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July 21, 2014

Via Hand Delivery

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

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JUL 21 2014

S.C. Supreme Court

RE: Travis Montre Smith v. State of South Carolina
Circuit Court Case No: 2011-CP-42-5555
Appellate Case No.: 20013-001696

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

With highest regards,

Suzanne H. White
Assistant Deputy Attorney General

SHW/aam
Enclosures

cc: Kathrine H. Hudgins, Esquire (w/enclosure)

STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 21 2014

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2013-001696

Travis Montre Smith, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the PCR Court properly hold that Petitioner was not prejudiced by Counsel's failure to object to the additional crack presented to the jury in the BEST bag where the evidence of guilt was overwhelming?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Petitioner was indicted at the July 2007 term of the Spartanburg County Grand Jury for trafficking in cocaine (08-GS-42-3530). Petitioner was represented by William H. McPherson, Esquire. On February 27, 2009, Petitioner proceeded to trial where he was convicted as indicted. Petitioner was sentenced by the Honorable J. Derham Cole to confinement for a period of twenty-five (25) years.

A timely notice of appeal was filed on behalf of Petitioner and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Smith, Op. No. 2011-UP-201 (Filed May 3, 2011). The Remittitur was issued on May 19, 2011.

The Petitioner subsequently filed a PCR application on December 14, 2011. The Respondent made its Return on or about September 11, 2012. An evidentiary hearing into the matter was convened on April 5, 2013, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and was represented by Kenneth P. Shabel, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Following the hearing and submission of memoranda by both parties, The Honorable J. Mark Hayes II denied the PCR application by written Order dated July 26, 2013.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR Court properly held that Petitioner was not prejudiced by Counsel’s failure to object to the additional crack presented to the jury in the BEST bag where the evidence of guilt was overwhelming.

At the hearing, Respondent argued Counsel was ineffective for failing to object to the entry into evidence of the BEST bag, which contained both the cocaine for which Petitioner was being tried, but also a bag of crack cocaine, for which he was arrested but not tried.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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, 80 L.Ed.2d 674. The Petitioner 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 Petitioner 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 Petitioner 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

The PCR court properly found that Petitioner was not prejudiced by Counsel's failure to object to the entry of the BEST bag as evidence because of overwhelming evidence of Petitioner's guilt. (App. p. 236). As the PCR court noted, there was sufficient evidence in the record to support the conviction, including the testimony of two very credible officers, the chemist who tested the drugs, and a dash cam video. (App. p. 236).

The facts as presented at trial included testimony from both Officers Satterfield and Wilde. Officer Satterfield testified that he observed the Petitioner running from Officer Wilde and throwing a clear plastic bag back towards the vehicle. (App. p. 69-70). Satterfield also testified that the driver never went near the bag or moved from his location. (App. p. 70). Satterfield also testified that he completed a field test on the subject in the package and determined that it was positive for cocaine. (App. p. 71). Testimony continued with Satterfield identifying the BEST bag (State's Ex. #4), and indicating that it was the same cocaine that he retrieved after the Petitioner threw the bag. (App. p. 72). The jury was then shown the dash cam video of the stop. (App. p. 74). Based upon assertions that the driver of the vehicle was found to

have had both cocaine and crack cocaine in his possession, on cross-examination, Counsel did ask Satterfield if the bag that was picked up contained both cocaine and crack, to which Satterfield acknowledged that it did. (App. p. 90). However, Satterfield testified that he “saw [Petitioner] pull them out, pull the drugs out and thrown them.” (App. p. 94).

Officer Wilde then testified that when he asked the Petitioner to step out of the vehicle for a quick pat down, the Petitioner took off running. Wilde then testified that he was able to grab the Petitioner’s jacket, but Petitioner continued to run. (App. p. 100). Wilde testified that during the chase, Petitioner threw something the size of a baseball. (App. p. 101). Wilde further testified that following Petitioner’s arrest, over \$6,000 was found in Petitioner’s coat, bundled together in rubber bands. (App. p. 103). Wilde also testified that he never saw the driver get near the coat or the item thrown by Petitioner. (App. p. 103). On cross-examination, Wilde further testified that he saw the Petitioner “throw the dope,” and that the bag which was recovered contained crack and cocaine, while acknowledging that the driver was found with cocaine and a crack pipe. (App. p. 119).

