STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2013-000745

RECEIVED
AUG 14 2014
S.C. Supreme Court

STEVEN LECROY, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

ISSUES PRESENTED....3

STATEMENT OF THE CASE....4

STANDARD OF REVIEW....6

ARGUMENT....8

CONCLUSION....11

ISSUE PRESENTED

Is there evidence of probative value to support the post-conviction relief court's finding that counsel was not ineffective for not posing a contemporaneous objection to the introduction of Petitioner's statement, where there is no reasonable likelihood that the result of the trial would have been different or that the trial court's pre-trial ruling would have been reversed on appeal?

STATEMENT OF THE CASE

Petitioner was true bill indicted during December 2007 term of the Richland County Grand Jury for Possession of a Controlled Substance – Second Offense, Trafficking Methamphetamines (10 to 28 Grams) – Third Offense, and Possession of Marijuana – Second Offense (2007-GS-40-01329 through -01331). He was represented by J. Rhodes Bailey, Esquire, and James "Jay" Cooper, III, Esquire, (hereafter collectively referred to as "counsel") of the Richland County public Defender's Office. Petitioner first proceeded to jury trial with counsel on August 28, 2008, which resulted in the granting of a mistrial due to a State's witness inadvertently publishing the "degree" of the offenses to the jury.

On February 24, 2009, the matter was called again for trial before the Honorable J. Michelle Childs. At the start of the trial, the court granted the state's motion to proceed *in absentia* as Petitioner did not appear at that time. After pre-trial motions and a two day trial, the jury convicted Petitioner of all charges as indicted and Judge Childs entered a sealed sentence. On September 19, 2009, Petitioner appeared before Judge Childs, at which time the sentence was unsealed and imposed. Applicant received twenty-five years imprisonment for Trafficking Methamphetamines – Third Offense, and one year imprisonment for each Possession of a Controlled Substance and Possession of Marijuana, with all sentences to be served concurrently.

A notice of appeal was filed and an appeal perfected on Petitioner's behalf. LaNelle C. DuRant of the South Carolina Office of Appellate Defense represented Petitioner on appeal. By Order dated October 11, 2011, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Steven LeCroy, Op No. 2011-UP-434 (filed October 11, 2011). The Remittitur was issued October 28, 2011.

Petitioner filed an application for post-conviction relief on May 8, 2012, alleging ineffective assistance of counsel. Respondent made its Return on June 4, 2012, requesting an evidentiary hearing be held. An evidentiary hearing was convened on January 17, 2013, at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. Petitioner was present and represented by Robert FitzSimons, Esquire. Respondent was represented by Assistant Attorney General Robert D. Corney of the South Carolina Attorney General's Office. Petitioner did not testify at this hearing, but presented testimony was presented from both of his former attorneys. Judge Cooper denied and dismissed Petitioner's application by written Order filed March 8, 2013.

Petitioner filed a timely Notice of Appeal and served his Petition for Writ of Certiorari on February 27, 2014. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "*any* evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, supra.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, supra. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. Second, counsel's deficient performance must have prejudiced the applicant 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.

ARGUMENT

Is there evidence of probative value to support the post-conviction relief court's finding that Counsels was not ineffective for not posing a contemporaneous objection to the introduction of Petitioner's statement, where there is no reasonable likelihood that the result of the trial would have been different or that the trial court's pre-trial ruling would have been reversed on appeal?

Petitioner alleges counsel was ineffective for failing to pose a contemporaneous objection to the introduction of his statement at trial, thereby failing to preserve the question of admissibility for appellate review. The post-conviction relief court properly rejected this argument, finding that any alleged deficiency of counsel did not amount to ineffective performance, as there is no reasonable likelihood that the result of the proceeding would have been different but for this purported error.[1] Specifically, the post-conviction relief court found that "there is no 'reasonable probability' that had the statement been suppressed at trial *altogether*, the jury would have returned a verdict of 'not guilty' to the charges," citing overwhelming evidence of guilty. (App. p. 463). Additionally, the post-conviction relief court found that there was no reasonable probability that Petitioner's convictions would have been overturned on appeal had a contemporaneous objection been made. (App. p. 464). As there is evidence of probative value to support these findings, this Court should affirm the post-conviction relief court.

