STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Edward W. Miller, Circuit Court Judge

JASON TURMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000151

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

1. Did the PCR court correctly find that trial counsel's overall performance fell below a reasonable standard when counsel did not seek a plea offer; did not review the video with Petitioner before trial; and elicited testimony from the co-defendant that co-defendant and Petitioner Turmon had previously dealt drugs together; but did the PCR court err in finding that Petitioner Turmon was not prejudiced by trial counsel's deficient performance?

2. Did the PCR court err in failing to find trial counsel ineffective for requesting the jury charge on possession of cocaine which the judge gave to the jury when the officers testified that Petitioner Turmon never touched the drugs in this "reverse buy" where the police provided the drugs?

STATEMENT

In May 2009, the Pickens County Grand jury indicted Petitioner Jason Turmon on the charge of trafficking cocaine 400 or more grams. App. 440-App. 441. Turmon proceeded to trial before the Honorable G. Edward Welmaker and a jury. Turmon was represented by Scott Robinson, and the state was represented by Doug Richardson. App.1. The jury found Appellant guilty as charged. App. 320, ll. 3-6. Appellant was sentenced to twenty-two years. App. 331, ll. 14-17. Turmon's trial attorney filed a notice of appeal which was perfected by the Office of Appellate Defense with the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. State v. Turmon, Op. No. 2012-UP-188 (Ct. App. filed March 14, 2012).

On August 13, 2012, Turmon filed an application for post-conviction relief (PCR). The state filed a return on March 28, 2013. An evidentiary hearing was held on October 24, 2013 before the Honorable Edward W. Miller. Turmon was represented by R. Mills Arial, and the state was represented by Karen C. Ratigan. App. 382. On December 6, 2013 Judge Miller issued an order denying Turmon's PCR application and dismissing it with prejudice. Turmon's attorney filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court correctly found that trial counsel's overall performance fell below a reasonable standard when counsel did not seek a plea offer; did not review the video with Petitioner before trial; and elicited testimony from the co-defendant that co-defendant and Petitioner Turmon had previously dealt drugs together; but the PCR court erred in finding that Petitioner Turmon was not prejudiced by trial counsel's deficient performance.

Sometime prior to July 8, 2008, Travis Cherry, a used car salesman from Easley, was found in possession of cocaine. App. 188, ll. 9- App.189, ll. 25. Cherry had previously been convicted of a cocaine related offense, and he feared an enhanced sentence. App. 200, ll. 16-24. So, Cherry sought to become a confidential informant (CI) in order to reduce his sentencing exposure. App. 200, l. 25 – App. 201, l. 3.

On July 8, 2008, Cherry contacted Martin Brooks of the Pickens County Sheriff's Department. App. 133, ll. 17-23. Cherry agreed to become an informant for the Sherriff's Department in exchange for a reduced sentence. Brooks wanted to set a sting to sell a kilogram of cocaine to a drug dealer. App. 191, ll. 11-17. Brooks urged Cherry to convince one of his contacts to buy the cocaine. App. 191, ll. 11-17. Cherry thought of Petitioner Turmon's friend, Darrell Lewis.

Cherry knew that Lewis bought and sold large quantities of cocaine. App. 191 ll. 15-19. Lewis did not know Cherry and therefore would not buy from him. App. 219, ll. 5-16. But Turmon was a mutual friend of Cherry and Lewis. So, Cherry *needed* Appellant to arrange the deal with Lewis. App. 191, ll. 22-25

Cherry had known Turmon since childhood, and was even named godfather to Turmon's child. App. 197, l. 1 – App.. 198, l.2. Cherry was also well aware of Turmon's financial

difficulties. App.198, ll. 3-11. Cherry had loaned Turmon money on several occasions. App. 198, ll. 6-22. Knowing Turmon was destitute; Cherry used the promise of money to entice his long time friend into arranging the deal. App. 194, l. 22 – App. 195, l. 15. Appellant agreed to broker the deal and contacted Lewis. Once approached by Turmon, Lewis reluctantly agreed to meet with Cherry and purchase the cocaine. App. 219, l. 13 – App. 221, l. 12.

A sting was set up at an apartment in Easley. Turmon was sent into the apartment first to ensure everything was okay. After ensuring that the coast was clear, Turmon left but soon returned with Lewis and over twenty-four thousand dollars. App. 160, ll. 9-13. Once Lewis agreed to purchase the cocaine, deputies sprung their trap. App.162, ll. 1-15. Lewis and Turmon were arrested.

