drug evidence where the evidence technician of the North Charleston Police Department utterly failed in her report to identify what evidence she received from Officer Patricia Jourdan and where Officer Jourdan was unavailable to testify at trial as to what evidence she delivered to the evidence technician.

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction ... has two components.” Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice. Id. To satisfy the first prong, a defendant must show counsel's performance “fell below an objective standard of reasonableness.” Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001). “To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.” Id. at 571, 552 S.E.2d at 723.

The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). The appellate court will reverse if there is no probative evidence to support the PCR court's findings or the decision is controlled by an error of law. Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008).

At the PCR hearing, Petitioner offered into evidence the “Form C Certificate of Proof of Chain of Custody or Control Form” prepared by North Charleston Police Department evidence technician Alex Teachey. App. 946. On this form, Alex Teachey purported to have received certain evidence by Officer Patricia Jourdan by drop box. This form, however, did not list any of the evidence received by Alex Teachey and was

completely blank in that regard. Id. During trial, Officer Jourdan was on vacation and did not testify as to what drugs or other evidence she delivered to Alex Teachey. App. 598, l. 14 – 599, l. 12. Between the lack of Officer Jourdan’s testimony as to what evidence she delivered to Alex Teachey and the lack of any description at all on the form prepared by Alex Teachey as to what evidence was received by Alex Teachey, the chain of custody as to the drug evidence was insufficient such that all of the drug evidence should have been suppressed at Petitioner’s trial. Therefore, Petitioner’s trial counsel rendered ineffective assistance of counsel in stipulating that the chain of custody was complete.

This Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007); see also Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957). Where an analyzed substance has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Id. at 33-34, 100 S.E.2d at 537. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive. State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004). The courts have found evidence inadmissible where there was a missing link in the chain of possession because the identity of those who handled the substance was not established at least as far as practicable. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001).

In Petitioner’s case, the State was missing at least two links in the chain of possession of the drug evidence and the manner of handling the evidence was not

reasonably demonstrated. First, Officer Patricia Jourdan was unavailable to testify at trial. It is therefore unknown what drug evidence she collected. App. 598, l. 14 – 599, l. 12. Second, the report of evidence technician Alex Teachey is completely silent as to what drug evidence she received from Officer Jourdan – not a single piece of evidence is listed on this report. App. 946.

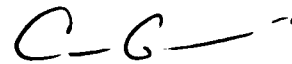
At the PCR hearing, Petitioner's trial counsel testified that he stipulated to the chain of custody in exchange for being allowed to admit the police report of Officer Patricia Jourdan into evidence because he felt like the police report was beneficial to Petitioner. App. 898, l. 1 – 899, l. 3. However, this was not a valid trial strategy because the report of Officer Jourdan was never admitted into evidence. App. 4; 216. Petitioner did not receive anything of value for this trial counsel's agreement with the State to stipulate to the sufficiency of the chain of custody. The PCR court's ruling that trial counsel made a strategic decision at trial to stipulate to the chain of custody of the drug evidence in exchange for the admission into evidence of a police report written by Officer Jourdan is not supported by the evidence.

Petitioner's trial counsel was ineffective for failing to challenge the chain of custody of the drug evidence because had he done so, the drug evidence would have been suppressed and the State therefore could not have secured convictions against Petitioner for PWID cocaine and the related proximity charge. Petitioner accordingly requests this Court to reverse the PCR court's denial of post-conviction relief and reverse Petitioner's convictions.

CONCLUSION

For the reasons set forth herein, Petitioner Donovan Murray requests this Court to grant his Petition for Writ of Certiorari and ultimately reverse his convictions for possession with intent to distribute cocaine and possession with intent to distribute cocaine within proximity of a school.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
R. MARKLEY DENNIS, JR., CIRCUIT COURT JUDGE

DONOVAN MURRAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001267

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donovan Murray 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 January 22, 2013. 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 Donovan Murray.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 7th day of April, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

DONOVAN MURRAY,

PETITIONER,

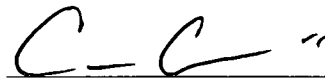
V.

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 Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Donovan Murray, #304604, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of April, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of April, 2014.

reana hendrix (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.