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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

May 29, 2014

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

**RE: Ian Rice, 274002 v. State of South Carolina
2013-001781**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Petition for Writ of Certiorari and the original and two (2) copies of the Appendix in the above case.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
In The Supreme Court

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MAY 29 2014

CERTIORARI TO LAURENS COUNTY

S.C. Supreme Court

The Honorable Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2013-001781

Ian Rice, Respondent,

v.

State of South Carolina, Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the PCR court err in finding Counsel ineffective for not objecting to clearing of the courtroom where there is no evidence in the record that people other than defendants from unrelated cases were excused and released from the courtroom by the assistant solicitor?
- II. Did the PCR court err in finding there was presumed prejudice under U.S. v. Cronig and where there was overwhelming evidence of Respondent's guilt?

STATEMENT OF THE CASE

Ian Rice ("Respondent") was indicted at the October 2006, term of the Laurens County Grand Jury for Possession With Intent to Distribute Crack Cocaine Within Proximity to a Park or School (2006-GS-30-1587) and Distribution of Crack Cocaine (2006-GS-30-1588). Clyde L. Pennington, Jr., Esquire, represented him. On November 15, 2007, Respondent underwent trial, pursuant to which he was found guilty as indicted. The Honorable D. Garrison Hill concurrently sentenced him to confinement for a period of ten (10) years for Possession With Intent to Distribute Crack Cocaine Within Proximity to a Park or School and seventeen (17) years for Distribution of Crack Cocaine.

A Notice of Appeal was filed on Respondent's behalf; however it was dismissed on December 7, 2007. The Remittitur was sent on January 10, 2008.

Respondent filed an application for post-conviction relief on June 9, 2008. Respondent made its Return on January 7, 2009. Respondent filed an amended application on January 18, 2013. An evidentiary hearing into the matter was convened on March 11, 2013 at the Laurens County Courthouse. Respondent was present at the hearing and represented by Laura M. Saunders, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Attorney General's Office represented the State. By Order filed on July 9, 2013, the Honorable Clifton B. Newman, Jr., granted post-conviction relief.

Respondent received written notice of the Order granting PCR on July 23, 2013. Respondent filed a timely Notice of Appeal on August 22, 2013. This petition follows.

ARGUMENTS

- I. **The PCR court erred in finding Counsel ineffective for not objecting to clearing of the courtroom where there is no evidence in the record that people other than defendants from unrelated cases were excused and released from the courtroom by the assistant solicitor.**

The PCR Court erred in finding Counsel ineffective for failing to object to the clearing of the courtroom prior to the Confidential Informant's (CI) testimony at Respondent's trial.

In a post-conviction relief proceeding, the Applicant (in this case, Respondent) bears the burden of proving the allegations in their application. Butler, Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, Id.

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Respondent such that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

At Respondent's trial, the solicitor, prior to the confidential informant (CI) testifying, asked for the courtroom to be cleared. (App. p. 36 lines 13-17). Whereupon, the trial judge asked the lawyers to approach for an unrecorded bench conference. (App. p. 36 lines 18-20). After this conference, the trial judge took a quick recess, excusing the jury from the courtroom. After the jury returned, the confidential informant, who purchased crack cocaine from the Respondent, testified as to her involvement in this case. (App. pp. 37-66).¹ On re-cross-examination by Counsel, the CI was asked about her ongoing involvement with law enforcement as a CI. To which the following colloquy occurred:

CI: I thought we were only, I thought we were only here to talk about [Respondent] and not everything else. I think case just has to do with [Respondent].

Counsel: Miss Sanford, I asked you if you had ever made any other buys in front of these twelve people with common sense and you said no?

CI: I didn't know I was supposed to say that in public and give names. I didn't know. That is why they cleared the courtroom.

(App. p. 66 lines 3-11).

At the evidentiary hearing, the solicitor (Ms. Zimmerman) testified the reason she asked for the courtroom to be cleared was that other defendants, who had pending cases in which the CI was working, were present in the courtroom. (App. p. 236 lines 4-22). She stated the CI was nervous about testifying because the defendants from other drug buys were present. The

¹ Petitioner asserts there is no evidence in the record that the trial judge closed the courtroom or disallowed any citizens from entering the courtroom during Respondent's trial.

solicitor also testified she had discussions with the trial judge and Counsel about the fact that at the solicitor's request, the other defendants were there, and therefore, the solicitor could ask that the other defendants be cleared from the courtroom. The solicitor lastly testified she believed this was a non-issue as it was for the protection of the CI. (App. p. 238 lines 18-22).