Turmon was charged with trafficking cocaine in excess of four hundred grams third offense. However, Lewis agreed to cooperate with law-enforcement so he was set free. App. 225, ll. 5-24.

At trial, Turmon's only defense was entrapment as trial counsel described in his opening statement. App. 89, ll. 6 – 24. The trial court agreed that there was sufficient evidence for a jury to consider the defense, but the wording of the proposed instruction disputed. App. 257, ll. 11-17. Appellant argued that the State's proposed instruction "dilutes" the entrapment defense. App. 268, l. 20 – App. 269 l. 14. The trial court overruled Appellant's objection and instructed the jury, "If you find that the defendant had *any predisposition* without any government inducement and influence to commit the crime the defense of entrapment would *not* apply." App. 269, ll. 15-17; App. 311, ll. 5-8 (emphasis added).

During his cross examination of Darrell Lewis, trial counsel asked him:

> **Q:** And you've never had any prior dealing with Jason (Turmon) before this time regarding drugs, have you?
>
> **A:** Yes.

Q: You have?
A: Yes.

Q. Okay, When?

A: Oh before that, you know, I done made rules before that.

Q: Before that, no, correct?

A: No, No, listen. I'm saying---you asked me have we dealt any drugs prior to this incident. I said yes. There's times he called me, asked me could I get some, I got some for him. He went and seen whoever he seen, brought me back the money. I left.

Q: Okay.

App. 226, ll. 1 – App. 227, ll. 14.

Officer Chad Brooks testified at trial that he arranged the deal with the CI, Travis Cherry to get Darrell Lewis and Turmon to buy the cocaine. App. 130, ll. 1 – App. 132, ll. 1; App. 170, ll. 1 – 15.

The judge did charge possession and entrapment. App. 299, ll. 24-25; App. 308, ll. 14 – App. 309, ll. 10; App. 310, ll. 13 – Ap. 311, ll. 17.

At his PCR hearing, Turmon testified that his trial counsel was ineffective in his cross examination of Darrell Lewis. His cross examination made it appear that Turmon was predisposed to selling drugs when Turmon's defense was entrapment . App. 385, ll. 8 – App. 392, ll. 23.

Trial counsel was ineffective because Turmon did not see the video and audio until they were in court. His attorney did not show them to him before the trial. App. 402, ll. 1 – 10. Turmon never had a plea offer from the state as far as he knew. He had told his attorney in the beginning that he wanted the best plea deal he could get. App. 402, ll. 14 – 25; App. 402, ll. 25- App. 403, ll. 8.

Trial counsel testified that he was retained by Turmon to represent him. Counsel admitted that he did not think he reviewed the videotape of the drug transaction with Turmon. He did review the written materials. App. 413, ll. 16 – App. 414, ll. 20.

Counsel said the transaction was a reverse buy because the state had the drugs they were trying to sell. His defense was entrapment. He also, through his cross of the officers, showed that Turmon never touched the drugs. App. 414, ll. 23 – App. 416, ll. 16. Counsel said the state never made a plea offer and he did not remember if he tried to obtain an offer or not. There was no note in his file about a plea offer. App. 416, ll. 17 – App. 417, ll. 11.

The PCR judge then asked trial counsel several questions. The judge first asked if counsel had anything in his file to show that he talked to the solicitor's office about some lesser plea negotiation. Counsel replied that he did not. The judge confirmed that counsel did not review the video and audio with his client, Turmon. Counsel had no recollection if he did or did not. App. 424, ll. 15 – App. 425, ll. 2.

Finally, the judge asked if there any facts in the record to show that Turmon and Travis Cherry were dealing drugs three weeks prior. The state responded that Lewis, the co-defendant, had testified that he had dealt drugs with Turmon before. App. 425, ll. 9 – App. 426, ll. 6. The judge was concerned from the trial transcript pages 226-227 that defense counsel brought up on his own that his client, Turmon, had prior drug dealings with the co-defendant. The judge said the defense argument was entrapment but his argument against predisposition was gone after that testimony. App. 426, ll. 22 – App. 427, ll. 14.

At the close of the hearing, the PCR judge said he had real concerns about that cross-examination by defense counsel putting his own client's character into evidence with the prior bad

acts. If he was trying to get an entrapment defense, this testimony showed a predisposition. Counsel did not try to work out a plea deal. Counsel did not review the video and audio with Turmon. On the record, the judge found that defense counsel's efforts fell below an objective standard of reasonableness, but not to the point of being prejudicial to Turmon. In light of the overwhelming evidence of guilt, the judge denied the PCR application. App. 428, ll. 1 – 21.