In its Order, the post-conviction relief court determined that Petitioner failed to establish that the result of his proceeding would have been different (i.e., that he would have been acquitted) if the statement had been suppressed. (App. p. 463). In support of this finding, the court noted that:

---

[1] Finding that Petitioner did not meet his burden in regards to the prejudice prong, and therefore, could not establish ineffectiveness of counsel, the post-conviction court did not rule as to whether counsel's performance was deficient. (App. p. 466).

> "[Petitioner] was the *only* person in the room where the drugs were found, and the only other person present in the house was [Petitioner]'s mother, who was in her 70's or 80's and had no involvement in the drugs. In the left front pocket of the pants [Petitioner] was wearing, law enforcement found a plastic ziplock bag containing a white crystal-like substance which later tested positive as 7.57 grams of methamphetamine. Another 4.09 grams of meth were found in a metal tin on [Petitioner]'s computer desk in his room, where law enforcement also recovered various pill bottles containing GHB, Xanax, Valium, Diazepam, Flexeril, and Ambien."

(App. p. 463). The court elaborated that "even without [Petitioner]'s statement expressly admitting ownership of the drugs, there is no reasonable probability the jury would have returned a verdict finding [Petitioner] not guilty of the charges." (App. p. 464). These findings are supported by more than ample evidence in the record, including the testimony of numerous witnesses who all testified that the drugs were found in either directly on or in the direct control of Petitioner: Narcotics Investigator Anthony Branham (App. p. 148-169.); Narcotics Investigator John Lutz (App. p. 187-190.); and Narcotics Investigator Damon Robertson (App. p. 200-201.). Therefore, the post-conviction relief court correctly determined that Petitioner failed to establish the requisite prejudice, as there is no reasonable probability that the jury would have rendered verdicts of "not guilty" absent Petitioner's statement.

Furthermore, the post-conviction relief court properly determined that there was "**no** reasonable probability that had counsel posed a contemporaneous objection or undertaken some other step to preserve the issue for direct appeal, the Court of Appeals in reviewing the claim on its merits would have found the trial judge abused her discretion in admitting the statement." (App. p. 464) (emphasis in original). "On appeal, the conclusion of the trial [court] 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) (citing State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996)). The post-conviction court cited to the pre-trial Jackson v. Denno hearing, where the sole witness, Sergeant Poole, testified that Petitioner had been tased for an extremely short duration three times approximately forty-five minutes prior after giving officers numerous assurances that he was not in pain or discomfort and receiving medical clearance from EMS. (App. p. 465). This is supported ample evidence from the record from the Jackson v. Denno hearing, clearly establishing that Petitioner was not experiencing discomfort when the statement was given. (App. 88-99). The trial court correctly determined that the statement was admissible after considering the testimony and listening to arguments from counsel and the State. (App. 109-115). There is no reasonable probability that this ruling would have been reversed on appeal, as there is no evidence that the trial court abused its discretion. Therefore, the post-conviction relief court correctly concluded that Petitioner failed to establish any prejudice from counsel's alleged deficiency.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No.2013-000745

STEVEN LECROY, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

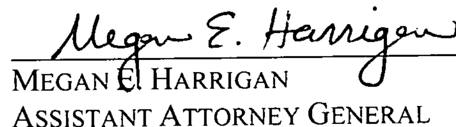
PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 14th day of August, 2014.



MEGAN E. HARRIGAN
ASSISTANT ATTORNEY GENERAL

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

CONCLUSION

For the foregoing reasons, this Court should deny this Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
SC Bar No. 100108
Assistant Attorney General

By: Megan E. Harrigan
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

August 14, 2014

ALAN WILSON
ATTORNEY GENERAL

August 14, 2014

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

RECEIVED
AUG 14 2014
S.C. Supreme Court

Re: Steven LeCroy v. State of South Carolina
Appellate Case No. 2013-000745

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** and in the above case. Please let me know if anything else is needed.

Sincerely,

Megan E. Harrigan

Megan E. Harrigan
Assistant Attorney General
S.C. Bar No. 100108

MEH
Enclosures

cc: Carmen Ganjehsani, Esquire
Trisha Allen, Victim Services

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283