Also, at Petitioner’s trial, the Chemist with the Spartanburg Sheriff’s office, Beth Stuart, testified that State’s Exhibit #4, the BEST bag was the one from which she tested evidence. (App. p. 125). Stuart also testified that her analysis report indicated which substances and weights were in the bag, which she testified was a white powdery substance corresponding to cocaine of 11.10 grams. (App. p. 125-6). Counsel’s objection to entry of the analysis report was sustained as cumulative, but the BEST bag was entered into evidence as State’s Exhibit #4.¹

Finally, the trial court instructed the jury that the Petitioner had been charged with **trafficking in cocaine** and reviewed the specific statute regarding cocaine, in particular charging the jury with the charge regarding actual possession. (App. p. 151; 156-9). Additionally, the

¹ Respondent notes that the transcript reflects that “Cocaine marked State’s Exhibit No. 4.” (App. p. 127).

court instructed the jury that “the state has to prove that [the Petitioner] did, in fact, have **possession of ten grams or more of cocaine or any mixture of a substance containing cocaine.**” (App. p. 159). There was never any reference in the jury charge to crack cocaine, an indictment for crack cocaine, the required weight of crack cocaine, or that it was even evidence.

In addressing the PCR Court’s order of dismissal, Petitioner takes aim at its reference to Brown v. State, 383 S.C. 506, 680 S.E.2d 909. In Brown, a PCR Court found trial counsel ineffective for failing to object to a “Golden Rule” closing argument during which the solicitor asked the jury to “speak up for [child victim],” because the Petitioner suffered prejudice as a result of that failure. Id. However, this Court reversed the PCR Court’s decision, in part, and ruled that although trial counsel was deficient in failing to object to the “Golden Rule” argument, the Petitioner failed to meet his burden under Strickland by showing prejudice. Id. Petitioner states that the reason the Petitioner in Brown could not show prejudice was “because the solicitor’s remark was limited in duration **and** there was overwhelming evidence of guilt.”² (PWC, p. 7). Such a reading misconstrues the presence of both factors in Brown with the *requirement* that they both be present, and suggests that overwhelming evidence *alone* is not sufficient to destroy prejudice. Nothing could be further from the truth. No prejudice occurs, *despite trial counsel’s deficient performance*, where there is overwhelming evidence of guilt. Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991).

Further, Petitioner’s assertion that the State’s introduction of the additional crack cocaine for the jury to view in the current case is “far more prejudicial than the limited and brief

² The first reason given by the Court was that the comments “did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.” Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (citing Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007)).

improper ‘Golden Rule’ comment,” even if true,³ is not relevant to the question of prejudice when dealing with overwhelming evidence.

The lack of prejudice does not, however, *depend* on the evidence being overwhelming. When an ineffectiveness claim is presented the defendant must show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). In addition, the Petitioner must show prejudice by establishing that the outcome would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 694. Petitioner has failed to lay out a credible claim that would suggest a reasonable probability that, but for Counsel's alleged errors, the outcome of his trial would have been different. Nowhere in Petitioner's brief is there any indication as to how the absence of the additional crack cocaine in the BEST bag would have changed the outcome of the trial. Petitioner's defense turned on whether the jury believed the drugs were his or not. The crucial issue concerned credibility of the police officers. This case does not involve, nor does any contested issue turn on, the specific type or quantity of drugs in the BEST bag.

The Petitioner failed to establish that the outcome of his trial would have been different had the BEST bag been objected to. As a result, Petitioner has failed to carry his burden with respect to the prejudice prong.

³ It is not entirely clear from the facts that trial counsel's alleged ineffectiveness in the present case was “far more prejudicial” than in Brown, where it was “indisputable that the case was ‘emotionally charged’ given it involved sexual conduct with a three-year-old child,” and the Court found that “the solicitor's remarks imploring the jurors to ‘speak for’ the victim undeniably asked the jurors to set aside their impartiality and, instead, consider the evidence from the subjective position of the child victim.” 383 S.C. 506, 527, 680 S.E.2d 909, 915.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
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By: 
ATTORNEYS FOR THE RESPONDENT

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CERTIORARI TO SPARTANBURG COUNTY
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The Honorable J. Mark Hayes, II, Circuit Court Judge

Circuit Case No.: 2011-CP-42-5555
Appellate Case No.: 2013-001696

TRAVIS MONTRE SMITH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

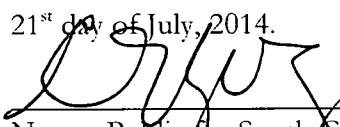
The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 21st day of July, 2014.



Anne A. Mueller

Legal Assistant for Respondent

SWORN to before me this
21st day of July, 2014.


Notary Public for South Carolina

(L.S.)

My Commission Expires: 