The PCR judge ruled in his order trial counsel's overall representation of Turmon fell below a reasonable standard. Counsel did not review the video nor audio tapes with Turmon before trial. Counsel did not attempt to obtain a plea offer from the state on this serious charge. Then the order read: "Most importantly, this court notes that while trial counsel's strategy was to argue an entrapment defense at trial, he actually elicited testimony from Lewis that he and Applicant had previously dealt drugs together." App. 436.

Then the court found that Turmon failed to prove the second prong of Strickland that he was prejudiced by trial counsel's performance. The state had overwhelming evidence of Turmon's guilt with the video and audio tapes and trial testimony. App. 436.

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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable

professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), the Supreme Court held that to prove prejudice as an element of ineffective assistance of counsel claim, the applicant must show there as a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

In Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002), the Supreme Court held that Green had to show more than the fact that trial counsel committed errors; he must show the errors adversely affected his right to a fair trial. The Court also wrote that whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina. The Court cited State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985), which held that the cumulation of errors warranted reversal, but each individual error caused prejudice.

In State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995), the Court of Appeals found multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together.

In Trumon's case, the cumulation of errors was prejudicial because there was a reasonable probability that the result of the trial was affected. The defense was entrapment. When trial counsel elicited testimony from the co-defendant that he and Trumon had dealt drugs previously together, this nullified the defense of entrapment because it showed a propensity on Trumon's to deal drugs. Trial counsel cancelled the defense of entrapment by introducing his client's prior drug dealings.

If Trumon had received a plea offer which he said he asked counsel to obtain, there was a strong probability that his sentence would have been less. If counsel had shown the video to Trumon before trial, there was a probability that the defense could have been strengthened or another defense developed.

Whether each error is considered prejudicial, or the cumulation of errors is prejudicial, Trumon was prejudiced either way.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for requesting the jury charge on possession of cocaine which the judge gave to the jury when the officers testified that Petitioner Turmon never touched the drugs in this "reverse buy" where the police provided the drugs.

Sometime prior to July 8, 2008, Travis Cherry, a used car salesman from Easley, was found in possession of cocaine. App.188, ll. 9- App.189, ll. 25. Cherry had previously been convicted of a cocaine related offense, and he feared an enhanced sentence. App. 200, ll. 16-24. So, Cherry sought to become a confidential informant (CI) in order to reduce his sentencing exposure. App. 200, l. 25 – App. 201, l. 3.

On July 8, 2008, Cherry contacted Martin Brooks of the Pickens County Sheriff's Department. App.133, ll. 17-23. Cherry agreed to become an informant for the Sherriff's Department in exchange for a reduced sentence. Brooks wanted to set a sting to sell a kilogram of cocaine to a drug dealer. App. 191, ll. 11-17. Brooks urged Cherry to convince one of his contacts to buy the cocaine. App. 191, ll. 11-17. Cherry thought of Turmon's friend, Darrell Lewis.

Cherry knew that Lewis bought and sold large quantities of cocaine. App. 191 ll. 15-19. Lewis did not know Cherry and therefore would not buy from him. App. 219, ll. 5-16. But Turmon was a mutual friend of Cherry and Lewis. So, Cherry *needed* Appellant to arrange the deal with Lewis. App. 191, ll. 22-25

Cherry had known Turmon since childhood, and was even named godfather to Turmon's child. App. 197, l. 1 – App.. 198, l.2. Cherry was also well aware of Turmon's financial difficulties. App.198, ll. 3-11. Cherry had loaned Turmon money on several occasions. App. 198. ll. 6-22. Knowing Turmon was destitute; Cherry used the promise of money to entice his long time friend into arranging the deal. App. 194, l. 22 – App. 195, l. 15. Appellant agreed to broker the deal

and contacted Lewis. Once approached by Turmon, Lewis reluctantly agreed to meet with Cherry and purchase the cocaine. App. 219, l. 13 – App. 221, l. 12.

A sting was set up at an apartment in Easley. Turmon was sent into the apartment first to ensure everything was okay. After ensuring that the coast was clear, Turmon left but soon returned with Lewis and over twenty-four thousand dollars. App. 160, ll. 9-13. Once Lewis agreed to purchase the cocaine, deputies sprung their trap. App.162, ll. 1-15. Lewis and Turmon were arrested.