Additionally, Counsel admitted he did not object to the clearing of the courtroom on the record, but testified that at the unrecorded bench conference, he explained to the trial judge that he saw no reason to close the courtroom. (App. p. 245 lines 7-9). Counsel also indicated the judge explained since the solicitor was the one holding the other defendants in the courtroom, the solicitor could decide to let them leave the trial. (App. p. 245 lines 11-14). Counsel further testified he did not think closing the courtroom for the CI was "a big deal," and opined it would have made no difference on appeal. (App. 247 lines 6-11).

Waller v. Georgia, 467 U.S. 39 (1984) and Presley v. Georgia, 120 S.Ct. 721 (2010) stand for the proposition that a right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions..." Waller at 46, 104 S. Ct. at 2215. However, courts have also held that protecting witnesses such as a CI is a compelling interest sufficient to permit the closure of the courtroom during that witness's testimony. Cf. Brown v. Kuhlman, 142 F.3d 529, 537-538 (2d Cir. 1998) (recognizing preservation of undercover officer's safety as a compelling interest sufficient to permit closure of courtroom during officer's testimony); United

States v. De Los Santos, 810 F.2d 1326, 1334 (5th Cir.1987) (safety of confidential informant and potential apprehension of suspected narcotics dealers constituted overriding interest).

First, there is no evidence in the record indicating the trial judge ever “closed” the courtroom so that other citizens were denied access to the courtroom. Second, the solicitor wanted the courtroom cleared for the safety of the CI as the CI was working or had worked on other drug buy cases. Defendants from those other drug buy cases were present in the courtroom at the beginning of the Respondent’s trial at the solicitor’s request. Counsel testified that, at the unrecorded bench conference, he explained to the trial judge that he found no reason for the courtroom to be closed, but the trial judge stated since the solicitor had the other defendants present at her request, she was allowed to release them from the courtroom. Both the solicitor and Counsel testified the “closure” of the courtroom for the CI’s testimony was a non-issue. Additionally, the solicitor testified the CI was very nervous because the other defendants were in the courtroom. As evidenced by the CI’s testimony, she knew she was there for the Respondent’s trial only and not those of the other defendants. Clearly, protection of the CI in this case would warrant closing the courtroom during her testimony. As such, Counsel was not ineffective for not objecting to the closure. This Court should reverse the PCR court based on its erroneous legal analysis as there is no evidence the courtroom was ever “closed” and further, because if there was a closure of the courtroom, it was for a brief time and for a compelling reason.

II. The PCR court erred in finding there was presumed prejudice under U.S. v. Cronic and where there was overwhelming evidence of Respondent's guilt.

The PCR court erred by finding presumed prejudice by Counsel's failure to object to the "closure" of the courtroom. The PCR further erred in holding U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984) is applicable to this case. Additionally, Respondent cannot prove resulting prejudice in this case due to the overwhelming evidence of his guilt.

U.S. v. Cronic is inapplicable

Contrary to the PCR court's order, this case clearly does not fall under the rubric of U.S. v. Cronic and thus, presumed prejudice is inapplicable. "In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel 'at a critical stage of his trial.'" Nance v. Ozmint, 367 S.C. 547, 551-52, 626 S.E.2d 878, 880 (2006). "Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer 'entirely fails to subject the prosecution's case to meaningful adversarial testing,' thus making 'the adversary process itself presumptively unreliable.'" Id. "Third, the Court identified certain instances 'when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" Id.

The PCR court held Respondent's case fell under both the first and second prongs. This analysis is misguided. Under the first prong, Respondent would have to show he was completely denied counsel 'at a critical stage of his trial.' This cannot be shown. Counsel was present during the entire trial and defended Respondent throughout his trial. Plainly, Respondent was not

denied counsel ‘at a critical stage of his trial.’ Under the second prong, Respondent must show Counsel ‘entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing.’ As found in the trial transcript, Counsel gave an opening statement, thoroughly cross-examined each of the State’s witnesses, presented a closing argument, and made motions and objections on Respondent’s behalf. Clearly, Counsel subjected the prosecution’s case to a meaningful adversarial testing. Therefore, presumed prejudice under Cronic is inapplicable to Respondent’s case.

Respondent not denied right to a public trial

Next, the PCR court held the “denial of right to a public trial” in this case was a structural error under Chapman v. California, 386 U.S. 18 (1967) and Neder v. United States, 527 U.S. 1(1999). Respondent asserted because Neder mentions Waller, supra, as an example of a ‘structural error’ in that there was a denial of a right to a public trial, Respondent’s case is not subject to a harmless-error analysis. The United States Supreme Court has held a structural error applies in a “very limited number of cases.” Neder at 8. “A ‘structural’ error, [US Supreme Court] explained in Arizona v. Fulminante², is a ‘defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997). The denial to the right to a public trial in Waller was held to be a structural error because the closure of the entire suppression hearing was unjustified due to the fact the State failed to specify whose interests were being infringed. Interestingly, there was no structural error found in Neder and thus, it was subject to the harmless error rule.