Turmon was charged with trafficking cocaine in excess of four hundred grams third offense. However, Lewis agreed to cooperate with law-enforcement so he was set free. App. 225, ll. 5-24. Officer Chad Brooks testified at trial that he arranged the deal with the CI, Travis Cherry to get Darrell Lewis and Turmon to buy the cocaine. App. 130, ll. 1 – App. 132, ll. 1; App. 170, ll. 1 – 15. On cross examination, Officer Brooks admitted that Turmon never touched the drugs so Turmon did not have actual possession of the drugs. App. 170, ll. 16 – App. 171, ll. 25.

When the trial judge asked the attorneys for any other charges, the state asked if he intended to charge possession although the state did not think it was a possession case. The judge replied that he had not intended to but he would if either attorney thought it was appropriate. The state responded that they did not think it was appropriate. The judge did not think there anything about that but he would do it if asked. Defense counsel told the judge that he would like to have that charge. App. 268, ll. 17 – App. 270, ll. 12.

The judge did charge possession and entrapment. App. 299, ll. 24-25; App. 308, ll. 14 – App. 309, ll. 10; App. 310, ll. 13 – Ap. 311, ll. 17.

At his PCR hearing, Turmon testified that trial counsel was ineffective for requesting the jury charge on possession when the officers testified that Turmon never touched the cocaine.

Turmon did not understand requesting that charge when there was no evidence of just possession. There had to be evidence in the trial to support the charge. App. 397, ll 1 – App. 399, ll. 5.

Counsel said the transaction was a reverse buy because the state had the drugs they were trying to sell. His defense was entrapment. He also through his cross of the officers showed that Turmon never touched the drugs. App. 414, ll. 23 – App. 416, ll. 16. Counsel said the state never made a plea offer and he did not remember if he tried to obtain an offer or not. There was no note in his file about a plea offer. App. 416, ll. 17 – App. 417, ll. 11.

On cross examination, counsel admitted that he did not know what his strategy was in asking for a jury charge on possession. App. 423, ll. 21 – App. 424, ll. 13.

The PCR judge ruled in his order trial counsel's overall representation of Turmon fell below a reasonable standard. Then the court found that Turmon failed to prove the second prong of Strickland that he was prejudiced by trial counsel's performance. The state had overwhelming evidence of Turmon's guilt with the video and audio tapes and trial testimony. App. 436.

The judge did find that trial counsel was not ineffective for requesting the jury charge on possession even though Turmon never touched the drugs. Although trial counsel could not remember why he asked for the charge, the PCR judge found that it clearly part of counsel's trial strategy. Counsel was obviously hoping the jury would find that he was never in possession since the testimony was that Turmon never touched the drugs. App. 435.

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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of

competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In State v. Fripp, 397 S.C. 455, 725 S.E.2d 136 (Ct. App. 2012) (Cert Granted July 10, 2014 pending), the Court of Appeals reversed the case because the evidence did not warrant the jury instruction on constructive possession and giving of the instruction was not harmless and required reversal. The Court cited State v. Ballenger, 322 S.C. 196, 470 S.E.2d 851 (1996), where the Supreme Court defined possession:

> Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession ahs dominion and control over either the drugs or the premises upon which the drugs are found.

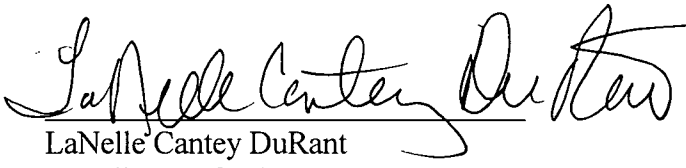
The Supreme Court held in Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008), that "a jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial."

Trial counsel was ineffective for requesting a jury charge on possession when the police officers testified that Trumon did not have physical possession. It was prejudicial to Trumon because there was a reasonable expectation that the jury was confused by this charge in light of the totality of the circumstances of a reverse buy.

CONCLUSION

Based on the above, cert should be granted and the order of the PCR court finding trial counsel was ineffective should be affirmed. The PCR order denying the PCR based on a lack of prejudice should be reversed, and the case remanded for a new trial. The order finding trial not ineffective should be reversed and the case remanded.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of September, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Edward W. Miller, Circuit Court Judge

JASON TURMON,

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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 Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Jason Turmon, #285665, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 10th day of September, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of September, 2014.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.