² 499 U.S. 279, 111 S.Ct 1246 (1991).

Respondent was not denied the right to a public trial. The public was allowed to remain in the courtroom during jury voir dire and selection, unlike Presley, *supra*. The only time the courtroom was cleared was during the CI's testimony. As explained above, this was done because there were other defendants, on whose cases the CI was working, present in the courtroom that made the CI quite nervous. Without clearing the courtroom, the CI might not have testified as truthfully and frankly as she did. While there seems to be no indication in the record that the trial judge affirmatively "re-opened" the courtroom, no evidence was presented at the PCR hearing that the courtroom remained closed during Respondent's entire trial. While Counsel testified only the other defendants were in the courtroom during the trial, Respondent claims members of his family were also present. However, none of these family members testified at the PCR hearing that they were denied access to the courtroom during the trial. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (Respondent must provide testimony of witnesses at the PCR hearing in accordance with the rules in order to prove prejudice). Since there was no evidence presented that the courtroom was closed during the entirety of the Respondent's trial, to presume such would be pure speculation. Since there was no structural error in this case as Respondent was not denied the right to a public trial, this case is subject to the harmless error analysis, which includes an overwhelming evidence of guilt analysis.

Overwhelming evidence of guilt

Petitioner submits there was overwhelming evidence of the Respondent's guilt in this case, and as such, any alleged deficiency by Counsel is not prejudicial under Strickland, *supra*.

"Since Chapman, [the US Supreme Court has] repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on

the whole record, that the constitutional error was harmless beyond a reasonable doubt.” Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436 (1986). Where there is overwhelming evidence of guilt, a trial counsel’s deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (S.C. 1991).

In this case, the CI testified she bought crack cocaine from Respondent. (Tr. p. 40 lines 2-7). The CI also identified the two videos, which were introduced at trial, that recorded of her buying crack cocaine from Respondent. (Tr. p. 43 lines 2-6). The first was her purchasing crack cocaine from Respondent, and the second was making sure Respondent was clearly on camera. (Tr. p. 44 lines 18-22). These videos showed Respondent wearing a distinctive North Carolina State University tee-shirt during the transaction. (Tr. p. 77 lines 7-12). The CI also testified she knew Respondent prior to the drug transaction, and this is one of the reasons she was able to readily identify Respondent. (Tr. p. 54 lines 6-9). Additionally, Officer Goggins testified he recognized Respondent and his voice on the first video. (Tr. p. 76 line 24- p. 77 line 10). Therefore, Officer Goggins had the CI travel back to find Respondent and record a clear video showing Respondent’s face, while the Respondent was wearing the same shirt. (Tr. p. 77 lines 10-12; p. 84 lines 7-16). Further, Kukila Stanley, an expert in the chemical components of a controlled substance testified she tested the crack cocaine bought from Respondent and confirmed that the substance was, in fact, .2 grams of crack cocaine. Lastly, Respondent has two prior convictions for possession and distribution of crack cocaine, which proves a lack of mistake occurred in this case. Clearly, through these witnesses, Respondent was involved in the distribution of crack cocaine. As such, there is overwhelming evidence of his guilt in this case,

and therefore, any alleged errors of Counsel cannot be deemed to have prejudiced Respondent's case. Even assuming this Court does not find overwhelming evidence of guilt, viewing the record as a whole, any constitutional error was harmless beyond a reasonable doubt pursuant to Van Arsdall, supra.

CONCLUSION

For the reasons stated above, this Court should grant certiorari and reverse the PCR Court as not only was Counsel effective in his representation of Respondent, but also because first, U.S. v. Cronic is inapplicable to this case and second, because Respondent can prove no resulting prejudice from Counsel's alleged errors due to the overwhelming evidence of Respondent's guilt in this case.

Respectfully submitted,

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By: 

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May 29, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County

The Honorable Clifton B. Newman, Circuit Court Judge

IAN RICE, 274002

Respondent,

vs.

STATE OF SOUTH CAROLINA

Petitioner.

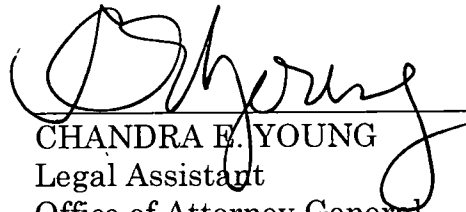
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Petition for Writ of Certiorari and Appendix on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani
SC Commission on Indigent Defense
1330 Lady Street; Suite 401
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 29th day of May, 2014.


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